Australian Government

Department of Health

Department Reference: FOI 2338

Paul Farrell
Via email: paulfrancisfarrell@gmail.com

Dear Mr Farrell

NOTICE OF DECISION

I refer to your request of 12 April 2021 to the Department of Finance, seeking access under the *Freedom of Information Act 1982* (Cth) (the Act) to the following:

> The contract (or contracts) between AstraZeneca and the Health Department relating to the delivery and production of COVID-19 vaccines. For the avoidance of doubt, I am referring to the letter of intent below and the ensuing contracts created pursuant to clause 10 of this letter.
>
> https://www.health.gov.au/sites/default/files/documents/2020/12/foi-request-1938-covid-19-vaccine-agreement-with-astrazeneca-astrazeneca-letter-of-intent.pdf

I am authorised under subsection 23(1) of the Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

Decision

I have identified one document falling within the terms of your request.
I have decided to refuse access to the document in full.

The document and relevant exemptions applied are set out in the Schedule at Attachment A. The reasons for my decision are set out at Attachment B.

Third party consultation

You were informed on 29 April 2021 that consultations with a third party would be necessary. I considered the contentions put to me by that third party when making my decision.

FOI review rights

If you are dissatisfied with my decision, you may apply for a review.

Internal review

Under section 54 of the Act, you may apply for internal review of this decision.

In accordance with section 54B of the Act, an application for internal review must be made in writing within 30 days after the day you are notified of this decision (or such further period as the department allows). To assist in the internal review process, please provide reasons as to why you consider the review of my decision is necessary.

The internal review will be carried out by another officer of this department within 30 days of receipt of your application.

An application for an internal review should be addressed to:

Email: FOI@health.gov.au
Mail: FOI Unit (MDP 516)
Department of Health
GPO Box 9848
CANBERRA ACT 2601

Information Commissioner review

Alternatively, under section 54L of the Act, you may apply to the Office of the Australian Information Commissioner (OAIC) for review of my decision by the Information Commissioner.

In accordance with subsection 54S(1) of the Act, an IC review application in relation to a decision covered by subsection 54L(2) (access refusal decisions) must be made in writing within 60 days after the day you are notified of this decision (if you do not request an internal review).

More information about Information Commissioner review is available on the OAIC website at: https://www.oaic.gov.au/freedom-of-information/reviews/.

The OAIC can be contacted by:

Email: enquiries@oaic.gov.au
Phone: 1300 363 992

Complaints

If you are dissatisfied with actions taken by the department, you may also make a complaint.

Complaint to the department

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website:

https://www.health.gov.au/about-us/contact-us/complaints.

Complaint to the Information Commissioner

Information about making a complaint to the Information Commissioner about action taken by the department is available on the OAIC website:

https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/.

Relevant provisions

The Act, including the provisions referred to in this letter, can be accessed from the Federal Register of Legislation website:
https://www.legislation.gov.au/Series/C2004A02562.

Contacts

If you require clarification of any of the matters discussed in this letter, please contact the FOI unit on (02) 6289 1666 or email: FOI@health.gov.au.

Yours sincerely

Allison Jones
A/g Assistant Secretary
Science & Investment Branch

10 June 2021

ATTACHMENT A

SCHEDULE OF DOCUMENTS - FOI 2338

Document No.	Pages	Description	Decision on access[1]	Exemption
1	39	AstraZeneca Supply Agreement	Exempt in full	Section 33 - whole document Section 45 - whole document Section 47 - whole document

[1] E: Exempt in full.

ATTACHMENT B

REASONS FOR DECISION - FOI 2338

Material taken into account

In making my decision, I had regard to the following:

- the terms of your request
- the content of the documents sought
- advice from departmental officers with responsibility for matters relating to the documents sought
- submissions from a third party
- submissions from other Commonwealth government agencies
- the relevant provisions of the Act, and
- guidelines issued by the Australian Information Commissioner under section 93A of the Act (the FOI Guidelines).

Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemptions identified in the Schedule at Attachment A apply to the documents, are set out below.

Section 33 - documents affecting national security, defence or international relations

Paragraph 33(a)(i) of the Act permits exemption of a document if disclosure of the document would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

For the reasons set out below, I consider there are real and substantial grounds for expecting that the disclosure of document 1 would cause damage to the security of the Commonwealth.

'Security of the Commonwealth' is defined in paragraph 4(5)(a) of the Act as follows:

> (5) Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:
>
> (a) matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth

Section 4 of the *Australian Security and Intelligence Organisation Act 1979* (Cth) defines 'security' as:

> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
>
> (ii) sabotage;
>
> (iii) politically motivated violence;
>
> (iv) promotion of communal violence;
>
> (v) attacks on Australia's defence system; or
>
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (aa) the protection of Australia's territorial and border integrity from serious threats; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Paragraph 5.29 of the FOI Guidelines provide that the term 'security of the Commonwealth' broadly refers to:

> a. the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests
>
> b. the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations.

In regards to the terms 'could reasonably be expected to' and 'damage', paragraphs 5.16, 5.17 and 5.28 of the FOI Guidelines provide that:

> 5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.
>
> 5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, be presently occurring, or could occur in the future.
>
> 5.28 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible … but [should be] determined on the facts of each particular case.

Having reviewed the information in light of the above definitions and the FOI Guidelines, I am satisfied of the real and substantial risk to national security that release of document 1 would pose.

