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FOI/NIAA/1920/027

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Tony Williams
(via Right To Know)

DECISION BY: Jeremy Mickle
Branch Manager, Strategic Policy Branch

Dear Mr Williams,

I refer to your email, dated 5 September 2019, to the National Indigenous Australians Agency (the NIAA), in which you made a request under the *Freedom of Information Act 1982* (the FOI Act) for access to the following:

- 1) Any documents held by the National Indigenous Australians Agency regarding communication between the Minister for Indigenous Australians or his Office and the Indigenous Advisory Council;
- 2) Any documents provided by the National Indigenous Australians Agency to the Minister for Indigenous Australians or his office regarding recommendations to replace Ms Andrea Mason as the Chair of the Indigenous Advisory Council;
- 3) Any documents provided by the National Indigenous Australians Agency to the Minister for Indigenous Australians or his Office regarding the future of the Indigenous Advisory Council including any possible meetings; and
- 4) Any documents held by the National Indigenous Australians Agency with advice from the Minister for Indigenous Australians to the Prime Minister about the future of the Indigenous Advisory Council.

The time period for this request is from the Minister's appointment on 29 May 2019 to present (2 September 2019), a period of almost 100 days.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Agency's Chief Executive Officer under section 23 of the FOI Act.

Searches for relevant documents

The Agency has undertaken searches of its relevant electronic and paper records. Five documents have been identified as falling within the scope of your FOI request (the requested documents).

Matters Taken Into Account

In making my decision in this matter I have had regard to the following:

- the terms of your request;
- the content of the requested documents;
- consultation with the Agency's FOI advisers;
- the provisions of the FOI Act; and
- Guidelines made by the Australian Information Commissioner under the FOI Act (the FOI Guidelines).

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Decision

The Prime Minister's Indigenous Advisory Council (IAC) provides advice to the Government on Indigenous affairs, and focuses on practical changes to improve the lives of Aboriginal and Torres Strait Islander people. Members have a strong understanding of Indigenous culture and bring a diversity of expertise in economic development and business acumen, employment, education, youth participation, service delivery and health. The membership includes representation from the private, public and civil society sectors and is drawn from across Australia. The IAC meets regularly with the Prime Minister and relevant senior ministers. The IAC reports annually to the Government on its activities, via letter to the Prime Minister.

The current IAC was formed in 2017, through a decision of Cabinet, and consists of five members (with two positions currently vacant). The Government is currently considering the future direction of the IAC, as well as the makeup of the membership.

The requested documents contain options and recommendations for the future direction of the IAC, as well as assessments of potential members of the IAC, and other similar bodies.

Relevant to the FOI Act, I consider that releasing some of the material in the requested documents to you:

- *[section 47F] would involve the unreasonable disclosure of personal information about individuals; and*
- *[section 47C] would disclose deliberative matter relating to advice or recommendation prepared for the purposes of the deliberative processes involved in the functions of a Minister.*

Accordingly, I have decided to refuse access to one document in part, and four documents in full, as detailed below.

Reasons for decision

Section 47F of the FOI Act - personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person.

Section 47F of the FOI Act further provides that in determining whether the disclosure of personal information would be unreasonable, an agency must have regard to the following matters:

- 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 relevant factors.

The term 'personal information' has the same meaning as it has in the *Privacy Act 1988* – that is, essentially, information or an opinion about an identified person or a person who can be easily identified, whether that information is true or not.

The requested documents contain substantial detail on the professional backgrounds of potential IAC members. These details were compiled and provided by the NIAA for the Prime Minister's consideration. Given the high profile of the persons, such lists are normally used in consideration across multiple appointment processes for portfolio bodies.

The persons discussed in the documents, in many cases, are not aware that they are under consideration. In the event that they are selected for an appointment, they will be approached by the Prime Minister (or relevant Minister or agency) and the position will be negotiated. The person's name is only publicly linked to the position if and when an appointment has been successfully negotiated.

The information in the documents is not well known, the persons described are not known to be related to the IAC, and the information is not publicly available.

If documents 3 and 4 were released, then there would be a number of effects on the persons named in the documents. For persons who are being considered for positions (in this or other appointment processes), prematurely announcing this

consideration will impact on other roles they perform (especially where they may need to relinquish one role to accept another, and they have not yet announced this to the losing body). For persons who are not ultimately considered for positions, this will have a reputational impact, which will diminish their ability to perform other roles they may hold.

