



**Australian Government**  
**Attorney-General's Department**

Our ref: FOI22/331

3 February 2023

Alex Sullivan

By email: [foi+request-9652-4be4557a@righttoknow.org.au](mailto:foi+request-9652-4be4557a@righttoknow.org.au)

Dear Alex Sullivan

**Freedom of Information Request FOI22/331 – Decision letter**

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

**Your request**

On 5 December 2022, you requested access to:

*Under the Freedom of Information Act 1982, I would like to seek any documents that pertain to the Attorney-General's decision to overturn the prosecution of Bernard Collaery, if such documents exist.*

On 15 December 2022, the department emailed you to acknowledge your request, and asked you to consider revising your request, as the department's preliminary searches indicated that a practical refusal reason existed in relation to your original scope.

On 15 December 2022, you revised your scope to:

*I am specifically seeking documents such as briefings or advice that were prepared for the Attorney-General, any statements written or prepared by the Attorney-General, any correspondence that the Attorney-General's office had undertaken with Mr. Collaery, and any correspondence that the Attorney-General's office had with the Director of Public Prosecutions regarding this case.*

*I am not seeking drafts or duplicates of the above documents.*

On 15 December 2022 and 17 January 2023, the department emailed and sought your agreement to extensions of the processing time for your request of 21 and 9 days respectively. You agreed to grant both of these extension requests. Thank you for your assistance in this regard.

Following the extensions, a decision in relation to your request is due on 3 February 2023.

**My decision**

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have identified 2 documents that fall within the scope of your request. I did this by making enquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request
- the content of the documents identified as within scope of your request
- the provisions of the FOI Act
- the views of other government agencies with an interest in the relevant documents
- the FOI Guidelines issued by the Australian Information Commissioner (the Guidelines).

I have decided to:

- Grant access to 1 document in part with deletion of material which:
  - is exempt from the operation of the FOI Act under s 7(2); and
  - may be regarded as irrelevant to your request under s 22(1) of the FOI Act; and
  - is exempt pursuant to ss 33(a)(i) and (iii), 42(1), 47E(d) and 47F of the FOI Act.
- Refuse access in full to 1 document on the basis that the material it contains is:
  - exempt from the operation of the FOI Act pursuant to s 7(2); and
  - exempt pursuant to ss 33(a)(i) and (iii) and 42(1) of the FOI Act.

#### **Additional information**

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The statement of reasons at **Attachment B** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

The documents to which I have decided to grant partial access under the FOI Act are at **Attachment C**.

#### **Questions about this decision**

If you wish to discuss this decision, the FOI case officer for this matter is Dana, who can be reached on (02) 6141 6666 or by email to [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely



E Brayshaw  
Assistant Secretary  
National Security Information Branch

#### **Attachments**

Attachment A: Review rights  
Attachment B: Statement of reasons  
Attachment C: Documents



**Australian Government**  
**Attorney-General's Department**

**Attachment A - FOI Review rights**

If you are dissatisfied with the decision of the Attorney-General's Department (the department), you may apply for internal review or Information Commissioner review of the decision.

The department encourages applicants to consider seeking internal review as a first step as it may provide a more rapid resolution of your concerns.

***Internal review***

Under s 54 of the *Freedom of Information Act 1982* (FOI Act), applications for internal review must be made in writing within 30 days of the date of the decision letter, and be lodged in one of the following ways:

Email: [foi@ag.gov.au](mailto:foi@ag.gov.au)

Post: Freedom of Information and Privacy Section  
Strategy and Governance Branch  
Attorney-General's Department  
3-5 National Circuit BARTON ACT 2600

An officer of the department other than the officer who made the original decision will complete the internal review within 30 days of receipt of your request.

Providing reasons you believe internal review of the decision is necessary will facilitate the completion of the internal review.

***Information Commissioner review***

Under s 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of the decision letter, and be lodged in one of the following ways:

Online: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

Email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

Post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.



## **Attachment B – Statement of reasons – FOI22/331**

This document provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

### ***Section 7 - Exemption of certain persons and bodies***

Section 7 of the FOI Act provides that certain persons, bodies and departments are exempt from the operation of the Act in relation to particular types of documents. Relevantly, under s 7(2), the department is exempt from the operation of the FOI Act in relation to documents in respect of activities undertaken by the Australian Government Solicitor.

I can confirm that parts of the documents subject to your request contain information in respect of the activities of the Australian Government Solicitor. I am therefore satisfied that this information is exempt from the operation of the FOI Act, and I have excluded it pursuant to s 7(2). For added context, the relevant 'activities' I am referring to is the provision of legal advice.

In relation to the material I have deleted under s 7(2), I am also satisfied that:

- there exists a legal adviser-client relationship;
- the correspondence was created for the dominant purpose of giving or receiving legal advice;
- the advice was provided independently; and
- the advice was provided on a confidential basis.

