

From: FOI <FOI@pmc.gov.au>
Sent: Thursday, 9 January 2020 2:43 PM
To: Amanda Nowland <amanda.nowland@oaic.gov.au>; FOI <FOI@pmc.gov.au>
Cc: [REDACTED] s47E(c), s47F
Subject: RE: Seeking transfer of FOI request [SEC=OFFICIAL]

OFFICIAL

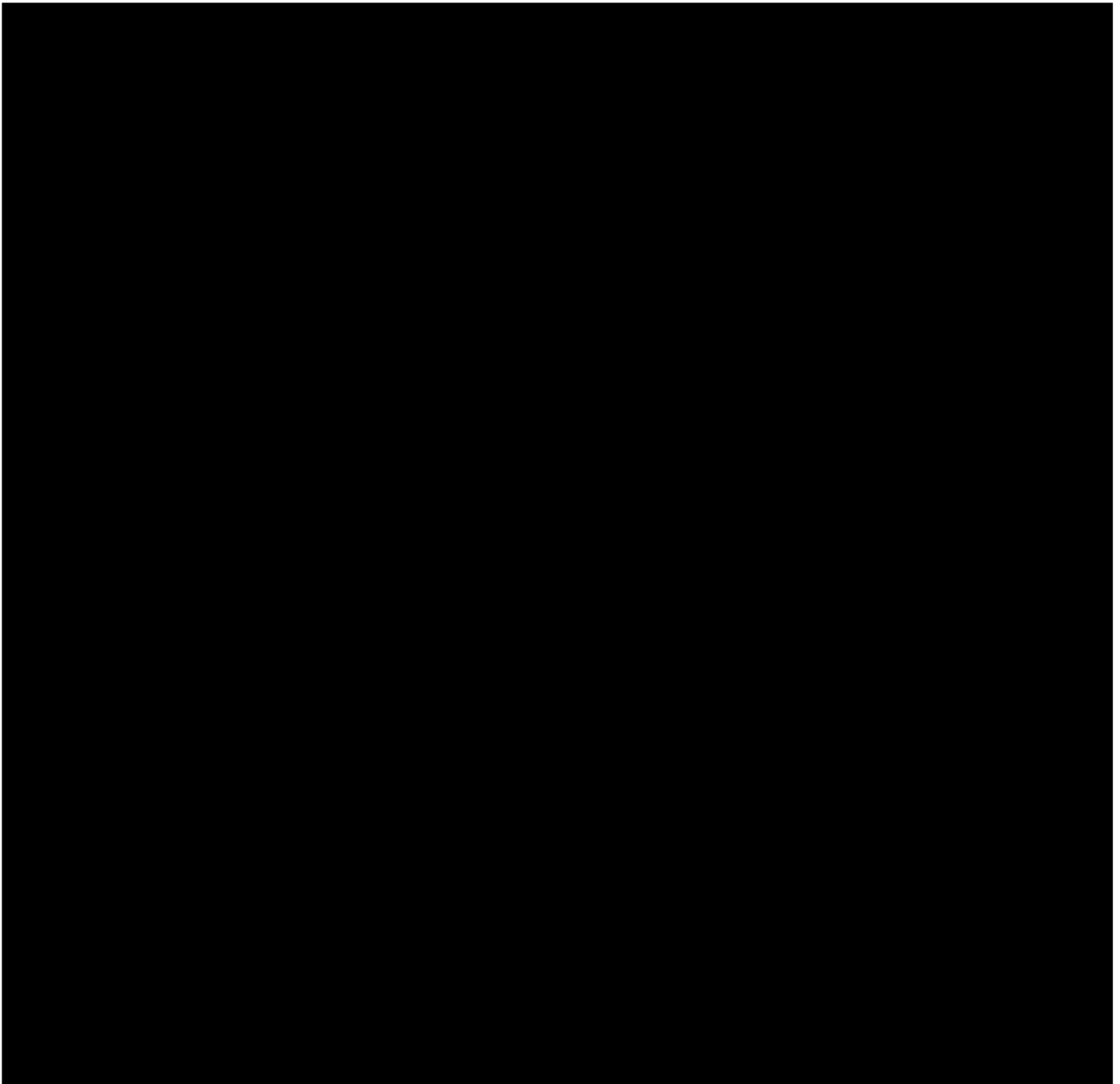
Hi Amanda

Further to our discussion earlier, if possible, could you please forward to me a copy of the FOI request your office received.

