



Your ref: MR23/01376

Our ref: FOI23/463-IC

28 February 2025

Ms Claire Lynch  
Office of the Australian Information Commissioner  
By email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

Dear Ms Lynch

### **Information Commissioner review – MR23/01376 - Submissions**

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The purpose of this letter is to provide the Information Commissioner with the Attorney-General's Department's (**the department**) submissions in response to Information Commissioner (IC) review MR23/01376. Thank you for granting the department an extension to the 28 February to provide these submissions.

On 27 March 2024 and 18 April 2024, the department made a revised decision under section 55G of the *Freedom of Information Act 1982* (the FOI Act) in response to Mr Waldek Lupinski's (**the applicant**) access request.

On 15 May 2024, the Office of the Information Commissioner (OAIC) informed the department that the applicant wished to proceed with his IC review application and sought submissions from the department. This correspondence provides the Information Commissioner with the requested submissions. It also makes submissions in response to other concerns raised by the applicant regarding the processing of his request.

The department provides at **Attachment A** a schedule listing documents that are relevant to this access request together with a summary of the initial access decision and the exemptions claimed by the department in these submissions. **Attachment B** contains a summary of the processing of the Freedom of Information (FOI) request and **Attachment C** contains information about the *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 matter (the *Stradford* proceedings) and the department's role in relation to this matter.

## **Information Commissioner review**

On 14 November 2023, the applicant lodged an IC review application of a deemed decision by the department. On 27 November 2023, the OAIC issued a *Notice of IC review application* and a *Direction to produce documents*.

On 18 April 2024, the department made a substantive decision under s 55G of the FOI Act.

On 3 May 2024, the applicant confirmed with the OAIC that he wished to proceed with his IC review application and outlined his submissions under the headings 'A' to 'J'.

A copy of the applicant's concerns and the department's response are set out in further detail under the heading titled *Submissions - Applicant's concerns* below.

## **Engagement with the applicant to resolve or refine matters in scope of IC review**

On 4 November 2024, the department wrote to the applicant and invited him to take part in a telephone or video conference to attempt to resolve or narrow the issues in dispute. The department noted that this engagement process is in line with the OAIC's *Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews*.

The department informed the applicant that this engagement could assist to clarify information about the section 55G decision and address the concerns the applicant had raised in his IC review application.

On 5 November 2024, the applicant responded to the department to decline the invitation to speak over telephone or by video conference, stating that he wished to communicate only via his Right to Know (RTK) email address.<sup>1</sup>

On 12 November 2024, the department wrote to the applicant to acknowledge his preference to engage via his RTK email address. In an attempt to narrow some of the issues in dispute, the department provided further information to address the concerns the applicant had raised under parts A and C of his IC review submissions.

On 14 November 2024, the applicant responded to the department's correspondence and stated that:

- the 'primary issue' grounding his IC review application was that – to justify the department's delay – the department initially told him that 176 documents, totalling more than 3500 pages, had been identified with the scope of his request
- the 'major ancillary issue' is that he did not believe the department's officials were trustworthy and had failed to adhere to their statutory obligations
- publicly available documents should not have been included in the documents for his request, because the department should have been aware (from his previous correspondence) that he had already accessed this material, and

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<sup>1</sup> The applicant has used a number of different RTK email addresses in relation to his correspondence regarding request FOI23/463. As a consequence, correspondence relating to this request appears across several RTK request pages.

- documents of the Federal Court of Australia (Federal Court) are exempt from the FOI Act under paragraph 12(1)(b) and should not have been identified as documents for his request.

The applicant also reiterated his concerns about:

- receiving incorrect advice about the Commonwealth's involvement in the false imprisonment of Mr Stradford in the *Stradford* proceedings, and
- the transfer of his request by the Attorney-General's Office to the department.

The department's submissions in response to the applicant's concerns are addressed under the heading titled *Submissions – Applicant's concerns* below and in **Attachment B**.

## Department's submissions

The department provides a response to the applicant's submissions for IC review below. In doing so, the department has responded to the applicant's submissions by using the same titles as provided by the applicant in his correspondence of 3 May 2024 - Parts A – J. These submissions also respond to concerns raised by the applicant during the engagement process.

The department provides submissions below to maintain its decision under s 55G to refuse access to documents 1, 5 and 7-27. While the access decision for each of the documents in scope of the request remains unchanged, the department has made some minor amendments to the exemptions claimed. As noted above, **Attachment A** sets out the documents, the initial access decision and the exemptions claimed by the department in these submissions.

### Submissions – Applicant's concerns

The department is of the view that its engagement with the applicant from 4 to 14 November 2024 did not effectively resolve or narrow the issues in dispute. As a result, the department has:

- responded to each of the applicant's concerns below using the headings A to J, which correspond with the headings used by the applicant to organise his submissions of 3 May 2024, and
- provided submissions under an additional heading *Transfer of request from Attorney-General's Office* to address the additional concern the applicant raised in his correspondence of 14 November 2024, which is not captured under categories A to J.

### Part A – Publicly available documents

In part A of his submissions, the applicant stated that he objects to the inclusion of documents 2, 3, 4 and 6 in response to his request. These documents are, respectively:

- the Federal Court's summary of the judgment in *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020

- the Federal Court’s reasons for judgment in *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020
- an order made by the Federal Court on 31 October 2023, and
- a version of the Federal Court’s reasons for judgment in *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 as published on Austlii.

