



26 February 2024

CR

By email: [foi+request-11050-fa8cd04c@righttoknow.org.au](mailto:foi+request-11050-fa8cd04c@righttoknow.org.au)

Dear CR,

### **Freedom of Information – Notice of decision**

#### **FOI Reference number: 23-24 – 32**

I refer to your email correspondence to the Fair Work Commission (**Commission**) dated 26 January 2024, in which you made a request for documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

#### **Request**

On 26 January 2024, you requested:

“...

1. Any submissions from the ABC to the Fair Work Commission regarding Antoinette Lattouf.

...”

**(the requested document)**

#### **Decision**

I reviewed the Commission’s case file for this matter and identified one document that came within the scope of your request. My decision is to refuse you access to the requested document on the basis that the:

- entirety of the requested document is exempt under section 37(2)(a) of the FOI Act;
- entirety of the requested document is conditionally exempt under section 47E(d) of the FOI Act and disclosure would, on balance, be contrary to the public interest;
- personal information contained in the requested document is conditionally exempt under section 47F of the FOI Act and disclosure would, on balance, be contrary to the public interest; and
- business information contained in the requested document is conditionally exempt under section 47G of the FOI Act and disclosure would, on balance, be contrary to the public interest.

I am authorised as a delegate of the President of the Commission under the FOI Act to make a decision in relation to your request. The 30-day statutory time period for processing your request commenced on the day after the day on which the request was received. The due date for your request is **Monday 26 February 2024**.

### Reasons for decision

In reaching my decision, I considered the following:

- your correspondence of 26 January 2024 outlining the particulars of your request;
- the FOI Act;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**the FOI Guidelines**); and
- the file concerning the Commission matter pertaining to your request, including the requested document.

Before I provide an explanation regarding the reasoning behind my decision, there are some key points that I should raise regarding the scope of your request and the FOI Act.

The FOI Act gives an applicant a right of access only to documents in existence at the time a request has been lodged with an agency. Documents which come into existence and are held by an agency after a request under the FOI Act has been made do not fall within the scope of that request. This also applies in the event that the request itself is later the subject of an internal review or a review from the Information Commissioner.<sup>1</sup> With respect to your request, there was only one document which I could locate that existed at the time you had made the request and is captured by the scope of your request.

I must also have regard to some key general provisions contained in the FOI Act that are extracted below for your reference.

Section 11 of the FOI Act provides:

#### 11 Right of access

(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:

- (a) a document of an agency, other than an exempt document; or
- (b) an official document of a Minister, other than an exempt document.

(2) Subject to this Act, a person's right of access is not affected by:

- (a) any reasons the person gives for seeking access; or
- (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

Additionally, section 26 of the FOI Act states:

#### 26 Reasons and other particulars of decisions to be given

(1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
- (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

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<sup>1</sup> Re *RADAR Investments Pty Ltd and Health Insurance Commission and others* [2004] AATA 166.

(b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and

I give to the applicant appropriate information concerning:

- (i) his or her rights with respect to review of the decision;
- (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
- (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

Finally, section 31B of the FOI Act provides:

### **31B Exempt documents for the purposes of this Part**

A document is **exempt** for the purposes of this Part if:

- (a) it is an exempt document under Division 2; or
- (b) it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note 1: A document is an exempt document for the purposes of this Act (see subsection 4(1)) if:

- (a) is it exempt under this section; or
- (b) it is exempt because of section 7 (exemption of certain persons and bodies); or
- (c) it is an official document of a Minister that contains matters not relating to the affairs of an agency or a Department of State.

Note 2: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

In essence, section 11 of the FOI Act bestows upon you a legally enforceable right to access documents held by a Commonwealth agency such as the Commission. However, a FOI applicant's reasons for seeking access to a document, or an agency's belief about a person's reasons for seeking access, are not relevant to that request.<sup>2</sup>

I also note that if a decision-maker reaches a conclusion that part of, or the entirety of a document falls within an exemption under the FOI Act, then part of, or the entirety of that document does not have to be disclosed. The circumstances of your request warrant an explanation as to why I have determined the documents that you have requested to be exempt.