Many thanks

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s47E(c), s47F



From: s47E(c),
To: [Amanda Nowland](#)
Cc: [FOI; Moran, Celeste](#); s47E(c),
Subject: FW: PM&C ref: FOI/2020/010 - re FOI2018/015 - OAIC Complaint Ref no CP18/01243 URGENT: courtesy consultation [SEC=OFFICIAL]
Date: Thursday, 16 January 2020 9:50:12 PM
Attachments: s22

s47E(d)
[ATTACHMENT A - PMC Detailed Reasons FOI2020-010 re FOI2018-015 and OAIC Complaint Ref no CP18-01243.pdf](#)
[RE Seeking transfer of FOI request SECOFFICIAL.msg](#)

Importance: High

OFFICIAL

Dear Ms Nowland,

Thank you for your emails of 9 and 15 January 2020 (below and attached) requesting transfer of the OAIC FOI request to the Department of the Prime Minister and Cabinet (the Department).

s47C, s47E(d)

Courtesy Consultation Comments

-

Scope

We provide our preliminary comments below in relation to s47E(d) we consider would be in scope of the request as set out in your email of 9 January 2020; namely:

s47E(d)

We submit that the other documents you have provided to us s47E(d) do not comprise *submissions* made by the Department of the Prime Minister and Cabinet in relation to the matter with OAIC reference: CP18/01243. Our reasons are as follows:

s47E(d)

s47E(d)

In our view, s47E(d) do not fall within the scope of the request as they are not the *submissions* made by the Department in relation to the complaint investigation.

The Department's *submissions* in response to the complaint investigation can be clearly distinguished from the other documents provided to the OAIC both in substance and form.

Preliminary consultation comments

The Department's submissions were provided to the OAIC on a confidential basis for the purposes of assisting with a complaint investigation pursuant to section 69 of the *Freedom of Information Act 1982* (FOI Act). On that basis, we submit s47E(d) (i.e. the documents in scope) should be exempt in full.

s47C, s47E(d)

Grounds for exemption of remaining material not covered by the above limited exception:

The Department objects to the disclosure of s47E(d) in full under sections **45, s 47E(d), s 47C, s 47F and s 47G** of the FOI Act.

Section 76(1) of the FOI Act provides that '[a]n investigation must be conducted in private and in a way the Information Commissioner thinks fit' (emphasis added by the Department). This is the guiding principle upon which the Department bases its legitimate expectations that, unless otherwise agreed, any confidential submissions that the Department provided to the OAIC in response to a complaint investigation being pursued under the FOI Act will be maintained in confidence by the OAIC and the Information Commissioner. This expectation goes to the nature, substance and integrity of the process (i.e. a formal complaint investigation under law) and applies in principle to former, current and future investigations for which the Department has provided confidential submissions and/or receives agreement to provide in the future.

Additionally, there is a large range of frank and comprehensive deliberative, operational, personal and business-related material within the confidential submissions.

The Department acknowledges that conditional exemptions are subject to the public interest test, with regard to the factors favouring access set out in section 11B(3) of the FOI Act.

In these particular circumstances, the Department submits that disclosure of the confidential

documents would, on balance, be contrary to the public interest on the basis that disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy
- impede the administration of justice generally, including procedural fairness
- infringe the statutory requirement in s 76(1) of the FOI Act that '[a]n investigation must be conducted in private and in a way the Information Commissioner thinks fit' (emphasis added)
- prejudice the ability of an agency to fulfil its statutory obligations in processing requests under the FOI Act
- prejudice the conduct, with the potential to impede the integrity of an investigation by the Australian Information Commissioner (IC) under Part VIIB of the FOI Act
- impede the necessary flow of information to a regulatory agency to enable both the respondent agency and IC to fulfil their statutory obligations
- prejudice an agency's ability to lawfully obtain and communicate confidential information
- prejudice an agency's ability to obtain information and respond to requests for similar information in the future
- disclose sensitive operational and technical information of the Department over which security should be maintained, which if disclosed would have a substantial adverse effect on the proper and efficient conduct of the Department's operations and increase broader security risk to the Department
- harm the interests of an individual

In the time available, we note the above factors and considerations supporting non-disclosure are not exhaustive. We have elaborated further on our underpinning reasoning in the attached word document.

'DZ' and Commonwealth Ombudsman

As you would be aware, in ['DZ' and Commonwealth Ombudsman \[2014\] AICmr 137](#) [15]-[17], the Information Commissioner considered whether disclosure of a communication from a Department of Employment officer consulting the Ombudsman's office about how to manage information held across two agencies for the purpose of the Ombudsman's investigation would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations for the purposes of s 47E(d).

The Information Commissioner was satisfied that in circumstances where information is held across more than one agency, agencies would be less forthcoming and willing to consider and consult with the Ombudsman during an investigation on the proper course of action where their information is not treated confidentially, and that disclosure would have a substantial adverse effect on the function of the Ombudsman to investigate complaints in private under the *Ombudsman Act 1976*.

The Department submits that the documents covered by this FOI request are more sensitive than the kind of document dealt with in *'DZ' and Commonwealth Ombudsman*. This is because the documents covered by this FOI request also go to the *substance of the complaint* as opposed to the management of information across two agencies in the context of a complaint.

The Department submits that the reasoning in *'DZ' and Commonwealth Ombudsman* applies

with greater force in relation to the documents covered by this FOI request.

Further consultation with PM&C

Any other documents considered in scope by the OAIC

As mentioned above, based on the terms of the request as set out in your email of 9 January 2020, the Department considers that only s47E(d) [REDACTED] are within scope.

