



## Australian Government

### Department of Social Services

**Our reference:** FOI LEX 44311

**Decision date:** 20 May 2022

**Applicant name:** Karen

**By email:** Karen <foi+request-8657-9f8210db@righttoknow.org.au>

Dear Karen,

#### **Freedom of Information request FOI LEX 44311**

1. I refer to correspondence received by the Department of Social Services (the Department) on 27 March 2022, in which you requested access to:

*'...the policy changed cited on page 134 of 'Portfolio Additional Estimates Statements 2021-22 Social Services Portfolio', note (c) that reads "As a result of change in Australian Government policy, responsibility for the Information, Linkages and Capacity Building Program was transferred from NDIA to DSS effective 31 January 2021.'*

2. Your request was made pursuant to the *Freedom of Information Act 1982* (FOI Act).

#### **Decision**

3. The Department has undertaken a reasonable search of its records and has identified six (6) documents relevant to your request.
4. I have made a decision to grant access in part to the six (6) documents identified. These documents are listed in **Appendix 1**.
5. Where I have decided to grant access to a document in part, I have listed the exemption provisions I rely upon in **Appendix 1** and, if applicable, have annotated the edited copies of those documents so that you can identify the specific section of the FOI Act that I rely upon for each redaction.

## **Authority to make decision**

6. I am an officer authorised by the Secretary of the Department to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the FOI Act.

## **Material taken into account**

7. When making my decision I considered the following:
  - the terms of your request;
  - the types of information and documents that are in the Department's possession; and
  - the content of the documents that fall within the scope of your request.
8. I also particularly considered the following provisions of the FOI Act:
  - sections 11 and 11A which give the Australian community a legally enforceable right to access information held by the Government of the Commonwealth;
  - section 3 which outlines the objects underpinning that right of access;
  - section 11B to assess whether release of a conditionally exempt document was contrary to the public interest;
  - sections 42 ,47C, 47E(d) and 47F insofar as they are relevant to each of the redactions that have been made in documents that have not been released in full;
  - section 22 which requires the release of exempt documents in an edited form in certain circumstances, including the removal of information that would reasonably be regarded as irrelevant; and
  - section 93A which requires that I have regard to the Guidelines issued by the Australian Information Commissioner.
9. Full extracts of provisions of the FOI Act that I have relied upon are in **Attachment A**.

## **Summary of reasons for decision**

10. I have decided to **grant access** in part to six (6) documents within the scope of your request. The complete reasons for my decision can be found at **Appendix 2**.
11. My decision to grant access in part is made on the basis of the following exemptions in accordance with the FOI Act:

### ***Documents subject to legal professional privilege (section 42)***

12. 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 (LPP).
13. One of the documents identified as relevant to the terms of your request includes information that falls into this category, being advice provided to the Commonwealth by an independent legal advisor concerning an aspect of the proposed transfer. The privilege in this advice has not been waived and so I consider that the subject document, being document two (2), is exempt for the purposes of this provision of the FOI Act.

### ***Public interest conditional exemption - Deliberative processes (section 47C)***

14. Section 47C of the FOI Act provides that a document is conditionally exempt if disclosure would disclose 'deliberative matter.' Deliberative matter is 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; a Minister; or the Government of the Commonwealth.
15. I find that three (3) of the documents identified as within scope of your request contain material that is conditionally exempt under section 47C of the FOI Act.
16. Having considered the nature of the information in those documents, and having had regard to the various factors favouring disclosure and those against, I am satisfied that disclosure of the information is not in the public interest and that documents one (1), two (2), three (3) and five (5) are exempt documents.

***Public interest conditional exemption - certain operations of agencies (section 47E)***

17. Section 47E(d) 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.
18. Documents two (2) and three (3) contain the mobile phone numbers of senior executives. These phone numbers are not publicly available and I am satisfied that release of these contact details could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.
19. There are well-established mechanisms through which the public can contact the Department reflecting the need to and benefits of having only certain portals for such contact. Consequently, I am satisfied that it is not the public interest to disclose the information identified in documents two (2) and three (3).

***Public interest conditional exemption - personal privacy (section 47F)***

20. 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).
21. I find that document four (4) contains material that is conditionally exempt under section 47F of the FOI Act being the name and contact details of a person not within the Department. These details are not publicly available and I am satisfied that release of this personal information would be not only be unreasonable but would also be contrary to the public interest.