The applicant states that:

*Not one of the documents is a document for the purposes of the FOI Act because all of those documents are materials maintained for reference purposes that are otherwise publicly available (be it on the websites of the Federal Court, on the Commonwealth Law Courts portal, on Austlii etc).*

On 12 November 2024 the department attempted to resolve this issue in correspondence sent to the applicant.

On 14 November 2024 the applicant stated in his response to this correspondence that the department should have excluded these documents, as the department should have been aware from his previous correspondence that he already had access to some of these documents.

The department submits that the decision to include documents 2, 3, 4 and 6 in the request was correct as explained below.

As outlined in the Freedom of Information Commissioner’s decision in *Mills and Department of Immigration and Border Protection* [2014] AICmr54 at paragraph [20], and reiterated in the Freedom of Information Guidelines (FOI Guidelines) at paragraph 2.41, apart from the limited circumstances provided for in subsection 12(1), there is no provision in the FOI Act to refuse access to a document solely on the ground that it is publicly available.

The department is of the view that it was appropriate to release these documents to the applicant, as they fell within the scope of the request. Further, the applicant did not state in his initial request or subsequent correspondence that he was not seeking publicly available documents. As a result, the department maintains it correctly included the documents in its response to his request.

## **Part B – Inclusion of document 4**

In part B of his submissions, the applicant stated that he objects to the inclusion of document 4 because the document was created after the lodgement date of his request.

Document 4 is an order made by the Federal Court in the *Stradford* proceedings on 31 October 2023 regarding the respondents’ payment of damages to the applicant. The department released this document in full to the applicant.

The department acknowledges that this document was created after the date the FOI request was received by the department.

## **Part C – Documents of the Federal Court**

In part C of his submissions, the applicant stated that he objects to the department including the Federal Court Notices of Filing (documents 16, 18 and 19) within the identified documents

for his request. He stated that these documents are exempt from the FOI Act under paragraph 12(1)(b).

On 12 November 2024, the department attempted to resolve this issue in correspondence sent to the applicant.

On 14 November 2024, the applicant responded to the department and maintained his view that documents of the Federal Court were exempt from the FOI Act under paragraph 12(1)(b) and should not have been included as documents for his request.

The department submits that it was correct to include documents 16, 18 and 19 in the response to the request as explained below.

Paragraph 12(1)(b) of the FOI Act states that:

*Part not to apply to certain documents*

*(1) A person is not entitled to obtain access under this Part to:*

*...*

*(b) a document that is open to public access, as part of a public register or otherwise, in accordance with an enactment or a Norfolk Island law, where that access is subject to a fee or other charge; or*

*...*

For documents to be exempt from the FOI Act under paragraph 12(1)(b), all three of the following criteria must be met:

- the documents must be open to public access
- the documents must be part of a public register or otherwise, and
- the documents must be able to be applied for, subject to a fee.

Documents 16, 18 and 19 are documents of the Federal Court. The department is satisfied that the Federal Court meets the definition of ‘public register or otherwise’ as outlined in paragraph 12(1)(b) of the FOI Act.

The department is also satisfied that individuals are able to make an application to the Federal Court to request access to the documents after paying the relevant fee. However, the department is not satisfied that the documents are ‘open to public access’. This is because they are not documents that a person (who is not a party to the proceeding) is entitled access to under rule 2.32 of the *Federal Court Rules 2011* (the Rules). Providing access to the documents, which refer to Mr Stradford’s real name, would be in breach of an order made by the Federal Court on 30 August 2023 that the applicant be given the pseudonym ‘Mr Stradford’.

Documents 16, 18 and 19 are subject to non-publication and suppression orders and therefore fall within the category of documents that are prohibited or restricted from publication under Part VAA of the *Federal Court of Australia Act 1976*.

The department remains of the view that these documents do not fall within the scope of paragraph 12(1)(b) as the documents are not 'open to public access'. These documents are not 'open to public access' because the applicant is not entitled to inspect them and would have to, pursuant to sub-rule 2.32(4) of the Rules, request the Federal Court's leave to inspect the documents. As such, the department considers that documents 16, 18 and 19 are within the scope of the FOI Act, noting that they are subject to exemptions from disclosure to the applicant as set out in **Attachment A**.

## **Part D – Section 22 - irrelevant matter deleted**

In part D of his submissions, the applicant objected to the application of section 22 of the FOI Act and indicated that he had not received an explanation as to why section 22 had been applied to the documents for his request.

On 18 April 2024, the department provided reasons for the application of section 22 in Attachment C of its section 55G revised decision letter.

The department submits the application of section 22 was appropriate and provides further explanation below.

The department holds a large number of documents relating to, or associated with, the *Stradford* proceedings due to its roles and responsibilities as outlined at **Attachment C**. However, the majority of the documents, and parts of documents processed for the request, do not relate to:

- the Commonwealth's role as one of the named respondents in the proceedings
- the Commonwealth's role, as one of the named respondents in the proceedings, for allegedly falsely imprisoning Mr Stradford, or
- the Commonwealth's costs, as one of the named respondents in the proceedings, in defending the proceedings.

Deleting irrelevant information from a document that is to be released can have benefits for both agencies and applicants. An agency may not have to consider whether the deleted information is otherwise exempt or if a third party should be consulted, and can more quickly reach a decision to provide access to the non-exempt information (FOI Guidelines, paragraph 3.96). When processing documents for the request, the department removed material outside the scope of the request in accordance with section 22. The decision on access was then made on the remaining relevant material. Where section 22 is listed in the schedule, this indicates the document (or part of a document) contained irrelevant material.