If the OAIC decision-maker considers other documents are in scope and/or other persons are to be consulted on either the Department's confidential submissions or other documents, we request to be consulted to provide further submissions prior to any third party consultation taking place. This particularly the case in so far as those documents may reveal personal information of Departmental staff below SES level.

Thanks, s47E
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s47E(c), s47F [REDACTED]

FOI & Privacy Section

Legal Policy Branch | Government Division

Department of the Prime Minister and Cabinet

s47E(c), s47F [REDACTED]

[REDACTED] | foi@pmc.gov.au | www.dpmc.gov.au

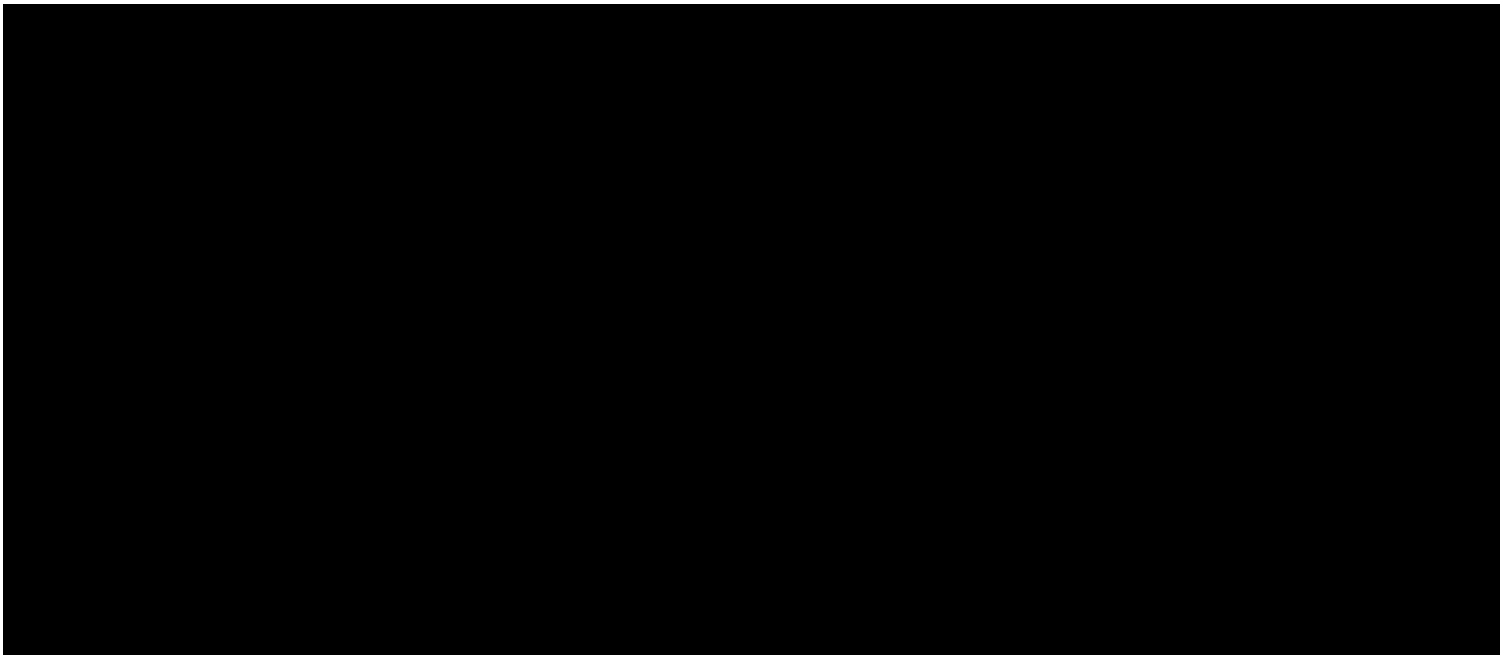
PO Box 6500 CANBERRA ACT 2600



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Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

PM&C reference: FOI/2020/010

Attachment A - Detailed reasons

The Department of the Prime Minister and Cabinet's detailed reasons in support of exemption of the documents under s 45, s 47C, s 47E(d), s 47F and s 47G(1)(b) of the FOI Act appear below.

The Department makes some general observations below regarding the Department's legitimate expectations regarding confidentiality of the submissions, which we consider are relevant to the application of each of the exemptions we have claimed, followed by detailed reasons in support of each exemption.

Unless otherwise indicated, references to document numbers are to the numbers given to the documents s47E(d)

s47E(d)

Scope

As set out in the Department's cover email of today's date, the Department considers that only the following documents fall within the scope of the FOI request set out in Ms Nowland's email of 9 January 2020; namely:

s47E(d)

The Department's submissions in response to the complaint investigation can be clearly distinguished from the other documents provided by Ms Nowland both in substance and form.

If the OAIC decision-maker considers other documents are in scope and/or other persons are to be consulted on either the Department's confidential submissions or other documents, we request to be consulted to provide further submissions prior to any third party consultation

taking place. This is particularly the case in so far as those documents may reveal personal information of Departmental staff below SES level.

