



12 September 2024

Our reference: LEX 81058
LEX 79938

Frank N Fearless

Only by email: foi+request-11485-acc729fe@righttoknow.org.au

Dear Sir / Madam

Freedom of Information Request – Internal Review Decision

I refer to your correspondence received by Services Australia (the Agency) on 13 August 2024, seeking an internal review of the original decision (LEX 79938) made by the Agency on 5 August 2024 in relation to your request for access to documents under the *Freedom of Information Act 1982* (FOI Act).

Background

On 4 June 2024, you requested access under the FOI Act to the following documents:

1. The internal report or document modelling the Agency's ongoing staffing requirements. I am referring to the modelling created 'in the budget context' and referred to by your CEO in the Budget Estimates hearing on the 3rd of June.
2. Any report or summary outputs (powerpoints) produced by Korda Mentha when they were engaged to independently review the performance of the Agency prior to this year's budget.

On 5 August 2024, the Agency notified you it had decided to **refuse access** your request in full as the documents requested were exempt on the basis they contained:

- material submitted to the Cabinet for its consideration, and created for the dominant purpose of briefing a Minister on a Cabinet Submission (section 34 exemption),
- deliberative material, the disclosure of which would be contrary to the public interest (section 47C conditional exemption).

On 13 August 2024, you requested an internal review of the original decision.

Summary of my internal review decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act.

Consistent with the requirements of section 54C(2) of the FOI Act, I have made a fresh decision.

Having considered the material before me, I have decided to **refuse access** to the documents falling within the scope of your request.

I note, while the original decision maker considered that there were 9 documents in the scope of your request, I consider that there are 7 documents in the scope of the request. This is because I have considered documents 7 – 9 (as referred to in the original decision), to comprise one document, being the final report.

I have decided that all of the documents are exempt under the FOI Act on the basis they contain:

- material subject to the cabinet exemption (section 34 exemption), and
- deliberative material, the disclosure of which would be contrary to the public interest (section 47C conditional exemption).

Please see the schedule at [Attachment A](#) for a detailed list of the documents and further information regarding the reasons for my decision.

You can ask for a review of the decision

If you disagree with any part of the decision, you can ask for an external review by the Australian Information Commissioner. See [Attachment B](#) for more information about how to request an external review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@servicesaustralia.gov.au.

Yours sincerely

Philippa
Authorised FOI Decision Maker
Freedom of Information Team
FOI and Reviews Branch | Legal Services Division
Services Australia



SCHEDULE OF DOCUMENTS

INTERNAL REVIEW –Frank N Fearless - LEX 81058 (79938)

Doc No.	Date	Description	Decision	Exemption	Comments
1.	November 2023	Budget and Efficiency Review – Interim findings report (draft)	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(1)(d)) Deliberative material (section 47C)
2.	November 2023	Budget and Efficiency Review – Interim findings report (draft)	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(1)(d)) Deliberative material (section 47C)
3.	December 2023	Budget and Efficiency Review – Interim findings report (draft)	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(1)(d)) Deliberative material (section 47C)
4.	January 2024	Budget and Efficiency Review – Interim findings report (draft)	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(1)(d)) Deliberative material (section 47C)
5.	January 2024	Budget and Efficiency Review – Steering Committee meeting	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(2)) Deliberative material (section 47C)

Doc No.	Date	Description	Decision	Exemption	Comments
6.	February 2024	Budget and Efficiency Review – Key modelling assumptions (draft)	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(2)) Deliberative material (section 47C)
7.	February 2024	Budget and Efficiency Review – Final Report	Exempt in full	34 47C	Material subject to cabinet exemption (section 34(1)(a)) Deliberative material (section 47C)



Attachment A

REASONS FOR DECISION

What you requested

On 4 June 2024, you requested access under the FOI Act to the following documents:

1. The internal report or document modelling the Agency's ongoing staffing requirements. I am referring to the modelling created 'in the budget context' and referred to by your CEO in the Budget Estimates hearing on the 3rd of June.
2. Any report or summary outputs (powerpoints) produced by Korda Mentha when they were engaged to independently review the performance of the Agency prior to this year's budget.

On 5 August 2024, the Agency notified you of the original decision.

Your internal review request

On 13 August 2024, you requested an internal review of the original decision, and contended the application of sections 34 and 47C over the documents. Your submissions have not been reproduced due to length, but have been given due regard.

What I took into account

In reaching my decision I took into account:

- your original request dated 4 June 2024
- your internal review request dated 5 August 2024
- the documents falling within the scope of your request
- whether the release of the material would be in the public interest
- consultation with the Department of Prime Minister and Cabinet
- consultations with Agency officers about:
 - the nature of the documents
 - the Agency's operating environment and functions
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines), and
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act.

