



Australian Government
**Department of Employment
and Workplace Relations**

Our Ref LEX 590

MBV

Right to Know

By email: foi+request-9979-28a2c0b3@righttoknow.org.au

Dear MBV

Your Freedom of Information request - decision

I refer to your request, received by the Department of Employment and Workplace Relations (department) on 27 February 2023, for access under the *Freedom of Information Act 1982* (FOI Act) to the following documents:

"I seek Meeting Briefs prepared for the Minister for Employment and Workplace Relations from 1 June 2022 to 24/02/2023 which reference the CFMMEU/CFMEU or MUA.

I seek briefs which were prepared for the Minister to meet with stakeholders/third parties, including the CFMMEU/CFMEU or MUA and industry groups."

My decision

The department holds three documents (one document and two attachments) totalling 7 pages which falls within the scope of your request.

I have decided to grant you **access in part** to the documents in question.

I have decided that certain parts of the documents are exempt under the FOI Act because they contain:

- deliberative matter, the disclosure of which would be contrary to the public interest (section 47C conditional exemption)
- commercially valuable information (section 47(1)(b)); and
- material containing the business information of third parties (section 47G conditional exemption).

A document schedule and the reasons for my decision are set out at **Attachment A**.

How we will send your documents

The documents being released to you are attached.

You can ask for a review of my decision

If you disagree with any part of the decision, you can ask for a review. There are two ways you can do this. You can ask for an internal review by the department or an external review by the Australian Information Commissioner.

You can find information about your rights of review under the FOI Act, as well as information about how to make a complaint at **Attachment B**.

Further assistance

If you have any questions, please email foi@dewr.gov.au.

Yours sincerely

Claudia

Claudia
Authorised decision maker
Department of Employment and Workplace Relations

5 May 2023

SCHEDULE OF DOCUMENTS – MBV – LEX 590

Number	Pages	Date	Description	Decision	Exemption	Comments
1.	2	14/02/2023	Meeting Brief: MB23-000027: To: Minister for Employment and Workplace Relations - ACTU and MUA Seacare Scheme	Grant access in part	s 22 s 47 / 47G s 47C	Staff names and contact details removed on relevance grounds under section 22(1)(a)(ii) of the FOI Act Third party information redacted under sections 47(1)(b) and 47G(1)(a) of the FOI Act Deliberative material redacted under section 47C of the FOI Act
1A.	3		Attachment A: Talking Points	Grant access in part	s 47 / 47G s 47C	Third party information redacted under sections 47(1)(b) and 47G(1)(a) of the FOI Act Deliberative material redacted under section 47C of the FOI Act
1B.	2		Attachment B: Background - the Seacare scheme	Grant access in part	s 47 / 47G s 47C	Third party information redacted under sections 47(1)(b) and 47G(1)(a) of the FOI Act Deliberative material redacted under section 47C of the FOI Act

REASONS FOR DECISION

What you requested

On 27 February 2023, you requested access to the following:

“I seek Meeting Briefs prepared for the Minister for Employment and Workplace Relations from 1 June 2022 to 24/02/2023 which reference the CFMMEU/CFMEU or MUA.

I seek briefs which were prepared for the Minister to meet with stakeholders/third parties, including the CFMMEU/CFMEU or MUA and industry groups.”

On 9 March 2023, the department advised you that it would treat the names, signatures, position titles and contact details of staff members as irrelevant in accordance with section 22 of the FOI Act unless you advised otherwise. As you did not advise that you wished to have this information included in the scope of your request, I have redacted the names, signatures, position titles and contact details of departmental staff members as irrelevant material under section 22 of the FOI Act.

Consultation with third party

On 22 March 2023, the department informed you of the requirement to consult with a third party on material concerning it. This extended the statutory processing period by 30 days under section 15(6)(a) of the FOI Act.

Extension of time

On 6 April 2023, the department sought your agreement to a 7 day extension of time until 5 May 2023 to process your request. On 6 April 2023, you confirmed your agreement to the extension.