It is also worthwhile noting that once a document is released under the FOI Act, it is released into the public domain. There is nothing in the FOI Act which limits what an applicant can do with any document which is released to them. A decision to provide an applicant access to a document under the FOI Act should therefore be made in the knowledge that the applicant may share the content of the released document with other individuals.<sup>3</sup>

### *The scope of your request*

Requests made under the FOI Act should be construed in a broad common-sense way and not by the rules of construction developed for the interpretation of legal documents.<sup>4</sup>

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<sup>2</sup> [3.35] FOI Guidelines.

<sup>3</sup> [3.36] FOI Guidelines.

<sup>4</sup> *Russell Island Development Association Inc and Department of Primary Industries* (1994) 33 ALD 683.

I have construed the meaning of “submissions”, as stated in your request, to refer to documents which outlines and contends the legal position of the Australian Broadcasting Corporation (**ABC**) in relation to an ongoing matter before the Commission. That matter is, as you may know, an application to deal with an unlawful termination of employment in which the ABC and Ms Antoinette Lattouf are parties to.

Having considered the number and availability of documents which were in existence at the time of your request, only one document which was captured by the scope of your request was located. I will now turn to the relevant exemption and conditional exemptions which apply to the requested document.

*Section 37(2)(a) (enforcement of law and protection of public safety)*

Section 37(2)(a) of the FOI Act states:

...

(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the fair trial of a person or **the impartial adjudication of a particular case**;

...

**(emphasis added)**

In order for this exemption to apply, it needs to be demonstrated that the disclosure of the requested document would or could reasonably be expected to either prejudice the fair trial of a person or the impartial adjudication of a particular case.

To construe the meaning of this provision, I need to assess the key terms of that provision and their meaning.

With respect to the meaning of the words ‘would or could reasonably be expected to’, I need to assess the likelihood of the predicted or forecast event, effect or damage which would occur as a result of disclosing a document.<sup>5</sup> There must, based on reasonable grounds, be at least a real, significant, or material possibility of prejudice.<sup>6</sup>

I also need to have regard to the meaning of the words ‘substantial adverse effect’. In the context of this provision, those words refer to ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’.<sup>7</sup> In particular, the meaning of the word ‘substantial’ in this context has been interpreted to mean the ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.<sup>8</sup>

The word ‘prejudice’ in this context refers to a disadvantage resulting from some judgment or action of another which results in injury or detriment.<sup>9</sup>

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<sup>5</sup> *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 at [37].

<sup>6</sup> *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623, [79].

<sup>7</sup> *Re Thies and Department of Aviation* [1986] AATA 141 [24].

<sup>8</sup> *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 367 [383].

<sup>9</sup> [5.22] FOI Guidelines.

This exemption is designed to protect individuals against the same type of harm as the law relating to contempt of court. This exemption was modelled on an exemption under the United States Freedom of Information Act 1966.<sup>10</sup> The exemption under the United States Freedom of Information Act has been interpreted to mean that the trial and adjudication must be pending or truly imminent and that it is more probable than not that disclosure of a document(s) would seriously interfere with the fairness of those proceedings.<sup>11</sup>

The matter relating to the requested document is still before a Commission Member for consideration and is scheduled for a hearing in around two weeks. In my view, the matter is pending and imminent.

If I were to disclose the requested document, it would, or at the very least, could reasonably be expected that the impartiality of the matter may be prejudiced and compromised as a consequence. In my view, there would be a high likelihood of prejudice towards one of the parties in the relevant Commission matter, should I decide to disclose the requested document. The particulars of the requested document, being a submission from the respondent in the relevant Commission matter, may cause unnecessary harm to the respondent if the contents of the requested document were to be released. Given the timing of the hearing, the public disclosure of the contents of the requested document would likely interfere with the fair treatment of the parties.

Furthermore, the Commission has a statutory obligation to ensure that it exercises its functions as a tribunal in a fair and just manner.<sup>12</sup> If I were to disclose the requested document, it may be perceived that the Commission has not acted in a fair and just manner towards the parties.

It is evident that if I were to disclose the requested document, the fact that the specific contents of that document being in the public domain may also seriously interfere with the fairness of the matter.

I am therefore satisfied that the entirety of the requested document is exempt on that basis.

