



Australian Government

Department of Health and Aged Care

FOI reference: FOI 5338

Martin Bronx

Email: foi+request-11896-37f71a1a@righttoknow.org.au

Dear Mr Bronx,

Decision on your Freedom of Information Request

I refer to your information access request of 14 August 2024, made to the Department of Health and Aged Care (the department) under the *Freedom of Information Act 1982* (Cth) (FOI Act). In your request, you sought access to:

Any documents, internal emails, briefings, notes, relating to the payment of "excess for children" on private health insurance policies, created within the last two months from the date of this request.

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 access request.

Consultation on scope of request

On 12 September 2024, the department contacted you by email noting that in our acknowledgement email to you of 19 August 2024 we advised that draft documents would be excluded from your request unless you advised otherwise. Although you did not advise that you sought draft documents, we noted that some documents relevant to the subject of your request were in draft form. We therefore advised that we have interpreted your request as including the most recent draft of a document in existence as at the date of your request.

Extension of time to process request

On 6 September 2024, the department wrote to you under section 15AA of the FOI Act seeking a 14-day extension of time to allow it to process your FOI request.

On 6 September 2024, you responded to the department agreeing to the extension of time request. As a result, the statutory date for your FOI access request was extended to 27 September 2024.

On 23 September 2024, the department wrote to you under section 15AA of the FOI Act seeking a 7-day extension of time to allow it to process your FOI request.

On 23 September 2024, you responded to the department refusing the extension of time request. As a result, the statutory date for your FOI access request remains 27 September 2024.

Reasonable searches

The department has conducted reasonable searches for documents in scope of your request. As per the FOI Guidelines [at 3.89], these searches were undertaken with reference to:

- the subject matter of your request
- the department's current and past file management systems
- the department's record management systems
- the individuals within the department with knowledge of the subject matter of the documents, or who could assist with location of documents
- the age of the documents.

I am satisfied that the searches undertaken were both thorough and reasonable in the context of the scope of your request, the resources of the Department, and the requirements of the FOI Act and Guidelines.

Decision on access

I have identified five documents that are relevant to your request. The documents comprise five primary documents and two attachments.

These documents were in the possession of the department when your request was received.

I have decided to:

- grant access to two documents in part, subject to the deletion of exempt and irrelevant material
- refuse access to three documents as they contain fully exempt and irrelevant material.

A schedule setting out the documents relevant to your request, with my decision in relation to those documents, is at **ATTACHMENT A**.

My reasons for not providing access to material that has been deleted from the documents are set out in **ATTACHMENT B**.

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, as required by section 11C of the FOI Act. 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



Paul McBride
Assistant Secretary
Private Health Strategy Branch
26 September 2024

ATTACHMENT A.

SCHEDULE OF DOCUMENTS

FOI REQUEST 5338

Document	Pages	Date	Description	Decision on access	Relevant provisions of FOI Act
1	3	27/06/ 2024	Consultation paper - Summary of issues	Exempt in full	s42 s47C
2	2	19/07/ 2024	Email	Exempt in part	s22 s47C
3	2	30/07/ 2024	Email	Exempt in full	s42 s47C
3.1	4	30/07/ 2024	Attachment to document 3: Proposed amendments to the Private Health Insurance (Complying Product) Rules 2015	Exempt in full	s42 s47C
4	2	6/08/ 2024	Email	Exempt in part	s22 s47C s47F
5	4	13/08/ 2024	Email	Exempt in full	s42 s47C
5.1	25	9/08/ 2024	Attachment to document 5: DRAFT consultation paper	Exempt in full	s42 s47C

ATTACHMENT B.

**REASONS FOR DECISION
FOI 5338**

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
- 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 parts of 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.

Documents 2, 3, 4 and 5 contain information that was produced when emails were transferred to PDF format. As this information is not part of the original documents, it is not relevant to your request.

The documents contain the names and telephone numbers of departmental employees. When your request was acknowledged on 19 August 2024, we notified you that any public service employee names below Senior Executive Service level and direct telephone numbers of all staff 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 42 - Documents subject to legal professional privilege

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.

The FOI Guidelines state:

5.145 To determine the application of this exemption, the decision maker needs to turn to common law concepts of privilege. The statutory test of client legal privilege under the *Evidence Act 1995* is not applicable and should not be taken into account.

