



27 March 2023

Our reference: LEX 72134

Rex Banner

By email: foi+request-9853-ea0c8bf9@righttoknow.org.au

Dear Mr Banner

Freedom of Information Request – Internal Review Decision

I refer to your correspondence received by Services Australia (the Agency) on 27 February 2023, seeking an internal review of the decision made by the Agency on 20 February 2023 in relation to your request for access to a document under the *Freedom of Information Act 1982* (FOI Act).

Background

On 27 January 2023, you requested access under the FOI Act to the following document:

I request the Privacy Impact Assessment:

Reference Number: 38354

Title: myGov Enhancement – Analytics

Apologies the reference number should be 38355

On 27 February 2023, the Agency notified you that it had decided to refuse your request as the requested material was exempt under the FOI Act (original decision).

On 27 February 2023, you requested an internal review of the original decision.

Summary of my internal review decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act. Consistent with the requirements of section 54C(2) of the FOI Act, I have made a fresh decision.

I have decided to **refuse** your request as it relates to material that is fully exempt under the FOI Act.

Please refer to **Attachment A** for further information regarding the reasons for my decision.



You can ask for a review of our decision

If you disagree with any part of the decision, you can ask for a review by the Australian Information Commissioner. See **Attachment B** for more information about how to request a review.

Further assistance

If you have any questions please email freedomofinformation@servicesaustralia.gov.au.

Yours sincerely

Lachlan
Authorised FOI Decision Maker
Freedom of Information Team
FOI and Ombudsman Branch | Legal Services Division
Services Australia



SCHEDULE OF DOCUMENTS FOR RELEASE

BANNER, Rex - LEX 72134 (71600)

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	1 - 34	12 October 2020	Privacy Impact Assessment – Enhanced myGov Analytics 38355	Exempt in full	Section 42 Section 47C	The document is subject to legal professional privilege The document comprises deliberative matter



Attachment A

REASONS FOR DECISION

What you requested

On 27 January 2023, you requested access under the FOI Act to the following document:

I request the Privacy Impact Assessment:

Reference Number: 38354

Title: myGov Enhancement – Analytics

Apologies the reference number should be 38355

On 27 February 2023, the Agency notified you of the original decision.

On 27 February 2023, you requested an internal review of the original decision, providing written submissions in which you argued that:

I am writing to request an internal review of Services Australia's handling of my FOI request '38355 myGov Enhancement - Analytics Privacy Impact Assessment'.

> I have applied the exemption in section 42 of the FOI Act to Document 1 in its entirety.

There is no way the entire document is subject to LPP, it's a privacy impact assessment, we know what for, tenders show who it's from, so we know that the title page can't be subject to LPP.

> Further, I am satisfied the Agency's ability to obtain legal advice on issues would be substantially prejudiced if this document were to be made publicly available through FOI processes. In my view, real harm is likely to result from release of the document as doing so would waive privilege and disclose the particular legal provider's approach to the interpretation, analysis and application of legislation, systems and processes administered by the Agency.

This is not real harm, a simple Google search will show plenty of PIAs that have been either published after a FOI request or proactively published.

<https://www.digitalidentity.gov.au/sites/default/files/2021-11/DTA%20DIF%20PIA3.pdf>

[https://www.digitalhealth.gov.au/sites/default/files/documents/adha-my health record mobile applications project-privacy impact assessment.pdf](https://www.digitalhealth.gov.au/sites/default/files/documents/adha-my%20health%20record%20mobile%20applications%20project-privacy%20impact%20assessment.pdf)

[https://www.digitalhealth.gov.au/sites/default/files/2020-11/ADHA-My Health Record Mobile Applications Project-Privacy Impact Assessment.pdf](https://www.digitalhealth.gov.au/sites/default/files/2020-11/ADHA-My%20Health%20Record%20Mobile%20Applications%20Project-Privacy%20Impact%20Assessment.pdf)

https://www.righttoknow.org.au/request/559/response/2178/attach/3/MyGov%20PIA%20with%20attachments%20Redacted%20for%20release.pdf?cookie_passthrough=1

None of them have ever been marked as LPP or confidential.



>The document identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection.

[...]

> However, I also consider disclosure could reasonably be expected to prejudice the Agency's ability to obtain comprehensive legal advice in the future and would destroy or diminish the commercial value of the provider's PIA methodology and approach, ultimately impede the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice.

See above, this doesn't make sense if other PIAs (including a mygov one) have been released. The MyGov PIA appears to have been proactively been released.

> The document identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection. I am also satisfied the document is not operational information or purely factual information.

> Furthermore, a PIA contains purely factual information, that is discussing the state of such a project and privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection.

