



Decision and Statement of reasons issued under the *Freedom of Information Act 1982*

Decision and reason for decision of Zoey (Position Number 62214764),
Senior Information Access Officer, Information Access Unit,
Client and Information Access Branch, Department of Veterans' Affairs

Applicant: Jenny

Decision date: 9 July 2024

FOI reference number: LEX 65817

Sent by email: foi+request-10957-176177a2@righttoknow.org.au

Dear Jenny,

Freedom of Information Request: LEX 65817

Decision

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has identified twelve (12) document relevant to your request and combined them into one (1) document bundle.
2. I have made the decision to refuse access to the document.
3. The document that I have chosen to refuse access to is set out in **Schedule 1**, together with applicable exemption provisions.

Authority to make decision

4. I, Zoey (Position Number 62214764), Senior Information Access Officer, Information Access Unit, Client and Information Access Branch, am an officer authorised by the Secretary of the Department to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the FOI Act.

Summary

5. On 05 March 2024 you made a request for access to documents in the possession of the Department. Your request sought access to:

'..... On 14 February 2024 Secretary Frame testified before the FADaTLC (Senate Estimates):

"Between the end of April and August [2023], I commissioned a range of work and advice to seek further assurances and more information about the [MATES] program." (Page 110 of the transcript)

I apply for copy of these documents (whether held electronically or in discrete form) of Secretary Frame she refers to in that statement, including any responses she received in response to those commissioned works and advice sought.

As the MATES program has been the subject of multiple media reports regarding breaches of privacy and failures to obtain consent, there is a public interest in this information so please make sure these documents are accessible to everyone when responding. '

6. On 07 March 2024, the Department acknowledged your request via email.
7. As no extensions of time have been applied to process your request, a decision on your request was due by 04 April 2024.
8. In accordance with section 15AC of the FOI Act, the principal officer of the Department is taken to have made a decision personally refusing to give access to the documents on the last day of the initial decision period. Even where a decision has not been issued within the prescribed timeframe, the Department retains an obligation to process and finalise the FOI request. I would like to apologise for the delay in issuing this decision to you and any inconvenience it may have caused.
9. As a decision on your request was not made within the timeframe as prescribed in section 15(5)(b) of the FOI Act, Regulation 7(2) of the *Freedom of Information (Charges) Regulations 2019* prescribed that no charge is payable.

Material taken into account

10. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to refuse access to the document follows.

11. I have taken the following material into account in making my decision:

- the terms of your request on 05 March 2024;
- the types of information and documents that are in the Department's possession;
- the content of the document that fall within the scope of your request;
- Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered the following provisions of the FOI Act relevant to my decision:
 - Section 11B Public interest exemption - factors
 - Section 15 Request for Access
 - Section 22 Access to edited copies with exempt or irrelevant material deleted
 - Section 42 Documents subject to legal professional privilege
 - Section 47E Public interest conditional exemptions-certain operations of agencies
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**);

12. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

13. I have decided to **refuse access** to the document within the scope of your request in accordance with the following exemptions in the FOI Act:

Documents subject to legal professional privilege (section 42)

14. 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 (LPP). The FOI Guidelines provide that, at common law, determining whether a communication is privileged requires a consideration of:

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

15. Having regard to the FOI Guidelines, the Department engaged Proximity to undertake a review of the Veterans' Medicines Advice and Therapeutics Education Services (MATES) program processes in order to advise on the robustness of the opt-out procedure and to provide any necessary advice and recommendations as a result of that review.
16. The Department maintains that a legal adviser-client relationship exists and that the Reports and communications between the Department and Proximity, was for the dominant purpose of giving and receiving legal advice in relation to compliance under the Privacy Act. Further, the Reports and communications were:
 - received, and prepared by Proximity in its capacity as external legal adviser to the Department
 - sent by, and directly to, staff members responsible for responding to the issues contained in the document on a confidential basis, and
 - not intended for wider dissemination.
17. There is no information available to the Department which suggests LPP has been waived in relation to this matter at this time, expressly or otherwise as the substance of the advice has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.
18. As section 42 of the FOI Act is not a conditional exemption, I am not required to consider a public interest test.

Public interest conditional exemptions--certain operations of agencies sections 47E(d)

19. Section 47E(d) conditionally exempts documents where disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient

conduct of the operations of an agency.

20. This conditional exemption applies to the Report in its entirety. Disclosure of the Letter and Report would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Department's management of litigation.

21. Section 47E(d) of the FOI Act provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

22. Paragraph 5.20 of the Guidelines, issued under section 93A of the FOI Act (FOI Guidelines) provides:

The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

Proper and efficient conduct of an agency's operations

23. In *Re James and Ors and Australian National University* (1984) 5 ALD 687, the phrase 'conduct of the operations of an agency' was interpreted to extend 'to the way in which an agency discharges or performs any of its functions'.