...

5.148 The underlying policy basis for legal professional privilege is to promote full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. Legal professional privilege protects documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice. The information in a document is relevant and may assist determining the purpose of the communication, but the information itself is not determinative.

5.149 At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential

I am satisfied that the documents or parts of documents marked 's42' consist of information that is subject to legal professional privilege. I am satisfied that :

- the necessary legal adviser-client relationship exists; the legal adviser was acting in their capacity as a professional legal adviser and the giving of the advice was attended by the necessary degree of independence
- the communication was brought into existence for the dominant purpose of giving or receiving legal advice for use in actual or anticipated litigation
- the advice was provided independently, and
- the advice provided was confidential.

For the reasons outlined above, I have decided that the documents or parts of documents marked 's42' are exempt from disclosure under section 42 of the FOI Act.

5. Section 47C - Deliberative processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure 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 an agency; or a Minister; or the Government of the Commonwealth.

Deliberative process

Paragraph 6.54 of the FOI Guidelines states that deliberative process involves the exercise of judgement in developing and making a selection from different options:

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.

Deliberative matter

Paragraph 6.59 of the FOI Guidelines states that '*deliberative matter*' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words 'opinion, advice or recommendation, consultation or deliberation'.

I am satisfied that the documents contain material that meets the criteria of deliberative matter, and that this material forms part of a deliberative process. The documents set out the weighing up and evaluation of competing arguments and can be characterised as the thinking process of the department or the process of reflection upon the wisdom and expediency of a particular proposal.

For the reasons outlined above, I have decided that the documents or parts of documents marked 's47C' are conditionally exempt from disclosure under section 47C 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.

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 6.125 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.

Paragraph 6.132 of the FOI Guidelines states that an individual is a natural person and does not include a corporation, trust, body politic or incorporated association. Section 47F specifically extends to the personal information of deceased persons.

I am satisfied that the part of document 4 marked 's47F' includes personal information, that is, the name of a Ministerial advisor.

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:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- 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

I am satisfied that the disclosure of personal information contained within document 4 would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the individual whose personal information is contained in the document is identifiable
- release of this information would cause anxiety to the individual concerned
- no further public purpose would be achieved through the release of the personal information, noting that the personal information is included in the document as a result of their employment circumstance
- the information is current and has not lost its sensitivity through the passage of time
- the placing of the personal information of individuals who work in a Minister's Office into the public domain has the potential to place those individuals at risk of harassment, abuse, threats and intimidation. This would be detrimental to the individuals concerned, and potentially also their families. Mitigating this risk is even more important with the prevalence of social media and technology allowing individuals to be more easily identifiable and contactable in online environments
- the individual would not expect the information to be placed in the public domain, and detriment may be caused to the individual to whom the information relates, and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

For the reasons outlined above, I have decided that the part of document 4 marked 's47F' is 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.

Paragraph 6.224 of the FOI Guidelines states:

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
- relates to matters of common concern or relevance to all members of the public, or a substantial section of the public.

Factors favouring disclosure

Section 11B 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:

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure, or
- 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 inform debate on a matter of public importance
- would not promote effective oversight of public expenditure, and
- would not 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:

s47C

- could reasonably be expected to prejudice the deliberative processes of forming opinion, advice and/or recommendations by creating an environment in which there is a chilling effect on the open consideration of all options available to the department. Any impediment to the deliberative process could adversely impact the effectiveness of the department's decision-making, which is against the public interest.
- could reasonably be expected to establish a precedent of release of deliberative material, which could hinder the flow of suggestions, preliminary opinions, advice and/or recommendations within the department. Any impediment to the deliberative process could reasonably be expected to adversely impact the department's ability to innovate, iterate and improve its policy and procedures, which is against the public interest.

s47F

- could reasonably be expected to prejudice the protection of the relevant individual's right to personal privacy, noting that the substance of the documents has been released to you and disclosure of the personal information would not provide you with any further insight into the workings of government.
- would not achieve any public purpose and, on balance, would harm the individual's right to personal privacy, which would be contrary to the objects of the *Privacy Act 1988* and therefore against the public interest.

In forming my decision, I confirm that 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.

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. I have therefore redacted the conditionally exempt information from the documents released to you.

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 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