



OFFICIAL

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2024/281

Phil Anderson

General Manager Policy, Advocacy and Standards

Financial Advice Association Australia

Email: phil.anderson@faaa.au

Dear Mr Anderson

I refer to your request to the Department of the Prime Minister and Cabinet (the Department), under the *Freedom of Information Act 1982* (the FOI Act), received on 18 August 2024.

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

Scope of request

You set out your request in the following terms:

This email is to provide a Freedom of Information request with respect to the Impact Analysis Equivalent application and related documents for the Financial Services Compensation Scheme of Last Resort Levy Bill 2023 and the two related Bills.

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6983

The EM to this Bill states:

The Financial Services Royal Commission Final Report has been certified as being informed by a process and analysis equivalent to an Impact Analysis for the purposes of the Government decision to implement this reform. The Financial Services Royal Commission Final Report can be accessed through the Australian Parliament House website.¹

The Impact Analysis Equivalent document on the PMC Office of Impact Analysis (OIA) website states that

The Impact Analysis Equivalent document/s (Review and any required additional analysis), your agency certification letter, and the OIA decision (including any commentary on the quality of analysis) will be published on the Department of the Prime Minister and Cabinet's website, following the announcement of the associated policy decision.

However, there is no record of any impact analysis equivalent application, certification or OIA decision on the OIA website. In fact, there is absolutely no record of this legislation on the OIA website.

I request copies of all documents with respect to the Impact Analysis for the Compensation Scheme of last Resort legislation. This would include all documents related to the Impact Analysis Equivalent application, such as the agency certification letter, any additional analysis provided, the Regulatory Burden Estimate table, the OIA decision and other documents relevant to the approval provided by the OIA to rely upon the 2019 Hayne Royal Commission Final Report as being equivalent to an Impact Analysis (Regulation Impact Statement).

Further, as an earlier version of this legislation (Financial Services Compensation Scheme of Last Resort Levy Bill 2022) was tabled in Parliament on 8 September 2022, I also request the same documentation with respect to the 8 September 2022 version of the legislation.

On 15 October 2024 the Department wrote to you as part of a request consultation process under the FOI Act to engage you on the terms of the request. On 16 October 2024 you discussed the request with an FOI officer who confirmed with you in writing a revised request. As such the request was revised to the following terms (numbered for reference purposes):

- 1. The regulatory burden estimate table for implementation of the Compensation Scheme of Last Resort (CSLR)*
- 2. Documents showing the Office of Impact Analysis' (OIA) decision to accept the assessment provided in the regulatory burden estimate table*
- 3. Certification from the Department of Treasury showing equivalence to a Regulatory Impact Statement for the proposed CSLR legislation.*

In addition you provided the following background information:

It might be useful to be specific about the actual Bills that this relates to. I am seeking this data for the 2023 CSLR Bills that were tabled in March 2023 and passed in June 2023.

There were actually three related Bills that enabled the establishment of the CSLR as per the following link to the EM and extract of the names of the Bills from the front cover.

https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6984_ems_09448656-a7e3-4444-b183-dd93868ae77d/upload_pdf/JC009023.pdf;fileType=application%2Fpdf

Request decided out of time

A decision on your request was due 18 October 2024. Unfortunately the Department was unable to complete the processing of your request by the due date.

In these circumstances the Department follows the Guidelines issued by the Information Commissioner under section 93A of the FOI Act which states *'Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request.'*¹

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- the documents relevant to your request
- the FOI Act
- the Guidelines issued by the Information Commissioner² (the Guidelines).

Documents in scope of request

The Department has identified 13 documents that fall within the scope of your revised request.

These documents are set out in the Schedule of Documents at Attachment A.

Decision

I have decided to grant access in part to the documents on the grounds specifically identified information is conditionally exempt (section 47C and 47E).

Information reasonably regarded as irrelevant material has also been deleted (section 22).

¹ Paragraph 3.161 of the Guidelines.

² Section 93A of the FOI Act.

I have also decided to grant full access to the 'Supplementary Final Report – Review of the financial system external dispute resolution and complaints framework' by means of providing you with a link to access this document due to its extensive length and as it is published on Treasury's website. This document was identified as an Attachment to document 11 and is specifically referenced in the Schedule of Documents as document 11.1. You can access the document at the following link: <https://treasury.gov.au/sites/default/files/2019-03/Supplementary-Final-Report-2.pdf>.

I note the Certified Independent Review process for the *Government Response to the Financial Services Royal Commission* (that includes the Compensation Scheme of Last Resort and the *Final Decision Review Certification letter*) was published on 26 September 2019 on the OIA website. You can access the document at the following link: <https://oia.pmc.gov.au/published-impact-analyses-and-reports/government-response-financial-services-royal-commission>.

Reason for decision

My findings of fact and reasons for decision are set out below.

