



Statement of reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of Position Number 62210022

Applicant: Julie
Decision date: 2 October 2018
FOI reference number: FOI 24297

Dear Julie,

Freedom of Information Request: FOI 24297

1. I have made a decision to refuse access to the documents relevant to your request.

Summary

2. I, Position Number 62210022, am an officer authorised by the Secretary of the Department of Veterans' Affairs (the Department) to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982* (the FOI Act).
3. On 31 August 2018, you made a request for access to documents in the possession of the Department. You specifically sought access to:

"...I seek copy of all the DVA Executive Management Board Minutes for FY16/17..."
4. As no extensions of time have been applied to process your request, a decision is due by 2 October 2018.
5. I have decided not to impose a charge in relation to this request, in accordance with regulation 3(1) of the *Freedom of Information (Charges) Regulations 1982*.
6. The Department has undertaken a reasonable search of its records and has identified 11 documents relevant to your request. The documents relevant to your request are listed at Schedule 1.

Documents subject to this request

7. The documents under assessment are the minutes that arose from Department's Executive Board meetings for the 2015/16 Financial Year. For ease of reference, the documents will be referred to as the "Minutes" and the Executive Board will be referred to as the "Board".

Decision

8. I have made a decision to refuse access to the documents relevant to your request. The documents that I have chosen to refuse access to are set out in Schedule 1, together with the applicable exemption provisions.

Material taken into account

9. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to refuse access to the documents follows.

10. I have taken the following material into account in making my decision:

- the terms of your request;
- the types of documents that are in the Department's possession;
- the content of the documents that fall within the scope of your request;
- Departmental practice around the dissemination and access to the Minutes;
- Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered the following provision[s] of the FOI Act relevant to my decision:
 - Section 11B Public interest exemption – factors
 - Section 47C Public interest conditional exemptions--deliberative processes
 - Section 47E Public interest conditional exemptions--certain operations of agencies; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

11. A full extract of all FOI Act provisions used to make my decision are provided in Schedule 2.

Reasons for Decision

12. I have decided to refuse access to documents within the scope of your request in accordance with the following exemptions in the FOI Act:

Public interest conditional exemptions--deliberative processes (section 47C)

13. I consider that the Minutes contain discussions and recommendations by the Board in relation to a broad range of issues and that this material is conditionally exempt in accordance with section 47C of the FOI Act.

14. 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, a Minister or the Government of the Commonwealth.
15. The Australian Information Commissioner has issued Guidelines under section 93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. As the Guidelines explain:

... 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.
16. Further, while purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to the provision of policy advice and elaborates its context or likely impact it may potentially come within the deliberative document exemption.
17. The Minutes are official records of actions and decisions of the board, including discussions and opinions about sensitive policy, proposals, activities and other matters of concern. The Minutes contain high level advice and discussions outlining options and strategies that were or are under consideration in relation to a number of matters concerning the Department. Due to the sensitivity of some discussions, restrictions are placed within the Department as to who can access the Minutes, noting that some material is restricted to Board members only.
18. Release of the Minutes under the FOI 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 an agency, a Minister or the Government of the Commonwealth. Some of these deliberations are of a sensitive nature. Upon inspection of the Minutes, I am of the view that where factual material is provided, it is done so in the course of assisting with the Board's deliberations.
19. The information does not fall within any of the exclusions in subsections 47C (2) and (3) of the FOI Act. Accordingly, I have decided that the Minutes which are listed as exempt in accordance with this provision in Schedule 1, meet the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5).

Application of the public interest test:

20. 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.

21. 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:
- (a) disclosure would promote the objects of the FOI Act, including:
 - (i) inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community;
 - (ii) reveal the reason for a government decision and any background or contextual information that informed the decision; and
 - (iii) enhance the scrutiny of government decision making.
22. I also considered the following factors which do not favour disclosure:
- (a) 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, a Minister or the Government of the Commonwealth;
 - (b) disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;
 - (c) disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and
 - (d) disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency (insofar as content relates to the commercial affairs of the Commonwealth).
23. Releasing the documents sought may significantly reduce the quality, clarity or frankness of discussions between Board members and ultimately, the advice and recommendations that arise from these meetings. This potential detriment to the public interest of release of the documents outweighs the factors in favour of access.
24. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.
25. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