#### *Section 47E(d) (certain operations of agencies)*

Section 47E(d) of the FOI Act provides:

#### **47E Public interest conditional exemptions—certain operations of agencies**

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

**(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.**

**(emphasis added)**

In order to construe the meaning of section 47E(d), I need to assess the key terms of that provision and their meaning.

With respect to the meaning of the words ‘would or could reasonably be expected to’, I need to assess the likelihood of the predicted or forecast event, effect or damage which would occur as a result of

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<sup>10</sup> Moira Paterson, *Freedom of Information and Privacy in Australia; Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005), 348.

<sup>11</sup> *Washington Post Co v United States Department of Justice* 863 F 2d 96, 101-2 (DC Cir, 1988).

<sup>12</sup> *Fair Work Act 2009* (Cth), s.577(1)(a).

disclosing a document.<sup>13</sup> There must, based on reasonable grounds, be at least a real, significant, or material possibility of prejudice.<sup>14</sup>

I also need to have regard to the meaning of the words 'substantial adverse effect'. In the context of section 47E(d), those words refer to 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'.<sup>15</sup> In particular, the meaning of the word 'substantial' in this context has been interpreted to mean the 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.<sup>16</sup>

With respect of the phrase 'conduct of operations', the meaning of those words has been construed by the Administrative Appeals Tribunal to extend to the way in which an agency discharges or performs any of its functions."<sup>17</sup> The word 'prejudice' in this context is given its ordinary meaning.

It should be noted that the extent to which this exemption applies is greatly dependent on the circumstances and context of the information in question.<sup>18</sup>

However, this conditional exemption has been applied in circumstances where it has been demonstrated that disclosure of documents will affect the future ability of an agency to obtain information or cooperation from external stakeholders by inhibiting the candour and frankness of that information and how it is provided.<sup>19</sup> For instance, in *L' and Australian Human Rights Commission*,<sup>20</sup> the Information Commissioner held that the disclosure of documents relating to a record of discussions during a conciliation; 'would undermine the confidential nature' of conciliations conducted by an agency.<sup>21</sup>

I am also cognisant of section 776 of the *Fair Work Act 2009* (Cth) (**FW Act**), which states:

**776 Dealing with a dispute (other than by arbitration)**

(1) If an application is made under section 773, the FWC must deal with the dispute (other than by arbitration).

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

...

Disclosure of the requested document would significantly undermine the Commission's jurisdiction in relation to unlawful termination matters in that the specific contents of the requested document was later the subject of a private conference between the parties. The purpose of that conference was to provide the parties in that matter to have a full and frank discussion as to how the matter should proceed and whether there are any real prospects of the matter resolving before going to a hearing.

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<sup>13</sup> *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 at [37].

<sup>14</sup> *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623, [79].

<sup>15</sup> *Re Thies and Department of Aviation* [1986] AATA 141 [24].

<sup>16</sup> *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 367 [383].

<sup>17</sup> *Re James and Australian National University* (1984) 6 ALD 687 at 699.

<sup>18</sup> Moira Paterson, *Freedom of Information and Privacy in Australia; Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005), 311.

<sup>19</sup> *Re Telstra Australia Ltd and Australian Competition and Consumer Commission* [2000] AATA 71.

<sup>20</sup> [2012] AICmr 21.

<sup>21</sup> *Ibid* at [10].

The disclosure of the requested document could also have a substantial adverse effect on how the Commission collects information for matters within its jurisdiction which concerns termination of one's employment. The Commission's case management system, alternative dispute resolution functions, and tribunal Members are aided by parties providing full and frank information, including in written submissions. If that information is later disclosed into the public domain by a mechanism other than a public hearing and decision of the Commission, it could reasonably be expected that parties would be less willing and forthcoming in providing that information to the Commission. This could reasonably be expected to hinder the Commission's management on a variety of matters concerning termination of employment disputes such as unlawful termination and unfair dismissal matters.

