



OFFICIAL

## Freedom of Information (FOI) request

### Notice of Decision

Reference: FOI-2023-025

To BE

Email: [foi+request-9808-6981a33d@righttoknow.org.au](mailto:foi+request-9808-6981a33d@righttoknow.org.au)

Dear BE

I refer to your request to the Department of the Prime Minister and Cabinet (the Department) under the *Freedom of Information Act 1982* (the FOI Act) received on 20 January 2023.

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

### Scope of request

You set out your request in the following terms:

*I seek access to documents held by the Department of Prime Minister and Cabinet that relate to the charging, or potential charging, of fees by the Prime Minister's office to FOI applicants. I am willing to limit my search to documents from 1 December until today.*

*I am seeking access to any general advice as well as communication and advice in relation to individual FOIs (including FOIs I have submitted as well as those which have been the subject of public reporting). Where the communication or advice relates to an individual FOI matter, information which would identify the applicant is irrelevant to my request.*

*Personal information of PMC employees below the SES level can be treated as irrelevant information.*

On 23 January 2023 you clarified that your request is for:

*Any general advice as well as communication and advice in relation to individual FOIs (including FOIs I have submitted as well as those which have been the subject of public reporting) - is limited to advice and communication from PMC to PMO in relation to the charging or potential*

*charging of fees to FOI applicants. This relates to general advice about charging of fees as well as advice about the charging of fees in a particular FOI or categories of FOI.*

On 16 February 2023 you agreed to exclude duplicate copies of the same document from your request.

## 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.

## Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- the FOI Act
- the Guidelines issued by the Information Commissioner<sup>1</sup> (the FOI Guidelines)

## Documents in scope of request

The Department has identified 19 documents that fall within the scope of your request.

These documents are set out in the Schedule of Documents at **Attachment A**.

## Decision

I have decided to grant access in part, with exempt and irrelevant material deleted, on the basis that the documents contain information exempt under:

- section 42 (legal professional privilege);
- section 47C (deliberative material); and
- section 47E (operations of the agency).

## Reason for decision

My findings of fact and reasons for deciding that certain information is exempt or irrelevant is set out below.

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<sup>1</sup> s 93A of the FOI Act

## 1. Section 42 – Legal professional privilege

Section 42 of the FOI Act provides:

- 1) *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 discuss the need to consider common law concepts of legal professional privilege<sup>2</sup>, including:

- *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.*

The document contains information of such a nature that it is legal advice, and I am satisfied that this information meets the common law requirements for establishing a claim of legal professional privilege.

I am satisfied that part of the document is exempt under section 42(1) of the FOI Act.

## 2. Section 47C – Public interest exemption - Deliberative processes

Section 47C of the FOI Act provides:

- 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.*

When considering what records would be deliberative material, I have had regard to the discussion in the FOI Guidelines, in particular paragraphs 6.58-6.63:

*A deliberative process involves the exercise of judgement in developing and making a selection from different options:*

*The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking*

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<sup>2</sup> 5.126 to 5.129 of the FOI Guidelines

*processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*

*'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.*

*A deliberative process may include the recording or exchange of:*

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *Interim decisions or deliberations*

...

*'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'.*

Section 47C(2) of the FOI Act provides that deliberative matter does not include purely factual material. On this point, at paragraph 6.73, the FOI Guidelines state:

*'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.'*

The Department provides administrative support and general advice to the Prime Minister's Office for the processing of their Freedom of Information (FOI) requests. The nature of the requested information is in the form of draft notices, review of preliminary estimates and advice prepared by the Department, upon instruction from the Prime Minister's Office. I am satisfied that the material within the documents constitute advice on the application of the FOI Act and that these documents contain information that meet the definition of 'deliberative matter'.

I am also satisfied that where these documents contain factual material, the factual material is an integral part of the deliberative content and purpose of the documents, or it is embedded in, or intertwined with, the deliberative content, such that it is impractical to excise it. I therefore find that the deliberative matter contained within the documents does not consist of 'purely factual material'.

Accordingly, I am satisfied that identified portions of the requested documents are conditionally exempt under section 47C(1) of the FOI Act as disclosure would release deliberative matter.

### 3. Section 47E – Public interest exemption - Certain operations of agencies

Section 47E(d) of the FOI Act provides:

- 1) *A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to...*
  - (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

Paragraphs 6.101 and 6.103 of the FOI Guidelines state:

*For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur. The term 'could reasonably be expected' is explained in greater detail in Part 5. There must be more than merely an assumption or allegation that damage may occur if the document were to be released.*

*An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect should be identified during the decision making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt material.*

The role of the Department is to support the Prime Minister and the Cabinet by providing informed advice, to assist in the design, and delivery of key Government policies, strategies and services.