What I took into account

In reaching my decision, I took into account:

- your original request dated 27 February 2023
- correspondence with you
- the document that falls within the scope of your request
- consultations with departmental officers about the nature of the documents and the operating environment and functions of the department
- consultations with other Government agencies
- consultation with a third party

- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- the *Freedom of Information (Charges) Regulations 2019*
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that certain parts of the documents you requested are exempt under the FOI Act. My findings of fact and reasons for deciding that an exemption applies are discussed below.

Section 22 of the FOI Act: access to edited copies with irrelevant matter deleted

I have decided that some parts of the documents falling within the scope of your request contain exempt and/or irrelevant material. In this regard, sections 22(1) and (2) of the FOI Act provide that:

Scope

(1) *This section applies if:*

(a) *an agency or Minister decides:*

- (i) *to refuse to give access to an exempt document; or*
- (ii) *that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and*

(b) *it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:*

- (i) *access to the edited copy would be required to be given under section 11A (access to documents on request); and*
- (ii) *the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and*

(c) *it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:*

- (i) *the nature and extent of the modification; and*
- (ii) *the resources available to modify the document; and*

(d) *it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.*

Access to edited copy

(2) *The agency or Minister must:*

- (a) prepare the edited copy as mentioned in paragraph (1)(b); and*
- (b) give the applicant access to the edited copy.*

Parts of the documents falling within the scope of your request include exempt and/or irrelevant material, as identified in the Schedule of Documents.

In accordance with section 22 of the FOI Act, I have deleted any exempt and irrelevant material and released the remaining material to you.

Section 47C of the FOI Act – Deliberative processes

Subsection 47C(1) of the FOI Act relevantly provides that:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*
 - (a) an agency;*

Exceptions

- (2) Deliberative matter does not include either of the following:*
 - (a) operational information; or*
 - (b) purely factual material.*

The FOI Guidelines state at paragraphs 6.52 to 6.88 that the main requirements of this conditional exemption are that:

- a document contains or relates to ‘deliberative matter’ that was prepared for a ‘deliberative purpose’ (subsection 47C(1));
- a document contains material that is not ‘purely factual’ or non-deliberative (subsection 47C(2)); and
- it would be ‘contrary to the public interest’ to give access at this time (subsection 11A(5)).

I am satisfied that the documents contain deliberative matter in the form of opinions, advice, analysis and recommendations concerning the Seacare workers’ compensation scheme, which were prepared for the purposes of the deliberative functions of the department in briefing the Minister. The documents provide advice, analysis and recommendations on the merits of a range of options proposed to the Minister for his consideration.

At paragraph 6.73, the FOI Guidelines state that 'purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

I am satisfied that the material in question constitutes deliberative matter which is neither operational information nor purely factual material. I am also satisfied that none of the exceptions in section 47C(3) of the FOI Act apply. As such, the material is conditionally exempt under section 47C of the FOI Act.

Public interest considerations

Under subsection 11A(5) of the FOI Act, the department must give you access to the material unless it would, on balance, be contrary to the public interest to do so at this time.

When weighing 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;
- inform debate on a matter of public importance being the Seacare workers' compensation scheme;
- increase scrutiny and discussion of the options being considered by the Government to address the Seacare workers' compensation scheme; and
- promote effective oversight of public expenditure.

Notwithstanding these matters, I have also considered the public interest factors weighing against the release of the conditionally exempt material. The document records the department's analysis of third parties' positions which are not publicly known, proposes options which still require further consideration and broad consultation with affected stakeholders prior to a decision being made by the government, and provides advice about the timing of those options. I have considered the extent to which disclosure could, in future, inhibit the department's frankness and candour in providing advice, recommendations and options for the Minister's consideration when attending similar meetings. I consider that the release of the sensitive considerations at this time would be contrary to the public interest, as it would risk pre-empting the government's position with respect to the Seacare workers' compensation scheme and prejudice ongoing discussions with stakeholders.

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.

Having considered the public interest factors for and against disclosure, I have decided that, in the circumstances, the public interest in disclosing the deliberative material contained in the documents is outweighed by the public interest against disclosure.

Section 47 of the FOI Act – commercially valuable information

I have applied the exemption in paragraph 47(1)(b) of the FOI Act to parts of the documents.