The department notes that in its section 55G decision, it claimed section 22 over the personal information of its officers and of other agencies. This included the contact details of all departmental officers and other Commonwealth public servants and the names of junior departmental officers. The department now considers this information is exempt under section 47F (personal privacy). Information about the reasons for not disclosing this material is outlined below under the heading *Submission – Exemptions*.

## **Parts E to G – Application of sections 42, 46, 47C, 47E and 47F**

In parts E to G of his submissions, the applicant stated that he objects to the application of sections 42, 46, 47C, 47E and 47F to the documents for his request. The department maintains that these exemptions have been appropriately applied to the documents identified as within scope of the request and outlines the reasons for this below under the heading *Submission – Exemptions*.

## **Part H – Application of section 7**

In part H of his submissions, the applicant objected to the application of section 7 to a number of the documents for his request. Subsection 7(2) of the FOI Act provides that certain persons, bodies and departments are exempt from the operation of the FOI Act, in relation to particular types of documents. The relevant agencies and documents that are exempt are set out in Schedule 2, Part II of the FOI Act. Relevantly, Schedule 2, Part II, Division 1, paragraph (b) prescribes that certain documents in respect of activities undertaken by the Australian Government Solicitor (AGS) are exempt from the operation of the FOI Act under section 7. Accordingly, in the section 55G decision certain documents that relate to activities undertaken by the AGS were refused in full – or where that material is within a document – in part.

AGS represented the second respondent, the Commonwealth, in the *Stradford* proceedings. The department confirms that particular parts of the documents identified as being within scope of this FOI request contain information in respect of the activities of AGS.

The department is of the view that the information relating to the activities of AGS is exempt from disclosure under subsection 7(2) of the FOI Act. Following consultation with AGS in the course of preparing these submissions, the department reconsidered the application of s7 to parts of some documents. However, the relevant documents were otherwise exempt under other exemptions.

## **Part I – Incorrect information**

In part I of his submissions, and reiterated in the applicant's correspondence of 14 November 2024, the applicant raised concerns about receiving incorrect information from the department. The department regrets that the applicant was initially provided incorrect information about the Commonwealth's involvement in the *Stradford* proceedings and the date on which his FOI request was considered validly received.

On 8 December 2023, in correspondence sent to the applicant, the department corrected the date of receipt of the FOI request and advised that it considered his request to have been validly made on 30 August 2023 and not 4 September 2023 as previously advised. On the same day, the department apologised to the applicant for the delay in processing this request.

In the decision letter AGOFOI23/465 sent to the applicant on the 19 September 2024, information was provided to the applicant about the Commonwealth's involvement in the *Stradford* proceedings. Further information is provided at **Attachment C**.

## Part J – Identification of number of documents for request

In part J of his submissions, and reiterated in the applicant's correspondence of 14 November 2024, the applicant took issue with the department advising him that 27 documents have been identified as being within the scope of his request, when he was previously advised that 176 documents were captured within the terms of his request.

Between 31 August 2023 and 7 September 2023, the department engaged with the applicant to clarify its understanding of the scope of the documents requested by the applicant. The result of this engagement did not revise the scope of the request and no further substantive information was received from the applicant to clarify his request.

The next engagement with the applicant occurred in December 2023. **Attachment B** contains a more detailed summary of the initial processing of the request.

On 21 December 2023, the department wrote to the applicant to advise him that its initial searches had identified 176 documents as being captured by the terms of his request. The department's initial searches were undertaken using search parameters based on the text in the applicant's request. It is not unusual for initial search results to capture material and documents that are out of scope or irrelevant to the scope of the request particularly when the scope of request is broad.

The department holds a large volume of material relating to the *Stradford* proceedings generally because of the department's roles and policy responsibilities. Please see **Attachment C** for more detail on those roles and responsibilities.

After identifying that 176 documents had been initially captured by these searches, the department reasonably formed the view that practical refusal grounds may exist based on the large volume of material identified. When the department wrote to the applicant on 21 December 2023, it advised that it wished to engage in an informal consultation with him before undertaking any formal request consultation process under section 24AB of the FOI Act. The correspondence also requested that the applicant engage with the department so the department could better understand the documents that were of interest to him.

The department notes that paragraph 3.128 of the FOI Guidelines states:

*Before commencing a formal request consultation process, agencies and ministers' offices are encouraged to discuss the request with the applicant. This is often a more efficient way of obtaining further information from the applicant and helping them to refine a request that is too large or vague. However, if the applicant cannot be contacted promptly, or the discussion does not elicit information that allows relevant documents to be identified, the request consultation process should be commenced.*

When the department undertook a more detailed assessment of the material that had been initially identified, the department identified that a significant number of the documents were outside the scope of the applicant's request. This is because these documents did not relate to the specific matters referred to in the request. The department therefore determined that a formal request consultation under section 24AB was no longer required.



The department is of the view that it was reasonable to seek to informally engage with the applicant as set out in the correspondence dated 21 December 2023, noting the department's initial searches had captured a large volume of material. The department considers that constructive informal engagement can assist with the efficient processing of requests and is consistent with the OAIC's guidance.