I have decided all documents within the scope of your request are exempt under the FOI Act. My findings of fact and reasons for deciding the exemptions apply to the documents are discussed below.

Section 34 of the FOI Act – Cabinet Documents

I have applied the exemption in section 34 of the FOI Act to all documents within the scope of your request.

Section 34 of the FOI Act relevantly provides:

General Rules

- (1) A document is an exempt document if:
 - (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
 - (b) it is an official record of the Cabinet; or
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
 - (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.
- (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
- (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Document 7

I have applied the exemption in section 34(1)(a) of the FOI Act to Document 7. I am satisfied on information provided by Agency officers, and consultation with the Department of Prime Minister and Cabinet, that Document 7 meets the criteria in section 34(1)(a)(i).

Further, I am satisfied Document 7 was brought into existence for the dominant purpose of submission for consideration by Cabinet (section 34(1)(a)(ii)). The Information Commissioner in *Rex Patrick and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 66 outlined the principles which are relevant in determining the dominant purpose of the document.¹ This is a question of fact. Having regard to the material available to me, consultation with Agency officers about the nature of Document 7, it is clear on the evidence available that Document 7 was brought into existence for the dominant purpose of being submitted for consideration by the Cabinet.

I am satisfied, from the material available to me and consultation with Department of Prime Minister and Cabinet, Document 7 is an exempt document having regard to section 34(1)(a) of the FOI Act.

¹ *Rex Patrick and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 66 at [6].

Documents 1 - 4

Section 37(1)(d) of the FOI Act provides that a document is exempt if it is a draft of a document to which section 34(1)(a) applies. It is clear from examination of the documents and the progression of the documents, Documents 1 – 4, as outlined in the Schedule, are drafts of Document 7. Accordingly, I am satisfied that these documents are exempt documents pursuant to section 34(1)(d) of the FOI Act.

Documents 5 - 6

Section 34(2) of the FOI Act provides that a document is an exempt document to the extent that is a copy or part of, or contains an extract from, a document to which subsection (1) applies. Having regard to the content of Documents 5 and 6, I am satisfied they contain, in their entirety, material to which subsection 34(1) applies.

Exceptions

The FOI Act provides the following exceptions to the Cabinet exemption:

Exceptions

(4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

I am satisfied the documents do not fall within the exceptions provided for in subsection (4) and (5). Further, having regard to the actual content of the documents, I am satisfied that to the extent that any purely factual material is contained in the documents, it is so intertwined with the deliberative material relevant to the report, that it is not reasonably practicable to separate.

I have had due regard to your submissions in relation to the application of section 34 of the FOI Act, including the commentary from the Information Commissioner that assumptions are purely factual.² I note this point was specifically addressed, and overturned, on review of the Information Commissioner's decision by the Administrative Appeals Tribunal.³ Further, the FOI Guidelines provide that while 'purely factual material' includes material such as statistical data, surveys and factual studies, a projection or prediction would not be considered purely factual.⁴

² *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 at [66].

³ *Warren; Services Australia and (Freedom of information)* [2022] AATA 4191 at [222] – [223] per Deputy President Britten Jones.

⁴ Guidelines at 5.93.

Therefore, I consider that modelling assumptions are not purely factual, as they are projections of future events.

I have noted your reference to the recent Full Court decision in *Warren v Chief Executive Officer, Services Australia* [2024] FCAFC 73. In this matter, the plurality considered the construction of section 34(3) of the FOI Act, which provides that a document is exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been *officially disclosed*. I have considered your submission, and note while the decision was officially disclosed within the meaning of section 34(3) and having regard to the reasoning at paragraph [168], the exemption in section 34(3) operates on the deliberation or decision of Cabinet. However, I consider that the exemption under section 34(3) does not apply in the present matter.

The plurality's consideration focussed on the meaning of "official disclosure" within the meaning of section 34(3).⁵ This is distinct from the exception provided for in section 34(5), which goes to "a document by which a decision of the Cabinet is officially published".

I am satisfied that the exemption in section 34(5) of the FOI Act does not apply to the requested documents as they are not documents by which a decision of the Cabinet has been officially published.

Conclusion

I have decided all documents within the scope of your request are exempt under section 34 of the FOI Act. Furthermore, I am satisfied that none of the exemptions provided for in section 34 apply. Therefore, I have decided to not release the documents to you.

Section 47C of the FOI Act – Deliberative matter

I have applied the conditional exemption in section 47C of the FOI Act to all documents within the scope of your request.

Deliberative matter

Subsection 47C(1) of the FOI Act provides:

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:

(a) an agency...

