



## Australian Government

### Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT  
BARTON

FOI/2019/303

#### *FREEDOM OF INFORMATION ACT 1982*

**REQUEST BY:** Mr James Pritchard

**DECISION BY:** Eleanor Browne  
A/g Assistant Secretary  
Social Services, Human Services and Veterans' Affairs  
Branch

**By email:** [foi+request-5709-1a25b39f@righttoknow.org.au](mailto:foi+request-5709-1a25b39f@righttoknow.org.au)

Dear Mr Pritchard

I refer to your email, dated 15 October 2019, in which you made a request to the Department of the Prime Minister and Cabinet (the **Department**) under the *Freedom of Information Act 1982* (the **FOI Act**) in the following terms:

*I request under Freedom Of Information all documents held by this office relating to the PM's speech on 22 Oct 2018 otherwise known as the National apology to Australian survivors and victims of child sexual abuse.*

*This would be expected to include any and all communications relating to the conception of this speech including drafts, amendments, suggestions and feedback.*

*Specifically this request would be expected to include the lasted draft of this speech as of Friday 19 Oct 2018.*

#### **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.

#### **Searches for relevant documents**

The Department has located 18 documents within the scope of your request (the **requested documents**).

## Decision

I have decided to refuse access, in full, to the requested documents, on the basis that:

- the requested documents information that is conditionally exempt under section 47C (deliberative material) of the FOI Act, and its disclosure would be contrary to the public interest; and
- part of Document 15 contains information that is exempt under section 42 (legally privileged information) of the FOI Act.

Further information is set out in the Schedule at **Attachment A** to this decision.

In making this decision, I have had regard to the following material:

- the FOI request;
- the documents relevant to the FOI request;
- the FOI Act; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **FOI Guidelines**).

### ***Section 47C of the FOI Act – deliberative material***

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.

Paragraph 6.59 of the FOI Guidelines provides that:

“‘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.”

I am satisfied that the requested documents meet the definition of “deliberative matter”. Accordingly, I am satisfied that the requested documents are conditionally exempt under section 47C of the FOI Act.

### **Public Interest Test**

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 the document would be contrary to the public interest:

- 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; or
- d) access to the document 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 factors in favour of disclosure in this case are, in my view that disclosure would:

- a) promote the objects of the FOI Act; and
- b) 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. The FOI Guidelines contain a non-exhaustive list of factors that may, depending on the circumstances of the case, may be against disclosure.

In *Crowe and Department of the Treasury* [2013] AICmr 69 (**Crowe**), the Australian Information Commissioner held that disclosure of the deliberative parts of a draft document (in that case, an incoming government brief prepared for a party that did not form government) would be contrary to the public interest, on the basis that:

*The confidentiality of the discussions and briefing provided to the new Minister are essential at that early stage in developing a relationship that accords with the conventions of responsible parliamentary government...*

*An incoming brief that is not confidential may include only bland material that will not raise concern, and possibly be of less value to a new government. An associated risk is that the brief will not be comprehensive and will be replaced by oral briefings to the new Minister.*

I consider that the underlying principles in *Crowe* are also applicable in this current matter. The main factor against disclosure in this case is that disclosure of the requested documents would inhibit the ability of the Department to effectively serve and support the Prime Minister in the discharge of his duties and responsibilities, such as the delivery of important public speeches, as



Departmental officers may be inhibited in providing frank and comprehensive advice and material to the Prime Minister's Office, due to the risk of disclosure.

In addition, the specific subject matter of the requested documents necessitate a sensitive and confidential approach in the treatment of their contents, which by their very nature as deliberations and draft versions, were never intended for publication or dissemination outside a very small group of officers within the Department. There is a risk that their disclosure may result in unnecessary hurt and pain for particular groups of people, which is an outcome that would be contrary to the public interest.

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

### ***Section 42 of the FOI Act - legal professional privilege***

Section 42(1) of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The FOI Guidelines at paragraph 5.127 provide that to determine the application of the exemption, the decision maker needs to turn to the common law concepts of legal professional privilege. The FOI Guidelines at paragraph 5.129 provide that at common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.

I am satisfied that part of Document 15 meets the common law requirements for establishing a claim of legal professional privilege and is therefore exempt under section 42 of the FOI Act.

### ***Application of other exemptions***

In addition to sections 47C and 42 of the FOI Act, I am also satisfied that the requested documents also give rise to the application of other exemption provisions in the FOI Act, such as section 47E(d) (operations of an agency) and section 47F (personal information) of the FOI Act.

However, as I am satisfied that the requested documents are exempt under sections 47C and 42 of the FOI Act, as applicable, I have not detailed the application of these other provisions exhaustively, for the purposes of this decision.

### ***Deletion of exempt or irrelevant information (section 22 of the FOI Act)***

Section 22 of the FOI Act provides that exempt or irrelevant information may be deleted from a copy of a document, and access granted to such an amended copy where it is reasonably practicable to do so, unless it is apparent that the applicant would not wish to have access to such a copy.

In accordance with section 22 of the FOI Act, I have removed the parts of the requested documents that contain irrelevant information that is outside the scope of your request. I have also excluded duplicate information in the requested documents (such as duplicate email trails), wherever relevant, to facilitate the processing of your request.

Further, in accordance with the Department's policy as advised to you on 6 November 2019, I find that the following information in the requested documents, where ever it occurs, is irrelevant to the FOI request:

- any person's signature;
- the names and contact details of Australian Public Service officers not in the Senior Executive Service (SES);
- mobile or direct numbers of SES officers; and
- the names and contact details of Ministerial staff at a level below Chief of Staff.

In accordance with section 22 of the FOI Act, I have also excluded the parts of the requested documents that contain the above details, where relevant.

### **Processing and access charges**

I have decided not to impose charges for the processing of your request.

### **Review rights**

Information about your rights of review under the FOI Act is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaint rights**

You may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/foi-complaints>.



Eleanor Browne  
A/g Assistant Secretary  
Social Services, Human Services and Veterans' Affairs Branch  
16 December 2019



## FOI REQUEST: FOI/2019/303

### SCHEDULE OF DOCUMENTS

01

| Document | Description | Decision                          |
|----------|-------------|-----------------------------------|
| 1        | Email       | Exempt in full under s47C         |
| 2        | Email       | Exempt in full under s47C         |
| 3        | Email       | Exempt in full under s47C         |
| 4        | Email       | Exempt in full under s47C         |
| 5        | Email       | Exempt in full under s47C         |
| 6        | Email       | Exempt in full under s47C         |
| 7        | Email       | Exempt in full under s47C         |
| 8        | Email       | Exempt in full under s47C         |
| 9        | Email       | Exempt in full under s47C         |
| 10       | Email       | Exempt in full under s47C         |
| 11       | Email       | Exempt in full under s47C         |
| 12       | Email       | Exempt in full under s47C         |
| 13       | Email       | Exempt in full under s47C         |
| 14       | Email       | Exempt in full under s47C         |
| 15       | Email       | Exempt in full under s42 and s47C |
| 16       | Email       | Exempt in full under s47C         |
| 17       | Email       | Exempt in full under s47C         |
| 18       | Email       | Exempt in full under s47C         |
| 19       | Minute      | Exempt in full under s47C         |