



Australian Government

Department of Health and Aged Care

FOI reference: FOI 5166

Kath

Email: foi+request-11461-96f0d4e3@righttoknow.org.au

Dear Kath

Decision on your Freedom of Information Request

I refer to your request of 29 May 2024, to the Department of Health and Aged Care (the department), seeking access under the *Freedom of Information Act 1982* (Cth) (FOI Act) to:

All correspondence including briefs, emails, meeting records and any other documents in the Technology Assessment and Access Division about the waitlist for the Insulin Pump Program since 1 July 2023.

Clarification/Modification of scope of request

On 21 June 2024, following consultation with you, you agreed to modify the scope of your request to the following:

'Performance Reports and correspondence from the IPP administrator that contains waitlist data since 1 July 2023'.

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

FOI decision

I have identified five documents that are relevant to your request. These documents were in the possession of the department when your request was received. A schedule of the documents is at **ATTACHMENT A**.

I have decided to give access to all five documents in part, subject to the deletion of exempt and irrelevant material.

Legislative provisions

The FOI Act, including the provisions referred to in my decision, is available on the Federal Register of Legislation website: www.legislation.gov.au/Series/C2004A02562.

The *Privacy Act 1988* (Cth) (Privacy Act), can also be accessed from the Federal Register of Legislation website here: www.legislation.gov.au/Series/C2004A03712.

Your review rights

I have set out your review rights at **ATTACHMENT C**.

Publication

Where I have decided to release documents to you, the department may also publish the released material on its Disclosure Log. The department will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference the department's Disclosure Log can be found at:
www.health.gov.au/resources/foi-disclosure-log.

Contacts

If you require clarification of any matters discussed in this letter you can contact the FOI Section on (02) 6289 1666 or at FOI@health.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Norris', written in a cursive style.

Sarah Norris
Assistant Secretary
Pharmacy Branch
26 July 2024

ATTACHMENT A.

SCHEDULE OF DOCUMENTS
FOI 5166

Document	Pages	Date	Description	Decision on access ¹	Relevant provisions of FOI Act
1	71	31/07/2023	Performance Report	RE	s47 s47E(d) s47F
2	55	31/01/2024	Performance Report	RE	s47 s47F
3	2	28/05/2024	Email	REI	s22 s47F
4	3	21/12/2023	Email	REI	s22 s47F
5	3	25/01/2024	Email	REI	s22 s47F

¹ RE = Release with exempt information deleted, REI = Release with exempt and irrelevant information deleted.

ATTACHMENT B.

**REASONS FOR DECISION
FOI 5166**

1. Material taken into account

In making my decision, I had regard to the following:

- the FOI Act
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- the terms of your FOI request as outlined above
- submissions from third parties consulted about documents which contain information concerning them
- the content of the documents sought, and
- advice from departmental officers with responsibility for matters relating to the documents sought.

2. Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemptions identified in the schedule of documents apply to the relevant documents are set out below.

3. Section 22 - deletion of irrelevant material

Section 22 of the FOI Act applies to documents containing exempt material (subparagraph (1)(a)(i)) and irrelevant information (subparagraph (1)(a)(ii)) and allows an agency to delete such material from a document.

I have deleted material in the documents which can reasonably be regarded as irrelevant to your request and prepared an edited copy for release. This information has been marked 's22' in the documents released to you.

The documents contain the names and telephone numbers of departmental employees. When your request was acknowledged, we notified you that this material would be considered irrelevant to the scope of your request unless you told us that you were seeking access to that material. On the basis that you did not notify us otherwise, this information has been deleted under section 22 of the FOI Act as outlined above.

4. Section 47E - Documents affecting 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.

Paragraph 6.84 of the FOI Guidelines states that section 47E conditionally exempts a document where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain identified agency operations.

In relation to conditional exemption subsection 47E(d) of the FOI Act, paragraph 6.112 of the FOI Guidelines states:

An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.

Paragraph 6.115 of the FOI Guidelines states that the predicted effect must bear on the department's 'proper and efficient' operations, that is, the department 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.

Document 1 contains operational information about the administration and performance of the Insulin Pump Program.

