



OFFICIAL

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2023/366

To Mr Alex Pentland

By email: foi+request-10910-d49170e6@righttoknow.org.au

Dear Mr Pentland

I refer to your request received by the Department of the Prime Minister and Cabinet (the Department), under the *Freedom of Information Act 1982* (Cth) (the FOI Act), received on 11 December 2023, on transfer from the Attorney-General's Department.

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 FOI request in the following terms:

I seek access to the briefs and talking points provided to the Attorney General for a press conference on Monday 13 November 2023.

On 11 December 2023 you clarified to the Attorney-General's Department that your request relates to the government's response to the Robodebt Royal Commission.

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, as clarified
- the documents relevant to your request
- the FOI Act

- the Guidelines issued by the Information Commissioner (the FOI Guidelines)¹

Documents in scope of request

The Department has identified 3 documents that fall within the scope of your request, as follows:

- Email briefing dated 8 November 2023, attaching
 - o draft talking points for Ministers, and
 - o draft whole-of-Government talking points

Request decided out of time

A decision on your request was due on 8 February 2024. Unfortunately the Department was unable to complete the processing of your request by the due date. In these circumstances the Department follows the advice in the Information Commissioner Guidelines at paragraph 3.163.

As a result review rights for your request can be direct to the Information Commissioner, information on how to submit a review is at the bottom of this letter.

Decision

I have decided to grant access in full to 2 documents, being draft talking points.

I have decided to grant access, in part, to 1 document on grounds that some material is conditionally exempt under section 47C (deliberative material) and section 47E(d) (certain operations of agencies) of the FOI Act.

Material found to be irrelevant has also been removed from the documents pursuant to section 22(1)(a)(i) of the FOI Act. This includes attachments to the email, which are not within the terms of your request.

Reason for decision

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

1. Section 47C – Deliberative process

Subsection 47C(1) of the FOI Act provides (extract):

A document is conditionally exempt if its disclosure under this Act would disclose 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.

¹ Section 93A of the FOI Act

Paragraph 6.58 of the FOI Guidelines provide that a deliberative process involves the exercise of judgement in developing and making a selection from different options.

Subsection 47C(2) of the FOI Act provides that deliberative matter does not include operational information or 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.'

Part of Document 1 contains advice, opinion or recommendations made by the Department to relevant Ministers, to support their deliberations and seek approval of key decisions related to the finalisation of the Government's response.

I am satisfied that this constitutes a 'deliberative process' that relates to the functions of the Department. I am satisfied that where the 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 parts of Document 1 are conditionally exempt under section 47C(1) of the FOI Act as disclosure would release deliberative matter.

2. Section 47E(d) – Documents affecting the certain operations of agencies

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

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 5.15-5.18 of the FOI Guidelines explain that the term 'reasonably be expected' means that the predicted effect needs to be reasonably expected to happen, and that the effect is identified during the decision making process.

I have determined that disclosure of certain material within Document 1 would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct on the operations of an agency. It is a primary function of the Department to consider, support and provide other Commonwealth agencies and the Prime Minister with effective and timely advice.

Document 1 includes material that, if disclosed, could reasonably be expected to inhibit the provision of operational information from other agencies, which would adversely impact the ability of the Department to engage effectively on cross-portfolio issues, to make deliberative assessment, and to engage on key priorities of Government and on matters of importance.

I have determined that disclosure of the identified material would, or could reasonably be expected to inhibit the Department's ability to carry out its functions, including its ability to obtain confidential, and/or sensitive information necessary to support the preparation of timely, accurate briefing, and its ability to make deliberative assessments and engage on issues of importance to support effective decision-making.

Accordingly, I am satisfied that parts of Documents 1 are conditionally exempt under section 47E(d) of the FOI Act.

Having found parts of the documents to be conditionally exempt, I am required to apply the public interest test as set out in section 11B of the FOI Act. The public interest exemption factors are discussed below.

3. 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.² 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.

As I have decided that parts of the requested documents are 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, I have noted the objects of the FOI Act³ 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 documents found to be conditionally exempt I am satisfied of the following:

- access would promote the objects of the FOI Act⁴;
- access may inform debate on a matter of public importance;
- access will not directly promote effective oversight of public expenditure; and
- 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 FOI Guidelines in order to work out if disclosure would, on balance, be contrary to the public interest.⁵ The FOI 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.

² Subsection 11A(5) of the FOI Act

³ Section 3 of the FOI Act

⁴ Paragraph 11B(3)(a) of the FOI Act

⁵ Subsection 11B(5) of the FOI Act

I consider that the following factors operate against disclosure:

- disclosure would, or could reasonably be expected to prejudice the provision of advice, recommendations, or opinions on matters of public importance
- disclosure would, or could reasonably be expected to impair or prejudice the flow of information to relevant Ministers by adversely affecting the continued level of trust or cooperation in existing inter-office relationships,

I have also considered the publication of the Government's response to the final report of the Robodebt Royal Commission, and factors relevant to the sealed chapter of that report. Accordingly, I am satisfied the public interest factors against disclosure outweigh the factors for disclosure and that the disclosure of the conditionally exempt material would be contrary to the public interest.

4. Section 22 – Deletion of irrelevant material

Section 22 of the FOI Act provides that the Department may prepare an edited copy of documents to remove information reasonably regarded as exempt from the operation of the FOI Act.

On 14 December 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, 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 I am satisfied that those parts of the requested documents may be deleted under section 22(1)(a)(ii) of the FOI Act.

Further, I have determined that attachments to the briefing email of 8 November 2023, which are not talking points, fall outside of the terms of your request. These documents have been identified as irrelevant and I am satisfied they may be deleted under section 22(1)(a)(ii) of the FOI Act.

The remaining parts of the documents are treated as relevant to your request, and released to you subject to relevant exemptions.

Review rights

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

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](#).⁶

⁶ <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/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. 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](#).⁷

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,



Branko Ananijevski

A/g Assistant Secretary

Legal Policy Branch

Department of the Prime Minister and Cabinet

19 April 2024

⁷ <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints/make-an-foi-complaint>