



**Australian Government**  
**Attorney-General's Department**

Our ref: FOI24/077-IR; CM24/9676

2 December 2024

John B

By email: [foi+request-11085-2a6de618@righttoknow.org.au](mailto:foi+request-11085-2a6de618@righttoknow.org.au)

Dear John

**Freedom of Information Request FOI24/077-IR - Internal Review decision**

I am writing to advise you of my decision following your request for internal review of the Attorney-General's Department's (the department's) *Freedom of Information Act 1982* (FOI Act) decision of 8 May 2024.

**Your request**

On 8 February 2024, you requested access to:

- ... the policies and decision-making processes within the Attorney-General's Department or OLSC regarding the remuneration of junior counsel (barristers) engaged by the government and;
1. The policy of setting fees for new counsel rates at \$1100 per day.
  2. The basis or criteria used to cap fees at a 6-hour day for junior counsel.
  3. Any analyses, reports, or correspondence discussing the comparison between the government's rate of \$1100 per day and the average market rate/market cap (which is currently \$2500 for most junior counsel as a starting rate, with a capped 10-hour day).
  4. Any analyses, reports, or correspondence discussing why the initial rate of \$1100 per day has not changed in over a decade.
  5. Policy or guidance given to agencies relating to the annual adjustments of barristers' fees by government agencies.

On 12 February 2024, the department acknowledged your request.

On 8 May 2024, the department made a decision to provide you partial access to certain documents in response to your request.

On 5 June 2024, you requested internal review of that decision. In particular, you stated you were:

- ... seeking review of the decision to refuse access to material in documents 2 and 3 made by the department on 8 May 2024.

On 19 June 2024, the department acknowledged your request for internal review and sought clarification on what you were seeking in the review.

On 19 June 2024, you confirmed that your internal review is seeking:

- ... review of the decision to refuse access to material in documents 2 and 3 made by the department on 8 May 2024, and review of whether any further documents falling within the scope of my original request exist.

On 8 July 2024, you finalised the scope of your internal review confirming that you are seeking:  
... the policies and decision-making processes within the Attorney-General's Department or OLSC regarding the remuneration of junior counsel (barristers) engaged by the government and;  
... trying to understand why OLSC continues to consider \$1100 to be the appropriate initial rate when that rate was first set well over a decade ago and is not increased to keep pace with inflation or market rates.

You also advised us that you disagreed with:

- The use of the s 47E(d) redaction on page 72 of document 2 in the initial decision for the reasons set out in the internal review request
- The lack of explanation by the original decision maker of how disclosing the information would reasonably be expected to have an adverse effect (as required by s 47E(d); and
- The decision that the public interest test weighed against release. You considered that it weighed in favour of disclosing the information.

A decision in relation to your internal review request was due on 5 July 2024. We apologise for the delay in finalising this request.

### **My decision**

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests made to the department.

In making my decision, I have taken the following material into account:

- the terms of your original request
- the content of the documents identified as within scope of your request
- the provisions of the FOI Act
- the department's decision of 8 May 2024
- the terms of your internal review request and your subsequent correspondence with the department
- the views of a third party consulted by the department under s 27 of the FOI Act and;
- the FOI Guidelines issued by the Australian Information Commissioner (the Guidelines).

In reviewing this matter, I have considered all the material before me. I arranged for staff within the department's Office of Legal Services Coordination to conduct further searches of the department's records management system using search terms developed with reference to the information provided in the scope of your internal review, and considered the results of those searches. Two additional documents were identified through these searches.

On page 72 of document 4, there is a name utilised in an example analysis table, the name in the example is not linked to an identifiable individual. On that basis, I consider the name used in the example to be suitable for release to you as the applicant.

After reviewing the relevant materials and conducting additional searches, I have decided to grant access in part to 4 documents and 3 documents in full. This means I have decided to grant you access to additional information in two documents identified in your original request, and partial access to the two newly identified documents.

### **Additional information**

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The Schedule of documents at **Attachment B** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The Statement of reasons at **Attachment C** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

**Questions about this decision**

If you wish to discuss this decision, the FOI case officer for this matter is Alistair, who can be reached on (02) 6141 6666 or by email to [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely



Kathryn Haigh  
First Assistant Secretary  
Legal Services and Modern Slavery Division

**Attachments**

Attachment A: Review rights  
Attachment B: Schedule of documents  
Attachment C: Statement of reasons  
Attachment D: Documents



## **Attachment A – Your review rights**

If you disagree with my decision, you may ask for an Information Commissioner review.

### ***Information Commissioner review***

Information Commissioner review requests must be submitted within 60 days of receiving this letter. Your request should include your contact details, a copy of my decision, and the reasons why you disagree with my decision. You can apply in one of the following ways:

**Online:** [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

**Email:** [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

**Mail:** Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Information Commissioner review is available at:

<https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>.