I am therefore satisfied that the two of the requested documents are conditionally exempt in full under section 47F of the FOI Act.

Public Interest

Section 11A(5) of the FOI Act provides that a conditionally exempt document must nevertheless be disclosed to the applicant unless its disclosure would, on balance, be contrary to the public interest.

In determining whether disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors in favour of disclosure against the factors against disclosure.

Section 11B(4) of the FOI Act sets out the following factors that the decision-maker must not take into account when deciding whether access to documents would be contrary to the public interest:

- access to the documents could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
- access to the documents could result in any person misinterpreting or misunderstanding the document;
- 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; or
- access to the documents could result in confusion or unnecessary debate.

I have not taken any of the above factors into account in making my decision.

Factors in favour of disclosure

The particular factor in favour of disclosure in this case is that disclosure would promote the objects of the FOI Act.

Factors against disclosure

The factors against disclosure in relation to section 47F of the FOI Act are, in my view, that disclosure:

- would be damaging to the persons concerned;
- would be an unnecessary intrusion into, and breach of, the persons' privacy; and
- would not create any tangible, compensating benefit to the public.

After careful consideration of all relevant factors I have decided that, on balance, the factors against disclosure outweigh those favouring disclosure. Specifically, I am of the view that disclosure of the conditionally exempt information would be contrary to the public interest.

Section 47C of the FOI Act – deliberative processes

Section 47C of the FOI Act provides that:

- (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.*

The FOI Guidelines state that:

6.63 *'Deliberative matter' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words 'opinion, advice or recommendation, consultation or deliberation'.*

6.59 *'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 or a proposal, a particular decision or a course of action.'*

A number of the requested documents contain discussion of possible future options for the composition of the IAC. These options were provided by the NIAA for the Prime Minister's consideration. It is likely that the Prime Minister will bring the appointment to Cabinet for discussion. The Prime Minister has yet to make any announcements on this subject.

I note that the future direction of the IAC is for the Prime Minister to decide, and the NIAA's role in this is to provide advice so that his decision may be well informed.

These documents are not Cabinet documents themselves, but contain information that will be used to inform future Cabinet deliberations. This information is not purely factual in nature, is not operational information, has not been officially disclosed, and is still in the process of being finalised.

That material is, therefore, conditionally exempt under section 47C of the FOI Act.

Public Interest

I have not taken any of the irrelevant factors listed above into account in making my decision.

Factors in favour of disclosure

The particular factors in favour of disclosure in this case is that disclosure would promote the objects of the FOI Act, and would improve public oversight and scrutiny of government decision making.

Factors against disclosure

The FOI Act does not provide for any public interest factors weighing against disclosure that decision makers may consider. However, in determining whether disclosure would be contrary to the public interest, I have had regard to the FOI Guidelines.

On the subject of documents relating to Cabinet discussions, which are themselves not Cabinet documents, the FOI Guidelines state:

6.86 *In some cases, a document may contain deliberative matter that relates to Cabinet in some way but is not exempt under the Cabinet exemption in s 34. An example would be a document containing deliberative matter that is marked 'Cabinet-in-Confidence' but nonetheless does not satisfy any of the exemption criteria in s 34. Disclosing a document of this kind would not necessarily be contrary to the public interest only because of the connection to Cabinet deliberations. For example, disclosure is less likely to be contrary to the public interest if:*

- *the document contains deliberative but otherwise non-sensitive matter about a policy development process that has been finalised, and*
- *the Government has announced its decision on the issue.*

6.87 *Even if Government has not announced a decision on the issue, disclosure of such a document is less likely to be contrary to the public interest if it is public knowledge that the Government considered or is considering the issue. The key public interest consideration in both situations is to assess whether disclosure would inhibit the Government's future deliberation of the issue.*

6.88 *Examples of non-sensitive matter in this context include information that is no longer current or that is already in the public domain, or information that provides a professional, objective analysis of potential options without favouring one over the other.*

As stated above, I am satisfied that the material in the document contains deliberative matter, and that it is inextricably linked to details of future Cabinet deliberations that have not been made public.

