



**Australian
Human Rights
Commission**

Our Ref: FOI-2023/0411101531

11 May 2023

Alex Pentland

By email: foi+request-10146-88d5eb3b@righttoknow.org.au

Dear Mr Pentland,

Notice of Decision: Request under the *Freedom of Information Act 1982 (Cth)*

1. I refer to your *Freedom of Information Act 1982 (Cth)* (FOI Act) request to the Australian Human Rights Commission (Commission).
2. I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.

1. Background

3. On 8 April 2023, you wrote to the Commission via email requesting the following:
 - a) Correspondence from Human Rights Commissioner Lorraine Finlay that contains the phrase "Voice to Parliament" or "Constitutional Alteration" since 1 July 2022
 - b) Correspondence between officials of the Australian Human Rights Commission relating to the statement "Commission Welcomes Constitutional Alteration Bill" issued on their website, accessible here <https://humanrights.gov.au/about/news/media-releases/commission-welcomes-constitutional-alteration-bill>
 - c) Correspondence between officials of the Australian Human Rights Commission relating to Lorraine Finlay's piece in The Australian titled "Voting No to Indigenous voice to Parliament doesn't mean you reject human rights", accessible here <https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.theaustralian.com.au%2Fcommentary%2Fvoting-no-to-voice-doesnt-mean-you-reject-human-rights-human-rights-commissioner-lorraine-finlay%2Fnews-story%2F368dbabe2ea1f0f3342306b8da193ba1%3Famp&data=05%7C>

[01%7Cfoi%40humanrights.gov.au%7C98ac3da0349c410e1b2f08db382a76f7%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C638165527415525288%7CUnknown%7CTWFpbGZsb3d8eyJWljojMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTil6lk1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=li5C06ZOMUE5EqxS%2FgQCFG7i%2F5TGEGTzqBXMTNYAjjg%3D&reserved=0](https://www.foi.gov.au/foi/01%7Cfoi%40humanrights.gov.au%7C98ac3da0349c410e1b2f08db382a76f7%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C638165527415525288%7CUnknown%7CTWFpbGZsb3d8eyJWljojMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTil6lk1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=li5C06ZOMUE5EqxS%2FgQCFG7i%2F5TGEGTzqBXMTNYAjjg%3D&reserved=0)

4. On 11 April 2023, we wrote to you acknowledging your FOI request and notifying you that a decision in relation to your request would be made by 11 May 2023.
5. Upon receipt of your request, the Deputy General Counsel of the Commission's Legal team contacted the senior members of staff who had been involved in discussions about the matters addressed in your FOI request, and asked to be provided with all documents that fall within the scope of your request.
6. The following categories of documents were found to be relevant to your FOI request:
 - a) Emails between Commission staff (including email correspondence from Human Rights Commissioner, Lorraine Finlay).
 - b) SMS messages between the Human Rights Commissioner and the President of the Commission.
 - c) SMS messages between the President and Chief Executive Officer (CEO) of the Commission.
7. The **attached** schedule of documents describes the documents found to fall within the scope of your FOI request, and each document's access decision. Each document's access decision has been made with regard to the following:
 - a. The content of the documents within the scope of your request.
 - b. The FOI Act.
 - c. Guidelines issued by the Office of the Australian Information Commissioner under s 93A of the FOI Act (Guidelines).¹
 - d. Relevant case law.

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*.

8. The **attached** bundle of documents are the documents being released to you.

2. Decision

9. Section 11 of the FOI Act requires documents that fall within an FOI Act request to be produced in response to that request unless the FOI Act provides an exemption for a particular type of document.

10. The FOI Act sets out categories of documents that are wholly exempt, and other categories of documents that are conditionally exempt. Conditionally exempt documents must be produced in response to an FOI Act request unless it would be contrary to the public interest to do so.

11. I have decided as follows:

- a) To partially grant access to the email correspondence between Commission staff. The emails, and parts of emails for which access has been refused have been redacted or withheld. Access is refused under s 47C (Deliberative processes) and s 47E (Documents affecting certain operations of agencies) of the FOI Act. A number of small redactions have also been made pursuant to s 47F (personal privacy) of the FOI Act.
- b) To fully grant access to the relevant SMS messages between the Human Rights Commissioner and the President of the Commission.
- c) To refuse access in full to the SMS messages between the President and CEO of the Commission. Access is refused under s 47C (Deliberative processes) and s 47E (Documents affecting certain operations of agencies) of the FOI Act.

12. Full reasons for reliance on these exemptions are set out below. I note that any material that is irrelevant to your request and contained within the documents has been redacted under s 22 of the FOI Act.