***Access to edited copies with exempt or irrelevant matter deleted (section 22)***

22. The Department may refuse access to a document on the grounds that it is exempt. However, if there is an intent to refuse, the Department must consider whether it would be reasonably practicable to prepare an edited copy of the document for release, that is, a copy with relevant deletions made under section 22 of the FOI Act. The Department is under the same obligation to consider

preparing an edited copy of a document by removing information that would reasonably be regarded as irrelevant to the request.

23. As identified above, in a number of instances I have determined that a document is an exempt document. Consistent with my obligation under section 22 of the FOI Act, in relation to those documents, I have considered whether I could provide access to edited copies, with exempt and conditionally exempt material removed. Where possible I have provided access to edited copies.

24. You will also note that I have made redactions in some documents on the basis that information has been identified that I consider would reasonably be regarded as irrelevant to your request. Unfortunately, the searches undertaken by the Department did not identify any one document that fully outlined the change of policy referred to in note (c) on page 134 of the 'Portfolio Additional Estimates Statements 2021-22 Social Services Portfolio'. Instead, the change of policy appears to be contained in a number of documents that also record other information. Where information in a document is information that is not about the policy change in relation to the ILC transfer, I have redacted it on the basis that it is irrelevant to your request.

### **Access to documents**

25. The documents released to you in accordance with the FOI Act are enclosed.

### **Publication of information**

26. The FOI Act outlines at Section 11C that agencies must publish information to members of the public, except in specified circumstances.

27. I am of the view that the documents released to you should be made available on the Department's FOI Disclosure Log. As such, details of your request will be published on the Department's FOI Disclosure Log within 10 days of release. You can access the Department's FOI Disclosure Log at <https://www.dss.gov.au/about-the-department/freedom-of-information/disclosure-log>.

## **Your rights of review**

28. Information about your rights to seek a review of this decision are at **Attachment B**.

## **Contact**

29. Should you have any enquiries concerning this matter please do not hesitate to contact the FOI team by email at [FOI@dss.gov.au](mailto:FOI@dss.gov.au).

Yours sincerely,

**E. Scott**

Director

Freedom of Information section

Legal Services Branch

20 May 2022

**Appendix 1**  
**Schedule of documents**  
**FOI 2122-108**

<b>Document reference</b>	<b>Date of document</b>	<b>Document description</b>	<b>Pages</b>	<b>Decision</b>	<b>Provisions relied upon</b>
1	07 May 2020	Minute to Secretary Campbell – EC20-000886. In scope page: page 5 entitled 'Additional Information'	1-5	Part Access	s 22 s 47C
2	28 May 2020	Brief, Minister Ruston – MS20-000498. Transfer of ILC from NDIA to DSS including transfer of policy and administrative authority.	6-11	Part Access	s 22 s 42 s 47C s 47E(d)
3	3 June 2020	Attachment A to EC20-001006. Letter to Martin Hoffman from Kathryn Campbell. Decision to transfer ILC to DSS, proposing a transition committee be established.	12-13	Part Access	s 22 s 47C s 47E(d)
4	15 June 2020	Martin Hoffman response to Kathryn Campbell letter. Acknowledge and agree establishment of transition committee.	14	Part Access	s 22 s 47F
5	11 September 2020	Letter to Prime Minister – Transfer of appropriation – Information, Linkages and Capacity Building Program.	15-17	Part Access	s 22 s 47C
6	30 September 2020	Response letter from Prime Minister to Ministers Ruston and Robert - endorsement on the transfer of the ILC to the Department of Social Services	18-19	Part Access	s 22

## Appendix 2

### Statement of Reasons

FOI LEX 44311

1. I have decided to **grant access** in part to six (6) documents within the scope of your request on the basis of the above outlined exemptions in accordance with the FOI Act. My reasons for that decision follow:

#### ***Documents subject to legal professional privilege (section 42)***

2. Section 42(1) of the FOI Act provides:

*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.*

3. Legal professional privilege (LPP) is a concept that underpins the right of an organisation or individual to obtain confidential information about its legal obligations and position. It protects that information from unwarranted disclosure that would damage the interests of justice and of the individual/organisation.
4. The FOI Guidelines issued by the Information Commissioner pursuant to section 93A of the FOI Act identify that, 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 for use or in connection with actual or anticipated litigation;*
  - *whether the advice given is independent; and*
  - *whether the advice given is confidential.*
5. Document two (2) of your request contains legal advice, provided by an independent external legal services provider listed on the authorised list of panel firms. I am therefore satisfied that a legal adviser-client relationship exists, and that the advice is independent.



