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ATTACHMENT C: STATEMENT OF REASONS – FOI/2324/024

1. This attachment, together with the **Decision Notice** and **Attachment B – Schedule of Documents**, provides 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).
2. **Attachment B – Schedule of Documents** provides a table with the description of documents, the decision relating to each document and a reference to the relevant provision under the FOI Act that has been relied upon to exempt the document from release. My considerations under the relevant provisions column are discussed below.

Deliberative matters of an agency (section 47C)

3. 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
 - a consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of the government, an agency, or a Minister.

4. The Guidelines issued by the Office of the Australian Information Commissioner (the FOI Guidelines) explain at paragraph 6.58 and 6.59 that:

A deliberative process involves the exercise of judgement in developing and making a selection from different options... 'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

5. Paragraph 6.60 of the FOI Guidelines further provide that a deliberative process must relate to the functions of an agency, such as functions under the instrument or Act that establish an agency. For the purposes of the FOI Act, the functions of an agency include:
 - policy-making and the processes undertaken in administering or implementing a policy, and
 - the non-policy decision-making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations.
6. I am satisfied that the documents contain material related to decision-making and deliberative processes that have taken place in the course of the NIAA's functions administering the Indigenous Advancement Strategy (IAS), which is essential to the NIAA's functions to deliver a range of programs for First Nations people.
7. In the Administrative Appeals Tribunal (AAT) decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 ('Wood'), Deputy President Forgie explains that the meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the

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formation of a view either about a certain subject or about a course of action and the subsequent expression of that view.

8. I am satisfied that the documents contain material that would disclose the nature of opinion, advice or recommendations that have been obtained, prepared or recorded in relation to the NIAA's functions administering the IAS.
9. I am satisfied that the exceptions in sections 47C(2) and 47C(3) do not apply, because the material is not purely factual in nature, nor incidental administrative content, nor reports of a scientific or technical nature, nor a final decision record or statement of reasons.
10. Accordingly, I have formed the view that the material is conditionally exempt under section 47C of the FOI Act. As I have found that the relevant material is conditionally exempt, I am required to consider whether it would be contrary to the public interest to grant access to the conditionally exempt material at this time.

Public interest

11. Section 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.
12. Paragraph 6.27 of the FOI Guidelines explains:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.

13. In making my decision, I have considered the factors favouring access set out in section 11B(3) of the FOI Act. I have not taken into account any of the irrelevant factors as set out in section 11B(4) of the FOI Act.
14. I have also had regard to the FOI Guidelines at paragraphs 6.19 and 6.22, which include a non-exhaustive list of public interest factors favouring disclosure and public interest factors that weigh against disclosure.
15. My consideration of the public interest test regarding the application of section 47C of the FOI Act follows:

Factors in favour of disclosure

16. Of the factors favouring disclosure, I consider the release of the conditionally exempt material would promote the general public interest in accessing documents as expressed in sections 3 and 11 of the FOI Act.

Factors against disclosure

17. Of the factors against disclosure, I consider the release of the conditionally exempt material:
 - could reasonably be expected to disclose deliberative matter about a policy development process that has not been finalised, and release could inhibit frank and candid advice from NIAA staff in future, and
 - would not create any tangible benefit to the public.

18. After careful consideration of the relevant public interest factors, I consider the 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.

Operations of an agency (section 47E(d))

19. Section 47E(d) of the FOI Act conditionally exempts documents where disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

20. I am satisfied that parts of the documents contain login information and codes used by Agency personnel for authentication purposes and to ensure only authorised personnel are able to access NIAA communications systems.

21. Maintaining the integrity of the Agency's computer and communications systems is critical to the proper and efficient delivery of the Agency's functions. The release of the login information and codes used to authenticate authorised NIAA personnel would have a substantial adverse effect on the Agency's operations by compromising communications system availability and integrity. Further, release of this information could reasonably be expected to increase the risk of unauthorised access to Agency's computer and communications systems.

22. For the reasons above, I am satisfied that the release of the login information and codes used by authorised staff members to access the Agency's communications, would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the NIAA by compromising the integrity of these systems and increasing the risk of unauthorised access.

Public interest

23. Under the FOI Act, access to conditionally exempt documents must generally be given unless doing so would be contrary to the public interest. In making my decision, I have considered the factors mentioned in paragraphs 11 to 14 of this document.

24. My consideration of the public interest test regarding the application of section 47E(d) of the FOI Act follows:

Factors in favour of disclosure

25. Of the factors favouring disclosure, I consider the release of the conditionally exempt material would promote the general public interest in accessing documents as expressed in sections 3 and 11 of the FOI Act.

Factors against disclosure

26. Of the factors against disclosure, I consider the release of the conditionally exempt material:

- could reasonably be expected to increase the risk of unauthorised access to the Agency's computer and communications systems, and
- would not contribute to a matter of public interest, noting the limited use of login information and codes to the general public.

27. On balance, I have decided that the factors against disclosure outweigh those favouring disclosure and that disclosure of the conditionally exempt material would be contrary to the public interest.

Personal information (section 47F)

28. A document is conditionally exempt under section 47F of the FOI Act if its disclosure would involve the unreasonable disclosure of personal information about any person.