> In addition, whilst PIAs can be conducted for any project, a PIA is required for high risk projects. Service Australia is required to do a PIA for projects that involve a significant change to how they manage personal information, or, might have a significant impact on the privacy of individuals; or if directed to by OAIC.

Unless Services Australia has done the PIA on their own accord, this is a high risk project or (OAIC has determined that a PIA is required) and this is a project that the Australian public uses, a high risk project for all Australians sounds like it would be in the public interest that the public knows any privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection.

Lastly, I request Services Australia proactively release the document as it is in the public interest to do so.

What I took into account

In reaching my decision I took into account:

- your original request dated 27 January 2023
- your internal review request dated 27 February 2023
- other correspondence with you
- the document falling within the scope of your request
- whether the release of material would be in the public interest
- consultations with Agency officers about:
 - the nature of the document, and



- the Agency's operating environment and functions
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines), and
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act.

I have decided to refuse access to the document in full. My findings of fact and reasons for deciding the exemptions apply to the document are discussed below.

Section 42 of the FOI Act – legal professional privilege

I have applied the exemption in section 42 of the FOI Act to the document in its entirety.

This section of the FOI Act allows the Agency to redact documents or parts of documents subject to legal professional privilege (LPP).

The FOI Act does not define LPP. However, courts have decided whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent, and
- whether the advice given is confidential.

The document you requested is a Privacy Impact Assessment (PIA) prepared by an independent external legal provider for the purpose of providing the Agency confidential professional legal advice in relation to data analysis in enhancements made to the myGov platform.

Accordingly, I am satisfied LPP attaches to this document. I am also satisfied LPP has not been waived, as the document has not been distributed further than reasonably necessary for internal operational purposes, and the substance of the legal advice contained in the document has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.

Further, I am satisfied there is a possibility of real harm resulting from release of the document. In particular, I consider the Agency's ability to obtain independent external legal advice on issues would be substantially prejudiced if it were to waive privilege over this document (which sets out the particular legal provider's PIA methodology, together with their approach to the interpretation, analysis and application of legislation, systems and processes administered by the Agency) and make it publicly available through FOI processes.

In your submissions, you have provided examples of other PIAs released under the FOI Act or proactively published. However, each FOI decision made by a decision maker is on its own merits. As such, while LPP may have been waived with respect to other PIAs, whether in



response to FOI requests or otherwise, it has not been waived in this instance and I consider there is a possibility of real harm resulting from release of the document.

For the reasons set out above, I am satisfied the document is exempt in full under section 42 of the FOI Act.

Section 47C of the FOI Act – deliberative material

I have applied the conditional exemption in section 47C of the FOI Act to the document in its entirety.

This section of the FOI Act provides a document is conditionally exempt if it would disclose deliberative matter. Deliberative matter is an opinion, advice or recommendation, or a consultation or deliberation that has taken place in the course of, or for the purposes of, the deliberative processes of an agency. Material which is operational or purely factual information is not deliberative matter. The deliberative exemption also does not apply to reports of scientific or technical experts, reports of a body or organisation prescribed by the regulations, or a formal statement of reasons.

I am satisfied the document comprises deliberative matter, being advice and recommendations, which have been prepared by the Agency's legal services provider in the course of undertaking the PIA. The document identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection. I am also satisfied the document is not operational information or purely factual information, and is otherwise not of a kind specifically excluded by the FOI Act.

Accordingly, I find the document is conditionally exempt, in full, under section 47C(1) of the FOI Act.

Public interest considerations

Access to conditionally exempt material must be given unless I am satisfied it would not be in the public interest to do so.

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act.

I have also considered relevant factors weighing against disclosure, indicating access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- destroy or diminish the commercial value of the provider's PIA methodology approach
- impede the full and frank disclosure between a lawyer and client, which assists the effective administration of justice, and
- prejudice the Agency's ability to obtain comprehensive legal advice in the future.

Based on these factors, I have decided, in this instance, the public interest in disclosing this document is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.



Conclusion

I am satisfied the document sought is conditionally exempt under section 47C of the FOI Act. Further, I have decided that on balance it would be contrary to the public interest to release the document.

Summary of decision

I have decided to refuse your request on the basis:

- the document is subject to legal professional privilege and therefore exempt in full under section 42 of the FOI Act, and
- the document comprises deliberative material, and disclosure would be contrary to the public interest and the document is therefore exempt in full under section 47C of the FOI Act.



Attachment B

INFORMATION ON RIGHTS OF REVIEW
FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of an Freedom of Information internal review decision

If you still believe a decision is incorrect, the FOI Act gives you the right to apply for a review of the internal review decision. Under section 54M of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner. There are no fees for this review.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can lodge your application:

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Services Australia decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the Agency's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act, There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:



Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.