6. The legal advice contained within the document is an extract of the legal advice provided by that firm, created for the specific purpose of providing the Department with advice on aspects of its position in relation to the transition.
7. The information has not, so far as I am aware, been made public nor is there any other evidence that legal privilege has been waived. I therefore consider the advice to be confidential in nature and not for further disclosure.
8. As section 42 of the FOI Act is not a conditional exemption, I am not required to consider a public interest test.

***Public interest conditional exemption - Deliberative processes (section 47C)***

9. Section 47C of the FOI Act provides that a document is conditionally exempt if:

*...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; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

10. Of note, material which is operational or purely factual information is not deliberative. The deliberative exemption also does not apply to reports of scientific or technical experts, reports of a body or organisation prescribed by the regulations, or a formal statement of reasons.
11. The FOI Guidelines explain that 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document. The meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.
12. The nature of some of these documents indicates that they are likely to contain deliberative material. Document two (2), particularly, was a briefing document

seeking Ministerial agreement to the transfer at a time when the precise terms had not been finalised. It necessarily contained deliberative material about those decisions.

13. Documents one (1), two (2), three (3) and five (5) all contain information that I have judged to be deliberative in nature. They include advice and recommendations on aspects of the transfer of the ILC program that was provided to inform the decisions being made within the Department and by the relevant Ministers. Release of that information would disclose opinions prepared for the Department's deliberative processes and the consultation that had taken place in respect of that deliberation.

14. It is not necessary for me to identify that any particular harm will flow from disclosure of these documents, although that is a factor I will consider when applying the public interest test below.

#### Application of the public interest test

15. Section 11A(5) provides that an agency 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 would, on balance, be contrary to the public interest.

16. In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:

- disclosure would promote the objects of the FOI Act because it reveals contextual information related to a machinery of government change; and
- disclosure would inform debate on a matter of public interest, being the operation of the ILC program and its administration within the Department.

17. I also considered the following factors which do not favour disclosure:

- disclosure would reveal the thinking, opinions and deliberations associated with the policy change;
- that disclosure of this deliberative material would harm the operations of the Department, including the ability for the Department to undertake frank briefings with a view to providing advice to the Government; and

- disclosure could reasonably be expected to prejudice the management function of an agency.

18. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

19. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am especially concerned that disclosure would inhibit the ability of the Department to undertake frank preliminary discussions to advise the Government. Consequently, I have concluded that it is not in the public interest to release the information.

***Public interest conditional exemption - certain operations of agencies (section 47E)***

20. 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, by Norfolk Island or by an agency;*
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

21. Parts of documents two (2) and three (3) contain the mobile phone numbers of senior executives in the Department. These phone numbers are not publicly available, and I am satisfied that release of these contact details could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

22. The subject matter contained within the documents is of broad public interest. Information about the ILC program is, rightly so, of particular import to

individuals who are personally involved in the delivery or receipt of the relevant services and to interest and advocacy groups. The program has been the subject of correspondence to the Department from those interested parties.

23. Consequently, if the personal contact details of the senior executives involved in the administration of this program were released into the public domain, there is a real chance that members of the public would freely use those contact details to engage with them directly.
24. The Department has established lines of communication with the public to ensure that resources and personnel are managed efficiently and effectively and that public enquiries are appropriately dealt with and answered. Information can be, and is, directed to senior executives in the Department using these lines of communication and publicly available channels. Disclosure of the direct contact numbers for senior executive staff is unnecessary in this respect.
25. It is critical to the operations of the Department that senior executives be able to properly discharge their duties in a timely and effectual manner. There is also an expectation that they will provide well-considered and authoritative advice on matters within their remit on behalf of the Department.
26. If, as a general prospect, these senior executives were able to be contacted by the public directly, there is a real risk that their time and attention would be not be able to be directed as required by the organisation. They would also be put in a position that unjustifiably compromised their ability to provide services to the Department along with quality, well-informed counsel. This would significantly and adversely interfere with the proper operations of the Department.
27. Accordingly, I have decided that these documents meet the criteria for this conditional exemption.
28. However, where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5) of the FOI Act.

### Application of the public interest test

29. Section 11A(5) provides that an agency 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 would, on balance, be contrary to the public interest.

30. In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:

- disclosure would promote the objects of the FOI Act.

31. I also considered the following factors which do not favour disclosure:

- 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;
- disclosure could reasonably be expected to harm the interests of an individual or group of individuals; and
- disclosure could reasonably be expected to prejudice the management function of an agency.

32. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

33. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure and so I have concluded that it is not in the public interest to release the information.