General observations – the Department’s legitimate expectations

The Department has a legitimate expectation that, unless otherwise agreed, any submissions that the Department provided to the OAIC will be maintained in confidence by the OAIC.

This legitimate expectation is based on the following grounds:

- Section 76(1) of the FOI Act provides that ‘[a]n investigation must be conducted in private and in a way the Information Commissioner thinks fit’ (underlining is the Department’s emphasis). The FOI Guidelines¹ state at paragraph 11.16 that ‘The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner’s complaint investigations ... The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)).’
- Part VIIB of the FOI Act contains protections for those involved in providing information to the Information Commissioner, namely preservation of legal professional privilege (s 84 of the FOI Act), and immunity from civil proceedings and from civil and criminal penalty for giving information in good faith for the purposes of a complaint investigation (s 85 of the FOI Act).
- The Department submits that the combined effect of ss 76(1), 84 and 85 of the FOI Act is to encourage agencies to provide frank and candid information to the Information Commissioner for the purposes of a complaint investigation. The Department submits that releasing confidential submissions under the FOI Act would discourage agencies from providing frank and candid information to the Information Commissioner and be contrary to the requirement that ‘an investigation must be conducted in private’.

s47C, s47E(d)

¹ FOI Guidelines combined November 2019 published on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

s47C, s47E(d)



Section 45

Noting the circumstances in which the Department's submissions were communicated to the OAIC and the Department's legitimate expectations as described above, and noting the exception to the application of s 45 of the FOI Act in s 45(2) of the FOI Act, the Department submits that disclosure would constitute a breach of confidence owed to the following persons or bodies:

s47F



Section 47C

The Department submits that the documents contain deliberative matter 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 particular, the documents contain the Department's opinion and advice 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 the Department in responding to the investigation of a complaint by the Information Commissioner under Part VIIB of the FOI Act.

The Department's submissions on the application of the public interest test are under the heading "the public interest" further below.

OFFICIAL: SENSITIVE

Section 47E(d)

The Department submits that disclosure of the documents would have a substantial adverse effect on the proper and efficient conduct of the operations of:

- the Department, by inducing a reluctance to provide information to the OAIC if the Department were aware that information, provided in the circumstances described above in connection with the Department's legitimate expectation of confidentiality, were to be disclosed under the FOI Act. The Department's ability to fully justify its actions in a sensitive complaint investigation would thereby be impaired; and
- the OAIC, by depriving the OAIC of the information it requires in order to fully discharge its statutory complaint investigation function under Part VIIB of the FOI Act.

In this regard we refer you to a pertinent decision of the Information Commissioner in which it was broadly held that disclosure of documents provided to the Commonwealth Ombudsman by an agency in the context of a complaint investigation by the Ombudsman was exempt under s 47E(d) of the FOI Act.

In *'DZ' and Commonwealth Ombudsman* [2014] AICmr 137 [15]-[17], the Information Commissioner considered whether disclosure of a communication from a Department of Employment officer consulting the Ombudsman's office about how to manage information held across two agencies for the purpose of the Ombudsman's investigation would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations for the purposes of s 47E(d). The Information Commissioner was satisfied that in circumstances where information is held across more than one agency, agencies would be less forthcoming and willing to consider and consult with the Ombudsman during an investigation on the proper course of action where their information is not treated confidentially, and that disclosure would have a substantial adverse effect on the function of the Ombudsman to investigate complaints in private under the *Ombudsman Act 1976*.

We submit that the documents covered by this FOI request are more sensitive than the kind of document dealt with in *'DZ' and Commonwealth Ombudsman* in that the documents covered by this FOI request go to the substance of the complaint as opposed to the management of information across two agencies in the context of a complaint. We therefore submit that the reasoning in *'DZ' and Commonwealth Ombudsman* applies with greater force in relation to the documents covered by this FOI request to support exemption under s 47E(d) of the FOI Act.

The Department further submits that disclosure of the documents would have a substantial adverse effect on the Department's ability to process requests under the FOI Act. **s47E(d)**

s47E(d)

s47E(d) Third parties and courtesy consultees might provide only bland responses or no responses if they were aware that their confidential responses might be disclosed under the FOI Act despite assurances of confidentiality. If the Department were deprived of fulsome responses from third parties or courtesy consultees, then the Department would not be able to make fully informed access decisions in response to requests under the FOI Act. This would be contrary to the objects of the FOI Act.

The Department's submissions on the application of the public interest test are under the heading "the public interest" further below.

Section 47F

The Department submits that the documents contain information the disclosure of which would be an unreasonable disclosure of the personal information of the following individuals:

- if the applicant is not the complainant (Mr Will Frazier) in CP18/01243, the complainant;

s47F(1), s47G(1)

The Department submits that disclosure of the personal information would be unreasonable for the following reasons:

- The personal information is not well known.
- The persons to whom the personal information relates are not known to be or to have been associated with the matters dealt with in the document.
- The personal information is not available from publicly accessible sources.
- The individuals concerned are likely to express opposition to the disclosure of their personal information.
- The circumstances of the Department's collection and use of the information were either in the context of confidential communications concerning third party consultation in the processing of FOI request FOI/2018/015 s47E(d)

s47E(d) referred to above), or in the context of an FOI applicant whose request was not published on the Right to Know website s47F(1)

s47F(1) This personal information was included submissions which, as we have noted above, were communicated to the OIAIC on a confidential basis.