Paragraph 6.123 of the FOI Guidelines states:

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

24. Since the Report was commissioned, the Department has continued to undertake extensive investigations and analysis in relation to the matters raised in the Report. These investigations have uncovered a further number of highly complex matters which span three decades and involve multiple agencies and parties. Accordingly, the Report contains material, information and legal analysis at a point in time only. Further, the Department is

currently managing in response to the matters raised in the Report, a representative Complaint, Federal Court Proceedings and notices issued by the Royal Commission.

25. The Department contends that the disclosure of the document would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Department's management of litigation on the basis that:
- The Report contains a detailed analysis of the factual and legal issues surrounding a process that is the subject of litigation as outlined above.
 - Disclosure of the Report at this point in time would potentially impact on litigation as the Report was commissioned on limited facts and information available to both the Department and Proximity at the time.
 - Disclosing this type of information would prejudice the ability of Proximity to provide full and frank advice to the Department without fear of prejudicial information be disclosed, particularly in relation to such a significant matter like MATES. It would inhibit the free exchange of information and, in turn, substantially and adversely affect the proper and efficient conduct of litigation involving the Commonwealth.
26. Any prejudice would be more than mere irritation, embarrassment or inconvenience to the Department. In the wrong hands, the information could be used to use information against the Department eg. subvert the outcome of litigation involving the Commonwealth.
27. Accordingly, for the reasons outlined above I consider that certain material, as identified in Schedule 1, meets the criteria for conditional exemption under section 47E(d) of the FOI Act.

Application of the public interest test - sections 47E(d)

Application of the public interest test:

28. Section 11A(5) provides that an agency 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 would, on balance, be contrary to the public interest.
29. In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:
- (a) disclosure would promote the objects of the FOI Act

- (b) disclosure would inform debate on a matter of public importance

30. I also considered the following factors which do not favour disclosure:

- (a) disclosure could be expected to adversely affect the delivery of services by the Department in accordance with its functions
- (b) disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency;
- (c) disclosure could reasonably be expected to prejudice the management function of an agency.

31. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

32. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

Information Publication Scheme

33. The Information Publication Scheme requires the Department to publish information released in response to individual requests made under the FOI Act, except in specified circumstances.

34. In accordance with section 11C(1)(a) of the FOI Act, details of your request and the document requested will not be made available in the Department's FOI Disclosure Log as it relates to business and professional affairs and it would be unreasonable to publish this information.

Your rights of review

35. If you are dissatisfied with my decision you may apply for Information Commissioner Review of the decision through the Office of the Australian Information Commissioner (**OAIC**). In accordance with section 54E(b) of the FOI Act, internal review is not available as the Department did not finalise your FOI request within the prescribed statutory timeframe.

OAIC review

36. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by OAIC must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

Online: www.oaic.gov.au
Post: Director of FOI Dispute Resolution
Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001
Facsimile: (02) 9284 9666
Phone: 1300 363 992
Email: FOIDR@oaic.gov.au

37. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAIC: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

Contact us

38. If you wish to discuss this decision, please do not hesitate to contact the Information Access Unit using the following details:

Online: <https://www.dva.gov.au/about-us/overview/reporting/freedom-information/access-information>
Post: Information Access Unit
Department of Veterans' Affairs
GPO Box 9998, Brisbane QLD 4001
Phone: 1800 838 372
Email: Information.Access@dva.gov.au

Yours sincerely,

Zoey (Position Number 62214764)

Senior Information Access Officer

Information Access Unit

Client and Information Access Branch

Department of Veterans' Affairs

9 July 2024



Schedule of documents

Applicant: Jenny

Decision date: 9 July 2024

FOI reference number: LEX 65817

Document reference	Date of document	Document description	Page number	Decision	Exemption provision
1	Various	LEX 65817 – Combined documents	1-178	Refuse Access	s42, 47E(d)



Schedule of relevant provisions in the FOI Act

3 Objects-general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access-general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects-information or documents otherwise accessible)).

- (5) 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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

11B Public interest exemptions - factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include 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.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
- (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.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

15 Requests for access (as related to the requirements for requests)

Persons may request access

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
- (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).
- (2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:
- (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the agency or Minister.

22 Access to edited copies with exempt or irrelevant matter deleted

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.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter-that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
 - (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - (aa) in the case of a decision to refuse to give access to a conditionally exempt document-include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
- (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.
(see section 11A).

42 Documents subject to legal professional privilege

- (1) 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.

- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

Public interest conditional exemptions

47E Public interest conditional exemptions-certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).