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

The FOI Act sets out reasons for material to be exempt in the following situations:

(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.*

Document 4 has been identified as a record prepared for a deliberative processes. It includes the advice and opinion of Treasury provided to the Department for the purpose of weighing up and making a decision on the information provided.

The FOI Guidelines set out three stages for making a decision information is conditionally exempt due to deliberative processes. The first and second stage requires me to consider the nature of the document, and whether it was recorded for a deliberative process. As above the document is a record of the opinion and advice provided to the Department by Treasury. I am satisfied the information is deliberative in nature, and was prepared for the purposes of engaging in a deliberative process.

Thirdly, I must be satisfied the deliberative process involves the functions exercised by an agency, Minister or the Commonwealth government. In light of the nature of the document as discussed above, and having regard to feedback from relevant stakeholders, I am satisfied the deliberative process was entered into for the purpose of exercising the functions of an agency.

I have had regard to the exceptions set out in section 47C(2) of the FOI Act and find they are not relevant in connection to the information conditionally exempt under section 47C, that is the information is not the kind to be operational or purely factual material.

I am satisfied parts of document 4, containing deliberative material, is conditionally exempt under section 47C of the FOI Act.

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

The FOI Act sets out reasons for material to be exempt in the following situations:

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 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).

The documents have been identified as containing information that forms part of the agencies operations. That is they include operational contacts and information relating to Cabinet processes, the disclosure of which would have an adverse impact on the proper and efficient operational work of the Department of the Prime Minister and Cabinet in undertaking its daily operations and when preparing Cabinet material.

Operational contacts

This conditional exemption has been applied to internal operational email accounts and phone numbers where they appear in the emails.

The FOI Guidelines explain a decision maker is required to assess whether 'the predicted effect needs to be reasonably expected to occur'.

The release of internal operational email accounts or phone numbers would reasonably be expected to result in non-official communications or public inquiries made to contacts that are not monitored by staff whose role or function is to manage inquiries from the general public. Disclosure is expected

to result in such communications effectively bypassing established channels for members of the public to contact and make inquiries with the Department.

Departments have established a centralised function to ensure staff with appropriate training are employed to manage external communications. This allows other internal business areas to efficiently undertake their daily operations. Disclosure of these contact details would not only result in unnecessary and inefficient duplication of administrative processes, but would place additional pressures on operational areas who are not resourced or trained to triage and manage direct contact and inquiries from members of the public.

It is reasonably expected that disclosure of internal operational contacts would adversely affect the Department's ability to respond effectively to urgent official activities that form its usual operations.

I am satisfied parts of the documents, containing information of the internal operational contacts, is conditionally exempt under section 47E(d) of the FOI Act.

Cabinet processes

The [Cabinet Handbook](#) sets out the operational environment for agencies when preparing materials in connection to Cabinet, such as:

49. The following is an indication of the kind of issues that would normally require consideration by the Cabinet (including by reference to the relevant Cabinet Committee):

- (a) proposals relating to the delivery of the Government's formally agreed strategic priorities*
- (b) controversial proposals, which are likely to lead to significant public comment*
- (c) proposals affecting the Government's financial position, or important financial commitments*
- (d) issues that impact on every member of the Cabinet, or on the portfolio interests of a number of ministers (particularly where agreement cannot be reached)*
- (e) the most significant domestic policy issues*
- (f) significant matters affecting state and territory relations*
- (g) the most significant international business, including international treaties and agreements*
- (h) national emergencies, including any decision to take military action*
- (i) proposals that affect Australia's constitutional arrangements*
- (j) proposed responses to recommendations made in parliamentary committee reports*
- (k) proposed reviews or public inquiries*

(l) proposals involving significant new legislation or regulations [note: all legislative proposals require approval from the Parliamentary Business Committee of Cabinet (PBC)]

(m) significant government appointments.

The [Legislation Handbook](#) provides further information about the operations surrounding the development and introduction of legislation and its connection to Cabinet processes.

I am satisfied the specifically identified information marked in the document under section 47E(d) form part of the agencies operations.

The FOI Guidelines set out the grounds for determining when an adverse impact would or could reasonably be expected to occur and that I must be satisfied of the predicted effect.³

In light of this, I have further considered the Cabinet Handbook which explains the importance for confidentiality of the deliberations of the Cabinet. In considering the content of the FOI documents I have had particular regard to the following parts of the Cabinet Handbook:

21. The principle of collective responsibility requires that ministers should be able to express their views frankly in Cabinet meetings in the expectation that they can argue freely in private while maintaining a united front in public when decisions have been reached. This in turn requires that opinions expressed in the Cabinet and Cabinet Committees, including in documents and any correspondence, are treated as confidential.

23. The vital importance of confidentiality in relation to the deliberations of Cabinet is recognised in legislation and under the common law. The Freedom of Information Act 1982 (the Act), for example, recognises the special nature of Cabinet deliberations in the exemption it provides for certain Cabinet documents from disclosure under the Act (subject to limited exceptions). Cabinet confidentiality is also a well-established ground for not producing documents or information on a public interest immunity basis to courts, royal commissions or legislatures.