I am satisfied that the parts of the document 1 marked 's47E(d)' contains information which, if disclosed, would or could reasonably be expected to, have a substantial adverse effect on the department's proper and efficient operations. The information in question relates to contract deliverables and administration of the Insulin Pump Program by a third party. If this information were released it could reasonably be expected to adversely impact the relationship with the supplier and/or impede the department's future delivery of the Insulin Pump Program.

I confirm that the information contained in this document relate to operational activities being undertaken by the department in an expected and lawful manner, and that disclosure would not reveal inefficiencies in the way in which the department conducts those operational activities.

For the reasons outlined above, I have decided that the parts of the document marked 's47E(d)' are conditionally exempt from disclosure under section 47E of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

5. Section 47 - Documents disclosing trade secrets or commercially valuable information

Subsection 47(1) of the FOI Act provides that a document is an exempt document if its disclosure would disclose:

- (a) trade secrets; or
- (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Commercially valuable information

Paragraphs 5.234 and 5.235 of the FOI Guidelines state:

- 5.234 To be exempt under s 47(1)(b) a document must satisfy two criteria:
- the document must contain information that has a commercial value either to an agency or to another person or body, and
 - the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed
- 5.235 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case whether information has commercial value:
- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
 - whether the information confers a competitive advantage on the agency or person to whom it relates – for example, if it lowers the cost of production or allows access to markets not available to competitors
 - whether a genuine "arm's-length" buyer would be prepared to pay to obtain that information
 - whether the information is still current or out of date (out of date information may no longer have any value), and
 - whether disclosing the information would reduce the value of a business operation or commercial activity – reflected, perhaps, in a lower share price.

I am satisfied that the material marked s47 in the documents 1 and 2:

- is only known to the department and the affected third party, for whom it has value
- is not known to others, and disclosure of the information would detract from its intrinsic commercial value
- confers a competitive advantage on the affected third party, and provides the affected third party with access to markets not available to its competitors
- is something that a genuine “arm’s length’ buyer would be prepared to pay to obtain
- is still current, and retains its intrinsic value to the affected third party
- would reduce in value to the business operations or commercial activities of the affected third party if disclosed.

As notified to you on 27 June 2024, in accordance with the obligations under section 27 of the FOI Act, the department has consulted with an affected third party. In making my decision on access to the relevant documents, I have taken into consideration the exemption submissions made during that consultation process.

For the reasons outlined above, I have decided that the parts of the documents marked ‘s47’ are exempt from disclosure under section 47 of the FOI Act.

6. Section 47F – Documents affecting personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Personal Information

Personal information has the same meaning as in the Privacy Act. Specifically, section 6 of the Privacy Act provides that *personal information* means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

Paragraph 6.123 of the FOI Guidelines states that for particular information to be personal information, an individual must be identified or reasonably identifiable.

Paragraph 6.125 of the FOI Guidelines states that personal information can include a person’s name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.

An individual is a natural person rather than a corporation, trust, body politic or incorporated association.

I am satisfied that parts of the documents marked 's47F' include personal information.

Unreasonable Disclosure of Personal Information

Subsection 47F(2) of the FOI Act provides that in determining whether the disclosure would involve the unreasonable disclosure of personal information, I must have regard to the following matters:

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources
- (d) any other matters that the agency or Minister considers relevant.

Paragraph 6.133 of the FOI Guidelines states that:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

I note that the AAT, in *Re Chandra and Minister for Immigration and Ethnic Affairs [1984] AATA 437* at paragraph 51-52, stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...

Paragraphs 6.137 and 6.138 of the FOI Guidelines state:

6.137 Key factors for determining whether disclosure is unreasonable include:

- a) the author of the document is identifiable
- b) the documents contain third party personal information
- c) release of the documents would cause stress on the third party
- d) no public purpose would be achieved through release

6.138 As discussed in the leading s 47F IC review decision of 'FG' and National Archives of Australia [2015] AICmr 26, other factors considered to be relevant include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person

- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity

Documents 1 and 2 contain testimonials from and data related to a number of children. Documents 3, 4 and 5 contain the names and personal contact information of a number of individuals that work for JDRF.