Section 47(1)(b) provides:

(1) A document is an exempt document if its disclosure under this Act would disclose:

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Paragraph 5.204 of the FOI Guidelines states that to be exempt under paragraph 47(1)(b), a document must contain information that has a commercial value to another person or body, and the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

It is a question of fact as to whether information has commercial value, and whether disclosure would destroy or diminish that value. The following factors may assist in that task:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value;
- whether the information confers a competitive advantage on the agency or person to whom it relates;
- whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information;
- whether the information is still current or out of date (out of date information may no longer have any value); and
- whether disclosing the information would reduce the value of a business operation or commercial activity.

I have consulted with a third party about the release of commercial information concerning the third party in the documents. The information comprises the terms of a proposal, including the name of the third party, the arrangements for the proposal, and pricing information. I consider that the information has commercial value.

Based on the response provided by that third party, I am satisfied that the information in question is not widely known and is still current. The third party has also informed me that the information in the documents was provided to the department on a confidential basis. If released, the third party considers that its competitors could use the information to gain an advantage over it.

Having regard to the nature of the information and the third party's concerns, I consider that the release of the information in question could reasonably be expected to destroy or diminish the commercial value of that information.

As such, I have applied the exemption in paragraph 47(1)(b) of the FOI Act to parts of the document.

Section 47G of the FOI Act – Business information

I have also applied the conditional exemption in paragraph 47G(1)(a) of the FOI Act to parts of the documents.

Section 47G(1)(a) of the FOI Act relevantly provides:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

Paragraph 6.185 of the FOI Guidelines provides that the exemption is intended to protect the interests of third parties dealing with the government.

I have decided that the documents contain material which, if released, would, or could reasonably be expected to, unreasonably and adversely affect a third party in respect of their lawful business or commercial affairs. Specifically, as explained above, I consider that disclosing information relating to the proposal would diminish the commercial value of the information and unreasonably and adversely affect the third party's business affairs, including their ability to undertake future exploration of the viability of the proposal canvassed in the documents.

Public interest

Section 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

When weighing the public interest for and against disclosure, 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; and
- inform debate on a matter of public importance, being the Seacare workers' compensation scheme.

I have also considered the relevant factors weighing against disclosure indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure would, or could reasonably be expected to, unreasonably affect a third party in

respect of their lawful business affairs by making information available to their competitors. As negotiations are yet to be finalised, I consider that this would result in the department being unable to truly test the capacity of the market.

Additionally, noting that the third party provided the information to the department on a commercial-in-confidence basis, I consider that disclosure would be contrary to the public interest as it would be likely to prejudice the department's ability to obtain similar information in the future.

Based on these factors, I have decided that in this instance, the public interest in disclosing the information 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

In summary, I am satisfied that parts of the documents are exempt under section 47(1)(b) of the FOI Act. I am also satisfied that parts of the documents are conditionally exempt under sections 47C(1) and 47G(1)(a). Furthermore, I have decided that on balance, it would be contrary to the public interest to release the conditionally exempt material to you at this time. I have therefore deleted the exempt material and released the remaining material in accordance with subsection 22(1) of the FOI Act.

YOUR RIGHTS OF REVIEW

Asking for an explanation of an FOI decision

Before you ask for a formal review of an FOI decision, you can contact us and we will explain the decision to you.

Asking for a formal review of an FOI decision

If you still believe the decision is incorrect, the FOI Act gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

- an internal review officer in the department and/or
- the Australian Information Commissioner.

There are no fees for applying for a formal review.

Applying for an internal review by an internal review officer

If you apply for internal review, a different decision maker to the decision maker who made the original decision will review your request. The internal review decision maker will consider all aspects of the original decision afresh and decide whether the decision should change.

An application for internal review must be made in writing within 30 days of receiving this letter. You can lodge your application:

Post: Commercial and Information Law Branch
Department of Employment and Workplace Relations
Location Code: C50MA1
GPO BOX 9880
CANBERRA ACT 2601

Email: foi@dewr.gov.au

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

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

You can lodge your application in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Complaints to the Australian Information Commissioner

Australian Information Commissioner

You may complain to the Australian Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Australian Information Commissioner must be made in writing and can be lodged in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001