In this case I find disclosure of material relating to the operations surrounding Cabinet would cause an adverse effect to the proper and efficient operations of agencies when such material is being prepared and distributed with the understanding of these confidentiality principles.

I am satisfied the specifically identified information marked in the documents is conditionally exempt under section 47E(d) of the FOI Act.

³ Paragraph 6.90 of the FOI Guidelines.

3. Public Interest

The FOI Act provides that a conditionally exempt document must nevertheless be disclosed unless its disclosure would, on balance, be contrary to the public interest⁴. In determining whether disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors.

As I consider specified information within the documents is conditionally exempt, I am now required to consider the public interest factors. In doing so I have not considered the irrelevant factors as set out in section 11B(4) of the FOI Act, this includes:

- a) *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in 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 documents 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.*

In applying the public interest, I have noted the objects of the FOI Act⁵ and the factors favouring access as listed in section 11B(3) of the FOI Act. Having regard to the material before me and the circumstances of the documents found to be conditionally exempt I am satisfied of the following:

- access would promote the objects of the FOI Act⁶
- access may inform debate on a matter of public importance
- the subject of the conditionally exempt information within the documents does not offer any further insights into public expenditure
- I am satisfied that your personal information is not contained within the conditionally exempt documents and therefore s 11B(3)(d) is not a relevant factor to favour access.

The FOI Act does not set out any public interest factors against disclosure but require agencies to have regard to the FOI Guidelines in order to work out if disclosure would, on balance, be contrary to the public interest⁷. The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the documents found to be conditionally exempt, may weigh against disclosure.

⁴ Section 11A(5) of the FOI Act.

⁵ Section 3 of the FOI Act.

⁶ Section 11B(3)(a) of the FOI Act.

⁷ Section 11B(5) of the FOI Act.

The main factor against disclosure in this case is the impact to ordinary business functions running efficiently and that disclosure of the information would affect the ability of the Department to support the operational processes associated with preparing materials for Cabinet.

There is a risk disclosure of Cabinet related material would have a mosaic effect and could allow the public to piece together the context of matters deliberated at Cabinet, breaching the requirement and convention of Cabinet confidentiality as discussed in the Cabinet Handbook.

Having regard to all factors I find, on balance, disclosure of the specifically identified information marked in the documents under section 47E(d) is contrary to the greater public interest, that is to maintain the confidentiality of Cabinet and I am satisfied this material is exempt.

4. Deletion of irrelevant matter

Section 22 of the FOI Act authorises the preparation of an edited copy of a document.

1) *This section applies if:*

(a) *an agency or Minister decides:*

- i. *to refuse to give access to an exempt document; or*
- ii. *that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and*

(b) *it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:*

- i. *access to the edited copy would be required to be given under section 11A (access to documents on request); and*
- ii. *the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and*

(c) *it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:*

- i. *the nature and extent of the modification; and*
- ii. *the resources available to modify the document; and*

(d) *it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.*

Access to edited copy

2) *The agency or Minister must:*

- (a) *prepare the edited copy as mentioned in paragraph (1)(b); and*
- (b) *give the applicant access to the edited copy.*

Notice to applicant

3) *The agency or Minister must give the applicant notice in writing:*

- (a) *that the edited copy has been prepared; and*
- (b) *of the grounds for the deletions; and*
- (c) *if any matter deleted is exempt matter-that the matter deleted is exempt matter because of a specified provision of this Act.*

I have reviewed each of the documents found to contain material responsive to your revised request, and in those documents identified information that would disclose matters I find to be reasonably regarded as irrelevant to the revised request for access. This includes non-SES staff names, signatures not previously published, internal contact numbers including mobile phone numbers, and information pertaining to subjects that did not relate to the *Impact Analysis for the Compensation Scheme of last Resort legislation*.

It is possible for the Department to prepare edited copies of the documents using a computer system available to make redacted modifications. The results provide you with access to an edited copy which is required under section 11A of the FOI Act, and this edited copy removes the information found to be irrelevant to your request.

Review rights

If you disagree with my decision, you may apply for Information Commissioner review of the decision.

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 after the date of this letter. You can apply using the [OAIIC Web Form](#).⁸

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem.

If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing.

You can make a complaint using the [OAIIC Web Form](#).⁹

⁸ <https://webform.oaic.gov.au/prod?entitytype=ICReview&layoutcode=ICReviewWF>

⁹ <https://webform.oaic.gov.au/prod?entitytype=Complaint&layoutcode=FOIComplaintWF>

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If you wish to discuss any aspect of your requests, you can contact the FOI Section by email at foi@pmc.gov.au.

Office of Impact Analysis
Department of the Prime Minister and Cabinet

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