



2 July 2019

In reply please quote:

FOI Request: FA 19/02/00607

File Number: ADF2019/6611

Dear [REDACTED]

Freedom of Information (FOI) request - Access Decision

On 9 February 2019, the Department of Home Affairs (the Department) received a request for access to document under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

1 Scope of request

You have requested access to the following document:

A copy of any document or documents held by the Department and prepared for the purposes of paragraph 11.1(d) of the Legal Services Directions 2017 in respect of the illegal activity engaged in by Departmental staff in respect of their negotiation of the Department's enterprise agreement.

2 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access document or to amend or annotate records.

3 Relevant material

In reaching my decision I referred to the following:

- the terms of your request
- the document relevant to the request
- the FOI Act
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- advice from Departmental officers with responsibility for matters relating to the document to which you sought access
- advice from other Commonwealth Departments

4 Document in scope of request

The Department has identified one document as falling within the scope of your request. This document was in the possession of the Department on 9 February 2019 when your request was received.

5 Decision

The decision in relation to the document in the possession of the Department which fall within the scope of your request is to release one document in part with deletions.

6 Reasons for Decision

Detailed reasons for my decision are set out below. My findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

6.1 Section 22 of the FOI Act – irrelevant to request

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

On 12 February 2019, the Department advised you that its policy is to exclude the personal details of officers not in the Senior Executive Service (SES), as well as the mobile and work telephone numbers of SES staff, contained in documents that fall within scope of an FOI request.

I have therefore decided that parts of document marked 's22(1)(a)(ii)' would disclose information that could reasonably be regarded as irrelevant to your request, and have therefore prepared an edited copy of the document, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The remainder of the document has been considered for release to you as it is relevant to your request.

6.2 Section 42 of the FOI Act – Legal Professional Privilege

Section 42 of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

I am satisfied that parts of the document consists of confidential communications passing between the Department and its legal advisers, for the dominant purpose of giving or receiving legal advice.

In determining that the communication is privileged, I have taken into the consideration the following:

- there is a legal adviser-client relationship
- the communication was for the purpose of giving and/or receiving legal advice;
- the advice given was independent and
- the advice was given on a legal-in-confidence basis and was therefore confidential.

I have decided that parts of the document is exempt from disclosure under section 42 of the FOI Act.

The exempt parts of the document are not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The exempt parts of the document do not fall within the definition of operational information and remains subject to legal professional privilege.

6.3 Section 47C of the FOI Act – Deliberative Processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose deliberative matter relating to the deliberative processes involved in the functions of the Department.

'*Deliberative matter*' includes opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the deliberative processes of an agency.

'Deliberative processes' generally involves "*the process of weighing up or evaluating competing arguments or considerations*"¹ and the '*thinking processes –the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*'²

The document consists of an Agency Notification Form from the Department to the Office of Legal Services Coordination (OLSC).

OLSC, within the Attorney-General's Department, has various roles, including coordination of significant Commonwealth litigation. Under the *Legal Services Directions 2017* (the Directions), agencies are obliged to report to OLSC as soon as practicable about any possible or apparent breaches of the Directions arising in the context of litigation or legal work for the Commonwealth. The Agency Notification Form is the means by which OLSC gathers this information.

OLSC's approach is to assist agencies to comply with the Directions through support, guidance and training. This promotes awareness of obligations, recognition of better compliance strategies, identification of emerging issues, and appropriate management of legal risk. This is so regardless of whether the possible or apparent breach is in relation to significant or not significant Commonwealth litigation.

OLSC monitors agency compliance with the Directions. However, OLSC is not in a position to itself conduct reviews or investigations in relation to possible or actual non-compliance with the Directions, except in exceptional circumstances, such as where there is evidence of a systemic issue emerging within an agency or in the sphere of Commonwealth legal work generally.

The information provided in the Agency Notification Form is owned by the providing agency, but OLSC rely on it to make informed decisions about agencies' engagement with the Directions, what support to provide an agency, and if there is indeed a systemic issue emerging (which could emerge over the course of years).

¹ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

² *JE Waterford and Department of Treasury (No 2)* [1984] AATA 67

Disclosure of the approach and content of the Agency Notification Form could prejudice the ability of OLSC to obtain similarly frank information in the future from agencies, which could undermine the approach of OLSC to managing the Directions. OLSC takes a facilitative approach to administering the Directions and relies heavily on its ability to work in confidence with agencies to support their compliance with their obligations.

Whilst section 47C(2) provides that “deliberative matter” does not include purely factual material, I have had regard to the fact 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.³ A factual summary prepared to aid a complex issue may be classed as purely factual material, but may also be of a character as to disclose a process involving opinion, advice or recommendation. As such, a conclusion which involves a deliberative process may well prevent material from being purely factual⁴.

I am satisfied that the factors set out in subsection (3) do not apply in this instance.

I have decided that the information is conditionally exempt under section 47C of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard below

6.4 The public interest – section 11A of the FOI Act

As I have decided that parts of the document are conditionally exempt, I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest (section 11A of the FOI Act).

A part of a document which is conditionally exempt must also meet the public interest test in section 11A(5) before an exemption may be claimed in respect of that part.

In summary, the test is whether access to the conditionally exempt part of the document would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
- (b) inform debate on a matter of public importance;
- (c) promote effective oversight of public expenditure;
- (d) allow a person to access his or her own personal information.

³ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

⁴ *Harris v Australian Broadcasting Corporation and Others* (1984) 1 FCR 150

Having regard to the above:

- I am satisfied that access to the document would promote the objects of the FOI Act.
- I consider that the subject matter of the document does not seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.
- I consider that no insights into public expenditure will be provided through examination of the document.
- I am satisfied that you do not require access to the document in order to access your own personal information.

I have also considered the following factors that weigh against the release of the conditionally exempt information in the document:

- Disclosure of the conditionally exempt information under section 47C of the FOI Act could prejudice the ability of OLSC to manage and administer the Directions. Any prejudice to the ability of OLSC to manage and administer the Directions would be contrary to the public interest and I consider that this factor weighs strongly against disclosure.

I have also had regard to section 11B(4) which sets out the factors which are irrelevant to my decision, which are:

- a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- b) access to the document could result in any person misinterpreting or misunderstanding the document;
- c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- d) access to the document could result in confusion or unnecessary debate.

I have not taken into account any of those factors in this decision.

Upon balancing all of the above relevant public interest considerations, I have concluded that the disclosure of the conditionally exempt information in the documents would be contrary to the public interest and it is therefore exempt from disclosure under the FOI Act.

7 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

8 Your Review Rights

Internal Review

If you disagree with this decision, you have the right to apply for an internal review by the Department of this decision. Any request for internal review must be provided to the Department within 30 days of you being notified of the decision. Where possible please attach reasons why you believe a review of the decision is necessary. The internal review will be carried out by an officer other than the original decision maker and the Department must make a review decision within 30 days.

Applications for review should be sent to:

By email to: foi.reviews@homeaffairs.gov.au
OR

By mail to:
Freedom of Information Section
Department of Home Affairs
PO Box 25
BELCONNEN ACT 2617

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

9 Making a Complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)
Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Home Affairs as the relevant agency.

10 Contacting the FOI Section

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@homeaffairs.gov.au.



Authorised Decision Maker
Department of Home Affairs