



16 March 2023

Our reference: LEX 72136

Rex Banner

By email: foi+request-9855-310fadbf@righttoknow.org.au

Dear Mr Banner

Freedom of Information Request – Internal Review Decision

I refer to your correspondence dated 27 February 2023 seeking internal review of the decision made by Services Australia (the Agency) under the *Freedom of Information Act 1982* (the FOI Act) on 20 February 2023 (original decision).

Original decision

The original decision refused access to the relevant document in its entirety on the basis that it contained:

- material subject to legal professional privilege (section 42 of the FOI Act), and
- deliberative matter, the disclosure of which would be contrary to the public interest (section 47C of the FOI Act).

My decision on review

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 carefully examined the material before me, I have decided to affirm the original decision and **refuse** your request as it relates to material that is fully exempt under the FOI Act.

The reasons for my decision, including the relevant sections of the FOI Act, are set out at [Attachment A](#).

You can ask for a review of my decision

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

Further assistance

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

Yours sincerely

Verity

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

REASONS FOR DECISION

Background

On 27 January 2023, the Agency received your request for access to the following document under the FOI Act:

I request the Privacy Impact Assessment:

Reference Number: 38356

Title: myGov Enhancement – search tasks and payment features

On 20 February 2023, the Agency notified you of the original decision.

On 27 February 2023, you requested an internal review of the original decision, providing written submissions in which you argued that:

I am writing to request an internal review of Services Australia's handling of my FOI request '38356 myGov Enhancement - search tasks and payment features Privacy Impact Assessment'.

> I have applied the exemption in section 42 of the FOI Act to Document 1 in its entirety.

There is no way the entire document is subject to LPP, it's a privacy impact assessment, we know what for, tenders show who it's from, so we know that the title page can't be subject to LPP.

> Further, I am satisfied the Agency's ability to obtain legal advice on issues would be substantially prejudiced if this document were to be made publicly available through FOI processes. In my view, real harm is likely to result from release of the document as doing so would waive privilege and disclose the particular legal provider's approach to the interpretation, analysis and application of legislation, systems and processes administered by the Agency.

This is not real harm, a simple Google search will show plenty of PIAs that have been either published after a FOI request or proactively published.

<https://www.digitalidentity.gov.au/sites/default/files/2021-11/DTA%20DIF%20PIA3.pdf>

https://www.digitalhealth.gov.au/sites/default/files/documents/adha-my_health_record_mobile_applications_project-privacy_impact_assessment.pdf

https://www.digitalhealth.gov.au/sites/default/files/2020-11/ADHA-My_Health_Record_Mobile_Applications_Project-Privacy_Impact_Assessment.pdf

https://www.righttoknow.org.au/request/559/response/2178/attach/3/MyGov%20PIA%20with%20attachments%20Redacted%20for%20release.pdf?cookie_passthrough=1

None of them have ever been marked as LPP or confidential.

>The document identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection.

[...]

> However, I also consider disclosure could reasonably be expected to prejudice the Agency's ability to obtain comprehensive legal advice in the future and would destroy or diminish the commercial value of the provider's PIA methodology and approach, ultimately impede the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice.

See above, this doesn't make sense if other PIAs (including a mygov one) have been released. The MyGov PIA appears to have been proactively been released.

> The document identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection. I am also satisfied the document is not operational information or purely factual information.

Furthermore, a PIA contains purely factual information, that is discussing the state of such a project and privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection.

In addition, whilst PIAs can be conducted for any project, a PIA is required for high risk projects. Service Australia is required to do a PIA for projects that involve a significant change to how they manage personal information, or, might have a significant impact on the privacy of individuals; or if directed to by OAIC.

Unless Services Australia has done the PIA on their own accord, this is a high risk project or (OAIC has determined that a PIA is required) and this is a project that the Australian public uses, a high risk project for all Australians sounds like it would be in the public interest that the public knows any privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection.

Lastly, I request Services Australia proactively release the document as it is in the public interest to do so.

What I took into account

In reaching my decision I took into account:

- your original request dated 27 January 2023
- your internal review request dated 27 February 2023
- other correspondence with you
- the document that falls within the scope of your request
- whether the release of material is in the public interest

- consultations with Agency officers about:
 - the nature of the document, and
 - 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 to refuse access to the document in full. My findings of fact and reasons for deciding the exemptions apply to the document are discussed below.

