



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

Decision and reason for decision of Joshua (Position Number 62336362),
Assistant Director, Information Access Unit,
Client and Information Access Branch, Department of Veterans' Affairs

Applicant: Mr Arthur Jordan

Date of primary decision: 2 April 2024

FOI reference number (Primary): LEX 65725

Internal review decision date: 9 May 2024

Internal review reference number: LEX 66475

Sent by email: foi+request-11179-872f644a@righttoknow.org.au

Dear Mr Jordan,

Freedom of Information Internal Review Request: LEX 66475

Decision

1. The purpose of this letter is to give you a decision about your request for internal review for the decision made in LEX 65725 under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).
2. I have made the decision to affirm the original decision made by Charmaine (Position Number 62249379), Senior Information Access Officer, Information Access Unit, Ministerial, International & Stakeholder Relations Branch. That decision was to refuse access to the documents within the scope of your request.
3. The documents that I have decided to refuse access to are set out in **Schedule 1**, together with applicable exemption provision.

Authority to make decision

- I, Joshua (Position Number 62336362), Assistant Director, 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

Original Decision

- On 29 February 2024, you made a request for access to documents in the possession of the Department. Your request sought access to:

'... Under FOI, I request all legal advice received by the Department on the establishment and development of the Mates Program.

To be clear, I require any and all legal advice, the dominant purpose of which is Policy, not Litigation.

All business details of staff including full names, business emails and business telephone numbers are to be treated as "in scope" and are NOT to be redacted...'

- On 5 March 2024, the Department acknowledged your request via email.
- As no extensions of time have been applied to process your request, a decision on your request was due by 2 April 2024.
- On 2 April 2024, the Department made a decision to refuse access to two (2) documents within the scope of your request, under the following provisions of the FOI Act:
 - Section 42 Documents subject to legal professional privilege

Internal Review

- After receiving the Department's decision on 2 April 2024, you contacted the Department on 2 April 2024 requesting an internal review of the handling of this FOI request. Your internal review request was made in the following terms:

'...I am writing to request an internal review of Department of Veterans' Affairs's handling of my FOI request 'Establishment and development of the Mates

Program.'

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

https://www.righttoknow.org.au/request/establishment_and_development_of...

10. As your application was made within the 30 day of the original decision being made, the internal review decision is valid.
11. As no extension of time have been applied to process this internal review, a decision on your internal review application was due 2 May 2024. I would like to apologise for the delay in issuing this decision to you and any inconvenience it may have caused.

Material taken into account

12. 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 grant partial access to the document follows
13. I have taken the following material into account in making my decision.
 - the terms of your original request made on 9 February 2024 and the original decision made on this request on 2 April 2024;
 - the records of the searches carried out in processing your original request;
 - the terms of your internal review request made on 2 April 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 have also considered the following provisions of the FOI Act relevant to my decision:
 - Section 15 Request for Access
 - Section 42 Documents subject to legal professional privilege
 - Section 54C Internal review - decision on internal review; and

- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**);

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

Reasons for decision

15. I have decided to affirm the original decision made on 2 April 2024 to refuse access to the documents within the scope of your request, subject to the following provisions in the FOI Act.

Documents subject to legal professional privilege (section 42)

16. 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.

17. The document bundle contains communication for the purpose of giving legal advice by the Department's internal General Counsel Division.

18. I am satisfied that the legal professional privilege in these documents has not been waived as the documents have not been distributed further than is reasonably necessary for internal operational purposes. I am also satisfied the substance of the legal advice contained within the documents has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.

19. Further, I am satisfied the agency's ability to obtain legal advice on issues would be substantially prejudiced if these documents were to be made publicly available through FOI processes. In my view, real harm is likely to result from release of the documents as doing so would waive privilege and disclose the legal advice.

20. As section 42 of the FOI Act is not a conditional exemption, I am not required to consider a public interest test.

Your rights of review

21. 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**).

OAIC review

22. 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

23. 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

24. 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-of-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,

Joshua (Position Number 62336362)

Assistant Director

Information Access Unit

Client and Information Access Branch

Department of Veterans' Affairs

9 May 2024



Document schedule

Applicant: Mr Arthur Jordan

Decision date: 9 May 2024

FOI reference number: LEX 66475

Document reference	Date of document	Document description	Page number	Decision	Exemption provision
1	Various	Electronic Records	1-68	Refusal	s 42
2	Various	Electronic Records Emails	1-27	Refusal	s 42



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).

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.

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.

54C Internal Review - decision on internal review

Scope

- (1) This section applies if an application for internal review of an access refusal decision or an access grant decision (the original decision) is made in accordance with this Part.

Decision

- (2) The agency must, as soon as practicable, arrange for a person (other than the person who made the original decision) to review the decision.
- (3) The person must make a fresh decision on behalf of the agency within 30 days after the day on which the application was received by, or on behalf of, the agency.

Notice of decision

- (4) Section 26 extends to a decision made under this section.