The positions set out in the document are demonstrative of the overall offering AstraZeneca is providing to the Commonwealth in response to the COVID-19 pandemic and the accelerated manufacture and supply of the COVID-19 vaccine. I consider the particular damage to the security of the Commonwealth to be the fact that disclosure of the information could provide insight into the unique arrangements for the manufacture and supply of the COVID-19 vaccine. Releasing the information in document 1 would have the effect of signalling to other countries the terms agreed between the Commonwealth and AstraZeneca. The integrity and efficacy of the arrangements to manufacture and supply the vaccine may be compromised and thereby pose a threat to the national security of the Commonwealth if those terms were published.

While some of the information may be harmless in isolation, when taken in conjunction with other documented information, a mosaic is created that may reveal information pertaining to the COVID-19 vaccine that may threaten national security. In relation to the mosaic effect, paragraph 5.39 of the FOI Guidelines state that:

> When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite mosaic that can damage Australia's national security, defence or international relations.

I conclude that document 1 is exempt in full from disclosure under subsection 31B(a) and paragraph 33(a)(i) of the Act.

Section 33 of the Act is not a conditional exemption and accordingly, it is not subject to an application of the public interest test under subsection 11A(5) of the Act.

Section 45 – material obtained in confidence

Section 45 of the Act provides that a document is exempt if "its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence."

Paragraph 5.155 of the FOI Guidelines states:

> The exemption is available where a person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.

Under paragraph 5.195 of the FOI Guidelines, to found an action for breach of confidence, the following five criteria must be satisfied in relation to the information:

- the information must be specifically identified
- the information must have the necessary quality of confidentiality
- the information must have been communicated and received on the basis of a mutual understanding of confidence
- the information must have been disclosed or threatened to be disclosed, without authority, and
- unauthorised disclosure of the information has or will cause detriment.

Addressing the above criteria, I find that document 1 contains information that is confidential in nature and was communicated on that basis, and that there was a mutual understanding of confidence between the department and the third party concerned, and which is not in the public domain. The document contains a complex and inter-dependent suite of obligations, including confidentiality clauses, by which the department is bound. The third party has not consented to the disclose the contents of the document.

In conclusion, I find that disclosure of document 1 would be inconsistent with the parties' confidentiality obligations, and could lead to an action for breach of confidence. This document is exempt from disclosure in full under subsection 31B(a) and section 45 of the Act.

Section 45 of the Act is not a conditional exemption and accordingly, it is not subject to an application of the public interest test under subsection 11A(5) of the Act.

Section 47 – commercially valuable information

Paragraph 47(1)(b) of the Act provides that a document is an exempt document if its disclosure under the Act would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Under paragraph 5.204 of the FOI Guidelines, for a document to be exempt under paragraph 47(1)(b) of the Act, it must satisfy the following criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body, and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

Commercial value

Pursuant to paragraph 5.201 of the FOI Guidelines, in determining whether the information within document 1 is commercially valuable, I have had regard to whether:

- the information is known only to the persons for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
- the information confers a competitive advantage on the person to whom it relates – for example, it allows access to markets not available to competitors
- a genuine 'arms-length' buyer would be prepared to pay to obtain that information
- the information is still current or out of date (noting that out of date information may no longer have any value), and
- disclosing the information would reduce the value of a business operation or commercial activity, reflected perhaps in a lower share price.

As previously mentioned, document 1 contains highly confidential information about a unique commercial arrangement between the third party and the department in relation to the COVID-19 vaccine, including timeframes, pricing and logistics obligations in the manufacture, supply and distribution of the vaccine. Very limited information about the subject matter contained in the document has been disclosed publicly. The commercially sensitive and confidential terms set out in the document therefore represent considerable commercial value to the third party and disclosure could affect the profitability and viability of the third party's continuing business operations in relation to the vaccine.

The relevant third party operates in a global, hyper-competitive market. If the information were to be disclosed in the current environment, it could enable the third party's competitors to obtain a commercial advantage over it by disclosing the commercial and risk positions by which the third party is prepared to be bound. Further, disclosure of the information in document 1 may be prejudicial to onshore manufacturing arrangements and may hinder ongoing negotiations as the project evolves.

Destroyed or diminished

I understand and believe from the third party's submissions that, if the information in document 1 is disclosed, it could reasonably be expected that its intrinsic value will be destroyed or diminished. As outlined above, the information is valuable for the purposes of carrying on the commercial activities for which the third party is engaged by the department. The value of that information may be destroyed or diminished if its release enables the

third party's competitors to obtain a competitive advantage over it. Release would materially compromise the third party's ability to negotiate and to appropriately and fully manage its risks. It is my view the potential damage is real and substantial, and not insignificant or nominal.

I conclude that document 1 is exempt in full from disclosure under subsection 31B(a) and paragraph 47(1)(b) of the Act.

Section 47 of the Act is not a conditional exemption and accordingly, it is not subject to an application of the public interest test under subsection 11A(5) of the Act.

Section 47G – business information

I have not specifically applied the exemption under section 47G of the Act (*business information exemption*) to document 1 because I consider paragraph 47(1)(b) of the Act discussed above is the most applicable exemption. However, if there is a reason paragraph 47(1)(b) of the Act is not applicable, I consider paragraph 47G(1)(a) of the Act is applicable to document 1 in the alternative. The unreasonable adverse effect is as described above.