Section 42 of the FOI Act - legal professional privilege

I have applied the exemption in section 42 of the FOI Act to the document in its entirety.

This section of the FOI Act allows the Agency to redact documents or parts of documents subject to legal professional privilege (LPP).

Section 42 of the FOI Act relevantly provides:

(1) 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.

(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

(3) A document is not an exempt document under subsection (1) by reason only that:

(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and

(b) the information is operational information of an Agency.

The FOI Act does not define LPP. However, courts have decided 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, and
- whether the advice given is confidential.

The document you requested is a Privacy Impact Assessment (PIA) prepared by an independent external legal provider for the purpose of providing the Agency confidential professional legal advice in relation to feature enhancements made to the myGov platform. Accordingly, I am satisfied that LPP attaches to the entirety of the document.

I am also satisfied that privilege in these communications has not been waived. The document has not been distributed further than is reasonably necessary for internal operational purposes and the substance of the legal advice contained within the document has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.

Further, in my view, there is a possibility of real harm resulting from release of the document. In particular, I consider the Agency's ability to obtain independent external legal advice on issues would be substantially prejudiced if it were to waive privilege over this document (which sets out the particular legal provider's PIA methodology, together with their approach to the interpretation, analysis and application of legislation, systems and processes administered by the Agency) and make it publicly available through FOI processes.

I acknowledge in your request for internal review you provide examples of other PIAs released either proactively or in response to an FOI request. However, each decision made under the FOI Act should be considered on its own merits. As such, while LPP may have been waived in relation to other PIAs, it has not been waived in this instance and I consider real harm would result from release of the document.

For the reasons set out above, I am satisfied the document is exempt in full under section 42 of the FOI Act.

Section 47C of the FOI Act - deliberative matter

I have applied the conditional exemption in section 47C of the FOI Act to the document in its entirety.

This section of the FOI Act allows the Agency to redact documents or parts of documents relating to opinion, advice, recommendation obtained, or deliberation for the purposes of the deliberative processes involved in the functions of the Agency.

Section 47C of the FOI Act provides:

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

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);
- (b) purely factual material.

(3) This section does not apply to any of the following:

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an Agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a body or organisation, prescribed by the regulations, that is established within an Agency;

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

As detailed in this section of the FOI Act, material which is operational or purely factual information is not deliberative matter. 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.

I am satisfied the document comprises deliberative matter, being advice and recommendations, which have been prepared by the Agency's external legal services provider in the course of undertaking the PIA. The document identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection. As such, I am satisfied the document is not operational information or purely factual information, and is not otherwise of a kind specifically excluded by the FOI Act.

Accordingly, I find the document is conditionally exempt, in full, under section 47C(1) of the FOI Act.

Public interest considerations

Section 11A(5) of the FOI Act provides that access to conditionally exempt material must be given unless I am satisfied it would not be in the public interest to do so.

When weighing up the public interest for and against disclosure under section 11A(5), 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, and
- allow a person access to their own personal information, such as data held by the Agency on the myGov platform.

I also acknowledge that in your internal review request you submitted the project the subject of the PIA in question has been identified as posing a 'high privacy risk'. You stated it would be in the public interest to know the privacy and compliance risks posed by the project.

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

- destroy or diminish the commercial value of the provider's PIA methodology and approach

- impede the full and frank disclosure between a lawyer and client, which assists the effective administration of justice, and
- prejudice the Agency's ability to obtain comprehensive legal advice in the future.

Based on the above considerations, I have decided, in this instance, the public interest in disclosing this document 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

I am satisfied the document sought is conditionally exempt under section 47C of the FOI Act. Further, I have decided that on balance it would be contrary to the public interest to release the document.

Summary of decision

I have decided to refuse your request on the basis:

- the document is subject to LPP and therefore exempt in full under section 42 of the FOI Act, and
- the document comprises deliberative material, and disclosure would be contrary to the public interest and the document is therefore exempt in full under section 47C of the FOI Act.

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 a FOI decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. If you do not receive a decision from an Internal Review Officer in the Agency within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision. You will have 60 days to apply in writing for a 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

Note 2: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

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.