



Australian Government

Australian Public Service Commission

NTS

By email:

foi+request-10673-c78a76b9@righttoknow.org.au

Our reference: LEX 706

Dear Applicant

Freedom of Information request

1. I am writing about your Freedom of Information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) made on **8 November 2023** for access to documents held by the Australian Public Service Commission (the Commission).
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au.

Documents relevant to your request

3. You requested access to documents on the following terms:

'Under the FOI Act, I seek a copy of any document that sets out the sampling undertaken or any other methodology relied upon by Ms McIntyre in making her practical refusal decision with reference 'LEX 640'.'

4. I have identified two (2) documents in scope of your request.
5. The details of these documents are:
 - 1) Document 1 - Email from Engagement and Communication Directorate to the FOI team dated 11 September 2023
 - 2) Document 2- Email from the Engagement and Communication Directorate to the FOI team dated 4 October 2023

Decision

6. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
7. I have decided to grant partial access to the documents because I consider some content in scope of your request is exempt from section 47F of the FOI Act. The copies of the requested documents that I am releasing to you have been edited to remove the material

that is exempt.

8. My reasons are set out in **Attachment A**.

Deletion of exempt matter or irrelevant material

9. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.
10. Copies of the requested documents have been edited to remove material that is either exempt or irrelevant material to the scope of your request. The schedule at Attachment A sets out the grounds on which information has been redacted from the documents relevant to your request.

Your Submissions

11. I have considered your submissions made in your request:

'I note that paragraph 3.121 of the FOI Guidelines made by the Information Commissioner pursuant to s.93A of the FOI Act requires that a sampling process involving 10%-20% of the documents captured by a request be undertaken for the purposes of determining whether the work involved in processing a request would constitute a substantial and unreasonable diversion of resources from the agency's other operations.

I note the Guidelines further require that a person with appropriate knowledge or expertise should assess the sample of the documents, looking at each document as if they were making a decision on access, including indicating the number of documents that could be released in an edited form.'

12. I note the guidance referred to at paragraph 3.121 of the FOI Guidelines is a recommendation only:

'It is recommended that agencies examine a sample of the documents to assess the complexity of the material against whether the work involved in processing the request would constitute a substantial and unreasonable diversion of resources from the agency's other operations.'

13. The decision maker took the view that examination of a sample of documents was not possible or appropriate at the time of your request, based on consideration of the workload and available resources of the Commission at that time.
14. Between the date of your initial request (8 September 2023) and the date of the decision made in respect of request LEX 640 (6 October 2023) the Commission was handling several priority matters which required urgent support from the Commission's Engagement and Communication Directorate (ECD) and the decision maker. These priority matters included the following:
 - the Trust in Australian Public Services Report;
 - the State of the Service Report for 2023;
 - the SES100 initiative to attract First Nations SES;

- stakeholder consultation for the Australian Public Service Culturally and Linguistically Diverse (CALD) Employment Strategy; and
- the APS Reform annual statement.

15. In addition, the ECD during this period numbered only two officers and both were working at full capacity on these priority matters. As such they had no spare capacity in which to process your request LEX 640, including to undertake a sampling exercise.

16. The decision maker acted in good faith in consulting with the ECD about your request and the ECD's capacity to process it and, having assessed their response and priority workload, in making a decision to refuse the request on the grounds that processing it would be a substantial and unreasonable diversion of the Commission's resources.

17. Since then, and at the date of your request, the priority matters of the Commission have changed leaving the ECD capacity to process your request, which is now subject of your request for internal review of the decision made on LEX 640 (given reference LEX 705).

Yours sincerely



Dr Nicole Steele
Authorised FOI decision maker
7 December 2023

Reasons for decision

18. In making this decision I have had regard to:

- the terms of your requests;
- the terms of your submissions and responses to the request consultation process;
- the FOI Act; and
- the FOI Guidelines issued by the Australian Information Commissioner.

19. In making this decision I have not had regard to (section 24AA(3) FOI Act):

- any reasons that you have given for requesting access; or
- the agency's or Minister's belief as to what your reasons are for requesting access; or
- any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

Section 47F FOI Act – Personal privacy

20. Section 47F of the FOI Act provides a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information of any person.

21. 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.

22. This requires consideration of all of the circumstances. The Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 AT [51] outlined:

'...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...and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...'

23. A number of your requested documents capture the personal information of public servants and other individuals.

24. Under the FOI Act there is no presumption that agencies and ministers should start from the position that the inclusion of the full names of staff in documents increases transparency and the objects of the FOI Act: *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83].

25. With the substantial increase in electronic requests and related correspondence, a rise in anonymous applications as well as requests affecting the safety and wellbeing of employees, the Commission now assesses whether a disclosure of public servants' personal information in requests is unreasonable under section 47F of the FOI Act.
26. Having regard to the matters I must consider under subsection 47F(2) of the FOI Act, I have identified the following factors that, in my view, do not support release of certain public servants' personal information under section 47F of the FOI Act:
- the individual's personal information, in particular their full names, will identify them;
 - the names and contact details of a number of the individuals is generally not well known or publicly available and the disclosure of this information will not advance scrutiny of any decisions falling within the scope of your FOI request, particularly with regard to staff who are not relevant decision-makers and non-SES staff members who are acting under the direction of senior staff within relevant agencies in the course of their ordinary duties;
 - the release of some of the individual's personal information in connection with the subject matter of the documents would likely cause stress for them or other detriment, including in particular relevant personal information, including emails and mobile phone numbers could result in those individuals being contacted outside of appropriate official channels, including outside of business hours; and
 - no public purpose or interest in increasing transparency of government would be achieved through the release of the information.
27. Considering the above factors, I consider that the disclosure of personal information of certain public servants and of other individuals about would be unreasonable in the circumstances and could result in specific harm.
28. I have therefore decided that to the extent the documents include personal information about non-SES staff members and mobile phone contact details of SES staff members, those parts of the documents are conditionally exempt from disclosure under section 47F of the FOI Act. My consideration of the public interest test is provided separately below.
29. I have therefore decided to the extent that the documents include personal information that would be unreasonable to disclose, those parts are conditionally exempt from disclosure under section 47F of the FOI Act.

Sections 11A and 11B - Public Interest Test

30. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless (in the circumstances) access to the document would, on balance, be contrary to the public interest. I have found that certain material is conditionally exempt on the grounds of section 47F of the FOI Act.
31. In weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure at section 11B(3). In particular, I have considered the extent to which disclosure would:
- promote the objects of the FOI Act;
 - allow a person to access his or her own personal information
 - inform debate on a matter of public importance; and

- promote effective oversight of public expenditure.

32. I have identified the following factors as weighing against disclosure:

- the disclosure of certain personal information (including contact details) of a number of the identifiable individuals will not advance any scrutiny of any decisions falling within the scope of your FOI request;
- the disclosure of personal information could reasonably be expected to prejudice the protection of certain individual's right to privacy;
- there is a public interest in APS employers fulfilling their obligations under the *Work Health and Safety Act 2011*, in particular by preventing the exposure of staff members from potential harassment or threats in a public forum;

33. Taking into account the matters above, I find overall that disclosure of some parts of the requested documents would be contrary to the public interest. I therefore find that to the extent that the material contained in the documents is conditionally exempt under section 47F of the FOI Act, those parts of the requested documents are exempt from disclosure under the FOI Act.

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission; and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au

Post: The FOI Officer
Australian Public Service
Commission B Block, Treasury
Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your

reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (the OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: www.oaic.gov.au
Post: Australian Information
Commissioner GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au