



OFFICIAL

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2023/034

To: FOI Applicant

Email: <mailto:foi+request-9887-105d0e2c@righttoknow.org.au>

Dear FOI Applicant

I refer to your email of 2 February 2023 to the Department of the Prime Minister and Cabinet (the Department) requesting access to documents under the *Freedom of Information Act 1982* (the FOI Act).

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 am seeking all correspondence between the Department of the Prime Minister and Cabinet, the Prime Minister or his office and the Chief Minister of the Northern Territory, the Chief Minister's office or the Department of the Chief Minister and Cabinet which references 'Alice Springs', 'Marion Scrymgour' or 'Dorelle Anderson'.

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 provisions of the FOI Act

- the FOI Guidelines issued by the Information Commissioner¹ (the Guidelines)

Decision

The Department identified four documents falling in scope of your request. These documents are set out in the Schedule of Documents at **Attachment A**.

I have decided to grant access in part, with exempt material redacted under section 47B(b) and 47C(1) of the FOI Act. Material that is not relevant to the scope of your request has been removed under section 22(1)(a)(ii) of the FOI Act.

Reason for decision

My findings of fact and reasons for exemptions are set out below.

Section 47B – Public interest conditional exemption - Commonwealth-State relations

Section 47B(a) provides that a documents is conditionally exempt if disclosure under the FOI Act would, or could reasonably be expected to, divulge information or matter communicated in confidence by a State to the Commonwealth.

Section 47B(b) provides that a document is conditionally exempt if disclosure under the FOI Act would divulge information communicated in confidence by or on behalf of the Government or an authority of a State, to the Government or an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth.

Section 4(1) of the FOI Act provides that State includes the Australian Capital Territory and the Northern Territory.

These exemptions have been applied to documents 1 and 3 which are confidential communication between officers of the NT Government and the Commonwealth on matters under consideration and subject to further discussion between governments.

Section 47C – Public interest conditional exemption - deliberative processes

Section 47C(1) 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 (a) an agency or (c) the Government of the Commonwealth:

The FOI Guidelines note at paragraphs 6.58-6.63 that 'deliberative processes' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking

¹ s 93A of the FOI Act

processes, and 'deliberative matter' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document.

While section 47C(2) of the FOI Act provides that deliberative matter does not include purely factual material, paragraph 6.73, the FOI Guidelines state that '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.

Findings on application of section 47C of the FOI Act

This exemption has been applied to document 3 that contains draft document provided to the Commonwealth for consideration and is subject to further consultation between the governments. I am satisfied that it contains information that meets the definition of 'deliberative matter'.

I am also satisfied that to the extent to which the document contains factual material, the factual material is an integral part of the deliberative content and purpose of the documents, or 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'.

In addition, I am satisfied that none of the exceptions in subsection 47C(3) apply to the deliberative matter².

Public Interest Test

Section 11A(5) of the FOI Act provides that a conditionally exempt document must nevertheless be released to an FOI applicant unless its disclosure would, on balance, be contrary to the public interest. Having found that the requested documents contain material that is conditionally exempt under section 47B and 47C of the FOI Act, I am now required to apply the public interest test in section 11B of the FOI Act to that material.

Irrelevant factors

Section 11B(4) of the FOI Act sets out four factors that FOI decision makers must not take into account when deciding whether access to a document would be contrary to the public interest:

- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made; or

² See Para 6.75 of the Guidelines at www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions#documents-subject-to-deliberative-processes-s-47c

- 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 favouring disclosure

Section 11B(3) of the FOI Act sets out four public interest factors favouring access which must be considered if relevant. Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- promote the objects of this Act (including all the matters set out in sections 3 and 3A)
- inform debate on a matter of public importance
- promote effective oversight of public expenditure, and
- allow a person to access his or her own personal information.

Having considered these factors and the exempt material in the requested documents, I am satisfied that while disclosure may promote the objects of the FOI Act and inform debate on a matter of public importance, there are more significant factors against disclosure as set out below

Factors against disclosure

The FOI Act does not provide a prescribed set of factors weighing against disclosure for decision makers to consider. However, the FOI Act requires decision makers to have regard to the FOI Guidelines which contain, at paragraph 6.22, a non-exhaustive list of public interest factors that may, depending on the circumstances, operate against disclosure in this instance.

In this instance I consider disclosure could:

- reasonably be expected to inhibit departmental officers in the recording, or exchanging of future opinions, advice and recommendations, which feeds into advice to the Prime Minister and other stakeholders
- divulge information or matter created for the purpose of briefing Federal Cabinet and communicated in confidence on behalf of the Northern Territory Government to the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth, and constitute a breach of confidence between the governments
- substantially impact a Commonwealth-State program by interrupting or creating difficulty in discussions underway regarding the development of joint or parallel policy
- impair or prejudice the flow of information between states and Commonwealth by adversely affect the continued level of trust or cooperation in existing inter-office relationships.

After careful consideration of all relevant factors I am satisfied that these factors against release outweigh the factors for disclosure, and that the public interest would not be served in this instance by the release of deliberative material that would reveal confidential discussions between governments on matters that have not yet concluded.

I have, therefore, decided to refuse access to the documents under sections 47B and 47C of the FOI Act as set out in the attached document schedule.

Deletion of irrelevant material

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be 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 be reasonably regarded as irrelevant to the request.

On 3 February 2023, the Department advised you of its policy to exclude any person's signature, the names and contact details of officers not in the Senior Executive Service (SES), and the mobile or direct numbers of SES officers where these details are contained in documents that fall within the scope 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.

Accordingly, I am satisfied that the requested documents contain some irrelevant information under section 22(1)(a)(ii) of the FOI Act. In addition, I am satisfied that it is possible to prepare a copy of these documents with exempt and irrelevant material deleted, and that you would wish to be provided with such a copy.

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, please attach reasons why you believe review of the decision is necessary. Applications for review should be sent to 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](#)³ is available on the Office of the Australian Information Commissioner's website.

³ www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/

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. We may be able to rectify the problem. 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 [complaints⁴](#) is available on the Office of the Australian Information Commissioner's website.

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

Yours sincerely



Richard Aitken
Acting Assistant Secretary
First Nations Policy - Social & Economic
Social Policy Division
Department of the Prime Minister and Cabinet
6 April 2023

⁴ www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/