Australian Government

Department of Health

Department References: FOI 3660

Mr Dan McDonald
via email: foi+request-8550-bb5fe046@righttoknow.org.au

Dear Mr McDonald

NOTICE OF DECISION

I refer to your request of 3 March 2022 to the Department of Health (department), seeking access under the *Freedom of Information Act 1982* (FOI Act) to:

> Documents regarding the procurement of the All Covid-19 Vaccine supply for Australia, from and to any Federal and related State Cabinet or Ministerial Portfolio/ Business Agency:
>
> This includes:
>
> documents prepared for representatives of the Australian government regarding scope of negotiations/procurement authority and limits to authority to make an agreement between the Australian government and ALL Pharmaceutical Supplier of Organisation, approved and pending.
>
> contracts for supply, purchase, distribution and storage by the Australian government and ALL Pharmaceutical Supplier of Organisation for ALL Covid-19 Vaccines, approved and pending.

Information about COVID-19 vaccine procurement agreements

The Australian Government has invested more than $350 million in vaccine research and development. The Australian Government has also invested more than $8 billion in the national COVID-19 vaccine rollout and is continuing to roll out the approved vaccines.

As part of Australia's Vaccine and Treatment Strategy, the Australian Government has made several agreements to purchase doses of the Pfizer vaccine, which is manufactured overseas. Information about the Pfizer vaccine and the supporting supply agreements is available here:

- the Minister for Health's November 2020 statement on the Pfizer vaccine agreement
- the Minister for Health's February 2021 statement
- the Prime Minister's press conference
- the Prime Minister's media release about booster doses
- the Prime Minister's media release about the agreement with Poland
- the Prime Minister's media release on the Singapore swap
- the Prime Minister's media release on the UK partnership.

The Moderna vaccine is another mRNA vaccine, similar to Pfizer. Information about the Moderna supply agreement is available here:

- the Minister for Health's media release on the Moderna agreement.

Biopharmaceutical company CSL manufactures the AstraZeneca vaccine in Australia. Currently the AstraZeneca COVID-19 vaccine is the only vaccine that we can manufacture in Australia. Distribution of the locally made doses is ongoing. The Australian Government has secured 53.8 million doses of this vaccine, consisting of:

- 3.8 million doses imported from overseas, which arrived on 28 February 2021.
- 50 million doses manufactured in Australia.

The TGA has provisionally approved the Nuvaxovid vaccine developed by Novavax for use in a primary course of vaccination against COIVD-19 in people aged 18 years and older. Novavax and the Australian government announced an advance purchase agreement for 51 million doses of Novavax's COVID-19 vaccine in January 2021. Information about this vaccine is available here:

- Minister for Health media release.

FOI Decision

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

I have identified 20 documents falling within the scope of your FOI request. The documents are set out in the schedule at Attachment A.

I have decided to refuse access to all 20 documents in full on the basis that they are exempt. My reasons for this decision are set out at Attachment B.

Third Party Consultation

On 28 March 2022, the department informed you that consultation with third parties would be necessary. I took the submissions received by the third parties into account when making my decision on access.

FOI review rights

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

Internal review

Under section 54 of the FOI Act, you may apply for internal review of this decision.

In accordance with section 54B of the FOI Act, an application for internal review must be made in writing within 30 days after the day you are notified of this decision (or such further period as the department allows). To assist in the internal review process, please provide reasons you consider the review of my decision is necessary.

The internal review will be carried out by another officer of this department within 30 days of receipt of your application.

An application for an internal review should be addressed to:

Email: FOI@health.gov.au
Mail: FOI Unit (MDP 516)
Department of Health
GPO Box 9848
CANBERRA ACT 2601

Information Commissioner review

Alternatively, under section 54L of the FOI Act, you may apply to the Office of the Australian Information Commissioner (OAIC) for review of my decision by the Information Commissioner (IC).

In accordance with subsection 54S(1) of the FOI Act, an IC review application in relation to a decision covered by subsection 54L(2) (access refusal decisions) must be made in writing within 60 days after the day you are notified of this decision (if you do not request an internal review).

More information about IC review is available on the OAIC website at:
https://www.oaic.gov.au/freedom-of-information/reviews/

The OAIC can be contacted by:

Email: enquiries@oaic.gov.au
Phone: 1300 363 992

Complaints

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

Complaint 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:
https://www.health.gov.au/about-us/contact-us/complaints

Complaint to the IC

Information about making a complaint to the IC about action taken by the department is available on the OAIC website:
https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/

Relevant provisions

The FOI Act, including the provisions referred to in this letter, can be accessed from the Federal Register of Legislation website:
https://www.legislation.gov.au/Details/C2022C00056

Contacts

If you require clarification of any of the matters discussed in this letter you should contact Freedom of Information Unit via email at FOI@health.gov.au

Yours sincerely

Trish Garrett

Trish Garrett
First Assistant Secretary
Vaccine Operations & Data Division
COVID-19 Vaccine Taskforce