The Department's submissions on the application of the public interest test are under the heading "the public interest" further below.

Section 47G(1)(b)

The Department submits that disclosure of s47E(d) could reasonably be expected to prejudice the future supply of information to the Department for the purpose of the administration of the FOI Act by the Department. As noted above in relation to our submissions concerning s 47E(d) of the FOI Act, third parties and courtesy consultees might provide only bland responses or no responses if they were aware that their confidential responses might be disclosed under the FOI Act despite assurances of confidentiality. The Department requires fulsome responses from third parties and courtesy consultees in order to make fully informed access decisions in response to requests under the FOI Act.

The Department's submissions on the application of the public interest test are under the heading "the public interest" further below.

The public interest

In relation to the public interest conditional exemptions claimed by the Department (s 47C, s 47E(d), s 47F and s 47G(1)(b) of the FOI Act) the Department's submissions on the application of the public interest test in s 11A(5) of the FOI Act appear below.

The Department submits that of the public interest factors favouring access in s 11B(3) of the FOI Act which must be considered if relevant, the only factor that appears to be relevant is that disclosure of the conditionally exempt documents could promote the objects of the FOI Act. The Department is not otherwise aware of any other public interest factors that may favour disclosure of the conditionally exempt documents.

The Department submits that disclosure of the conditionally exempt documents would, on balance, be contrary to the public interest on the basis that disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy
- impede the administration of justice generally, including procedural fairness
- infringe the statutory requirement in s 76(1) of the FOI Act that '[a]n investigation must be conducted in private and in a way the Information Commissioner thinks fit' (emphasis added)
- prejudice the ability of an agency to fulfil its statutory obligations in processing requests under the FOI Act
- prejudice the conduct, with the potential to impede the integrity of an investigation by the Australian Information Commissioner (IC) under Part VIIB of the FOI Act
- impede the necessary flow of information to a regulatory agency to enable both the respondent agency and IC to fulfil their statutory obligations
- prejudice an agency's ability to lawfully obtain and communicate confidential information
- prejudice an agency's ability to obtain information and respond to requests for similar information in the future
- disclose sensitive operational and technical information of the Department over which security should be maintained, which if disclosed would have a substantial adverse effect on the proper and efficient conduct of the Department's operations and increase broader security risk to the Department
- harm the interests of an individual.

The Department submits that the OAIC should attach more weight to the public interest factors against disclosure than to the public interest factor favouring disclosure. The Department submits that the weight of the public interest compels a finding that disclosure of the conditionally exempt documents would, on balance, would be contrary to the public interest.

Third Party Consultations

If the OAIC proposes to release the documents contrary to the Department's submissions, then the Department submits that it would be prudent for the OAIC to undertake the following consultations:

- third-party consultations under s 27 and/or s 27A of the FOI Act, as applicable:

s47F(1), s47G(1)

- courtesy consultations:

OFFICIAL: SENSITIVE


s47E(d)

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s47C, s47E(d)

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s47E(c), s47F

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FOI& Privacy Section

16 January 2020

OFFICIAL: SENSITIVE

Document 3

From: s47E(c),
To: [Amanda Nowland](#)
Cc: [FOI](#)
Subject: RE: PM&C ref: FOI/2020/010 - re FOI2018/015 - OAIC Complaint Ref no CP18/01243 URGENT: courtesy consultation [SEC=OFFICIAL]
Date: Tuesday, 18 February 2020 11:16:16 AM
Attachments: s22

s22

OFFICIAL

Dear Amanda

Thank you for your time on the phone just now. As discussed:

- PM&C wishes to be provided with the documents in the form proposed for release to the applicant, and that this be provided to PM&C prior to those documents being released to the applicant, as PM&C reserves the opportunity to provide further comments in relation to the release of those documents.

s47F(1)

I note that you advised you would send me an email in the next half hour in response, many thanks in advance and please contact me anytime to discuss further.