The disclosure of the requested document would also reasonably be expected to undermine the Commission's alternative dispute resolution jurisdiction. The Commission has a reliance on parties being willing and forthcoming in providing information in order to resolve a matter via alternative dispute resolution. In some instances, alternative dispute resolution may be the best available option for both parties to discuss the dispute in question and reach a resolution. The contents of the requested document were the subject of a private conference. If the requested document were to be disclosed, the manner in which the Commission discharges its alternative dispute resolution functions may be greatly impeded if parties believed such information were to be released before their conference at the Commission.

I note that there is a publicly issued decision in relation to the matter pertaining to the requested document made by Deputy President Boyce on 16 February 2024.<sup>22</sup> However, the decision did not address any specific points raised in the requested document nor made any specific references to the contents of the specific document. The decision itself concerned the production of documents by the parties in that matter.

Based on the above, I am satisfied that the entirety of the requested document is conditionally exempt under section 47E(d) of the FOI Act.

*Section 47F (personal privacy)*

Section 47F of the FOI Act provides:

**47F Public interest conditional exemptions—personal privacy**

*General rule*

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister 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;
  - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

...

Section 4 of the FOI Act provides that the term 'personal information' has the same meaning as provided in the *Privacy Act 1988* (Cth). Relevantly, section 6(1) of the *Privacy Act 1988* provides:

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<sup>22</sup> *Lattouf v Australian Broadcasting Corporation* [2024] FWC 423.

**personal information** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.

As alluded to in section 6(1) of the *Privacy Act 1988*, the meaning of the term 'personal information' is fairly broad. Personal information can contain a person's name, address, and telephone number.<sup>23</sup> It can also include a person's signature.<sup>24</sup>

I further note that the information needs to convey or say something about a person, rather than just identifying them.<sup>25</sup>

The intention of the personal privacy conditional exemption is to prevent the unreasonable invasion of the privacy by third parties.<sup>26</sup> In determining what is meant by the term 'unreasonable' in this context Deputy President Hall of the Administrative Appeals Tribunal's comments in *Re Chandra and Minister for Immigration and Ethnic Affairs*<sup>27</sup> are relevant. In *Chandra*, the Deputy President 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...<sup>28</sup>

In addition to the Deputy President's above statement, I must have regard to the following matters in determining whether the disclosure of the requested document would involve an unreasonable disclosure of personal information:

- 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 matters that the agency or Minister considers relevant.<sup>29</sup>

Other factors which are relevant to this exemption and may be considered 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;

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<sup>23</sup> *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252.

<sup>24</sup> *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

<sup>25</sup> See [6.136] FOI Guidelines.

<sup>26</sup> *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 259.

<sup>29</sup> [6.140] FOI Guidelines.



- 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.<sup>30</sup>

The statement made by Heerey J in *Colakovski v Australian Telecommunications Corp*<sup>31</sup> is also apposite in these circumstances. In *Colakovski*, Heerey J stated:

“... if the information disclosed were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable...”<sup>32</sup>

The personal information contained in the requested document comprise of:

- the names of employees of the respondent;
- the employment history of the applicant; and
- untested and unverified allegations made by both the applicant and the respondent in relation to the conduct of the applicant and employees of the respondent.

Although general information about the matter such as the names of the parties and a social media post linked to the dispute is, or has been, in the public domain, the details of the above personal information is only confined to the Commission, the parties and their representatives.

I am also cognisant that the disclosure would presumably cause further stress on the individuals named in the requested document. It is important to note that an industrial dispute concerning the termination of a person’s employment is a daunting and stressful experience for all persons involved. The personal information contained in the requested document was submitted to the Commission on the basis that that information would assist the Commission in making a determination or encouraging a resolution to be reached between the parties, and not later disclosed into the public domain other than by way of a public decision. If such a disclosure were to occur, the release of the personal information would potentially cause unwarranted stress on all persons named in the requested document.

As I mentioned earlier in my letter, if a document is released under the FOI Act, it is released into the public domain. There are no provisions in the FOI Act which regulates how an applicant can disseminate a document in the event that the document is released under the FOI Act. There is the potential that the personal information contained in the requested document could be widely disseminated, whether it be maliciously or otherwise and may be taken out of context, or disseminated in a manner which does not provide a true reflection of the facts of the relevant Commission matter.