The material in parts of the documents comprises communications between the Department and the Prime Minister's Office regarding general advice on the application of the FOI Act.

I am satisfied that disclosure of the documents would or, could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department by discouraging advisors from sharing frank and candid communications with the Prime Minister's Office.

Accordingly, I am satisfied that these parts of the documents are conditionally exempt under section 47E(d) of the FOI Act.

I have considered public interest factors below.

#### 4. Public interest

The FOI Act provides that a conditionally exempt document must nevertheless be disclosed unless its disclosure would, on balance, be contrary to the public interest<sup>3</sup>. In determining whether its disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors.

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<sup>3</sup> s 11A(5) of the FOI Act

As I have decided that material is conditionally exempt, I am now required to consider the public interest factors. In doing so I have not taken into account the irrelevant factors as set out in subsection 11B(4) of the FOI Act.

In applying the public interest test I have noted the objects of the FOI Act<sup>4</sup> and the factors favouring access as listed in subsection 11B(3) of the FOI Act. Having regard to the material before me and the circumstances of the content within the documents found to be conditionally exempt I am satisfied of the following:

- access would promote the objects of the FOI Act<sup>5</sup>
- the conditionally exempt part of the documents may have the character of public importance and may be of interest to the public
- the release of the conditionally exempt information within the documents does not offer any insights into public expenditure
- I am satisfied that your personal information is not contained within the conditionally exempt documents and therefore paragraph 11B(3)(d) is not a relevant factor to favour access

The FOI Act does not set out any public interest factors against disclosure and require that agencies are to have regard to the Guidelines in order to work out if disclosure would, on balance, be contrary to the public interest<sup>6</sup>. The Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the documents found to be conditionally exempt, may weigh against disclosure.

The main factors against disclosure in this case is that disclosure of the conditionally exempt information would inhibit the ability of the Department to effectively support the Prime Minister in the discharge of duties, as officers may be inhibited in providing forthright and comprehensive advice to the Prime Minister, due to the risk of disclosure, thereby reducing the quality, clarity or frankness of advice.

Accordingly, I am satisfied the public interest factors against disclose outweigh the factors for disclosure and that the disclosure of the conditionally exempt material would be contrary to the public interest.

For these reasons, I have decided the material identified above is exempt under subsections 47C and 47E(d) of the FOI Act.

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<sup>4</sup> s 3 of the FOI Act

<sup>5</sup> s 11B(3)(a) of the FOI Act

<sup>6</sup> s 11B(5) of the FOI Act

## 5. Deletion of irrelevant matter

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would be reasonably regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonable be regarded as irrelevant to the request.

Parts of the documents contain information which consists of headers which have automatically been added to the documents when they were extracted from the Department's system, but which did not form part of the document as it existed at the date of your request. I consider this information to be irrelevant to your FOI request.

On 30 January 2023 the Department advised you of its policy to exclude the personal and direct contact details of officers not in the Senior Executive Service (SES) and any Ministerial staff below chief of staff, as well as any person's signature, and the mobile or direct numbers of SES officers, which are contained in documents that fall within the terms of an FOI request. This category of information is identified as irrelevant and documents can be modified by the Department to delete the irrelevant material.

Further, parts of the documents contain material falling outside the date range of your request or does not comprise of communication and advice from the Department to the Prime Minister's Office in relation to the charging, or potential charging, of fees to FOI applicants. I also note that you have excluded correspondence between the Department and FOI applicants and information which would identify an FOI applicant as irrelevant to your request. I consider these parts to be irrelevant to the scope of your request.

Accordingly I am satisfied that parts of the document are irrelevant under section 22(1)(a)(ii) of the FOI Act. The remainder of the document has been released to you as it is relevant to your request.

## Review rights

If you disagree with my decision, you may apply for internal review or Information Commissioner review of the decision.

### Internal review

Under section 54 of the FOI Act, you may apply in writing to the Department for an internal review of my decision. The internal review application must be made within 30 days after the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days from the date it is received.

Applications for review should be sent to [foi@pmc.gov.au](mailto:foi@pmc.gov.au).

## Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days after the date of this letter.

More information about Information Commissioner review is available [here](#).<sup>7</sup>

## FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. More information about complaints is available [here](#).<sup>8</sup>

If you wish to discuss any aspect of your requests, you can contact the FOI Section by email at [foi@pmc.gov.au](mailto:foi@pmc.gov.au).

Yours sincerely



Branko Ananijevski  
Acting Assistant Secretary  
Legal Policy Branch  
Department of the Prime Minister and Cabinet

14 March 2023

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<sup>7</sup> <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review>

<sup>8</sup> <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>