### ***Public interest conditional exemptions - personal privacy (section 47F)***

34. 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).

35. I find that document four (4) contains material that is conditionally exempt under section 47F of the FOI Act.

36. As discussed in the FOI Guidelines, the main requirements are that the documents:

- a) contain personal information;
- b) about a person that is reasonably identifiable;
- c) the information says something about the person;
- d) the person is a natural person; and
- e) the proposed disclosure would be unreasonable.

37. Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988* (Privacy Act). Personal information is defined in s 6 of the Privacy Act as:

*..information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) whether the information or opinion is true or not;*
- (b) whether the information or opinion is recorded in a material form or not.*

38. Where it may be possible to identify an individual using available resources, the practicability of doing so, including the time and cost involved, is relevant to deciding whether an individual is 'reasonably identifiable'. By way of further illustration, if identifying a person from available information is so impractical that there is almost no likelihood of it occurring, the information is not likely to be considered personal information.

39. As outlined, the information needs to convey or say something about a person, rather than merely identify them. However, the inclusion of a person's name or signature within a document may reveal personal information about them by virtue of appearing within the context of that document.

40. In the context of section 47F of the FOI Act, an 'individual' is a natural person. Corporations, trusts, bodies politic or incorporated associations are not covered by this exemption. Finally, the disclosure of personal information will only be conditionally exempt if the disclosure would be unreasonable.

41. As noted by the FOI Guidelines, 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.

42. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- 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; and
- d) any other matter I consider relevant.

43. I have also considered the following matters when determining whether disclosure would be unreasonable:

- a) the nature, age and current relevance of the information;
- b) whether disclosure would cause stress or other detriment to the person to whom the information relates;
- c) any opposition to disclosure expressed or likely to be held by that person;
- d) the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information disclosed; and
- e) whether disclosure of the information might advance the public interest in government transparency and integrity or would not achieve any public purpose.

44. The material that I have identified in document four (4) is the name of an individual who does not work in the Department. While that person is identified as a point of contact for liaison going forward, there is nothing to indicate that they were otherwise material to the information being discussed in the document. That person's information and contact details do not appear to be well known or publicly available and I do not have any indication that they have consented to disclosure of their details for the purposes of responding to your request.

45. Accordingly, I have decided that disclosure of the material outlined above would be unreasonable, and therefore meets the criteria for conditional exemption under this provision.

### Application of the public interest test

46. In finding that the documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to provide access at this time. Section 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document would, on balance, be contrary to the public interest'.

47. Subsection 11B(3) of the FOI Act provides a list of public interest factors favouring disclosure. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure, as well as public interest factors against disclosure.

48. In order to assess whether release of the exempt material would be contrary to the public interest, I have considered the following factors which favour disclosure:

- disclosure would promote the objects of the FOI Act.

49. I have also considered the following factors which do not favour disclosure:

- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- disclosure could reasonably be expected to prejudice the management function of an agency.

50. In addition to the reasons I discussed in paragraph 44, there are well-established mechanisms through which the public can contact the Agency and this reflects the need to and benefits of having only certain portals for such contact. I am satisfied that it is not the public interest to disclose this information

51. No irrelevant factors have been considered in making my deciding regarding whether access to the documents would, on balance, be contrary to the public interest.



52. For the above reasons, having regard to the particular factual circumstances of the matter and the material in question, I am of the view that on balance, the public interest factors against disclosure outweigh the factors favouring disclosure.

***Delete exempt or irrelevant material from documents and provide access to edited copies (section 22)***

53. Section 22(1)(a) of the FOI Act effectively provides that, where:

- i. I intend to refuse to give access to a document; OR
- ii. I decide to give access to a document that contains material that would reasonably be regarded as irrelevant to your request;

...I must consider whether I can provide an edited copy of the document.

54. In relation to documents that fall within the scope of your request, both of the above considerations apply.

55. Insofar as I have identified that some documents are conditionally exempt from release pursuant to sections 42, 47C, 47E(d) and 47F of the FOI Act, I consider that I can prepare versions of those documents with the exempt material redacted and that I would be required to give access to those edited documents.

56. In addition, I have identified information in some documents that I consider would reasonably be regarded as irrelevant to your request and I have also redacted that information from those documents. The information in question does not relate to the policy change referred to in note (c) on page 134 of 'Portfolio Additional Estimates Statements 2021-22 Social Services Portfolio' but is incidental to that correspondence, such as signatures or discussion about matters not relating to the policy change.

57. I have decided to provide access to these edited versions of the document, as outlined above at **Appendix 1**.