



27 March 2023

Our reference: LEX 72135

Mr Rex Banner (Right to Know)

By email: foi+request-9854-2f73ca81@righttoknow.org.au

Dear Mr Banner

Freedom of Information Request - Internal Review Decision

I refer to your request for internal review of the Freedom of Information (FOI) decision notified by an Authorised Decision Maker of Services Australia (the Agency) under the *Freedom of Information Act 1982* (FOI Act) on 27 February 2023 (LEX 71601) (the original decision).

Background

On 27 January 2023, you made a request under the FOI Act for the following document:

I request the Privacy Impact Assessment:
Reference Number: 38354
Title: myGov Enhancement Beta

On 27 February 2023, an Authorised Decision Maker of the Agency notified you of a decision to refuse access to this document on the basis that it was an exempt document under the FOI Act (original decision).

On 27 February 2023, you wrote to the Agency seeking internal review of the original decision on the basis that:

> 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/2020-11/ADHA-My Health Record Mobile Applications Project-Privacy Impact Assessment.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.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.righttoknow.org.au/request/38354_mygov_enhancement_beta_pri



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 of the FOI Act, I have reviewed this matter and 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 see **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 Office of 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 FOI.LEGAL.TEAM@servicesaustralia.gov.au.

Yours sincerely

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

**Attachment A****SCHEDULE OF DOCUMENTS FOR RELEASE**
INTERNAL REVIEW – BANNER, Rex (Right to Know) – LEX 72135 – LEX 71601

Doc No.	Pages	Date	Description	Decision	Exemptions	Comments
1.	1 – 49	16 September 2020	Privacy Impact Assessment – myGov Enhancement Beta 38354	Exempt in full	Section 42 Section 47C	The document is subject to legal professional privilege. The document comprises deliberative matter.



REASONS FOR DECISION

What you requested

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

I request the Privacy Impact Assessment:
Reference Number: 38354
Title: myGov Enhancement Beta

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

Your request for internal review

On 27 February 2023, you requested an internal review of the original decision. You submitted the following reasons for seeking internal review:

> 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.

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[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

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>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.

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What I took into account

In reaching my decision I took into account:

- your original request dated 27 January 2023
- the original decision dated 20 February 2023
- your request for internal review dated 27 February 2023
- 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 (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. My findings of fact and reasons for deciding that 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 adviser for the purpose of providing the Agency confidential legal advice. 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.

Your request for internal review provides examples of other PIAs that have been made publicly available. While LPP may have been waived in relation to other PIAs, that does not mean that it has been waived, or should be waived, in this instance. Each FOI decision is made on its own merits. In this instance, LPP has not been waived 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.

Section 47C 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. Further, the deliberative exemption 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 obtained by the Agency from its independent legal adviser for the purposes of the deliberative process involved in delivering myGov.

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 generally 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 legal provider's PIA methodology approach
- impede the full and frank disclosure between a lawyer and client, which facilitates 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 access to the document on the basis the document:

- is subject to legal professional privilege and therefore exempt in full under section 42 of the FOI Act, and
- 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.



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 an 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 a 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 54L 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.