I am further satisfied that the material in the document is not captured by any of the categories mentioned in the FOI Guidelines that might exclude it from such considerations.

The function and future of the IAC is a topic that is of great interest to many people, in particular the members of the IAC. While the process is still underway, I consider that premature release of this advice will cause uncertainty and anxiety for these people, in particular the members of the IAC.

In this context, I would consider that such uncertainty and anxiety would cause damage to the relationships between the members of the IAC and the NIAA, and the Government. This would further impact on the willingness of the members of the IAC to contribute to the work of the NIAA, and the Government, both with the IAC and with other bodies in the future. This would have the effect of diminishing the advice provided to the NIAA and to the Government, and the effectiveness of the relevant programs administered by the NIAA on behalf of the Government.

Additionally, I consider that:

- the issues under discussion are of public interest and importance;
- it is important for the Prime Minister to be able to decide the future of the IAC in a way that is both informed by advice from the NIAA, and without interference;
- premature release of this advice would damage the relationships between the members of the IAC, and the NIAA, and the Government;
- this harm would translate into a diminished capability for both the NIAA and the IAC; and
- this would not create any tangible, compensating benefit to the public.

I believe that there is a strong public interest in the ability of the Cabinet to have frank and open discussions around issues of national importance, and for responsible agencies to be able to discuss ways to implement Cabinet decisions openly and without fear of intrusion.

I also believe that there is a strong public interest in respecting the relationships between potential board appointees and the Government in order for the boards to maintain the strongest membership.

After consideration of all relevant factors I have decided that, on balance, the factors against disclosure outweigh those favouring disclosure. Specifically, I am of the view that disclosure of the conditionally exempt information would be contrary to the public interest.

Irrelevant material

Where the giving of access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access, section 22(1) of the FOI Act provides that it is possible for an agency to prepare an edited copy of the document, modified by deletions.

Document 1 contains information relating to an issue that is not relevant to the terms of your FOI request.

Further, you were advised by email on 10 September 2019 that the NIAA would delete certain material from the documents unless you were specifically seeking access to this material. You did not provide such advice, so the name of a staff member below the Senior Executive Service, as well as staff phone numbers, have been deleted from Document 1 as irrelevant.

Processing and access charges

I have decided not to impose charges for this FOI request.

Review rights

If you disagree with your FOI decision, you can ask for the decision to be reviewed. There are two ways you can ask for review of a decision: internal review by the NIAA; and external review by the OAIC.

Internal Review

You can ask the NIAA to review its decision in relation to access to documents. There is no charge for internal review. You must apply within 30 days of being notified of the decision, and the NIAA must make a review decision within 30 days. The review will be carried out by a different officer, at a more senior level.

You must apply in writing and you can lodge your application in the same way that you made your original FOI request.

Information Commissioner Review

The OAIC is an independent office that can review the decisions of agencies under the FOI Act.

You can ask the OAIC to review the NIAA's decision. You do not need to seek an internal review from the NIAA before seeking a review from the OAIC; however, going through the NIAA's internal review process gives us the opportunity to reconsider the initial decision and your needs may be met more quickly without undergoing an external review process.

The OAIC review process is free. You must apply to the OAIC within 60 days of being given notice of the decision. You must apply in writing, and further details are available on the OAIC website: www.oaic.gov.au

If you cannot access these websites, please contact the FOI Coordinator (contact details at the end of this notice), and further details will be provided to you.

Complaint rights

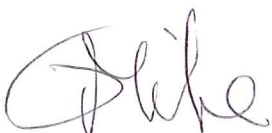
You may make a complaint to the Information Commissioner about the NIAA's actions in relation to this decision. Making a complaint about the way the NIAA has handled an FOI request is a separate process to seeking review of the NIAA's decision.

A complaint to the Information Commissioner must be in writing and identify the agency in respect of which the complaint is made. The Office of the Australian Information Commissioner (OAIC) may be contacted by phone (1300 363 992), email (enquiries@oaic.gov.au) or by letter (GPO Box 2999, Canberra ACT 2601).

Further information about the OAIC can be found on their website: www.oaic.gov.au.

Contact details

If you have any questions about this decision, or the FOI process, please contact the NIAA's FOI Coordinator at foi@niaa.gov.au.



Jeremy Mickle
Branch Manager
Strategic Policy Branch

2 October 2019