Subsection 47C(2) of the FOI Act provides deliberative matter does not include operational information or purely factual material.

⁵ Repeated in identical terms in section 34(6).

In effect, subsection 47C(3) of the FOI Act provides deliberative matter does not include:

- reports of scientific or technical experts
- reports of a body or organisation, or
- the record of a formal statement of reasons.

Paragraph 6.57 of the Guidelines provides:

A deliberative process may include the recording or exchange of:

- opinions
- advice
- recommendations
- a collection of facts or opinions, including the pattern of facts or opinions considered
- interim decisions or deliberations.

And further, at paragraph 6.54

The action of deliberating, in common understanding, involves the weighing up or evaluating of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

Is the material deliberative?

In *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551, the word 'deliberation' was considered by Beaumont J:

... "deliberation" suggests not only collective discussion but collective acquisition and exchange of facts preliminary to ultimate decision.

The plurality in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at 606 said:

As a matter of ordinary English the expression "deliberative processes" appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "The action of deliberating: careful consideration with a view to decision": see *The Shorter Oxford English Dictionary*. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

I am satisfied all of the documents within the scope of your request contain deliberative matter, being advice and recommendations which has been prepared to assist the Commonwealth (including Cabinet) to understand and make decisions in relation to the efficiency of the Agency. I am satisfied the exempt material is clearly deliberative in nature.

Does the material contain operational information?

Section 47C(2) of the FOI Act and paragraph 6.48 of the Guidelines provides that deliberative material does not include operational information (as defined in the FOI Act) or purely factual information.

Section 8A of the FOI Act defines operational information as information which assists 'the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public'.

There is no information contained within the material which could be properly classified as operational information.

Is the material purely factual in nature?

As discussed above, I have noted your contention that modelling assumptions are purely factual material. However, in line with case law and the Guidelines, a projection or prediction of a future event would not usually be considered purely factual, and therefore I consider modelling assumptions are not purely factual, as they are a projection of future events.

Paragraph 6.70 of the FOI Guidelines provides:

'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

Without disclosing the exempt material, it is clear on the face of the document that the material to which this exemption has been applied does not constitute purely factual information, and to the extent it does, it is intertwined with the deliberative material and is not reasonably practicable to separate.

Do any exceptions apply to the documents?

The section 47C conditional exemption does not apply to the types of documents specified in section 47C(3) of the FOI Act.

I am satisfied:

- the material is not a report on scientific or technical matters
- the Agency is not a body prescribed by the regulations, and
- the material to which this exemption has been applied is not a record or formal statement of the reasons for a final decision given in the exercise of a power or of an adjudicative function.

Accordingly, I am satisfied the documents within the scope of the request are deliberative matter captured under section 47C of the FOI Act.

Public interest considerations

Section 11A(5) of the FOI Act provides:

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.

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act
- promote effective oversight of public expenditure, including efficiency of the Agency's forecasted budget position to support its functions
- increasing scrutiny, discussion, comment and review of the Government's activities, in particular its expenditure of money, and
- inform public debate about the recommendations made in regards to the Agency.

However, I have also considered relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- undermine the essential public interest in the protection of Cabinet documents and the confidentiality of Cabinet deliberations, including the information that provides recommendations and strategies for Cabinet discussion, and
- prejudice the confidentiality of reports provided to Cabinet allowing for an informed budget process, which accords with conventions of responsible government.

While I have noted a variety of public interest factors in favour of disclosure, including considering the contentions raised in your request for internal review, I have nevertheless given significant weight to the long standing public interest in preserving Cabinet confidentiality, as I consider there are strong considerations of public policy militating against disclosure of documents that were before Cabinet.

On balance, I have decided the public interest in disclosing the documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Conclusion

In summary, I am satisfied the documents within the scope of the request are conditionally exempt under section 47C of the FOI Act. Furthermore, I have decided that on balance it would be contrary to the public interest to release this information.

Summary of my internal review decision

In conclusion, I have decided to **refuse access** to the documents falling within the scope of your request.

I have decided that all of the documents are exempt under the FOI Act on the basis they contain:

- material subject to the cabinet exemption (section 34 exemption), and
- deliberative material, the disclosure of which would be contrary to the public interest (section 47C conditional exemption).



Attachment B

INFORMATION ON RIGHTS OF REVIEW
FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information (FOI) decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of an FOI internal review decision

If you still believe a decision is incorrect, the FOI Act gives you the right to apply for an external review of the internal review decision. Under section 54M of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner. There are no fees for this review.

You have 60 days to apply in writing for review by the Australian Information Commissioner.

You can **lodge your application**:

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Agency's decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the Agency's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.