



Australian Government

Australian Public Service Commission

Our reference: LEX 683(650)

Anselmo Cristobal Hernandez y Pinal

By Email: foi+request-10699-9542a246@righttoknow.org.au

Dear Applicant

Notice of internal review decision- Freedom of Information- LEX 683(650)

1. The purpose of this letter is to advise you of my decision following your request for internal review of the Australian Public Service Commission (the Commission's) decision to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act).

Background

2. On 19 September 2023, you requested the following documents from the Commission under the FOI Act:

'According to a document on the FOI disclosure log on the APSC website (LEX 559), documents were released administratively under LEX 540 (reference SHC23-4379), LEX 544 (reference SHC23-4513), LEX 545 (reference SHC23-4540), and LEX 546 (SHC23-4521).

Subject to those documents being released administratively pursuant to this request for access, under the FOI Act, I request access to the administratively released documents associated with LEX 540, LEX 544, LEX 545, and LEX 546.'

3. Ten (10) documents were discovered that fell within scope of this request. These documents all relate to public interest disclosures (PIDs) under the *Public Interest Disclosure Act 2013* (the PID Act).
4. On 18 October 2023, the original decision maker, Ms Melanie McIntyre, refused access to all documents.
5. In providing the decision, she noted that once relevant exemptions were applied (s47E- certain operations of agencies, section 47F- personal privacy) the objects of the FOI Act would not be served by providing access to the edited version as extensive editing was required and would leave only a skeleton of the former documents.



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6. In your request for internal review, dated 18 October 2023, you submitted:

‘These documents that you have refused access to were released administratively to a person who made an FOI request for them. Why would these documents have been released administratively in response to an FOI request if, as you say, it is contrary to the public interest to grant access to them? Why would the APSC privilege one access applicant over another?’

Your decision doesn't make sense. It seems discriminatory.’

Decision

7. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
8. I am writing to you now to advise that I am satisfied the documents are partially exempt documents. I therefore affirm Ms McIntyre’s earlier decision to refuse your request for access to these documents.
9. **Attachment A** sets out the grounds on which the documents are partially exempt.
10. My reasons are set out in **Attachment B**.

Contacts

11. If you require clarification on matters in this letter, please contact the Commission’s FOI Officer by email at foi@apsc.gov.au.

Review rights

12. You are entitled to seek review of this decision. Your review rights are set out at **Attachment C**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Shyam Raghupathi'.

Mr Shyam Raghupathi
Authorised FOI decision maker
17 November 2023



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ATTACHMENT A

SCHEDULE OF DOCUMENTS

Document	Pages	Description	Exemptions
1	1 - 4	LEX 540 – FOI Request (LEX 189)	s 22 – s 47E, s 47F
2	5 - 8	LEX 540 – Decision Notice (LEX 189)	s 22 – s 47E, s 47F
3	9 - 12	LEX 544 – FOI Request (LEX 190)	s 22 – s 47E, s 47F
4	13 - 16	LEX 544 – Decision Notice (LEX 190)	s 22 – s 47E, s 47F
5	17 - 27	LEX 545 – Decision Notice (LEX 187)	s 22 – s 47E, s 47F
6	28 - 36	LEX 545 – Internal Review Decision (LEX 230)	s 22 – s 47E, s 47F
7	37 – 40	LEX 545 – FOI Request (LEX 190)	s 22 – s 47E, s 47F
8	41 – 44	LEX 545 – Decision Notice (LEX 190)	s 22 – s 47E, s 47F
9	45 – 53	LEX 546 – Internal Review Decision (LEX 230)	s 22 – s 47E, s 47F
10	54 - 64	LEX 546 – Decision Notice (LEX 187)	s 22 – s 47E, s 47F



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ATTACHMENT B

Reasons for Decision

13. In reaching my decision, I have considered:

- the terms of your request;
- the relevant documents;
- your internal review request, and supporting submissions, dated 18 October 2023;
- the FOI Act; and
- the FOI Guidelines.

Section 47E- Certain operations of agencies

14. Section 47E of the FOI Act provides that a document is conditionally exempt if it would, or could, reasonably be expected to, prejudice or have a substantial adverse effect on certain listed agency operations.

