



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

Decision and reason for decision of Carmen (Position Number 62373496),
Information Access Officer, Information Access Unit,
Client and Information Access Branch, Department of Veterans' Affairs

Applicant: Jenny

Decision date: 12 July 2024

FOI reference number: LEX 66204

Sent by email: foi+request-11236-b7df1711@righttoknow.org.au

Dear Jenny,

Freedom of Information Request: LEX 66204

Decision

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has identified one (1) document relevant to your request.
2. I have made a 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 provision.

Authority to make decision

4. I, Carmen (Position Number 623 734 96), 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 *Freedom of Information Act 1982 (Cth)* (**FOI Act**).

Summary

5. On 16 March 2024, you made a request for access to a document in the possession of the Department. Your request sought access to:

'...I apply under the Freedom of Information Act for copy of Ministerial Submission MS22-00569, received by the Minister in 2022.

The names of individuals within that document who are not SES grade are not required.

Attachments are not required.

Telephone and email details are not required...'

6. On 19 March 2024, the Department acknowledged your request via email.
7. On the 9 April 2024, as agreed, the scope was revised to the following:

'...I apply under the Freedom of Information Act for copy of Ministerial Submission MS22-000569, received by the Minister in 2022.

The names of individuals within that document who are not SES grade are not required.

Attachments are not required.

Telephone and email details are not required...'

8. As no extensions of time have been applied to process your request, a decision on your request was due by 15 April 2024.
9. 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.
10. 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

11. 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 documents follows.
12. I have taken the following material into account in making my decision:
 - the terms of your request on 16 March 2024 and revised 9 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 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
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**);
13. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

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

Documents subject to legal professional privilege (section 42)

15. 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.

16. Legal professional privilege applies to confidential communications between a legal adviser and client made for the dominant purpose of giving or receiving legal advice; or to documents produced for the dominant purpose of being used in actual litigation or litigation that is reasonably anticipated. It also applies to documents which either directly reveal, or would infer the nature, content, or substance of such communications.
17. This document is comprised of legal advice in consultation with both our own internal Legal and Audit Division as well as Maddocks Lawyers with the purpose to advise and inform the minister for Veterans' Affairs in regard to "Office of the Australian Information Commissioner (OAIC) – Privacy Complaint".
18. After review of this document and consulting with Pharmacy Programs and Operations team, I consider that Legal professional privilege applies. As the document was produced for the purpose of providing information and advice around litigation by a legal advisor and considered confidential.
19. I am of the view that the Department's ability to obtain legal advice on issues would be substantially prejudiced if these documents were to be made publicly available through FOI processes. I am satisfied that real harm is likely to result from release of the legal advice as doing so would waive privilege and disclose the Department's approach to the interpretation, analysis and application of legislation administered by the agency.
20. I am satisfied that the relevant material satisfies the elements of privileged material set out above and have therefore decided to refuse access to the document on the basis it is exempt in full under section 42 of the FOI Act.

21. 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

22. 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

23. 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

24. 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

25. 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,

Carmen (Position Number 62373496)

Information Access Officer

Information Access Unit

Client and Information Access Branch

Department of Veterans' Affairs

12 July 2024



Schedule of documents

Applicant: Jenny

Decision date: 12 July 2024

FOI reference number: LEX 66204

Document reference	Date of document	Document description	Page number	Decision	Exemption provision
1	16/12/2022	MS22-000569	1-4	Refused	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.