### ***FOI Complaints***

If you are concerned about how we handled your FOI request, please let us know what we could have done better, as we may be able to rectify the situation. If you are not satisfied with our response, you can make a complaint to the Information Commissioner. Your complaint must be 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](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1)

**Email:** [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

**Mail:** Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Freedom of information complaints is available at:

<https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints>



Attachment B - Schedule of documents - Freedom of Information Request FOI24/077-IR

Doc no.	Date	No. pgs	Description	Access decision	Exemption/s applied
1	7 January 2015	4	OLSC – Setting and negotiating Commonwealth Counsel rates	Newly identified document - Grant access in part	s 47E(d): Certain operations of agencies
2	1 February 2016	8	Engagement of Counsel – Draft report	Newly identified document - Grant access in part	s 22(1): Irrelevant material s 47C(1): Deliberative processes s 47E(d): Certain operations of agencies
3	2 July 2018	4	<i>Legal Services Directions 2017, Appendix D</i>	Grant access in full	Nil
4	1 April 2019	95	OLSC Standard Operating Procedures - Counsel rates	Additional information released - Grant access in part	s 22(1): Irrelevant material s 47E(d): Certain operations of agencies
5	28 April 2021	5	Briefing – ACT Bar concerns with respect to the engagement of counsel by the Commonwealth	Additional information released - Grant access in part	s 22(1): Irrelevant material s 47C(1): Deliberative processes
6	3 June 2021	1	Letter from the former Attorney-General to the ACT Bar Association	Grant access in full	Nil
7	14 December 2023	1	OLSC Counsel Rate Table – From 1 January 2024	Grant access in full	Nil



### **Attachment C - Statement of reasons - FOI24/077-IR**

This document, when read in conjunction with the schedule of documents at **Attachment B**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

#### ***Section 22: Access to edited copies with exempt or irrelevant matter deleted***

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

I note that the department contacted you on 3 September, you were asked if you agree that the following information would be regarded as irrelevant to your request:

*'The department's practice is to not disclose personal information of staff of the department and other government authorities, where that information is not publicly known or routinely disclosed (e.g. names of junior officers and contact information). The names of senior officers will generally be disclosed. In addition, duplicates and incomplete email chains, internal administrative email addresses and metadata within the scope of the FOI request will be excluded.'*

On 10 September 2024, you agreed to remove staff workplace email addresses, signatures and contact phone numbers of all departmental staff, and the removal of the names of non-Senior Executive Service (non-SES) staff from your request.

On 12 September 2024, you also agreed to exclude duplicates, incomplete email chains, internal administrative email addresses and metadata from your request.

I have also deleted other material in the documents that is irrelevant to the terms of your request. Having regard to the particular content of the documents for your request, I decided that information not related to the scope of your internal review is also irrelevant to your request. Given this, I considered it likely that you would also agree that this information is irrelevant to your request and have deleted this material under s 22 of the FOI Act.

#### **Public interest conditional exemptions**

An agency can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents for your request which are conditionally exempt under Division 3 relate to the following categories:

- deliberative processes (s 47C) and;
- certain operations of agencies (s 47E).

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the

forefront of decision making. My reasoning in regard to the public interest are set out under the heading 'Section 11A(5): Public interest test' below.

**Section 47C: Public interest conditional exemption - deliberative processes**

Section 47C of the FOI Act provides that 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 an agency.

In applying this exemption, paragraph 6.55 of the Guidelines provide that:

*It is not enough for the purposes of s 47C(1) that an opinion, advice or recommendation is merely obtained, prepared or recorded; it must be obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of the agency, minister or government.*

I am satisfied that the relevant material is not purely factual and is deliberative matter within the meaning of s 47C(1), being in the nature of and relating to:

- opinion, advice or recommendations for the purpose of briefing or informing the Attorney-General; and
- draft material or amendments, reflecting opinion, advice and recommendations about the material which was subject to change or revision.

The deliberative matter described above was created for the purpose of, and in connection with, the drafting of guidelines for the engagement of counsel and briefing the Attorney-General on Ministerial Correspondence.

Accordingly, I am satisfied that this material is conditionally exempt under s 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the heading 'Section 11A(5): Public interest test'.

**Section 47E: Public interest conditional exemption - certain operations of agencies**

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure 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 or by an agency;*
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I have decided to apply s 47E(d) to documents 1 and 2 of your request. My reasons for applying this exemption has been set out below.

Material within documents 1 and 2 consist of processes and systems that are used by the department for internal and operational reasons to determine counsel rates. I consider that disclosure of this information would likely to result in various (including unreasonable and vexatious) communications and inquiries being received into the relevant area of the department through their publicly available communication channels, although they are not resourced to manage that work. Disclosure of this information could possibly lead to favourable applications or legal matter requests that are of detriment to the Commonwealth. This would also require that the guidelines be redrafted and potentially be less effective.

I further note that the Office of Legal Services Coordination within the department has established publicly available channels of communication through which members of the community may submit enquiries and feedback related to determining counsel rates.

### **Section 11A(5): Public interest test**

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.224 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in s 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under s 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, including by:

- promoting the objects of the FOI Act, including by:
  - informing the community of the Government's operations,
  - revealing the reason for a government policy, process or decision, and
  - enhancing the scrutiny of government decision making, and
- promoting effective oversight of public expenditure.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could, as the case may be, reasonably be expected to prejudice:

- prejudice the competitive commercial activities of an agency,
- the Attorney-General's Department's ability to conduct its operations efficiently,



- the Attorney-General's Department's ability to obtain confidential information and;
- the maintenance of a safe and harassment free workplace.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.