3. Reasons for Decision

3.1 Conditional exemption (deliberative process)

13. Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure if it contains deliberate matter.

14. Deliberate matter is content that is in the nature of, or relating to either:

- a) an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- b) a consultation or deliberation that has taken place, in the course of, or for the purpose of, a deliberative process of the government, an agency or minister.

15. Deliberative matter does not include operational information or purely factual material.²

16. The FOI Guidelines explain that a deliberative process involves the exercise of judgment 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.

17. With reference to the attached schedule of documents, I have formed the view that disclosure of certain information in the following folios would involve the disclosure of deliberative matter: 1, 2, 3, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 24, 26. I have also formed the view that disclosure of the SMS messages between the President and CEO of the Commission, referred to at folio 27, would involve the disclosure of deliberative matter.

18. These documents include the following content:

- a) working drafts of the statement from the Commission's President published on the Commission's website on 30 March 2023 and related discussions between Commission staff providing opinions, advice, recommendations, and deliberations as part of the process leading to the finalisation and publication of that statement.
- b) working drafts of the Human Rights Commissioner's piece in the Australian titled "Voting No to Indigenous voice to parliament doesn't

² Section 47C(2), FOI Act.

mean you reject human rights” published on 30 March 2023, and related discussions providing opinions and advice.

- c) Discussions including expressing opinions, deliberating options, and providing advice and recommendations regarding the Commission’s strategy and approach to responding both externally and internally to inquiries and matters arising from the above publications.

19. The preparation of drafts in the process of arriving at a final product, and such internal discussions as described above is an operational function of an agency. I am satisfied that these documents contain deliberative matter.
20. However, pursuant to s 11A(5) of the FOI Act, a document must be disclosed even if it is conditionally exempt, unless disclosure of the document would be contrary to the public interest. In my view, disclosure of the deleted/withheld material in these documents, would be contrary to the public interest.
21. In forming this view, I have had regard to the below matters.
22. Disclosing the documents would promote the objects of the FOI Act (s 11B(3)(a)). I consider that this is the only factor in favour of disclosure and that it is outweighed by other factors. Given the other material disclosed, I am not satisfied that disclosure of the deleted material would inform public debate on a matter of public importance (s 11B(3)(b)).
23. One relevant public interest factor against disclosure identified in the FOI Guidelines is that disclosure could reasonably be expected to prejudice the management function of an agency.³The list of factors set out in the Guidelines is non-exhaustive.
24. Relevant management functions of the Commission include promoting an understanding and acceptance, and the public discussion, of human rights in Australia.⁴ The publication of the article by the Human Rights Commissioner, and the publication of the statement by the President of the Commission on 30 March 2023 concern a topical human rights issue.
25. The deleted materials contain discussions that ultimately go towards determining how best the Commission can promote an understanding and

³ Australian Information Commissioner, FOI Guidelines [6.22(n)].

⁴ *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(g).

acceptance and how best to promote public discussions around the human rights issue(s) in this particular context.

26. I am satisfied that disclosure of the deleted material could reasonably be expected to inhibit the effectiveness of the evaluation and decision-making processes of the Commission relevant to exercising this function.
27. There is a public interest in protecting the integrity of decision-making processes. This can be done by separating the final decisions from the opinions and discussions around specific decisions made along the way and provided at earlier stages of the consideration of a matter. The opinions expressed in the deleted material were preliminary in nature, they did not necessarily constitute final decision and were not intended to be viewed as constituting final decisions. These materials reflect the thinking process involved in arriving at a final point.
28. I have decided that it is appropriate to release some of the emails between Commission staff to provide high level context regarding the internal discussions that were had. To the extent that there is material in the documents likely to inform debate on a matter of public importance, I consider that it is contained in the parts of the documents to be released.
29. Having regard to all of these matters, I am satisfied that disclosure of the deleted/withheld material in these documents would be contrary to the public interest.

3.2 Conditional exemption (documents affecting certain operations of the agency)

30. Section 47E(d) of the FOI Act provides that a document is conditionally exempt from disclosure if 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'.
31. I have formed the view that disclosure of the documents (or parts of the documents) described in the attached schedule of documents at folios 1, 3, 8, 9, 12, 16, 17, and 27, could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Commission's function to

promote an understanding and acceptance, and the public discussion, of human rights in Australia.

