



Australian Government
Attorney-General's Department

Our ref: FOI23/417; CM23/16592

11 September 2024

Thomas

By email: foi+request-10542-db0d67c1@righttoknow.org.au

Dear Thomas

Freedom of Information Request FOI23/417 – Decision letter

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

Your request

On 9 August 2023, you requested access to:

Any email correspondence from January 2017 to July 2017 between the Attorney-General's Department and the Indigenous Affairs Group within PM&C (or whatever the relevant predecessor to the NIAA was called at that time), which attaches the Uluru Statement from the Heart (or draft versions of it).

In particular I would like to request access to any versions of the Uluru Statement that are longer than one page, or which contain the extracts of the Uluru Statement from the Heart set out in pages 16-32 of the Referendum Council Final Report, available online at the following address:

https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf

On 4 September 2023, the department wrote to you seeking your agreement to a 14 day extension under s 15AA of the FOI Act. You declined the extension request.

On 13 September 2023, the department wrote to the Office of the Australian Information Commissioner (OAIC) seeking a 30 day extension under s 15AC of the FOI Act.

On 9 October 2023, the OAIC agreed to a 30 day extension.

On 1 December 2023, the department wrote to you seeking to clarify the scope of your request.

On 24 May 2024, you wrote to the department advising the following:

'The scope of the request is for email correspondence from January 2017 to July 2017 between the Attorney-General's Department and the Indigenous Affairs Group within PM&C (or whatever the relevant predecessor to the NIAA was called at that time), and which attached the Uluru Statement from the Heart or draft versions of it.

I specified that as part of that request I would like to request access to any versions of the Uluru Statement that are longer than one page, or which contained extracts of the Uluru Statement from the Heart set out in pages 16-32 of the Referendum Council Final Report. This would mean that if an email within scope attached a version of the Uluru Statement from the Heart, then that copy of the Statement should be released (as well as the covering email).'

A decision in relation to your request was due on 11 October 2023.

My decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have identified 26 documents that fall within the scope of your request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request,
- the content of the documents identified as within scope of your request,
- the provisions of the FOI Act, and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines).

I have decided to:

- Grant access in full to 3 documents
- Grant access to 14 documents in part with deletion of material which:
 - may be regarded as irrelevant to your request under s 22(1) of the FOI Act; or
 - is exempt pursuant to s 47C(1) of the FOI Act.
- Refuse access in full to 9 documents on the basis that the material they contain is variously:
 - regarded as irrelevant to your request under s 22(1) of the FOI Act; or
 - exempt pursuant to ss 47C(1) and 34(1)(d) of the FOI Act.

Additional information

I note the Government's position that the Uluru Statement from the Heart is one page, signed by the delegates at the National Convention in 2017. The authors of the Uluru Statement from the Heart have confirmed this. The additional material set out on pages 16-32 of the Referendum Council's Final Report is background and extracts drawn from the regional dialogues.

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The schedule of documents at **Attachment B** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The statement of reasons at **Attachment C** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

The documents to which I have decided to grant full or partial access under the FOI Act are at **Attachment D**.

Questions about this decision

If you wish to discuss this decision, the FOI case officer for this matter is Claire, who can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely



David Lewis PSM
General Counsel (Constitutional)
Office of Constitutional Law

Attachments

- Attachment A: Review rights
- Attachment B: Schedule of documents
- Attachment C: Statement of reasons
- Attachment D: Documents



Australian Government
Attorney-General's Department

Attachment A – Your review rights

If you disagree with my decision, you may ask for an Information Commissioner review.

Information Commissioner review

Information Commissioner review requests must be submitted within 60 days of receiving this letter. Your request should include your contact details, a copy of my decision, and the reasons why you disagree with my decision. You can apply in one of the following ways:

Online: [OAIC Web Form](#)

Email: foidr@oaic.gov.au

Mail: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Information Commissioner review is available at:

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 concerned about how we handled your FOI request, please let us know what we could have done better, as we may be able to rectify the situation. If you are not satisfied with our response, you can make a complaint to the Information Commissioner. Your complaint must be in writing, and can be lodged in one of the following ways:

Online: [OAIC Web Form](#)

Email: foidr@oaic.gov.au

Mail: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Freedom of information complaints is available at:

<https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints>.



Attachment B - Schedule of documents - Freedom of Information Request FOI23/417

Doc no.	Date	No. pgs	Description	Access decision	Exemption/s applied
1	29 May 2017	2	Email from the Department of the Prime Minister and Cabinet (PMC) to the Attorney-General's Department (AGD)	Grant access in part	Section 22(1): Irrelevant material
2	29 May 2017	11	Draft Question Time Brief – Indigenous – Constitutional Recognition	Grant access in part	Section 22(1): Irrelevant material
3	8 June 2017	4	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material Section 47C(1): Public interest conditional exemption - Deliberative processes
4	19 June 2017	5	Document	Refuse access	Section 34(1)(d): Cabinet documents
5	19 June 2017	1	Uluru statement from the heart	Grant access in full	N/A
6	19 June 2017	5	Document	Refuse access	Section 34(1)(d): Cabinet documents
7	9 June 2017	1	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material Section 47C(1): Public interest conditional exemption - Deliberative processes
8	19 June 2017	3	Document	Refuse access	Section 34(1)(d): Cabinet documents
9	9 June 2017	5	Document	Refuse access	Section 34(1)(d): Cabinet documents
10	9 June 2017	2	Talking Points	Grant access in part	Section 22(1): Irrelevant material
11	14 June 2017	1	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material Section 47C(1): Public interest conditional exemption - Deliberative processes
12	14 June 2017	6	Document	Refuse access	Section 34(1)(d): Cabinet documents
13	14 June 2017	2	Talking Points	Grant access in part	Section 22(1): Irrelevant material
14	19 June 2017	4	Document	Refuse access	Section 34(1)(d): Cabinet documents
15	14 June 2017	3	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material Section 47C(1): Public interest conditional exemption - Deliberative processes
16	14 June 2017	1	Uluru statement from the heart	Grant access in full	N/A
17	14 June 2017	6	Document	Refuse access	Section 34(1)(d): Cabinet documents
18	14 June 2017	3	Talking Points	Grant access in part	Section 22(1): Irrelevant material