Disclosing the requested document would also create an unreasonable invasion of privacy of the affected third parties, namely the respondent’s staff. From assessing other materials on the matter file, it is evident that some of those individuals have no direct involvement in the matter. The requested document contains personal information belonging to, or pertaining to, those individuals.

Furthermore, although the respondent is a Commonwealth government entity, the substance of the matter does not have a direct nexus to government transparency. Disclosing the requested document would not, in my view, further advance government transparency.

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<sup>30</sup> ‘FG’ and National Archives of Australia [2015] AICmr 26 at [47].

<sup>31</sup> (1991) 29 FCR 429.

<sup>32</sup> Ibid, 441.

Based on the above, I am satisfied that the personal information contained in the requested document is conditionally exempt under section 47F of the FOI Act.

*Section 47G (business information)*

Section 47G of the FOI Act provides:

**47G Public interest conditional exemptions—business**

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
  - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

...

The operation of this conditional exemption depends on the effect of the disclosure rather than the precise nature of the information itself.<sup>33</sup>

Whether this conditional exemption applies in relation to the disclosure of the requested document requires an objective assessment as to whether there will be an expected adverse effect in releasing the requested document.<sup>34</sup>

Again, this conditional exemption contains the words ‘would, or could reasonably be expected to’. Like that of sections 37(2)(a) and 47E(d) of the FOI Act, those words involve a consideration of the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document. The meaning of the word ‘could’ require an analysis of the reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future. There also must, based on reasonable grounds, be at least a real, significant, or material possibility of prejudice. Again, the word ‘prejudice’ in this context is given its ordinary meaning.

I also note that in respect to section 47G(1)(b), it needs to be demonstrated that there must be a reasonable likelihood that disclosure of the abovementioned documents would result in both the quality and quantity of the business information being provided to the Commission would be reduced.<sup>35</sup>

The requested document contains untested and unverified information pertaining to the respondent’s implementation of its internal staff management procedures with respect to casual employees. That information specifically is not in the public domain and is, to some degree, commercially sensitive. It could reasonably be expected that that information be widely disseminated whether maliciously or otherwise and that the disclosure of the requested document would damage the respondent’s reputation and standing as an employer and as a Commonwealth government entity in general.

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<sup>33</sup> *Boston Consulting Group and Australian National University (Freedom of information) (No 2)* [2022] AICmr 16 at [18].

<sup>34</sup> [6.188] FOI Guidelines.

<sup>35</sup> *Re Maher and the Attorney-General’s Department* [1986] AATA 16.

Furthermore, the respondent in the relevant Commission matter, from time-to-time, provides business information to the Commission with respect to other matters in which it is a party to. It could reasonably be expected that the respondent be less willing and forthcoming in providing its business information to the Commission in relation to future Commission matters. The access to the business information, whether it be from a private sector organisation or from a State, Territory, or Commonwealth government agency, greatly assists the Commission in exercising its functions as an industrial relations tribunal. If there is a partial or full disclosure of the business information contained in the requested document, then it could reasonably be expected that a consequence of such a disclosure could reasonably prejudice the future supply of business information from the respondent, and potentially from other organisations to the Commission. This in turn could reasonably be expected to hinder the Commission's ability in administering its functions under other legislation it has an important role administering and enforcing. This includes the *Fair Work Act 2009*, *Fair Work (Registered Organisations) Act 2009*, and the *Work Health and Safety Act 2011* (Cth).

Based on the above information, it is evident that both sections 47G(1)(a) and 47G(1)(b) of the FOI Act are satisfied in regard to the business information contained in the requested document. Only one of the aforementioned provisions needs to be satisfied in order for me to apply this conditional exemption. Both of the aforementioned provisions apply in the case of your request, and on that basis the business information contained in the requested document is conditionally exempt under section 47G.

#### *Section 11A(5) (public interest factors)*

As sections 47E(d), 47F, and 47G are conditional exemptions under the FOI Act, those exemptions can only be applied to a document, or part of a document, if access to that document, or part of that document, would, on balance, be contrary to the public interest. For the avoidance of doubt, section 37(2)(a) is not a conditional exemption. My consideration of section 37(2)(a) does not include an evaluation of the public interest factors.

