



## Australian Government

### Department of Health and Aged Care

FOI reference: FOI 4617

Lucky Gilcrest

By Email: [foi+request-10543-6e9e079a@righttoknow.org.au](mailto:foi+request-10543-6e9e079a@righttoknow.org.au)

Dear Lucky

### Decision on your Freedom of Information Request

I refer to your request of 9 August 2023, to the Department of Health and Aged Care (the department), seeking access under the *Freedom of Information Act 1982* (Cth) (FOI Act) to:

*'I would like to make a request under section 15 of the FOI Act for the following regarding the Department of Health and Aged Care 2023 APS Census Results:*

*-Legal and Assurance Division Census Results*

*-Legal Advice and Legislation Branch Census Results'*

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

### FOI decision

I have identified 4 documents that are relevant to your request. These documents were in the possession of the department when your request was received.

I have decided to give access to four documents in part, subject to the deletion of exempt material.

A schedule setting out the documents relevant to your request, with my decision in relation to those documents, is at **ATTACHMENT A**.

My reasons for not providing access to material that has been deleted from the documents are set out in **ATTACHMENT B**.

### Legislative provisions

The FOI Act, including the provisions referred to in my decision, are available on the Federal Register of Legislation website: [www.legislation.gov.au/Series/C2004A02562](http://www.legislation.gov.au/Series/C2004A02562).

The *Privacy Act 1988* (Cth) (Privacy Act), can also be accessed from the Federal Register of Legislation website here: [www.legislation.gov.au/Series/C2004A03712](http://www.legislation.gov.au/Series/C2004A03712).

### **Your review rights**

I have set out your review rights at **ATTACHMENT C**.

### **Publication**

Where I have decided to release documents to you, the department may also publish the released material on its Disclosure Log. The department will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference the department's Disclosure Log can be found at:

[www.health.gov.au/resources/foi-disclosure-log](http://www.health.gov.au/resources/foi-disclosure-log).

### **Contacts**

If you require clarification of any matters discussed in this letter you can contact the FOI Section on (02) 6289 1666 or at [FOI@health.gov.au](mailto:FOI@health.gov.au).

Yours sincerely



Chris Johnston  
A/g General Counsel  
Legal Advice and Legislation Branch  
Legal and Assurance Division

30 August 2023

ATTACHMENT A.

SCHEDULE OF DOCUMENTS  
FOI 4617

Document	Pages	Description	Decision on access <sup>1</sup>	Relevant provision/s of FOI Act
1	25	Highlights Report APS30794 - Legal and Assurance Division	RI	s22
2	25	Highlights Report APS33743 - Lad Advice and Legislation Br	RI	s22
3	6	Census Results APS30794 - Legal and Assurance Division	RE	s47E(c) s47F s22
4	6	Census Results APS33743 - Lad Advice and Legislation Branch	RE	s47E(c) s47F s22

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<sup>1</sup> RE = Release with exempt information deleted.

**REASONS FOR DECISION  
FOI 4617**

**1. Material taken into account**

In making my decision, I had regard to the following:

- the FOI Act
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- the terms of your FOI request as outlined above
- the content of the documents sought, and
- advice from departmental officers with responsibility for matters relating to the documents sought.

**2. Finding of facts and reasons for decision**

My findings of fact and reasons for deciding that the exemptions identified in the schedule of documents apply to the parts of documents are set out below.

**3. Section 47E - Documents affecting certain operations of agencies**

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

**Section 47E(c) - Substantial adverse effect on management of personnel**

Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, paragraph [6.114] of the FOI Guidelines states that for this conditional exemption to apply, the documents must relate to either:

- the management of personnel - including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety, or

- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.

I am satisfied that the parts of the documents marked 's47E(c)' relates to staff feedback that is collected to inform the department's programs and activities for management of personnel and relates to human resources policies.

In considering whether the conditional exemption in s 47E(c) of the FOI Act applies, I have considered both elements of that provision, namely that:

- an effect would reasonably be expected following disclosure, and
- the expected effect would be both substantial and adverse.

The parts of the documents marked '47E(c)' contain sensitive information, that if released, would or could reasonably be expected to have a negative impact on the willingness of staff to participate in the census and the candour of responses the department may receive in future censuses. The staff responding to the census do so on the understanding that their responses are voluntary and anonymous. Staff are informed that the information is collected for the purposes of understanding their experiences of working in the department and the APS, to inform the agency's programs and planning, and for monitoring trends.

The expected effect is substantial and adverse. The department is dependent on staff voluntarily providing sensitive information on demographics, including cultural diversity, sexuality and gender identity in order to develop, implement and assess human resources policies and activities, including for addressing harassment, risks to work health and safety, and recruitment and support of a diverse workforce. Without this information, the department's ability to effectively and appropriately recruit and manage its personnel would be adversely affected. Accordingly, I am satisfied that the parts of the documents marked 's47E(c)' would, or could reasonably be expected to have, a substantial adverse effect on the management or assessment of personnel by the department.

For the reasons outlined above, I have decided that the parts of the documents marked 's47E' are conditionally exempt from disclosure under section 47E of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

#### **4. Section 47F - Documents affecting personal privacy**

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

### Personal Information

Personal information has the same meaning as in the Privacy Act. Specifically, section 6 of the Privacy Act provides that *personal information* means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

Paragraph [6.131] of the FOI Guidelines states that for particular information to be personal information, an individual must be identified or reasonably identifiable.

I consider that individuals will be reasonably identifiable where the questions relate to characteristics that reveal or convey something personal about the individual and the cohort of people responding to the question is small in number. I am therefore satisfied that parts of the documents marked 's47F' contains personal information.

