



Australian Government
Attorney-General's Department

14/6287

8 July 2014

Professor Simon Rice OAM
College of Law
The Australian National University
Canberra ACT 0200

Dear Professor Rice

Freedom of Information Request no. FOI14/069

This letter provides a response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Stephen Bouwhuis, Assistant Secretary, am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 2 May 2014 you requested access to documents relating to proposed amendments to the *Racial Discrimination Act 1975*. Specifically you sought access to:

"All submission received on the exposure draft Bill (Freedom of speech (repeal of s18c) Bill 2014) which proposed amendments to the Racial Discrimination Act 1975."

On 2 June 2014 we sent you a notice under section 24AB of the FOI Act explaining that I intended to refuse your request unless you were able to revise the scope to remove the practical refusal reason.

On 23 June 2014 you reduced the scope of your request to:

"access to collations, summaries, analyses, reports and similar documents relating to the submissions prepared by the Department."

I identified three documents which fell within the scope of your request. I did this by arranging for searches of both electronic and hard copy records held by the department as well as making enquiries of staff who may have been able to help locate documents within the scope of your request.

I am satisfied that those searches constitute a 'reasonable search' for the purposes of Part 3 of the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act: that is 'a reasonable search on a flexible and common sense interpretation of the terms of the request'.

The schedule of documents at **Attachment A** provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

Decision and reasons for decision

With regard to the documents identified in the attached schedule, I have decided to refuse access in full to one document and to grant access to an edited copy of the other two documents with material deleted in accordance with section 22 of the FOI Act.

In relation to document 1, I have decided to refuse access under section 47C of the FOI Act (deliberative process) and subsection 47E(d) of the FOI Act (certain operations of an agency). In relation to document 2, which consists of a submission and two attachments, I have decided to refuse access to the submission and one attachment under section 47C of the FOI Act (deliberative process) and subsection 47E(d) of the FOI Act (certain operations of an agency) and grant access to an edited copy of the other attachment, with material deleted because it is exempt under subsection 47F(1) of the FOI Act (personal privacy). In relation to document 3, which is a more recent version of the edited attachment being released, I have decided to grant access to an edited copy, with material deleted because it is exempt under subsection 47F(1) of the FOI Act (personal privacy).

Material taken into account

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

- the terms of your FOI request
- the contents of the three documents that fall within the scope of your request
- the FOI Act (specifically section 47C, subsection 47F(1) and subsection 47E(d)), and
- the Guidelines.

Findings on material questions of fact

My findings on material questions of fact are that documents 1 and 2 (Submissions and Attachment A) contain deliberative material that, if disclosed, would have a substantial adverse effect on the proper and efficient conduct of the operations of the department.

Public interest conditional exemption – deliberative processes

I have decided that the documents contain material that is conditionally exempt under subsection 47C(1) of the FOI Act, which provides:

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...

I note that deliberative matter does not include operational information or purely factual material. To the extent that the documents do contain some purely factual material, I have found that it is not possible to separate that material from the deliberative elements.

The deliberative matter which I have decided to exempt includes:

- policy options for consideration by the Attorney-General, and
- confidential consultation between officers of the department and the Attorney-General.

I am satisfied that the documents contain material that is conditionally exempt under subsection 47C(1) of the FOI Act, as providing access to them in response to your request would

disclose deliberative matter in the nature of, or in relation to, opinion, advice and recommendations prepared in the course of the deliberative processes involved in the functions of the department.

Public interest conditional exemption – certain operations of agencies

Material in the documents is conditionally exempt under subsection 47E(d) of the FOI Act, which provides:

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

I consider that disclosure of material in the documents would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of the department. The two documents requested contain sensitive briefing material produced by the department in carrying out its function of supporting the Attorney-General in carrying out his functions. Without the ability to provide the Attorney-General with full, frank briefing material in relation to issues within his portfolio responsibilities the department would be unable to properly carry out its function. Disclosure of documents of this kind in response to an FOI request would significantly impair the way in which the department could communicate with, support and advise portfolio ministers.

I am satisfied that the documents contain material that is conditionally exempt under subsection 47E(d) of the FOI Act, as disclosing them would reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the department.

Public interest conditional exemption – personal privacy

Material in documents 2 (Attachment B) and 3 is conditionally exempt under subsection 47F(1) of the FOI Act, which provides:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

In determining whether such disclosure would be an unreasonable disclosure of personal information, I have considered the following:

- The extent to which the information is well known
- Whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the documents
- The availability of the information from publicly accessible sources, and
- Any other matter that the agency or Minister considers relevant.