Personal information

29. 'Personal information' is information or an opinion about an identified person or a person who can be easily identified, whether that information or opinion is true or not.

30. Paragraph 6.130 of the FOI Guidelines further provides:

'Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.'

31. I am satisfied that the Documents contain personal information of other people. That is, names and personal contact details (email addresses and phone numbers) of third parties.

32. This is supported by a recent decision of Deputy President Forgie in Chief Executive Officer, Services Australia and Justin Warren [2020] AATA 4557 ('Warren'). In Warren, Deputy President Forgie found at [36], that public servant's details, such as names and contact numbers, were considered personal information for the purposes of the FOI Act.

Where disclosure is 'unreasonable'

33. In determining whether the disclosure of personal information would be unreasonable, I have had regard to the matters under section 47F(2) of the FOI Act, specifically:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be associated with the matters dealt with in the documents
- the availability of the information from publicly accessible sources, and
- any other matters that I consider relevant, specifically, any objections raised by third parties who were consulted on the release of their personal information.

34. Paragraph 6.142 of the FOI Guidelines sets out key factors to consider when determining whether disclosure would be unreasonable, being whether:

- the author of the document is identifiable
- the documents contain third party information
- release of the documents would cause stress on the third party, and
- no public purpose would be achieved through release.

35. I am satisfied that disclosing public servant's personal information would allow them to be identified. This information is not well known and not publicly available. The release of the information would affect the individuals' ability to perform their duties and functions as public servants. I am also satisfied that there is no public purpose served in releasing this information, and to do so would undermine the individuals' right to privacy.

36. Taking into account the factors outlined above under the FOI Act, the FOI Guidelines and the cases of *FG and NAA* and *Re Chandra* and third party submissions, I consider the disclosure of the documents would be an unreasonable disclosure of personal information. For these reasons, I am satisfied that the material is conditionally exempt under section 47F of the FOI Act.

37. As I have found that the relevant material is conditionally exempt, I am required to consider whether it would be contrary to the public interest to grant access to the conditionally exempt material at this time.

Public interest

38. Under the FOI Act, access to conditionally exempt documents must generally be given unless doing so would be contrary to the public interest. In making my decision, I have considered the factors mentioned in paragraphs 11 to 14 of this document.

39. My consideration of the public interest test regarding the application of section 47F of the FOI Act follows:

Factors in favour of disclosure

40. Of the factors favouring disclosure, I consider the release of the conditionally exempt material would promote the general public interest in accessing documents as expressed in sections 3 and 11 of the FOI Act, including by providing access to background information that informed a government decision.

Factors against disclosure

41. Of the factors against disclosure, I consider the release of the conditionally exempt material:

- could reasonably be expected to prejudice the protection of an individual's right to privacy, and
- could reasonably be expected to harm the interests of the persons concerned, specifically, in the performance of their duties as a public servant.

42. On balance, I have decided that the factors against disclosure outweigh those favouring disclosure and that disclosure of the conditionally exempt material would be contrary to the public interest.

Requests involving the use of computers (section 17)

43. Under section 17 of the FOI Act, if an FOI request is made for a document that could be produced by using a computer ordinarily available to the agency for retrieving or collating stored information, an agency is required to deal with the request as if it was a request for written documents to which the FOI Act applies.

44. The FOI Guidelines [at 3.212] explain that an obligation to produce a written record arises if:

- the NIAA could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information... and
- producing a written document would not substantially and unreasonably divert the resources of the NIAA from its other operations.

45. If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

46. Your request sought access to 'phone call history'. NIAA advisers have informed me that a 'phone call history' is not available in a discrete document, but is able to be produced in a written document through use of a computer.
47. I have considered whether it is possible for the NIAA to create a document under section 17 of the FOI Act with respect to this information, and have decided that a document could be produced by computers and is included in the schedule of documents attached.

Irrelevant material (section 22(1))

48. Section 22 of the FOI Act provides that an agency can give access to an edited document, modified by deletions to ensure the edited copy does not disclose any information that would reasonably be regarded as irrelevant to the request for access.
49. I am satisfied that the documents contain information that is irrelevant to your request. Your request states you 'do not seek the name or details of any person in a Ministerial Office below the level of Chief of Staff, or any non-SES officer.
50. On 14 September 2023, you were advised of the NIAA's policy to treat the names and contact information of Commonwealth staff not in the Senior Executive Service (SES), such as APS officers, and direct numbers and signatures or all Commonwealth officers including SES, as irrelevant to a request. I am satisfied that this information is irrelevant and may be redacted from the documents under section 22(1) of the FOI Act.
51. Further, a document which is publicly available have been excluded from the documents released to you. This publicly available document was released as Document 5 under FOI/2324/013 and can be accessed at <https://www.niaa.gov.au/sites/default/files/foi-log/foi-2324-013.pdf>.

Publication (section 11C)

52. Where an applicant is provided access to a document, section 11C of the FOI Act requires the NIAA to publish the document to members of the general public within ten (10) business days of providing the applicant with access to the document.
53. Documents are published on NIAA Disclosure Log at <https://www.niaa.gov.au/foi/agency-foi-disclosure-logs>.