21 April 2022

ATTACHMENT A

SCHEDULE OF DOCUMENTS – FOI 3660

Document no.	Date	Number of pages	Description	Decision on access	Exemptions applied
1	September 2020	39	AstraZeneca Vaccine Supply Agreement	Exempt	section 45 section 47
2	September 2020	14	CSL Supply and Production Agreement	Exempt	section 45 section 47
3	December 2020	9	CSL Supply and Production Agreement - Variation	Exempt	section 45 section 47
4	December 2020	37	Novavax Vaccine Supply Agreement	Exempt	section 45 section 47
5	December 2020	73	Pfizer Vaccine Supply Agreement	Exempt	section 45 section 47
6	February 2021	5	Amendment to Pfizer Vaccine Supply Agreement	Exempt	section 45 section 47
7	April 2021	6	Second Amendment to Pfizer Vaccine Supply Agreement	Exempt	section 45 section 47
8	May 2021	28	COVAX Pfizer Supply Agreement	Exempt	section 45 section 47
9	July 2021	24	Third Amendment to Pfizer Vaccine Supply Agreement	Exempt	section 45 section 47
10	August 2021	10	Tripartite Agreement Pfizer - Poland-Australia	Exempt	section 45 section 47
11	August 2021	15	Tripartite Agreement Pfizer - Singapore-Australia	Exempt	section 45 section 47
12	September 2021	7	UK Pfizer Doses - Agreement Pfizer and Australia	Exempt	section 45 section 47
13	December 2021	26	Fifth Amendment to Pfizer Vaccine and Supply Agreement	Exempt	section 45 section 47
14	May 2021	55	Moderna Vaccine Supply Agreement	Exempt	section 45 section 47
15	September 2021	7	Moderna EU Vaccine Resale Agreement – 1	Exempt	section 45 section 47
16	September 2021	7	Moderna EU Vaccine Resale Agreement – 2	Exempt	section 45 section 47
17	September 2021	7	Moderna EU Vaccine Resale Agreement – 3	Exempt	section 45 section 47
18	September 2021	7	Moderna EU Vaccine Resale Agreement – 4	Exempt	section 45 section 47
19	September 2021	7	Moderna EU Vaccine Resale Agreement – 5	Exempt	section 45 section 47
20	September 2021	7	Moderna EU Vaccine Resale Agreement – 6	Exempt	section 45 section 47

ATTACHMENT B

REASONS FOR DECISION – FOI 3660

Material taken into account

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

- the scope of your request
- the content of the documents sought
- advice from departmental officers with responsibility for matters relating to the documents sought
- submissions from third parties
- the relevant provisions of the FOI Act, and
- guidelines issued by the OAIC under section 93A of the FOI Act (FOI Guidelines).

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 or parts of documents are set out below.

Section 45 – Material obtained in confidence

Section 45 of the FOI Act provides that a document is exempt if its disclosure under the FOI Act would found an action by a person (other than an agency or the Commonwealth) for breach of confidence.

Paragraph 5.155 of the FOI Guidelines relevantly states:

> The exemption is available where a person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.

Under paragraph 5.195 of the FOI Guidelines, to found an action for breach of confidence, the following five criteria must be satisfied:

- the information must be specifically identified
- the information must have the necessary quality of confidentiality
- the information must have been communicated and received on the basis of a mutual understanding of confidence
- the information must have been disclosed or threatened to be disclosed, without authority, and
- unauthorised disclosure of the information has or will cause detriment.

Addressing the above criteria, I am satisfied that the documents contain information:

- specifically identified as being subject to a confidentiality requirement
- that is confidential in nature, and was communicated on that basis
- that was communicated pursuant to a mutual understanding of confidence between the department and the relevant third parties
- in circumstances where disclosure has not been authorised by the relevant third parties, and
- that, if disclosed, would cause detriment to the relevant third parties.

Disclosure of the documents would be inconsistent with the confidentiality obligations between the department and the relevant third parties, and would undermine industry confidence in the confidentiality of third party interactions and negotiations with the department regarding supply, pricing and risk measures.

The specific detriment that would be caused by unauthorised disclosure of the information contained in the documents would be undermining the bargaining position of the relevant third parties and the department in future negotiations. Disclosure could also adversely affect the relationship of the third parties with their existing customers.

I am satisfied that the documents are exempt from disclosure in full under section 45 of the FOI Act. Accordingly, they have not been provided to you.

Section 47 –Commercially valuable information

Subsection 47(1)(b) of the FOI Act exempts a document if its disclosure would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were to be disclosed.

Commercial value

Paragraph 5.204 of the FOI Guidelines provides that for a document to be exempt under paragraph 47(1)(b) of the FOI Act, it must satisfy two criteria:

1. the document must contain information that has a commercial value either to an agency or to another person or body, and
2. the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed

Paragraphs 5.205 to 5.207 of the FOI Guidelines provide that it is a question of fact whether the information has a commercial value, and whether disclosure would destroy or diminish that value. Commercial value can include information relating to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.

Paragraph 5.205 of the FOI Guidelines set out the following factors, which may assist in deciding 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.

Having regard the above criteria, I am satisfied that the documents contain commercial information regarding the procurement of vaccines to Australia:

- which is known only to the relevant parties
- which is specifically relevant to the unique commercial arrangements between the department and third parties, including indicative prices, payment terms, professional indemnity, ongoing funding measures, manufacturing details and production measures
- that has current and considerable commercial value to the third parties as it is relevant to the profitability and viability of the third parties' continuing business operations which would be lost if disclosed to a competitor
- which is not known to others, and that a competitor would pay to obtain the information, and
- the value of which would be lost or diminished if shared or disclosed, adversely impacting on the relevant third parties' competitive edge.

Destroyed or Diminished

I am satisfied that if the documents are disclosed, it could reasonably be expected that its intrinsic value would be destroyed or diminished. As outlined above, the information is valuable for the purposes of carrying on the commercial activities in which the Commonwealth engages. The disclosure of the relevant information could prejudice the future supply of such information to the Government.

For the reasons set out above, I am satisfied that the documents are exempt from disclosure under section 47 of the FOI Act. Accordingly, these documents have not been provided to you.