Regards

s47E(c), s47F

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Department of the Prime Minister and Cabinet

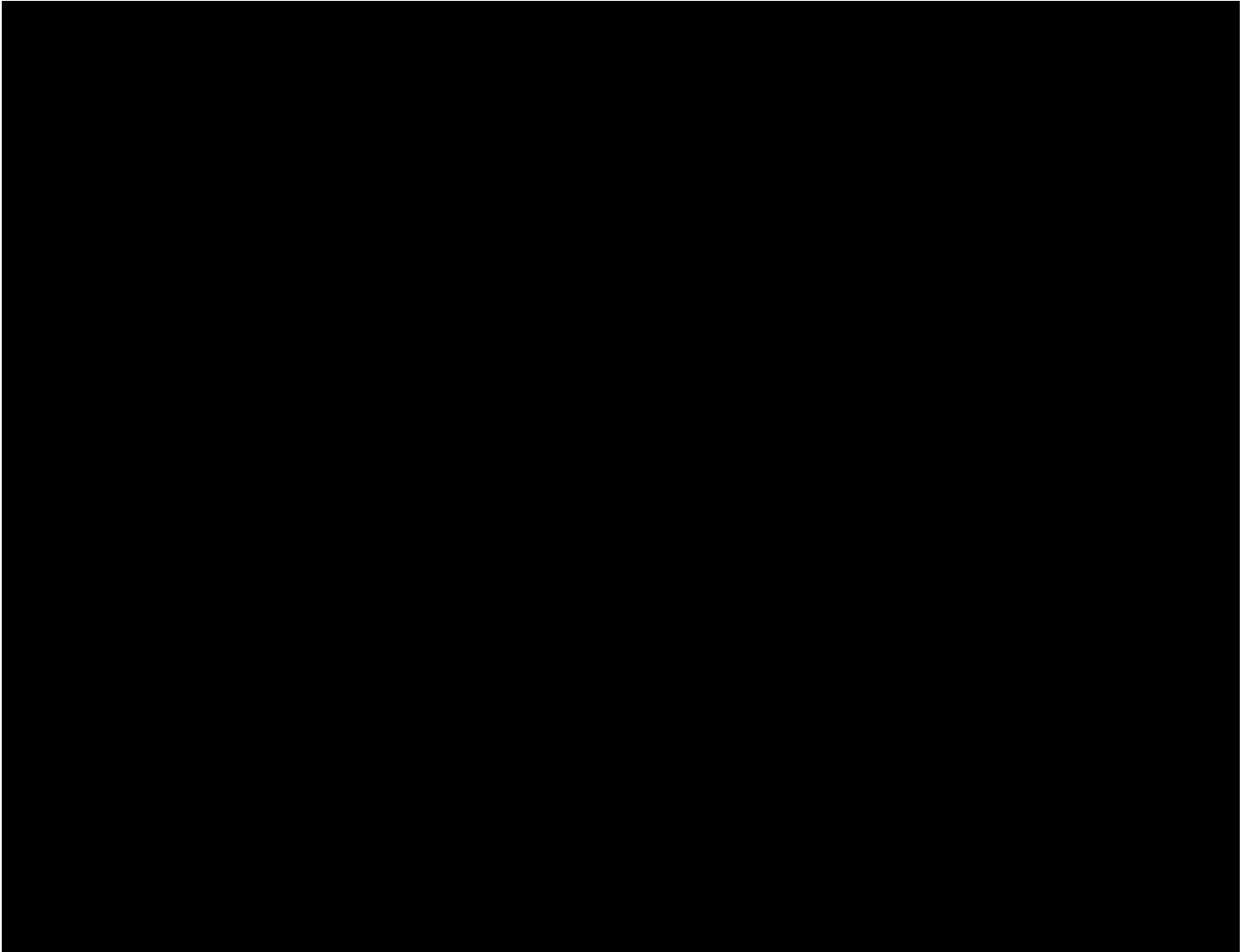
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The Department acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters and community. We pay our respect to their Cultures, Country and Elders both past and present.



From: FOI <FOI@pmc.gov.au>

Sent: Monday, 17 February 2020 4:35 PM

To: Amanda Nowland <amanda.nowland@oaic.gov.au>

Cc: FOI <FOI@pmc.gov.au>

Subject: RE: PM&C ref: FOI/2020/010 - re FOI2018/015 - OAIC Complaint Ref no CP18/01243

URGENT: courtesy consultation [SEC=OFFICIAL]

s22

OFFICIAL

Dear Amanda

Thank you for your below email. I am currently acting in s47E(c) position and have tried to call you this afternoon and left you a voicemail, grateful if you can call me back at the earliest opportunity to discuss.