Accordingly, section 11A(5) of the FOI Act provides:

(5) 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.

As outlined in [6.4] of the FOI Guidelines, 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
- related to matters of common concern or relevance to all members of the public, or substantial section of the of the public.

The main question in respect of the public interest test is whether the disclosure of the requested document in full, or in part, would be contrary to the public interest.

Also, it is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by a certain characteristic that depends on a particular situation.<sup>36</sup>

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<sup>36</sup> [6.6] FOI Guidelines.

Additionally, section 11B(3) of the FOI Act provides a list of factors which favour access to a document in the public interest. Section 11B(3) states:

*Factors favouring access*

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
  - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

Finally, I cannot consider the irrelevant factors listed in section 11B(4) of the FOI Act:

- (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.

I accept that disclosure of the requested document may potentially promote the objects of the FOI Act. I also note that disclosure may potentially inform members of the public in relation to staff of government agencies publishing content of a political nature onto social media and other such public forums. Furthermore, the contents of the requested document may be a matter of interest to individuals who have taken a close interest into the relevant Commission matter.

However, the above points alone are not determinative of whether the disclosure of the requested document would, on balance, be contrary to the public interest.

Disclosure of part of, or the entirety of, the requested document:

- could reasonably be expected to impede the administration of justice on the individuals named in the requested document and the parties to the relevant Commission matter, which is exacerbated by the fact that the matter is still ongoing;
- could reasonably be expected to prejudice the presiding Commission Member's ability to conduct the relevant matter impartially and reach a decision which has involved a thorough consideration of natural justice being afforded to both parties and all individuals involved;
- could reasonably be expected to interfere and hinder the ability for the Commission to make a decision or resolve the matter efficiently;
- would, or at the very least, could reasonably be expected to hinder the Commission's jurisdiction in relation to unlawful termination;
- would, or at the very least, could reasonably be expected to hinder the Commission's functions and jurisdiction pertaining to its alternative dispute resolution functions under the FW Act;
- could reasonably be expected to prejudice the right to privacy of the individuals named or referred to in the requested document;
- could reasonably be expected to prejudice the fair treatment of the individuals named or referred to in the requested document;
- could reasonably be expected to prejudice the commercial interests of the respondent of the relevant Commission matter;
- could reasonably be expected to prejudice the current and future employment prospects of the individuals named in the requested document, including the applicant named in the relevant matter;

- would, or at the very least could, reasonably be expected to be used as a mechanism to damage the respondent's reputation as an organisation; and
- could reasonably be expected to prejudice the Commission's ability to obtain similar information and personal and business information more generally when considering future matters involving the termination of one's employment, or disciplinary matters pertaining to one's employment.

I have not taken into account any of the irrelevant factors outlined in section 11B(4) of the FOI Act in making this assessment.

It is evident that the above factors which go against disclosing the requested document outweigh, on balance, the previously mentioned factors which favour disclosure of the requested document. I am therefore satisfied that access to the requested document, in its entirety, would, on balance, be contrary to the public interest, in respect of sections 47E(d), 47F, and 47G of the FOI Act.

#### *Relevance of third-party consultation*

I note that two of the three conditional exemptions under the FOI Act, namely sections 47F and 47G, provide for provisions in relation to third party consultation.

Section 27A(1) of the FOI Act, which concerns third party consultation for documents affecting an individual's personal privacy states:

- (1) This section applies if:
- (a) a request is made to an agency or Minister for access to a document containing personal information about a person (including a person who has died); and
  - (b) it appears to the agency or Minister that the person or the person's legal personal representative (the **person concerned**) might reasonably wish to make a contention (the **exemption contention**) that:
    - (i) the document is conditionally exempt under section 47F; and
    - (ii) access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Similarly, section 27 of the FOI Act, which concerns third party consultation for document's affecting an organisation's business information states:

- (1) This section applies if:
- (a) a request is made to an agency or Minister for access to a document containing information (**business information**) covered by subsection (2) in respect of a person, organisation or undertaking; and
  - (b) it appears to the agency or Minister that the person, organisation or proprietor of the undertaking (the **person or organisation concerned**) might reasonably wish to make a contention (the **exemption contention**) that:
    - (i) the document is exempt under section 47 (trade secrets etc.); or
    - (ii) the document is conditionally exempt under section 47G (business information) and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Prior to making a decision as to whether I consult with third parties as to whether they intend to provide submissions in relation to the disclosure of personal and business information, I formed a preliminary view. My preliminary view at the time was that even if I were to seek submissions in relation to sections 47F and 47G of the FOI Act, I would refuse access to the requested document in its entirety anyway under the other exemptions in the FOI Act. It is also worth noting that the relevant Commission matter is still before the Commission.