I am satisfied that the disclosure of personal information contained within the documents would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the individuals whose personal information is contained in documents 1 and 2 are identifiable by name, age, medical information, and connection to medical programs and/or hospitals
- release of the medical information contained in documents 1 and 2 would cause anxiety to the individuals concerned,
- no further public purpose would be achieved through the release of the personal information,
- the information is current and has not lost its sensitivity through the passage of time,
- the individuals concerned did not consent to and would not expect their testimonials or medical information to be placed in the public domain,
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act, and
- release of the information would be inconsistent with the objects of the *Privacy Act 1988*.

In making my decision, I have consulted with the affected third parties regarding the disclosure of the personal information contained in documents 3, 4 and 5, and I have considered any concerns raised by those individuals. Due to the substantial number of individuals referenced in documents 1 and 2, it has not been reasonably practicable to undertake section 27A consultations regarding the information contained in these documents. In deciding that the information is conditionally exempt under section 47F, I have given substantial weight to the objects of the *Privacy Act 1988*.

For the reasons outlined above, I have decided that the parts of the documents marked 's47F' are conditionally exempt from disclosure under section 47F of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

7. Disclosure is not in the public interest

Pursuant to subsection 11A(5) of the FOI Act, the department must give access to conditionally exempt documents unless access to the documents at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the documents would be contrary to the public interest.

Factors favouring disclosure

Subsection 11B(3) of the FOI Act provides that factors favouring access to documents in the public interest include whether access to the documents would do any of the following:

- (a) promote the objects of the FOI Act (including all 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.

Having regard to the above, I consider that disclosure of the conditionally exempt information at this time:

- would provide access to documents held by an agency of the Commonwealth which would promote the objects of the FOI Act by providing the Australian community with access to information held by the Australian Government.
- would not inform debate on a matter of public importance
- would not promote effective oversight of public expenditure, and
- would allow you access to your own personal information.

Factors weighing against disclosure

I consider that the following public interest factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

s47E(d)

- could reasonably be expected to prejudice the future administration and supply of the Insulin Pump Program. If this were to occur, members of the Australian community could experience difficult accessing necessary medical equipment, which is against the public interest

s47F

- could reasonably be expected to prejudice the protection of the relevant individuals' right to personal privacy
- would not provide you with any further insight into the workings of government, and
- would not achieve any public purpose and, on balance, would harm the individuals' right to personal privacy.

In making my decision, I have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act, which are:

- (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.

Conclusion

For the reasons set out above, after weighing all public interest factors for and against disclosure, I have decided that, on balance, disclosure of the conditionally exemption information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

ATTACHMENT C.

YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for a review.

Internal review

You can request internal review within 30 days of you receiving this decision. An internal review will be conducted by a different officer from the original decision maker.

No particular form is required to apply for review although it will assist your case to set out the grounds on which you believe that the original decision should be changed.

Applications for internal review can be made by:

Email: FOI@health.gov.au

Mail: FOI Unit (MDP 516)
Department of Health and Aged Care
GPO Box 9848
CANBERRA ACT 2601

If you choose to seek an internal review, you will also have a right to apply for Information Commissioner review (IC review) of the internal review decision once it has been provided to you.

Information Commissioner review or complaint

You also have the right to seek Information Commissioner (IC) review of this decision. For FOI applicants, an application for IC review must be made in writing within 60 days of the decision. For third parties who object to disclosure of their information, an application for IC review must be made in writing within 30 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Department of Health and Aged Care as the agency about which you are complaining.

You can make an IC review application or make an FOI complaint in one of the following ways:

- online at www.oaic.gov.au/freedom-of-information/reviews-and-complaints/
- via email to foidr@oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001, or

- by fax to 02 9284 9666.

More information about the Information Commissioner reviews and complaints is available on the OAIC website here: www.oaic.gov.au/freedom-of-information/foi-review-process.

Complaint

If you are dissatisfied with action taken by the department, you may also make a complaint directly to the department.

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website here: www.health.gov.au/about-us/contact-us/complaints