The department notes that paragraph 3.72 of the FOI Guidelines states that:

*Various provisions of the FOI Act require contact with an applicant. However, agencies and ministers' offices are encouraged, as a matter of good administrative practice, to contact an applicant to discuss their request as soon as practicable after receiving the request. This contact provides an early opportunity to assist the applicant to address any formal requirements that have not been met (see [3.47] of the FOI Guidelines). Early consultation can also lead to greater efficiency in the process. The agency or minister can discuss with the applicant the scope of their request, particularly if a preliminary assessment indicates there may be a practical refusal reason or estimated charges may be high (see paragraphs [3.108]–[3.135] and Part 4 of the FOI Guidelines). In many cases, an applicant may not be aware of the nature and volume of the agency's records, and, as a result, their request might be expressed in wider terms than is necessary.*

As noted above, in the context of this request, the department's document holdings in relation to the *Stradford* proceedings were large and complex. The initial search results identified a large number of documents and it was on this basis that the department sought to engage with the applicant. Departmental staff undertook a comprehensive review of the documents produced by the initial search results which then allowed the department to refine the scope of material that fell within the scope of the request for the purposes of processing the request.

The department acknowledges that the request was not processed within the statutory timeframe. The department continues to review its processes and procedures with a view to improving management of requests and where possible reducing the incidence of overdue requests.

## **Transfer of request from Attorney-General's Office to the department**

In his correspondence of 14 November 2024, the applicant raised concerns about the transfer of his request (AGOFOI23/465) from the Attorney-General's Office (the Office) to the department. On transfer of this request to the department it was allocated a new reference number, FOI23/500.

On 11 November 2023 the applicant applied for IC review of the deemed decisions of the department in FOI23/463 and FOI23/500.

On 22 August 2024 the OAIC determined that the request AGOFOI23/465 was not validly transferred to the department under section 16 of the FOI Act, as searches had not been undertaken prior to the transfer of the request. Following the OAIC's decision, on 19 September 2024, the Office finalised FOI request AGOFOI23/465. On 28 October 2024 the OAIC advised the

department that the IC review for AGOFOI23/465 (MR23/01375) had been withdrawn by the applicant and the matter was finalised under section 54R of the FOI Act.

The department provides FOI support to the Office under an administrative arrangement and has reviewed and adjusted processes in relation to the transfer of FOI requests from the Office to the department to reflect the OAIc's decision in this matter.

## Submissions – Exemptions

### Part IV Division 2

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. Exempt documents under Division 2 of Part IV include documents which would be contempt of court (subsection 46(a)), and documents subject to legal professional privilege (section 42).

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.

### Section 42 – Documents subject to Legal Professional Privilege

Subsection 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.*

At common law<sup>2</sup> determining whether a communication is privileged requires a consideration of the following four factors:

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

The department is satisfied that where section 42 has been claimed in the documents for this request, there was a legal adviser-client relationship, the communication was for the dominant purpose of giving legal advice and the advice was confidential and independent.

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<sup>2</sup> *Grant v Downs* [1976] HCA 63 *Waterford v Commonwealth of Australia* [1987] HCA 25 and *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67.

In the then Administrative Appeal Tribunal's (AAT) decision of *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728, the AAT confirmed that legal professional privilege also extends to in-house lawyers.

Paragraph 5.156 of the Guidelines states:

*In the AAT case of Ransley and Commissioner of Taxation (Freedom of information)... Tamberlin DP ... discussed that 'communications and information between an agency and its qualified legal advisers for the purpose of giving or receiving advice will be privileged whether the legal advisers are salaried officers [or not], provided they are consulted in a professional capacity in relation to a professional matter and the communications arise from the relationship of lawyer-client.*

Paragraph 5.168 of the FOI Guidelines states:

*Section 42(2) confirms that a document is not exempt if the person entitled to claim legal professional privilege waives the privilege.*

Paragraph 5.170 of the FOI Guidelines states that:

*Waiver of privilege may be express or implied. For example, privilege may be waived in circumstances where:*

- *the communication in question has been widely distributed,*
- *the content of the legal advice in question has been disclosed or*
- *a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice.*

The department is satisfied that legal professional privilege has not been, and should not be waived, in relation to the material in scope of this request. Accordingly, the department is satisfied that the material marked section 42 in the schedule for this request at **Attachment A** is exempt from disclosure under subsection 42(1) of the FOI Act.

## **Section 46 – Documents disclosure of which would be contempt of Parliament or contempt of court**

Section 46 of the FOI Act provides that a document is exempt if public disclosure of the document would, apart from the FOI Act and any immunity of the Crown:

- (a) be in contempt of court
- (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath, or
- (c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

In the department's section 55G decision, it applied subsection 46(b) to material subject to this request. However, in these submissions, the department submits the material previously

exempt under subsection 46(b) is exempt under subsection 46(a), as the real name of 'Mr Stradford' is protected by orders made by the Federal Court on 30 August 2023. If this information is released, the department is at risk of being held in contempt of court for releasing information that the Federal Court has ordered be prohibited or restricted from publication.

Paragraph 5.215 of the Guidelines states:

*A contempt of court is an action which interferes with the due administration of justice. It includes, but is not limited to, a deliberate breach of a court order.*

In addition, paragraph 5.216 of the Guidelines states:

*Documents protected under [section] 46(a) include documents that are protected by the courts as part of their power to regulate their own proceedings. For example, a court may prohibit or limit publication of the names of parties or witnesses in litigation, or statements and evidence presented to the court. Because public disclosure of such documents would be a contempt of court, the documents will be exempt.*

The department is satisfied that there are real and substantive grounds for expecting that disclosure of the relevant material would amount to contempt of court (subsection 46(a)). Further, the department has consulted with the Federal Court who has objected to the disclosure of this material.