Given that the requested document is exempt in its entirety under section 37(2)(a) of the FOI Act and conditionally exempt under section 47E(d) of the FOI Act, it would seem to be a futile expedition if I

were to ask for the affected third parties to provide submissions in relation to the disclosure of personal and business information contained in the requested document.

It is on that basis that I decided to not consult with any of the affected third parties in relation to that matter.

### *Redacting the requested document*

A refusal to give access to exempt documents triggers a requirement to consider section 22 of the FOI Act.

Section 22 of the FOI Act provides:

#### **22 Access to edited copies with exempt or irrelevant matter deleted**

##### *Scope*

(1) This section applies if:

- (a) an agency or Minister decides:
  - (i) to refuse to give access to an exempt document; or
  - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
- (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:
  - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
  - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
  - (i) the nature and extent of the modification; and
  - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

##### *Access to edited copy*

(2) The agency or Minister must:

- (a) prepare the edited copy as mentioned in paragraph (1)(b); and
- (b) give the applicant access to the edited copy.

##### *Notice to applicant*

(3) The agency or Minister must give the applicant notice in writing:

- (a) that the edited copy has been prepared; and
- (b) of the grounds for the deletions; and
- (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.

(4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

I have considered the nature and extent of the modifications which would need to be made to the requested document if it were to be released.

The nature and extent of the modifications to the requested document if they were to be applied would not leave any information of substance.

It is therefore reasonable that the entirety of the document be exempted and not reasonably practical to provide an edited copy of the requested document.

### *Conclusion on the relevant exemptions under the FOI Act*

Based on the above, the requested document and its contents are either exempted or conditionally exempted under the FOI Act.

I am satisfied that the entirety of the requested document is exempt under section 37(2)(a) of the FOI Act. I am also satisfied that the entirety of the requested document is conditionally exempt under section 47E(d) of the FOI Act. Moreover, with respect to section 47E(d), the disclosure of the entirety of the requested document would, on balance, be contrary to the public interest.

The personal information contained in the requested document is conditionally exempt under section 47F of the FOI Act and the disclosure of that personal information would, on balance, be contrary to the public interest.

The business information contained in the requested document is conditionally exempt under section 47G of the FOI Act and the disclosure of that business information would, on balance, be contrary to the public interest.

It is for those reasons as to why I refuse you access to the requested document.

### **Rights of review**

If you disagree with my decision, you have the right to apply for an internal review of my decision by the Commission. Any request for internal review must be made to the Commission within 30 days of being notified of my decision. The internal review will be conducted by an officer other than myself (as the original decision-maker), and the Commission must make a review decision within 30 days.

Applications for internal review should be sent to:

FOI Officer  
Fair Work Commission  
GPO BOX 1994  
Melbourne VIC 3001  
Email: [foi@fwc.gov.au](mailto:foi@fwc.gov.au)

### *Review by the Information Commissioner*

Under section 54L of the FOI Act, you can apply to the Information Commissioner for review of my decision. If you want to apply to the Information Commissioner for review, you must do so in writing within 60 days after you are notified of my decision.

More information in relation to this can be found on the [Information Commissioner website](#).

### *How to make a complaint*

You can complain to the Information Commissioner about action taken by the Commission in relation to your FOI request.

Enquires to the Information Commissioner can be directed to:

Phone: 1300 363 992 (local call charge); or

Online via an [Enquiry Form](#).

Please don't hesitate to contact me via email ([foi@fwc.gov.au](mailto:foi@fwc.gov.au)) if you have any queries concerning the above.

Yours sincerely,

Nick Kierce  
Assistant Legal Officer  
Legal Services  
Fair Work Commission