### Unreasonable Disclosure of Personal Information

Subsection 47F(2) of the FOI Act provides that in determining whether the disclosure would involve the unreasonable disclosure of personal information, I must have regard to the following matters:

- (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 matters that the agency or Minister considers relevant.

Paragraph 6.138 of the FOI Guidelines states that:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision-making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

I note that the AAT, in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at paragraph 259, stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...

Paragraphs [6.142] and [6.143] of the FOI Guidelines state:

6.142 Key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release

6.143 As discussed in the leading s 47F IC review decision of 'FG' and National Archives of Australia [2015] AICmr 26, other factors considered to be relevant include:

- 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

I am satisfied that the disclosure of personal information contained within the documents would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the individuals whose personal information is contained in the documents are reasonably identifiable in circumstances where the question relates to personal characteristics and the cohort of persons responding to the question is limited in number.
- release of this information would cause anxiety to the individuals concerned, given that the information was provided on the basis it was voluntary and anonymous.
- no further public purpose would be achieved through the release of the personal information.
- the information is current and has not lost its sensitivity through the passage of time, particularly as the results relate to the census conducted in 2023.
- the individuals would not expect the information to be placed in the public domain, and detriment may be caused to the individuals to whom the information relates if they are identified, including possible harassment or discrimination on the basis of race, country of origin, age or sexuality, and

- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

For the reasons outlined above, I have decided that the parts of the documents marked 's47F' are conditionally exempt from disclosure under section 47F of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

## **5. Disclosure is not in the public interest**

Pursuant to subsection 11A(5) of the FOI Act, the department must give access to conditionally exempt documents unless access to the documents at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the documents would be contrary to the public interest.

Paragraph 6.5 of the FOI Guidelines states:

The public interest test is considered to be:

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

### Factors favouring disclosure

Section 11B of the FOI Act provides that factors favouring access to documents in the public interest include whether access to the documents would do any of the following:

- promote the objects of the FOI Act (including all matters set out in sections 3 and 3A)
- inform debate on a matter of public importance
- promote effective oversight of public expenditure, or
- allow a person to access his or her own personal information.



Having regard to the above, I consider that disclosure of the conditionally exempt information at this time:

- would provide access to documents held by an agency of the Commonwealth which would promote the objects of the FOI Act by providing the Australian community with access to information held by the Australian Government.
- would not inform debate on a matter of public importance
- would not promote effective oversight of public expenditure, and
- would not allow you access to your own personal information.

Factors weighing against disclosure

I consider that the following public interest factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

- could reasonably be expected to prejudice the fair treatment of individuals noting that the individuals participated in the census on the understanding the information was being collected anonymously for the particular purpose relating the human resources policies and management of personnel
- could reasonably be expected to prejudice the management function of an agency
- could reasonably be expected to prejudice the protection of the relevant individuals' right to personal privacy, noting that the substance of the documents has been released to you and disclosure of the personal information would not provide you with any further insight into the workings of government, and
- would not achieve any public purpose and, on balance, would harm the individual's right to personal privacy.

In making my decision, I have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act, which are:

- (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;
- (d) access to the document could result in confusion or unnecessary debate.

## Conclusion

For the reasons set out above, after weighing all public interest factors for and against disclosure, I have decided that, on balance, disclosure of the conditionally exempt information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

### **6. Section 22 - deletion of irrelevant and exempt material**

Section 22 of the FOI Act applies to documents containing exempt material (subparagraph 22(1)(a)(i)) and irrelevant information (subparagraph 22(1)(a)(ii)) and allows an agency to delete such material from a document.

I have deleted material in the documents which can reasonably be regarded as irrelevant to your request and prepared an edited copy for release. This information has been marked 's22' in the documents released to you.

As I have decided that some of the information in the documents released to you is exempt from disclosure, I have prepared an edited copy of the document(s) by deleting the exempt information from the documents under section 22 of the FOI Act as outlined above.

## ATTACHMENT C.

### YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for a review.

#### Internal review

You can request internal review within 30 days of you receiving this decision. An internal review will be conducted by a different officer from the original decision maker.

No particular form is required to apply for review although it will assist your case to set out the grounds on which you believe that the original decision should be changed.

Applications for internal review can be made by:

Email: [FOI@health.gov.au](mailto:FOI@health.gov.au)

Mail: FOI Unit (MDP 516)  
Department of Health and Aged Care  
GPO Box 9848  
CANBERRA ACT 2601

If you choose to seek an internal review, you will also have a right to apply for Information Commissioner review (IC review) of the internal review decision once it has been provided to you.

#### Information Commissioner review or complaint

You also have the right to seek Information Commissioner (IC) review of this decision. For FOI applicants, an application for IC review must be made in writing within 60 days of the decision. For third parties who object to disclosure of their information, an application for IC review must be made in writing within 30 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Department of Health and Aged Care as the agency about which you are complaining.

You can make an IC review application or make an FOI complaint in one of the following ways:

- online at [www.oaic.gov.au/freedom-of-information/reviews-and-complaints/](http://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/)
- via email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)
- by mail to GPO Box 5218 Sydney NSW 2001, or

- by fax to 02 9284 9666.

More information about the Information Commissioner reviews and complaints is available on the OAIC website here: [www.oaic.gov.au/freedom-of-information/foi-review-process](http://www.oaic.gov.au/freedom-of-information/foi-review-process).

### **Complaint**

If you are dissatisfied with action taken by the department, you may also make a complaint directly to the department.

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website here: [www.health.gov.au/about-us/contact-us/complaints](http://www.health.gov.au/about-us/contact-us/complaints)