Doc no.	Date	No. pgs	Description	Access decision	Exemption/s applied
19	15 June 2017	1	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material Section 47C(1): Public interest conditional exemption - Deliberative processes
20	19 June 2017	4	Document	Refuse access	Section 34(1)(d): Cabinet documents
21	15 June 2017	5	Document	Refuse access	Section 34(1)(d): Cabinet documents
22	15 June 2017	2	Talking Points	Grant access in part	Section 22(1): Irrelevant material
23	17 July 2017	2	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material
24	17 July 2017	9	Indigenous Constitutional Recognition Whole-of-Government Talking Points	Grant access in part	Section 22(1): Irrelevant material
25	18 July 2017	2	Email from PMC to AGD	Grant access in part	Section 22(1): Irrelevant material
26	30 June 2017	183	Final Report of the Referendum Council	Grant access in full	N/A



Attachment C - Statement of reasons - FOI23/417

This document, when read in conjunction with the schedule of documents at **Attachment B**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

Section 22: Access to edited copies with exempt or irrelevant matter deleted

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

The department has considered that some of the material is regarded as irrelevant to your request under s 22 of the FOI Act, as the material doesn't relate to the Uluru Statement from the Heart. In addition, I note that:

'The department's practice is to not disclose personal information of staff of the department and other government authorities, where that information is not publicly known or routinely disclosed (e.g. names of junior officers and contact information). The names of senior officers will generally be disclosed. In addition, duplicates and incomplete email chains, internal administrative email addresses and metadata within the scope of the FOI request will be excluded.'

As there is no record available to me to suggest that you disagreed with this approach, I have decided to regard the above categories of information as irrelevant to your request and have deleted this material under s 22 of the FOI Act. I have also deleted other material in the documents that is irrelevant to the terms of your request.

Having regard to the particular content of the documents for your request, I decided that material within departmental briefs and talking points relating to the Voice referendum and not the Uluru Statement from the Heart, are also irrelevant to your request. Given this, I considered it likely that you would also agree that this information is irrelevant to your request and have omitted this material under s 22 of the FOI Act.

Exemptions

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. Documents for your request which are exempt under Division 2 of Part IV relate to Cabinet documents (s 34).

These exemptions are not subject to an overriding public interest test. Accordingly, where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Brief information about each of the exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information

about each of these exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions>.

Section 34: Cabinet documents

I have decided to apply s 34(1)(d) to the documents for your request. My reasons for applying this exemption is set out below.

Section 34(1)(d)

Section 34(1) of the FOI Act states that a document is an exempt document if:

- (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet, or
- (b) it is an official record of the Cabinet, or
- (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies, or
- (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

I have had regard to the particular contents of the documents for your request. I have also received advice from officers with responsibility for matters to which the documents relate. Based on these enquiries, I am satisfied the material in the relevant documents for your request, as set out at Attachment B, were proposed to be submitted to, or brought into existence for the dominant purpose of being considered by the Cabinet.

I have formed this view based on advice from the Department of the Prime Minister and Cabinet. I am also satisfied that the existence of the deliberation or decision has not subsequently been disclosed by the department or the ministers in attendance since the matters were discussed.

Accordingly, I am satisfied that this material is exempt from disclosure under s 34(1)(d) of the FOI Act.

Public interest conditional exemptions

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents for your request which are conditionally exempt under Division 3 relate to deliberative processes (s 47C).

Brief information about each of the conditional exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these conditional exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest are set out under the heading 'Section 11A(5): Public interest test' below.

Section 47C: Public interest conditional exemption - deliberative processes

Section 47C 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 an agency.

In applying this exemption, paragraph 6.55 of the Guidelines provide that:

The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.

I am satisfied that the relevant material is not purely factual and is deliberative matter within the meaning of s 47C(1), being in the nature of and relating to an opinion, advice or recommendations.

The deliberative matter described above was created for the purpose of, and in connection with, advice between the department and the Department of the Prime Minister and Cabinet on the Cabinet process.

Accordingly, I am satisfied that this material is conditionally exempt under s 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the heading 'Section 11A(5): Public interest test'.

Section 11A(5): Public interest test

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.224 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in s 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under s 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, by:

- informing the community of the government's operations,

- revealing the reason for a government decision, and
- enhancing the scrutiny of government decision making.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could, as the case may be, reasonably be expected to prejudice:

- the department's ability to obtain similar information in the future, and
- the management functions of the department.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.