## **Part IV Division 3 – Public interest conditional exemptions**

The bases for the conditional exemption claims made are explained below.

A document which is conditionally exempt must still be disclosed unless disclosure at that time would, on balance, be contrary to the public interest: subsection 11A(5) of the FOI Act.

Subsection 11B(3) of the FOI Act lists factors favouring access to a document in the public interest, where disclosure would do any of the following:

- (a) promote the objects of the FOI Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure, and
- (d) allow a person to access his or her own personal information.

Under subsection 11B(4) of the FOI Act, certain public interest factors against disclosure are identified as irrelevant and must not be taken into account:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of 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 document was (or is) of high seniority in the agency to which the request for access to the document was made, and
- (d) access to the document could result in confusion or unnecessary debate.

## **Section 47C – Deliberative processes**

Subsection 47C(1) of the FOI Act conditionally exempts a document to the extent that it contains 'deliberative matter'.

'Deliberative matter' is described in s 47C as 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, relevantly, in the functions of an agency...*

The FOI Guidelines state at paragraph 6.54:

*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 processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>3</sup>*

DP Forgie considered the meaning of 'deliberation' in the context of the predecessor to section 47C (paragraph 36(1)(a) of an earlier iteration of the FOI Act) in *Smith and Aboriginal and Torres Strait Islander Commission* [2000] AATA 512, observing at paragraph [54]:

*... the word 'deliberation' encompasses the notion of consideration. That consideration may involve consultation or discussion amongst more than one persons. Equally, a person who considers a matter on his or her own can be said to have deliberated upon it. Whether or not the deliberation leads in either case to the formation of an opinion, advice or recommendation is another matter.*

While the department is not responsible for the conduct of the *Stradford* proceedings, the department maintains a significant policy interest in the issues the proceedings raise. The material identified as subject to section 47C in this request contain deliberations and advice to the Attorney-General regarding appropriate policy responses to the issues raised in the proceedings.

### **Exceptions do not apply**

Deliberative matter will not be conditionally exempt under s 47C if it includes matters, or is in the form specified, in subsections 47C(2) and 47C(3).

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<sup>3</sup> *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 [58].

Relevant material in documents for this request that has been withheld under section 47C do not contain operational material (as defined in section 8A of the FOI Act) or purely factual material. These documents are not reports of the kind referenced in subsection 47C(3), nor a record of a final decision given in the exercise of a power or an adjudicative function.

Accordingly, the department submits that the relevant material is conditionally exempt under subsection 47C(1) of the FOI Act.

### **The public interest test**

Having found the relevant material to be conditionally exempt under section 47C, the department has considered the public interest factors weighing in favour of, and against, disclosure.

In the case of these documents, the factors in favour of disclosure include:

- informing the community of the Government's operations, deliberations and activities
- revealing the reasons or considerations for significant government decisions, and
- enhancing the scrutiny of government decision making.

By comparison, the public interest factors weighing against disclosure include:

- prejudicing the department's ability to provide frank and confidential advice to government
- prejudicing the department's ability to maintain trust with its critical stakeholders, including courts and other government departments and agencies by revealing material that was provided in confidence, and
- prejudicing the department's ability to obtain similar information in the future.

Disclosure of the deliberative material associated with the *Stradford* proceedings is reasonably likely to undermine the department's ability to:

- engage in frank and open discussions internally and with external stakeholders about the development of responses to emerging issues, particularly where those issues are sensitive or are of great policy significance, or
- provide advice to government about such issues.

Disclosure of the deliberative material is also reasonably likely to adversely impact the deliberative process itself and the ability of the department to respond to policy issues in circumstances where the deliberative process is still underway. Although the High Court of Australia (High Court) delivered its judgment in the *Stradford* proceedings on 12 February 2025, the department is continuing to consider the implications of that judgment.

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

## Section 47E – Certain operations of agencies

Subsection 47E(d) of the FOI Act conditionally exempts a document to the extent that its disclosure would, or could reasonably be, expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Paragraphs 6.15 – 6.16 of the FOI Guidelines states that the predicted effect must be reasonably expected to occur. There must be more than merely an assumption or allegation that damage may occur if the document were to be released.

The Federal Court considered the meaning of ‘would or could reasonably be expected to’ in the context of a predecessor business affairs exemption (subsection 43(1) of an earlier iteration of the FOI Act) in *Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* [1986] FCA 35:

*... the words ‘could reasonably be expected to...’ were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act... it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe [sub-paragraph] 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see *Kioa v West* [1985] HCA 81; (1985) 60 ALJR 113 per Mason J and Gibbs CJ).*

*... stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.*

### **Substantial adverse effect to the proper and efficient conduct of the operations of an agency**

The FOI Guidelines explain at paragraph 6.18 that the predicted effect needs to be both ‘substantial’ and ‘adverse’. The FOI Guidelines further explain:

*The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’. The word ‘substantial’, in the context of substantial loss or damage, has been interpreted as including ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.*

DP Hall explains in *Re James and Australian National University* [1984] AATA 501 at [340] that the expression ‘conduct of the operations of an agency’ extends ‘to the way in which an agency discharges or performs any of its functions’.

