



Australian Government
Attorney-General's Department

Our ref: FOI24/463 and FOI23/500; CM23/31878

27 March 2024

Waldek

By email: foi+request-10637-e069e78a@righttoknow.org.au

Dear Waldek

Freedom of Information Request FOI23/463 and FOI23/500 – Decision letter - tranche 1

The purpose of this letter is to give you a decision about your requests for access to documents under the *Freedom of Information Act 1982* (the FOI Act). Please note this decision is for your 2 identical FOI requests, one of which was transferred from the Office of the Attorney-General (office) to the Attorney-General's Department (department) under s 16(1) of the FOI Act on the 15 September 2023. This access decision is made under s 55G of the FOI Act and will be responded to in a staged approach. This decision relates to tranche 1 of the staged approach. The department will finalise the access decision in relation to tranche 2 documents by 15 April 2024.

Your requests

On 30 August 2023, you requested access to:

Under the FOI Act 1982 I request any and all documents relating to the Commonwealth's involvement in the false imprisonment of the applicant in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020.

On 30 August 2023, you subsequently wrote to the department to revise your FOI request and stated that:

Also, to the extent that it is not covered by my original FOI request, under the FOI Act I request any and all documents setting out the cost to the Commonwealth of defending the matter in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020.

On 30 August 2023, you also wrote to the office and requested access to:

Under the FOI Act 1982 I request any and all documents in your possession relating to the Commonwealth's involvement in the false imprisonment of the applicant in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020, including documents setting out the cost to the Commonwealth of defending the matter.

On 31 August 2023, the department acknowledged your request. Between the 31 August and 2 September 2023, the department corresponded with you in relation to your requests to better understand the documents you were seeking access to.

On 7 September 2023, the department wrote to you to confirm it understood that you were seeking:

any and all documents in the control of the AGD relating to the Commonwealth's involvement in the false imprisonment of the applicant in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020.

That request for any and all documents extends to any and all documents setting out the cost to the Commonwealth of defending the matter in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020.

The department also confirmed that it viewed you had submitted a valid FOI as of the 4 September 2023.

On 7 September 2023, you wrote to the department and disputed the date that your request was deemed valid.

On 15 September 2023, the FOI request you had submitted to the office was transferred to the department under s 16(1) of the FOI Act and on 4 October 2023 you were notified of this.

On 16 November 2023, the Office of the Australian Information Commissioner (OAIC) notified the department of your application for IC Review of both of your requests.

On 27 November 2023, the OAIC issued the department with a s 54Z notice and s 55T notice to produce documents in relation to these requests by 18 December 2023.

On 8 December 2023, the department wrote to you to confirm it considered your FOI requests validly received as of 30 August 2023. The department also sought your agreement to withdraw one of your FOI requests given they were identical.

On 14 December 2023, the department sent you a message via your 'Right to know' (RTK) profile, seeking to engage with you. You later advised this was unsuccessful.

On 21 December 2023, the department wrote to you on the RTK request pages and again invited you to withdraw one of your FOI requests given they were identical. The department also acknowledged it was aware the requests were subject to Information Commissioner Reviews and that initial document searches using the terms of your request, had captured 176 documents, totalling over 3500 pages. The department also advised that based on the voluminous nature of the request, it considered processing the requests would be a substantial and unreasonable diversion of resources, known as practical refusal reason. The department also advised that it intended to undertake a formal 'request consultation process' with you to narrow the scope of the request.

On 21 December 2023, the OAIC re-sent the department the s 54Z notice and s 55T notice to produce documents by 23 January 2024.

On 23 December 2023, the department wrote to the OAIC to advise it had been unable to engage with you and sought further advice. Later that day you wrote to the department and confirmed that you declined the department's request to withdraw one of the identical requests and disputed the department's view that practical refusal grounds existed. You also advised that the department's correspondence of 14 December 2023 had not been received.

On 22 January 2024, the department acknowledged your correspondence of 23 December 2023.

