



Our ref: FOI24/225; CM24/7692

24 July 2024

Mr James (John) Smith
By email: foi+request-11379-0e949e9b@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request FOI24/225 – Decision letter

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act), which you submitted to the Attorney-General's Department (the department).

Your request

On 1 May 2024, you requested access to:

... documents relating to interagency information management and sharing frameworks, policies, procedures, rules, guidelines, or processes insofar as they relate to investigations into allegations of war crimes by Australian Defence Force personnel in Afghanistan.

On 3 May 2024, the department acknowledged your request.

A decision in relation to your request was due on 31 May 2024.

My decision

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

I have identified 4 documents that fall within the scope of your request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request
- the content of the documents identified as within scope of your request
- the provisions of the FOI Act and;
- the FOI Guidelines issued by the Australian Information Commissioner under (the Guidelines).

I have decided to refuse access to 4 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.

Yours sincerely



Thomas Sharp
A/g Assistant Secretary

Attachments

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



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

Email: 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

Email: 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 FOI24/225

Doc no.	Date	No. pgs	Description	Access decision	Exemption/s applied
1	4 August 2022	6	Memorandum: International Cooperation Unit Handling Arrangements	Refuse access	s 37(1)(a), 37(2)(b): Documents affecting enforcement of law and protection of public safety s 47E(d): Certain operations of agencies
2	4 August 2022	2	Attachment to document 1: Signed undertaking	Refuse access	s 37(2)(b): Documents affecting enforcement of law and protection of public safety s 47E(d): Certain operations of agencies
3	4 August 2022	2	Attachment to document 1: Signed undertaking	Refuse access	s 37(2)(b): Documents affecting enforcement of law and protection of public safety s 47E(d): Certain operations of agencies
4	8 August 2022	2	Signed undertaking	Refuse access	s 37(2)(b): Documents affecting enforcement of law and protection of public safety s 47E(d): Certain operations of agencies



Attachment C - Statement of Reasons - FOI24/225

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).

Exemptions

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. Documents for your request that are exempt under Division 2 of Part IV relate to the following category; documents affecting enforcement of law and protection of public safety (s 37).

These exemptions are not subject to an overriding public interest test. Accordingly, where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Brief information about each of the exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions>.

Section 37: Documents affecting enforcement of law and protection of public safety

Section 37(1) of the FOI act provides that a document is and exempt document if its disclosure would, or could reasonably be expected to:

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;*
- (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or*
- (c) endanger the life or physical safety of any person.*

Section 37(2) of the FOI act provides that a document is and exempt document if its disclosure would, or could reasonably be expected to:

- (a) prejudice the fair trial of a person or the impartial adjudication of a particular case;*
- (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or*
- (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.*

I have decided to apply s 37(1)(a) and 37(2)(b) to the documents for your request. My reasons for applying these exemptions have been set out below.

In applying exemption s 37(1)(a) to document 1, paragraph 5.103 of the FOI Guidelines provide that:

Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase 'in a particular instance' it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.

In relation to applying exemption s 37(2)(b), paragraph 5.125 of the FOI Guidelines provide that:

'Lawful methods and procedures' are not confined to criminal investigations and can, for example, extend to taxation investigations. The exemption focuses on an agency's methods and procedures for dealing with breaches of the law, where disclosure would, or could reasonably be expected to, adversely affect the effectiveness of those methods and procedures.

The documents for your request contain information relating to lawful methods or procedures used by Commonwealth agencies and departments for the enforcement of the law. If disclosed, the release of this information would compromise the investigative strategies and the ability of the agencies to successfully utilise such methods or procedures in the future. I am satisfied that the particular methods and procedures are not widely known or published and that they are likely only known by those with responsibility for the kinds of work to which the documents relate. I am also satisfied that disclosure of the methods or procedures would adversely affect their effectiveness, such that they would require to be substantially changed to ensure their ongoing utility.

Accordingly, I am satisfied that this material is exempt from disclosure under ss 37(1)(a) and 37(2)(b) of the FOI Act.

Public interest conditional exemptions

An agency or minister 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 category; certain operations of agencies (s 47E).

Brief information about each of the conditional exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these conditional exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

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.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest are set out under the heading '*Section 11A(5): Public interest test*' below.

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

Information in documents 1-4 of your request contains information as to how Commonwealth agencies obtain and disclose information relevant to their investigations, and how they engage with key partners regarding the agency methods and arrangements with stakeholders on how information is used or managed.

Accordingly, I am satisfied that this material is conditionally exempt under s 47E(d) 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 header '*Section 11A(5): Public interest test*'.

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 6.5 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, and
 - enhancing the scrutiny of government actions
- informing debate on a matter of public importance, including by:
 - allowing or assisting inquiry into possible deficiencies in the conduct or administration of an agency or official, or
 - revealing or substantiating that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct,
- contributing to the administration of justice generally, including procedural fairness,
- contributing to the enforcement of the criminal law,
- contributing to the administration of justice and;
- advancing the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.

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:

- the fair treatment of individuals,
- prejudice security, law enforcement or public safety,
- impede the administration of justice generally, including procedural fairness,
- impede the administration of justice for an individual,
- impede the flow of information to the police or another law enforcement or regulatory agency,
- the Attorney-General's Department's ability to obtain confidential information,
- the Attorney-General's Department's ability to obtain similar information in the future and;
- harm the interests of an individual or group of individuals.

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.