32. In section 3.1 above, I have outlined why I am of the view that the documents captured by your FOI request were created in exercising the Commission's functions under s 11(1)(g) of the *Australian Human Rights Commission Act 1986* (AHRC Act).
33. As indicated in the Guidelines, the phrase 'could reasonably be expected to' requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document. The guidelines note that the use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.⁵
34. A central function of the Commission is to promote an understanding and acceptance, and the public discussion, of human rights in Australia. To be able to do this effectively, it is vital that Commission staff, especially senior management staff who are responsible for making decisions at the highest level, can communicate with one another in a candid fashion. An important part of being able to communicate frankly with colleagues is the expectation that some discussions will be kept confidential. Often there is no specific intention for the discussions to be treated as confidential but due to the nature of the information discussed, disclosure would or could reasonably be expected to come as a surprise to those providing it and could discourage them from speaking candidly which would hinder the best interests of the agency in carrying out its functions. Confidentiality of certain discussions provide an incentive to those within the Commission to fully, and without hesitation, participate openly in the Commission's internal deliberative processes to best assist the agency to carry out its functions.
35. For these reasons I find that disclosure of the documents (or parts of the documents) at folios 1, 3, 8, 9, 12, 16, 17, and 27, could reasonably be expected to have a substantial and adverse effect on the proper and efficient conduct of the operations of the Commission.
36. Pursuant to s 11A(5) of the FOI Act, a document must be disclosed even if it is conditionally exempt, unless disclosure of the document would be contrary to

⁵ Re Maksimovic and Australian Customs Service [2009] AATA 28.

the public interest. In my view, disclosure of the documents in question would be contrary to the public interest.

37. Section 11B(3) of the FOI Act sets out factors favouring disclosure of documents. These include:

- promoting the objects of the Act
- informing debate on a matter of public importance
- promoting effective oversight of public expenditure
- allowing a person to access his or her own personal information.

38. I have considered whether disclosure would promote the objects of the FOI Act. The objects of the FOI Act relevantly include the objects of:

- increasing scrutiny, discussion, comment and review of the Government's activities
- increasing recognition that information held by the Government is to be managed for public purposes, and is a national resource
- facilitating and promoting public access to information, promptly at the lowest reasonable cost.

39. I consider that disclosure of the withheld information may, to some limited extent, promote the objects of the FOI Act. Disclosure may, to some very limited extent, increase recognition that information held by Government is to be managed for public purposes and is a national resource in the sense that it would be an example of information held by an agency being provided to a member of the public. However, I do not consider that this factor should have determinative weight in the circumstances. I do not believe that the contents of the documents in question would particularly increase scrutiny, discussion, comment and review of the Government's activities.

40. I have considered whether disclosure would inform debate on a matter of public importance. While I consider that the overarching substantive subject matter of the publications and related discussions may in a general sense relate to a matter of public importance, the documents in question specifically contain Commission staff's deliberations and internal working processes that were not intended to be viewed as final decisions. Therefore, I consider that release of

these documents would only inform debate on a matter of public importance to a limited extent.

41. Further, disclosure would not go towards promoting oversight of public expenditure, as the documents do not contain information that relates to, or could provide insight into, public expenditure.
42. I have also had regard to the OAIC Guidelines which outline public interest factors favouring disclosure and public interest factors against disclosure. The OAIC Guidelines at 6.22 relevantly specify that disclosure may be contrary to the public interest where disclosure could reasonably be expected to:
 - impede the flow of information to ... [a] regulatory agency
 - prejudice an agency's ability to obtain confidential information
 - prejudice an agency's ability to obtain similar information in the future
 - harm the interests of an individual or group of individuals.
43. I consider that the release of the withheld materials would impede the Commission's ability to carry out its functions, as it could reasonably deter Commission staff, in this case senior members of staff, from fully and candidly participating in important deliberative decision-making processes.
44. In my view, the factors against disclosure of the withheld materials outweigh the factors in favour of disclosure. Accordingly, it is my view that disclosure would be contrary to the public interest.

3.3 Section 47F (personal privacy)

45. I note briefly that a number of small redactions to the documents have been made pursuant to s 47F(personal privacy) of the FOI Act. These redactions are at folios 11 and 15.
46. These redactions concern the names of individuals and organisations outside of the Commission. The Commission did not consult with these outside parties about releasing this information, which is likely to be 'personal information' under s 47F of the FOI Act. In my view, the remainder of the information contained in the documents at folios 11 and 15 and released to you provide a full picture of the information contained within those documents.

4. Your review rights

4.1 Internal Review

47. You may apply for an internal review of my decision by writing to the Commission within 30 days of the date of this letter stating the reasons why you believe the review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

4.2 Information Commissioner Review

48. You may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

Online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10
Email: foidr@oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
In Person: Level 3, 175 Pitt Street, Sydney NSW

Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/> for more information about a review by the Information Commissioner.

Yours sincerely



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