On the evening of the 23 January 2024, the department sought an extension of time from the OAIC to finalise the requests. The OAIC agreed to an extension of time to the 6 March 2024.

On 25 January 2024, the department wrote to you seek your agreement to revise the scope of your request to:

1. *Documents about the Commonwealth's involvement, as a party, in the false imprisonment claims made by the applicant in the Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020 case, and*

2. Documents that set out the total cost to the Commonwealth in defending the matter.

On 31 January 2024, you declined the department's suggested scope revision. The department decided not to pursue a practical refusal and to process your request on the original terms.

On 6 March 2024, the department wrote to you to confirm that due to the voluminous nature of your request, the processing of your request was longer than usual timeframes. The department also noted that correspondence for the request will be processed against one 'Right to know' email address moving forward given both requests are identical and that this would assist both the department and the Information Commissioner manage your reviews.

On 7 March 2024, the department updated the OAIc on the progress of your request noting the large number of documents required further processing time. Later that day and on 13 March 2024, you wrote to the department to complain about the time taken to process your request and for engagement with a supervisor in relation to the processing of the request.

On 13 March 2024, the OAIc issued the department with a s 55R notice to produce documents by 27 March 2023.

On 18 March 2024, a supervisor responded to your correspondence of 7 and 13 March 2024. That correspondence advised that it was working to finalise the requests by the 27 March 2024 and noted that the voluminous nature of the request had necessitated extensions of time.

My decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

In tranche 1, I have identified 6 documents that fall within the scope of your request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request
- the content of the documents identified as within scope of your request
- consultation comments provided to me by the Courts and Tribunals Branch, the Office of Legal Services Coordination and the Australian Government Solicitor with the department, and the Department of Finance
- the provisions of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines).

I have decided to refuse access to 2 documents and grant access to 4 documents in full.

Additional information

A high volume of material was captured in initial document searches, using the terms of your request. Further assessment of the documents identified has enabled the department to exclude duplicative material and out of scope material. As outlined above, the department will be finalising this request in a 2 stage process. The department is currently consulting with other Commonwealth agencies including the Federal Court, and undertaking further consultation with the Department of Finance and the Australian

Government Solicitor who have an interest in the material captured within tranche 2. The department will finalise the access decision in relation to tranche 2 by the 15 April 2024.

In accordance with s 55G(2) of the FOI Act, the department will forward a copy of this decision to the OAIC, along with a copy of the documents as required under paragraph 10.100 of the FOI Guidelines.

The schedule of documents at **Attachment A** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The statement of reasons at **Attachment B** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

The documents to which I have decided to grant full or partial access under the FOI Act are at **Attachment C**.

Questions about this decision

If you wish to discuss this decision, please contact the Freedom of Information and Privacy Team that can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely



Alice Linacre
First Assistant Secretary
Courts, Tribunals and Commercial Division

Attachments

Attachment A: Schedule of documents
Attachment B: Statement of reasons
Attachment C: Documents



Attachment A - Schedule of documents - Freedom of Information Request FOI23/463 and FOI23/500

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied
1	30 August 2023	3	Order made by the Federal Court of Australia	Refuse access	Section 46(b): Documents disclosure of which would be contempt of Parliament or contempt of court
2	30 August 2023	5	Summary of Federal Court of Australia's judgment in <i>Stradford (a pseudonym) v Judge Vasta</i> [2023] FCA 1020	Grant access	
3	30 August 2023	225	Federal Court of Australia's reasons for judgment in <i>Stradford (a pseudonym) v Judge Vasta</i> [2023] FCA 1020	Grant access	
4	31 October 2023	2	Order made by the Federal Court of Australia	Grant access	
5	30 August 2022	5	Internal document – handover notes	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contempt of Parliament or contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
6	15 February 2019	28	Full court of then Family Court of Australia decision in <i>Stradford & Stradford</i> [2019] FamCAFC 25.	Grant access	



Attachment B - Statement of reasons - FOI23/463 / FOI23/500

This document, when read in conjunction with the schedule of documents at **Attachment B**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

Section 7 of the FOI Act provides that certain persons, bodies and departments are exempt from the operation of the Act in relation to particular types of documents. Relevantly, under s 7(2), the department is exempt from the operation of the FOI Act in relation to documents in respect of activities undertaken by the Australian Government Solicitor.