Many thanks

Regards

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s47E(c), s47F

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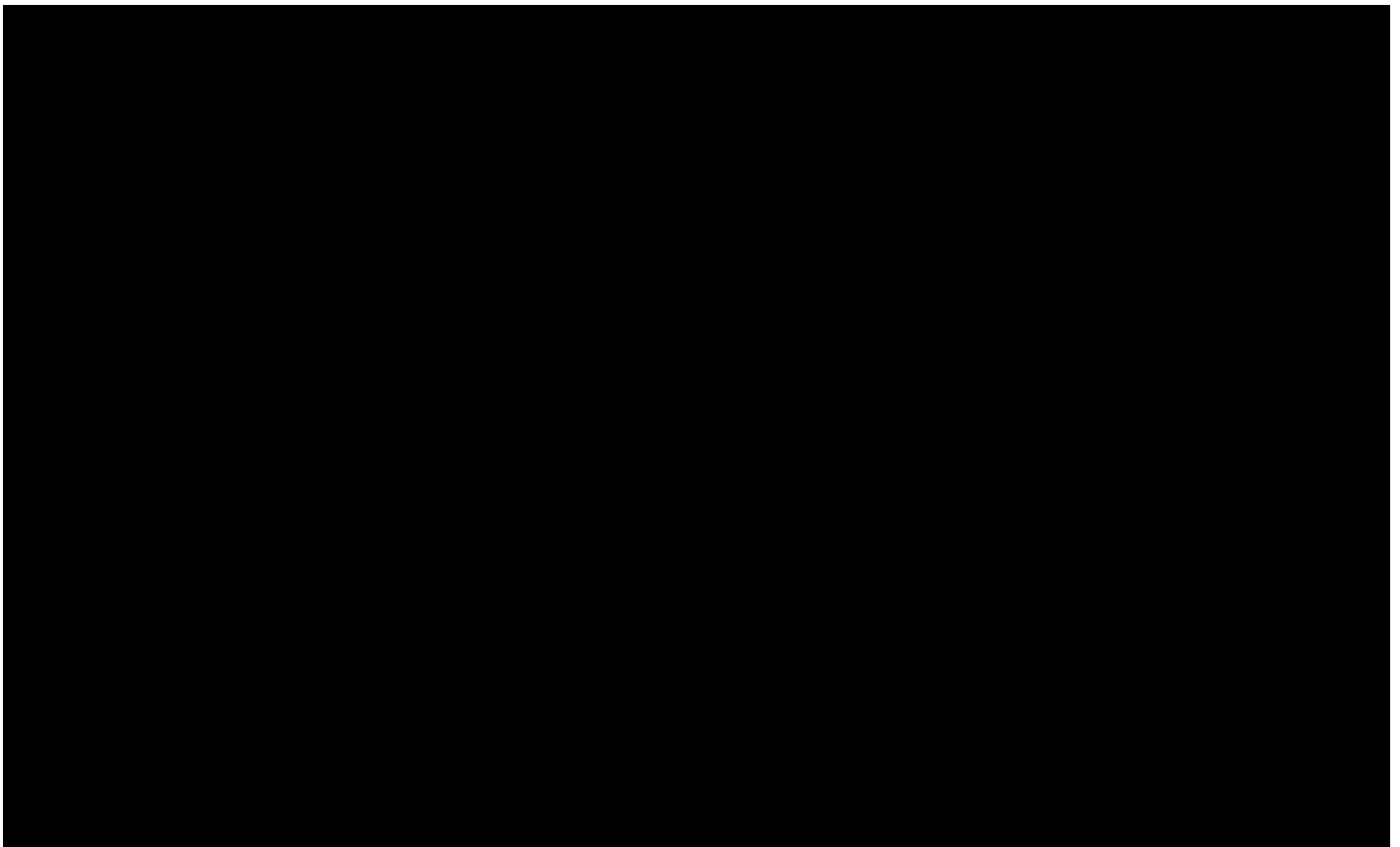
s47E(c), s47F

s47E(c), s47E(d) | foi@pmc.gov.au | www.pmc.gov.au

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From: s47E(c),
To: [Amanda Nowland](#)
Cc: [FOI: Moran, Celeste](#); [Rocelle Ago](#)
Subject: RE: Your ref: FOI/2020/010 agency consultation [SEC=OFFICIAL]
Date: Tuesday, 18 February 2020 5:00:35 PM
Attachments: s22

Document 4

s22

OFFICIAL

Dear Amanda

Thank you for your below email. We wish to provide the following further response.

s47E(d), s47F(1)

Accordingly, it is difficult for us to provide comments (and by 5PM today) in the absence of the documents you propose to release, noting that we previously submitted that s47C, s47E(d)

s47C, s47E(d)

s47C, s47E(d)

Again, in the absence of knowing which the documents you are proposing to release, we are unable to ascertain which of that information has been exempted. This also which hinders our ability to adequately and appropriately advise PM&C staff regarding the release of their details, and manage any sensitivities with staff/PM&C's relationship with third parties, in light of the release of that information.

In summary and per my email of earlier today, PM&C wishes to be provided with the documents in the form proposed for release to the applicant, and that this be provided to PM&C prior to those documents being released to the applicant, as PM&C reserves the opportunity to provide further comments in relation to the release of those documents.