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

26. I also consider that the Minutes contain information about the operation of the Department, which if it were to be released, could have a substantial adverse effect on the proper and efficient conduct of those operations. As such, the Minutes are also conditionally exempt in accordance with section 47E(d) of the FOI Act.
27. 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.
28. As noted above, the Minutes derive from the meetings of the Board. Discussions in these meetings can be highly sensitive, with access to those deliberations restricted on a need to know basis.
29. Disclosure could allow individual's access to sensitive information about the Department's operations, including where certain issues discussed in those Board meetings are controversial and/or have not yet been resolved. It is important Board members are open and honest in these meetings and that they can share confidential information or views without recourse where that is in the best interests of the Department and ultimately, its operations. Disclosing this type of information could reasonably be expected to diminish the type of information discussed in the meetings and subsequently, the quality of the decisions made in those meetings.
30. Accordingly, I have decided that the documents which are listed as exempt in accordance with this provision in Schedule 1, meet the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5).

Application of the public interest test:

31. 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.

32. 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:
- (a) disclosure would promote the objects of the FOI Act, including:
 - (iv) inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community;
 - (v) reveal the reason for a government decision and any background or contextual information that informed the decision; and
 - (vi) enhance the scrutiny of government decision making.
33. I also considered the following factors which do not favour disclosure:
- (a) 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, a Minister or the Government of the Commonwealth;
 - (b) disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;
 - (c) disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and
 - (d) disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency (insofar as content relates to the commercial affairs of the Commonwealth).
34. Release of the Minutes would be contrary to public interest. Board members need to be able to undertake rigorous and candid assessment of all information relevant to the Department's operations, and to consider in confidence, the most effective options and solutions to address the Department's affairs. It is important that Board members feel able to provide information, consider options and deliberate without restriction in order to ensure that the Board always considers all relevant information and opinions.
35. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.
36. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

Your rights of review

37. If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal Review

38. Under section 54 of the FOI Act, you may apply in writing to the Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
39. You can make your application for internal review in one of the following ways:

Post: Legal Services & Assurance, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: information.access@dva.gov.au

Information Commissioner Review

40. Under section 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 this letter, and be lodged in one of the following ways:
41. You can make your application for Information Commissioner review in one of the following ways:

Online: www.oaic.gov.au
Post: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001
Facsimile: (02) 9284 9666
Email: enquiries@oaic.gov.au
In person: Level 3, 175 Pitt Street, Sydney NSW

42. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the Office of the Australian Information Commissioner: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>

Contact us

43. If you wish to discuss this decision, please do not hesitate to contact me using the following details:

Post: Legal Services & Assurance, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: information.law@dva.gov.au

Yours Sincerely,

Position number 62210022
Authorised officer

2 October 2018



Schedule of documents

Applicant: Julie

Decision date: 2 October 2018

FOI reference number: FOI 24297

Doc ref	Date of document	Document description	Pages	Decision	Exemption provision
1	13 July 2016	Final Minutes of July Meeting	8	13 July 2016	ss 47C & 47E(d)
2	16 August 2016	Final Minutes of August Meeting	7	16 August 2016	ss 47C & 47E(d)
3	13 September 2016	Final Minutes of September Meeting	7	13 September 2016	ss 47C & 47E(d)
4	17 October 2016	Final Minutes of October Meeting	6	17 October 2016	ss 47C & 47E(d)
5	16 November 2016	Final Minutes of November Meeting	6	16 November 2016	ss 47C & 47E(d)
6	14 December 2016	Final Minutes of December Meeting	7	14 December 2016	ss 47C & 47E(d)
7	16 February 2017	Final Minutes of February Meeting	7	16 February 2017	ss 47C & 47E(d)
8	16 March 2017	Final Minutes of March Meeting	8	16 March 2017	ss 47C & 47E(d)
9	13 April 2017	Final Minutes of April Meeting	9	13 April 2017	ss 47C & 47E(d)
10	18 May 2017	Final Minutes of May Meeting	6	18 May 2017	ss 47C & 47E(d)
11	15 June 2017	Final Minutes of June Meeting	7	15 June 2017	ss 47C & 47E(d)



Schedule of relevant provisions in the FOI Act

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister 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 at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
 - (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

11 B Public interest exemptions--factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (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.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
 - (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
 - (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
 - (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.
(see section 11A).

Public interest conditional exemptions

47C Public interest conditional exemptions—deliberative processes

General rule

- (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; or
- (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (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.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47E Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act 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.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).