I can confirm that particular parts of the documents subject to your request contain information in respect of the activities of the Australian Government Solicitor. I am therefore satisfied that this information is exempt from the operation of the FOI Act, and I have excluded it pursuant to section 7(2).

Section 22: Access to edited copies with exempt or irrelevant matter deleted

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

In deciding to delete material which would reasonably be regarded as irrelevant to a request, the FOI Guidelines issued by the Office of the Australian Information Commissioner (OAIC) (the Guidelines) provide at paragraph 3.95 that:

It is important for agencies to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant

I note that when the department acknowledged your request on 7 September 2023 you were advised that the following information would be regarded as irrelevant to your request:

- personal information of junior officers of the department or other government authorities
- duplicate documents, and
- incomplete email chains within the scope of the FOI request.

Exemptions

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. Documents for your request which are exempt under Division 2 of Part IV relate to:

- documents disclosure of which would be contempt of Parliament or in contempt of court (s 46)

This exemption is not subject to an overriding public interest test. Accordingly, where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Brief information about this exemption is set out below. Additional information about each of these exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions>.

Section 46: Documents disclosure of which would be contempt of Parliament or contempt of court

Section 46 of the FOI Act provides that a document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown:

- (a) *be in contempt of court;*
- (b) *be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath; or*
- (c) *infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.*

I am satisfied that there are real and substantial grounds for expecting disclosure of the relevant material to be in contempt of court.

Accordingly, I am satisfied that this material is exempt from disclosure under s 46 of the FOI Act.

Public interest conditional exemptions

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents for your request which are conditionally exempt under Division 3 relate to the following categories:

- deliberative processes (s 47C), and
- certain operations of agencies (s 47E)

Brief information about each of the conditional exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these conditional exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest are set out under the heading 'Section 11A(5): Public interest test' below.

Section 47C: Public interest conditional exemption - deliberative processes

Section 47C of the FOI Act provides that 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 an agency.

In applying this exemption, paragraph 6.55 of the Guidelines provide that:

The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.

I am satisfied that the relevant material is not purely factual and is deliberative matter within the meaning of s 47C(1), being in the nature of and relating to:

- opinion, advice and recommendations,
- a collection of facts or opinions, including the pattern of facts or opinions considered, and
- interim decisions or deliberations.

The deliberative matter described above was created for the purpose of, and in connection with the creation of an internal handover document.

Accordingly, I am satisfied that this material is conditionally exempt under s 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the heading '*Section 11A(5): Public interest test*'.

Section 47E: Public interest conditional exemption - certain operations of agencies

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:

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I have decided to apply s 47E(d) to the documents for your request. My reasons for applying this exemption has been set out below.

Section 47E(d)

I have decided to apply s 47E(d) to relevant material in document 5 for your request. My reasons for applying this exemption have been set out below.

Material marked s 47E(d) contains information created by the department for operational purposes and contains information provided to it by other Commonwealth agencies. Disclosure of such information could reasonably be expected to have a substantial adverse effect on the working relationship between the department and these other agencies. Disclosure of such information could also reasonably be expected to have a substantial adverse effect on the proper and efficient management of operations of the department.

Accordingly, I am satisfied that this material is conditionally exempt under s 47E(d) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the header '*Section 11A(5): Public interest test*'.

Section 11A(5): Public interest test

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAI provide at paragraph 6.5 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in s 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under s 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.

In particular, I have given weight to the need for frankness, candour and completeness in the advice and commentary contained in the documents. I consider it would be contrary to the public interest to disclose certain material in the documents at this point in time, because it may prejudice the department's relationship with other Commonwealth agencies.