Regards

s47E(

s47E(c), s47F

FOI & Privacy Section

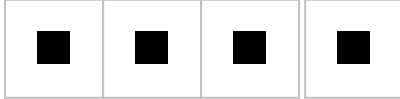
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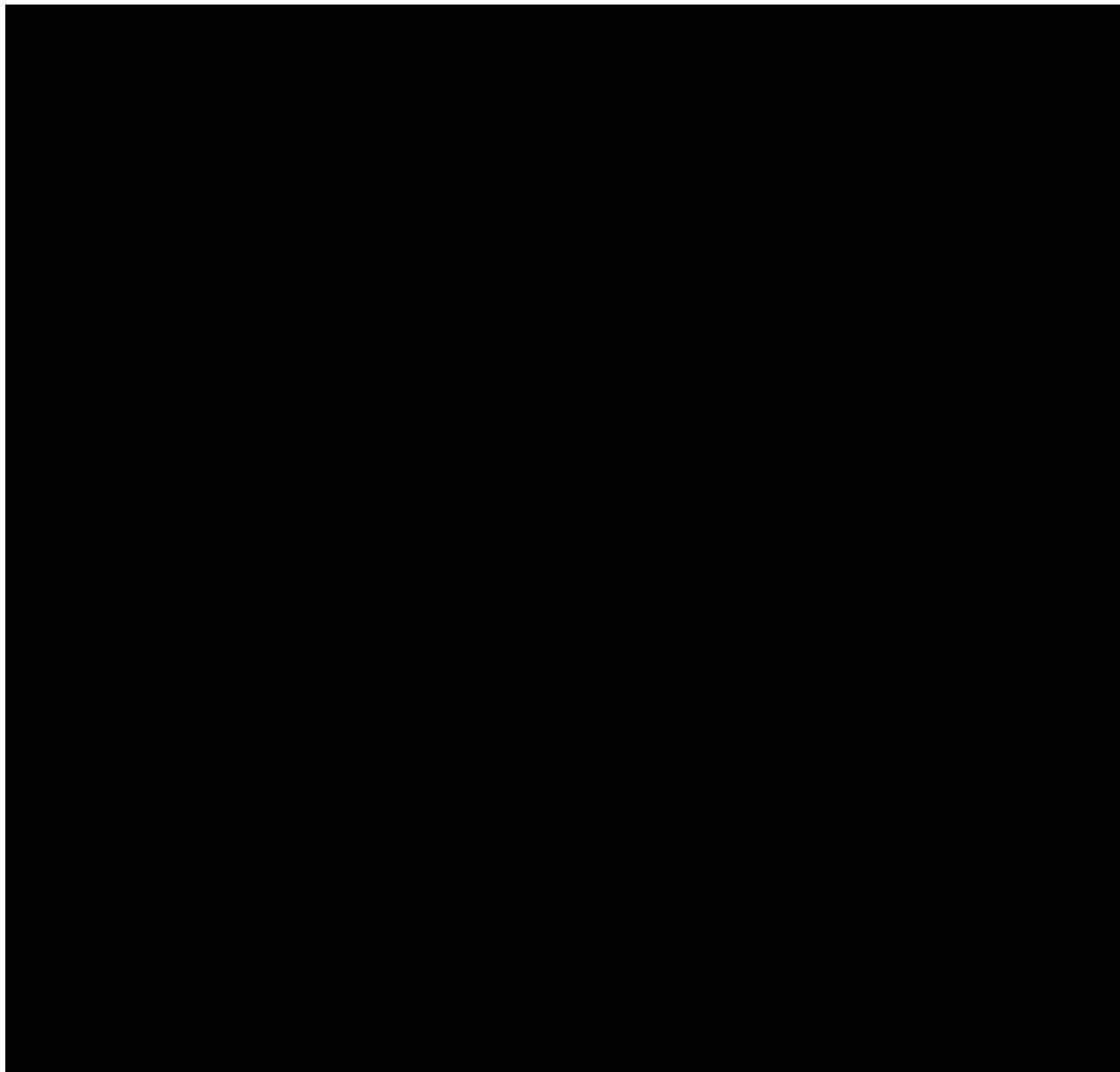
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From: FOI
To: s 47F
Cc: Moran, Celeste; Rocelle Ago; FOI
Subject: RE: Seeking transfer of FOI request [SEC=OFFICIAL]
Date: Wednesday, 19 February 2020 2:10:13 PM
Attachments: s22

Document 5

s22

OFFICIAL

Dear Amanda

I tried to send the below with attachments and just received a message that it has bounced back but is too large to send.

I am resending now without the attachments.

Kind regards

s47E(c), s47F

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s47E(c), s47F

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From: FOI
Sent: Wednesday, 19 February 2020 2:03 PM
To: 'Amanda Nowland' <amanda.nowland@oaic.gov.au>
Cc: FOI <FOI@pmc.gov.au>; Moran, Celeste <Celeste.Moran@pmc.gov.au>; 'Rocelle Ago' <rocelle.ago@oaic.gov.au>
Subject: RE: Seeking transfer of FOI request [SEC=OFFICIAL]

OFFICIAL

PM&C ref: FOI/2020/010

Dear Ms Nowland

I refer to your email of 23 December 2019 (attached), your email of 9 January 2020 providing the scope of the request (attached), your email of 15 January 2020 providing documents (attached), and our response of 16 January 2020 (attached).

I also refer to your email of 17 February 2020 (attached), and subsequent correspondence between us on 18 February 2020 (attached).

Based on these and follow-up discussions yesterday, we accept transfer of this request.

We would appreciate if you can provide us all relevant documents in relation to this request, including correspondence with the applicant in relation to extension/s of time and notice of the transfer of the request.

Kind regards

s47E(c), s47F

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s47E(c), s47F

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