Accordingly, the department submits that the relevant material is conditionally exempt under subsection 47E(d) of the FOI Act.

### **The public interest test**

Having found the relevant material to be conditionally exempt under subsection 47E(d), the department has considered the public interest factors weighing in favour of, and against, disclosure.

In the case of these documents, the factors in favour of disclosure include:

- informing the community of the Government's operations, deliberations and activities
- revealing the reasons or considerations for significant government decisions, and
- enhancing the scrutiny of government decision making.

By comparison, the public interest factors weighing against disclosure include:

- prejudicing the department's ability to obtain confidential information, and
- prejudicing the department's ability to obtain similar information in the future, and negatively impacting on the department's relationship with internal and external stakeholders.

Disclosure of this material could reasonably be expected to prejudice the department's ability to:

- effectively and efficiently develop strategy on, and policy responses to, current and emerging issues
- provide, or obtain, information communicated in confidence and information that continues not to be in the public domain
- engage in frank and open discussions internally and with external stakeholders in the course of developing strategy on, and policy responses to, current and emerging issues.

Although the High Court has delivered its judgment in the *Stradford* proceedings, the department is continuing to consider the implications of that judgment.

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

### **Section 47F – Personal privacy**

Subsection 47F(1) of the FOI Act conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person (other than the applicant). Personal information includes information or an opinion about an identified or reasonably identifiable individual, whether true or not, and regardless of whether it is recorded in material form.



## Unreasonable disclosure

In considering whether disclosure of this personal information is unreasonable, subsection 47F(2) of the FOI Act requires consideration of:

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources, and
- (d) any other matter the department considers relevant.

The department has had regard to the mandatory considerations in subsection 47F(2), alongside the relevant factors identified in *'FG' and National Archives of Australia* [2015] AICmr 26 at paragraphs [47]-[48], which have been included in the FOI Guidelines (at [6.138]). The following matters are relevant to the conditionally exempt material:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

The content in the documents exempted under subsection 47F(2) relate to personal information either about third parties or personal information of employees of the department and other agencies. The department is limited in what it can disclose in these submissions as doing so would disclose identifying information about the exempt material. The department acknowledges it is somewhat limited in the submissions it is able to make openly, in respect of section 47F claims about third parties and the weighing of the public interest in relation to that material. If it would assist the Information Commissioner, the department would be pleased to provide further submissions in a confidential manner.

The names and contact details of departmental and agency staff and senior Commonwealth public servants who have been involved in communications relating to the *Stradford* proceedings are captured in the documents for the request. The department submits that the applicant did not explicitly agree that names and contact details were irrelevant to the request as was originally marked in the section 55G decision. The department submits that the names and contact details of junior departmental officers and contact details for senior

Commonwealth public servants are exempt under subsection 47F(2). The department has not applied the subsection 47F(2) exemption over the names of senior Commonwealth public servants.

The personal information which the department has redacted under subsection 47F(2) is neither well known nor publicly available in a way that connects them to this department or the material. Similarly, the relevant individuals are not known to have associated with the department and relevant agencies in respect of the matters addressed in the documents. In all the documents identified as being within the scope of the request, the department submits the disclosure of the personal information would be unreasonable.

**Public interest test**

The department submits that the public interest in disclosing the information has not been established. Further, the public interest factor weighing against the release of this information is that it could reasonably be expected to prejudice the protection of an individual's right to privacy, including where it contains the personal information of third parties and current or former departmental employees, and would reveal their name, previous or current employer or contact details.

For these reasons, the department submits that it would be contrary to the public interest to give access to this material and that it is exempt under section 47F of the FOI Act.

If you have any questions about these submissions please contact the FOI and Privacy Team on 02 6141 6666 or by emailing [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely



Kenneth Eagle  
Assistant Secretary  
Office of Corporate Counsel

**Attachment A - Schedule of documents**

**Attachment B - Summary of processing of FOI Request**

**Attachment C - Summary of the Stratford matter and the department's role**

## Attachment A – Schedule of documents

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
1	30 August 2023	3	Order made by the Federal Court of Australia	Refuse access	Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 46(a): Documents disclosure of which would be in contempt of court
2	30 August 2023	5	Summary of Federal Court of Australia's judgment in <i>Stradford (a pseudonym) v Judge Vasta</i> [2023] FCA 1020	Grant access		
3	30 August 2023	225	Federal Court of Australia's reasons for judgment in <i>Stradford (a pseudonym) v Judge Vasta</i> [2023] FCA 1020	Grant access		
4	31 October 2023	2	Order made by the Federal Court of Australia	Grant access		
5	30 August 2022	5	Internal document – handover notes	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
					<p>given by a tribunal or other body having power to take evidence on oath</p> <p>Section 47C(1): Public interest conditional exemption - Deliberative processes</p> <p>Section 47E(d): Public interest conditional exemption - Certain operations of agencies</p>	<p>Section 47C(1): Public interest conditional exemption - Deliberative processes</p> <p>Section 47E(d): Public interest conditional exemption - Certain operations of agencies</p> <p>Section 47F(1): Public interest conditional exemption - Personal Privacy</p>
6	15 February 2019	28	Full Court of then Family Court of Australia decision in <i>Stradford &amp; Stradford</i> [2019] FamCAFC 25.	Grant access		
7	9 April 2021	4	Report	Refuse access	<p>Section 7(2): Exemption of certain persons and bodies</p> <p>Section 22(1): Irrelevant material</p> <p>Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath</p> <p>Section 47C(1): Public interest conditional exemption - Deliberative processes</p> <p>Section 47E(d): Public interest conditional exemption - Certain operations of agencies</p> <p>Section 47F(1): Public interest conditional exemption - Personal Privacy</p>	<p>Section 7(2): Exemption of certain persons and bodies</p> <p>Section 22(1): Irrelevant material</p> <p>Section 46(a): Documents disclosure of which would be in contempt of court</p> <p>Section 47C(1): Public interest conditional exemption - Deliberative processes</p> <p>Section 47E(d): Public interest conditional exemption - Certain operations of agencies</p> <p>Section 47F(1): Public interest conditional exemption - Personal Privacy</p>