15. In particular, under section 47E(d) a document is conditionally exempt if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

16. Consistent with the original decision, I consider disclosure of content of certain requests in the decision notices would be likely to have a larger effect of inhibiting or discouraging Commission staff and other Commonwealth staff to freely and effectively communicate on the assessment of matters under the PID Act.

17. Further, I consider disclosure of the information contained in those parts of documents 1-10 could reasonably affect the willingness of people to make complaints or raise concerns to the Commission under the PID Act.

18. Should individuals be unwilling or unable to effectively participate in these matters, I consider that this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act, including its ability to ensure that allegations of misconduct are being investigated and, where necessary, take appropriate action in a proper and efficient manner.

Section 47F- Personal Privacy

19. Section 47F of the FOI Act provides that a document is conditionally exempt if it would involve the unreasonable disclosure of personal information about any person.



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20. 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
- the information or opinion is recorded in a material form or not.

21. I am satisfied that the documents contain personal information including names and email addresses.

22. In considering whether disclosure of that personal information would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known;
- 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;
- the availability of the information from publicly accessible sources, and
- any other matter I consider relevant.

23. This further 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...'

24. I have considered the above factors, and identified the following factors that do not support release of this personal information:

- the individuals' personal information, in particular their name, will identify them;
- the personal information is unique and relates specifically to the individuals, and is generally not well known or publicly available; the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;
- release of the individuals' personal information may cause stress for them or other detriment; and disclosure would prejudice the individuals' right to privacy;
- disclosure would prejudice the individual's right to privacy.



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25. However, in accordance with section 11(A)5 of the FOI Act, I must nevertheless give access to the conditionally exempt information unless in the circumstances it would be, on balance, contrary to the public interest to do so. My consideration of the public interest is below.

Public interest considerations

26. Subsection 11A(5) of the FOI Act provides:

‘The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

27. 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;
- inform debate on a matter of public importance; and
- promote effective oversight of public expenditure.

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

- disclosure could reasonably be expected to prejudice the privacy of any third party individuals;
- disclosure of any third party individual’s personal information or parts of their FOI request will not advance the scrutiny of any decisions falling within scope of your FOI request;
- the disclosure of certain information could be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission (and could reasonably be expected to prejudice the Commission’s ability to obtain confidential information in the future/conduct investigations in the future).

29. On balance, I consider disclosure of the conditionally exempt information in documents 1-10 would be contrary to the public interest, and so the information is partially exempt from disclosure under sections 47E and 47F of the FOI Act.

Deletion of exempt matter or irrelevant material

30. 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 the request.



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31. Relevant to deleting exempt or irrelevant content from a document, the FOI Guidelines provide:

3.98 Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

32. I consider the objects of the FOI Act will not be served by providing access to an edited version of the exempt documents because extensive editing is required that would leave only a skeleton of the former documents, conveying little content or substance.

Privileging one access over another

33. I also note your submissions:

'These documents that you have refused access to were released administratively to a person who made an FOI request for them. Why would these documents have been released administratively in response to an FOI request if, as you say, it is contrary to the public interest to grant access to them? Why would the APSC privilege one access applicant over another?'

Your decision doesn't make sense. It seems discriminatory.'

34. In response, I draw your attention to paragraph 3.18 of the FOI Guidelines which provides:

'An FOI decision maker must approach each decision with an open mind... Generally, a decision maker is not prevented from making a decision by reason of having dealt previously with a similar issue or applicant, or having expressed a view about FOI Act principles or requirements.'

35. I acknowledge your concerns and assure you that this decision is not in any way intended to privilege one access over another, however I consider that it was open to me to look at this request on its own terms.

36. Whilst the decision maker in the other request you refer to took a particular view in that case, having regard to all the facts before them, to make an administrative release, I have decided that this request would be more appropriate to be dealt with under the FOI process. In making this decision, I have considered guidance from the OAIC on administrative release (available at: [Administrative access | OAIC](#)):



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'Where disclosure of the information sought would likely impact third parties, or would result in information from the documents being heavily redacted prior to disclosure, it may be more appropriate to deal with the request through the FOI process.'

37. Taking into account the above, I **affirm** Ms McIntyre's decision of 18 October 2023 to refuse your request for access to documents under sections 22, 47E and 47F of the FOI Act.



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ATTACHMENT C

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek external 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.

Applying for external review by the Australian Information Commissioner

If you do not agree with 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 (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