I consider that disclosure of material containing personal information would be an unreasonable disclosure as the information would identify an individual whose information is not publicly accessible, and whose consent has not been given for such a disclosure. As I have previously advised, the Department indicated on its website that submissions would not be made public without the consent of the author. Most authors of the submissions have not expressly provided their consent to release their submission.

Public interest considerations

Factors favouring disclosure

Access must be given to a conditionally exempt document unless it would be contrary to the public interest. In accordance with section 11B of the FOI Act, for the purposes of identifying whether access to the documents would, on balance, be contrary to the public interest under subsection 11A(5) of the FOI Act, I have considered relevant factors favouring disclosure, including:

- promoting the objects of the FOI Act (section 3), including:
 - giving the Australian community access to information held by the Government of the Commonwealth
 - promoting Australia's representative democracy by contributing towards increasing public participation in Government processes, with a view to promoting better-informed decision-making
 - increasing scrutiny, discussion, comment and review of the Government's activities, and
 - promoting public access to information, promptly and at the lowest reasonable cost (subsection 11B(3)(a))
- informing debate on a matter of public importance (subsection 11B(3)(b)), and
- promoting effective oversight of public expenditure (subsection 11B(3)(c)).

I find that the material contained in the two documents consists of deliberative material prepared at an early stage in the policy development process. While disclosure might to a certain extent inform debate on a matter of public importance, the deliberative nature of the material and the early stage of the deliberative process of policy development mean it would be unlikely to meaningfully contribute to increased public participation in government decision making. Disclosure would give access to advice prepared for a limited audience within government but, due to the early stage of deliberations, would be unlikely to increase scrutiny or review of government actions.

I do not consider that access to the documents could reasonably promote the effective oversight of public expenditure.

Relevant factors against disclosure

The FOI Act does not list any factors weighing against disclosure. Some possible factors to be considered against disclosure are listed in the Guidelines. Taking those suggestions and relevant circumstances into consideration, I have identified the following relevant factors against disclosure:

- the public interest in maintaining the flow of confidential communications between ministers and agencies, so as to allow scope to explore and develop policy issues
- the public interest in allowing a government to develop policy options and manage priorities based on frank advice, opinions and recommendations prepared for a minister rather than for a wider audience
- the public interest in supporting the ability of departments to create confidential deliberative material as part of the function of supporting ministers in carrying out their portfolio responsibilities, and
- the public interest in protecting the rights of an individual to their privacy.

I have found that the benefit to the public resulting from disclosure of the documents is outweighed by the benefit to the public in withholding the material.

Your review rights

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

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

email: foi@ag.gov.au
post: Freedom of Information and Privacy Section
Office of Corporate Counsel
Attorney-General's Department
3-5 National Circuit
Barton, ACT 2600

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.

Information Commissioner review

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:


online: <https://forms.business.gov.au/aba/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

If you wish to discuss this decision, please contact the department by email at foi@ag.gov.au or telephone (02) 6141 6666.

Yours sincerely



Stephen Bouwhuis
Assistant Secretary

Attachments

- A. Schedule of documents
- B. Document 2, Attachment B
- C. Document 3

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Schedule of documents – Freedom of information request no. FOI 14/069

Document	Date	Size (pages)	Description	Decision on access	Exemption
1	2 May 2014	9	<i>AGD Internal document</i> - Draft analysis of public submissions and options for addressing issues raised.	Refuse in full	section 47C (deliberative process) subsection 47E(d) (certain operations of an agency)
2	9 May 2014	67	<i>Submission to Attorney-General: AG-SB2014/0672</i> – Amendments to the Racial Discrimination Act 1975 Post Consultation <ul style="list-style-type: none"> Attachment A: Analysis of the public consultation and other issues. Attachment B: Spreadsheet log of all submissions received during the public consultation period. 	Refuse in full Submission and Attachment A Access in part Attachment B	Submission and Attachment A: section 47C (deliberative process) subsection 47E(d) (certain operations of an agency) Attachment B: Subsection 47F(1) (personal privacy)
3	23 June 2014	48	<i>Spreadsheet log of all submissions received during public consultation period</i> [Same working document as Attachment B listed above but updated as at 23 June 2014]	Access in part	Subsection 47F(1) (personal privacy)