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
8	26 May 2021	6	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes
9	15 June 2021	3	Email	Refuse access	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
10	25 June 2021	6	Report	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
					Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy	Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
11	30 September 2021	6	Report	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
12	18 February 2022	2	Federal Court of Australia order	Refuse access	Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 46(a): Documents disclosure of which would be in contempt of court

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
13	22 June 2021	3	Emails	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47F(1): Public interest conditional exemption - Personal Privacy
14	Undated	1	Internal summary document	Refuse access	Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies	Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
15	22 November 2023	7	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
					Section 47E(d): Public interest conditional exemption – Certain operations of agencies	Section 47E(d): Public interest conditional exemption – Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
16	14 December 2020	22	Federal Court of Australia Notice of Filing	Refuse access	Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 46(a): Documents disclosure of which would be in contempt of court
17	17 February 2021	4	Report	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
18	7 December 2020	5	Federal Court of Australia Notice of Filing	Refuse access	Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 46(a): Documents disclosure of which would be in contempt of court
19	14 December 2020	4	Federal Court of Australia Notice of Filing	Refuse access	Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having	Section 46(a): Documents disclosure of which would be in contempt of court



Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
					power to take evidence on oath	
20	17 February 2021	1	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be in contempt of court Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
21	18 February 2021	3	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47F(1): Public interest conditional exemption - Personal Privacy
22	23 February 2021	3	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be contempt of court Section 42(1): Documents subject to legal

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
					power to take evidence on oath Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption – Certain operations of agencies	professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption – Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
23	19 May 2021	2	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
24	23 March 2021	3	Email	Refuse access	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
					processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies	agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
25	24 November 2021	3	Email	Refuse access	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath	Section 42(1): Documents subject to legal professional privilege Section 46(a): Documents disclosure of which would be contempt of court Section 47F(1): Public interest conditional exemption - Personal Privacy
26	8 June 2021	4	Email	Refuse access	Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption – Certain operations of agencies	Section 7(2): Exemption of certain persons and bodies Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption – Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy

Document no	Date	No. pgs	Description	Access decision	Exemption/s applied (original decision)	Exemption/s applied (submissions stage)
27	24 May 2021	2	Correspondence	Refuse access	Section 22(1): Irrelevant material Section 46(b): Documents disclosure of which would be contrary to a direction given by a tribunal or other body having power to take evidence on oath Section 47E(d): Public interest conditional exemption – Certain operations of agencies	Section 22(1): Irrelevant material Section 46(a): Documents disclosure of which would be in contempt of court Section 47E(d): Public interest conditional exemption – Certain operations of agencies

## Attachment B - Processing request

On 30 August 2023 at 2pm, the applicant made a Freedom of Information (FOI) request to the Attorney-General's Department (the department) via the Right to Know platform for:

*Under the FOI Act 1982 I request any and all documents relating to the Commonwealth's involvement in the false imprisonment of the applicant in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020.*

On 30 August 2023 at 2:14pm, the applicant wrote to the department to expand on the scope of his request. He stated:

*Also, to the extent that it is not covered by my original FOI request, under the FOI Act I request any and all documents setting out the cost to the Commonwealth of defending the matter in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020.*

This request was allocated the reference FOI23/463.

On 30 August 2023 the applicant made the same request to the Office of the Attorney-General (the Office) via the Right to Know platform, which was allocated reference AGOFOI23/465.

The Office transferred that request to the department for processing – the request was allocated reference FOI23/500 on transfer. That request was then processed concurrently with FOI23/463. Therefore, both references FOI23/500 and FOI23/463 are listed on the substantive decision letter made on 18 April 2024.

Between 31 August 2023 and 7 September 2023, the department engaged with the applicant to clarify its understanding of the scope of the documents requested by the applicant. This was because the scope of the request was broad and initial searches indicated a large number of documents were potentially covered by the request. The department sought to clarify the scope of the request and the particular documents in which the applicant had an interest. This engagement did not revise the scope of the request and no further substantive information was received from the applicant to clarify his request.

On 29 September 2023, as the department had not made a decision in relation to the request for information in FOI23/463 within the statutory timeframe, it was deemed that the department had refused to give access to the requested documents – pursuant to section 15AC of the FOI Act. An IC Review commenced on 27 November 2023.

The department continued to process its decision in relation to the request and this decision was finalised under section 55G in two tranches. The first tranche of the decision was made on 27 March 2024 and the second and final tranche of the decision was made on 18 April 2024. The department identified 27 documents within the scope of the request, with 4 documents being released in full and access refused to 23 documents, under the following sections of the FOI Act:

- section 7 (exemption of certain persons and bodies)
- section 22 (irrelevant material)

- section 42 (legal professional privilege)
- section 46 (documents disclosure of which would be in contempt of Parliament or court)
- section 47C (deliberative processes)
- section 47E (certain operations of agencies), and
- section 47F (personal privacy).