Accordingly, I am satisfied that legal professional privilege exists in relation to all of the material concerned which has not been and should not be waived. I am therefore satisfied that this material, were it not exempt under s 7(2), would be exempt from disclosure under s 42 of the FOI Act (Documents subject to legal professional privilege).

### ***Section 22: Access to edited copies with exempt or irrelevant matter deleted***

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

In deciding to delete material which would reasonably be regarded as irrelevant to a request, the FOI Guidelines issued by the Office of the Australian Information Commissioner (OAIC) (the Guidelines) provide at paragraph 3.95 that:

*It is important for agencies to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant*

Accordingly, I have identified material in the documents which was not relevant to the scope of your request and I have deleted that material on that basis.

## Exemptions

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. Exempt documents in Division 2 of Part IV are:

- documents affecting national security, defence or international relations (s 33)
- documents subject to legal professional privilege (s 42).

These exemptions are not subject to an overriding public interest test. Where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Additional information about each of these exemptions can be obtained from the OAIC *FOI Guidelines*: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions>.

### **Section 33: Documents affecting national security, defence or international relations**

*Section 33 of the FOI Act provides that a document is an exempt document if its disclosure:*

- (a) would, or could reasonably be expected to, cause damage to:*
- the security of the Commonwealth;*
  - the defence of the Commonwealth; or*
  - the international relations of the Commonwealth;*

I note that paragraph 5.28 of the Guidelines provide that:

*'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency.*

I have decided that documents for your request contain material which is exempt from disclosure pursuant to ss 33(a)(i) and 33(a)(iii) of the FOI Act. I am satisfied that there are real and substantial grounds for expecting damage to occur to the Commonwealth's security and international relations if the material exempted under this subsection was disclosed. Accordingly, I have exempted this information from disclosure pursuant to ss 33(a)(i) and 33(a)(iii) of the FOI Act.

### **Section 42: Documents subject to Legal Professional Privilege**

Section 42(1) of the FOI Act provides that 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.

I am satisfied that, with respect to the relevant material:

- a legal adviser-client relationship exists,
- the advice was provided independently,
- the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation, and
- the advice was provided on a confidential basis.

I am also satisfied that the legal professional privilege in relation to the material has not been, and should not be waived. Accordingly, I am satisfied that the relevant material is exempt from disclosure under s 42(1) of the FOI Act.

### **Public interest conditional exemptions**

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Division 3 of includes the conditional exemption for:

- the certain operations of agencies (s 47E(d); and
- personal privacy (s 47F).

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest are set out below.

Additional information about each of these conditional exemptions can be obtained from the OAIC *FOI Guidelines* available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

#### ***Section 47E: Public interest conditional exemption—certain operations of agencies***

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, do any of the following:

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

#### **Section 47E(d)**

I have decided to apply s 47E(d) to document 1.

Material within document 1 includes the contact details, including phone numbers and email address used by the department and another entity for internal and operational reasons. I consider that disclosure of this information would be likely to result in various (including unreasonable and vexatious) communications and inquiries being received into the relevant areas of the other entity, which may cause confused and not reflect the entity's preferred business operations. I confirm the phone numbers and email addresses are not publicly available on the Australian Government Directory<sup>1</sup>, nor do they appear to be otherwise publicly available. I further note that the other entity concerned has established channels of communication through which members of the community and the media may submit enquiries and feedback.

Accordingly, I am satisfied that the relevant material is conditionally exempt under s 47E(d) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the

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<sup>1</sup> <https://www.directory.gov.au>

public interest and have included my reasoning in this regard below under the header '*Section 11A(5): Public interest test*'.

***Section 47F: Public interest conditional exemption—personal privacy***

Section 47F(1) 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. Document 1 contains the names of private individuals which is their personal information.

In deciding whether to conditionally exempt the personal information described above, I have had regard to the following factors set out in s 47F(2) of the FOI Act:

- (a) the extent to which the information is well known;*
- (b) whether the people to whom the information relates are 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 considers relevant.*

In my view the relevant personal information is not well known, nor are the persons concerned generally known to be (or to have been) associated with the particular matters dealt with in the documents. The information is known only to the persons whose information appears in the documents and departmental officers with responsibility for the matters concerned.

For the reasons set out above, I have decided to exempt the personal information of individuals pursuant to s 47F(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in this regard under the header '*Section 11A(5): Public interest test*'.

***Section 11A(5): Public interest test***

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.5 that 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*
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in s 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under s 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, including by promoting the objects of the FOI Act, including by:

- informing the community of the Government's operations; and*
- promoting the objects of the FOI Act.*

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could, as the case may be, reasonably be expected to prejudice:

- the protection of an individual's right to privacy
- prejudice an entities ability to efficiently manage its incoming communication with the public and agencies in relation to functions of the department.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.