On 22 August 2024 the OAIC determined the duplicate request FOI23/500, which was made to the Office and transferred to the department for processing was not correctly transferred. The office then processed a section 55G decision for that request with reference AGOFOI23/465. On 28 October 2024, the OAIC advised the department that the IC review for AGOFOI23/465 (MR23/01375) had been withdrawn by the applicant and the matter was finalised under section 54R of the FOI Act.

## Attachment C - *Stradford* proceedings and the Attorney-General's Department's role

The Attorney-General's Department (the department) notes that the title of the proceeding that was before the Federal Court of Australia (Federal Court) is *Stradford (a pseudonym) v His Honour Judge Salvatore Paul Vasta & Ors* (Federal Court proceeding ACD57/2020). The medium neutral citation for the Federal Court's judgment which was delivered on 30 August 2023 is *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020. For the purposes of these submissions, the department will refer to the proceedings as the *Stradford* proceedings or *Stradford*.

### The *Stradford* proceedings

Mr Stradford was a party to a family law property proceeding before Judge Vasta in the then Federal Circuit Court of Australia. Judge Salvatore Vasta ordered that Mr Stradford be imprisoned for 12 months, purportedly for contempt of court. Mr Stradford spent 7 days in police custody and prison before the order which resulted in his imprisonment was stayed pending an appeal. On appeal, the Full Court of the then Family Court of Australia overturned Judge Vasta's orders. Mr Stradford then initiated proceedings in the Federal Court against Judge Vasta, the Commonwealth and the State of Queensland, seeking damages for false imprisonment.

In the Federal Court proceedings, Mr Stradford claimed that by ordering him to imprisonment, Judge Vasta committed the torts of false imprisonment and collateral abuse of process. Mr Stradford also claimed that the Commonwealth and the State of Queensland were vicariously liable for the actions of their security, police and correctional services officers, who caused him to be falsely imprisoned.

On 30 August 2023, the Federal Court delivered its judgment. The Federal Court held that the respondents – Judge Vasta, the Commonwealth and the State of Queensland – were liable for the false imprisonment of Mr Stradford and that Mr Stradford is entitled to damages from the respondents.

On 28 September 2023, all three respondents filed notices of appeal to the Full Court of the Federal Court. On 8 February 2024, the respondents' appeals were removed into the High Court of Australia (High Court). On 14 and 15 August 2024, the Full Bench of the High Court heard the appeals.

On 12 February 2025, the High Court delivered its judgment. The High Court allowed Judge Vasta's, the Commonwealth's and Queensland's appeals and substituted orders made by the Federal Court on 30 August 2023, with an order that Mr Stradford's proceedings be dismissed.

The issues that arose in the *Stradford* proceedings are of significant policy interest to the department. The first issue is the scope of judicial immunity for federal inferior court judges. The second issue is the existence of a common law defence for persons executing court orders that are apparently valid on their face but which later turn out to be invalid.

### The department's records

The areas of the department that held documents relevant to the *Stradford* proceedings are the Office of Legal Services Coordination (OLSC) and the Federal Courts Branch (FCB).

OLSC works to ensure that Australian Government agencies receive consistent and well-coordinated legal service and it also administers the *Legal Services Directions 2017* (the Directions).

Paragraph 3 of the Directions requires non-corporate Commonwealth entities and a corporate Commonwealth entity (that was an Agency within the meaning of the *Financial Management and Accountability Act 1997* on 30 June 2014), to report to OLSC on significant issues that arise in the provision of legal services, including in relation to handling of claims, litigation and involvement in dispute management.

Certain documents initially identified by OLSC as being in scope of the applicant's request were later considered to be outside of scope because they did not relate to specific matters raised in the request, being the Commonwealth's involvement in the false imprisonment of Mr Stradford or the costs to the Commonwealth of defending the proceedings. Rather, they related to the general management of the proceeding as reported to OLSC, or to information such as ordinary processing instructions or references to published media articles.

FCB provides policy advice to government about matters relating to the federal courts: the High Court, the Federal Court and the Federal Circuit and Family Court of Australia (FCFCOA).

FCB provides advice in relation to the following matters:

- the conferral of federal jurisdiction on courts and related issues
- the role, structure and administration of the federal courts
- federal court operations and resources
- matters arising under legislation relating to federal courts and the judiciary, and
- terms and conditions applying to federal judicial officers.

As part of its key responsibilities, FCB maintains a strong policy interest in relation to the development of the common law doctrine of judicial immunity and its application to judges of the federal courts. For this reason, FCB had a keen interest in the progress of the *Stradford* proceedings.

FCB also has a policy interest in the implications of the *Stradford* proceedings for the liability of Commonwealth, state and territory police, correctional and security officers who execute court orders which are apparently valid on their face but are later found to be invalid.

Because of OLSC's and FCB's key roles and responsibilities, the department held a large number of documents relating to, or associated with, the *Stradford* proceedings. However, the majority of the documents the department held did not relate to:

- the Commonwealth's role as one of the named respondents in the proceedings,
- the Commonwealth's involvement in the alleged false imprisonment of Mr Stradford, or
- the costs to the Commonwealth of defending the proceedings.

Neither OLSC nor FCB are responsible for the Commonwealth's conduct of the proceedings as a party to the proceedings.