



Australian Government

Australian Public Service Commission

WC

By email: foi+request-11065-95d524fd@righttoknow.org.au

Our reference: LEX 801

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 **1 February 2024** 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.
3. I have prepared this notice in accordance with section 26 of the FOI Act. Subsection 26(2) of the FOI Act provides that a notice under section 26 "*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*".

Background

4. On 1 February 2024, you requested the following from the Commission under the FOI Act:

“Under the FOI Act, I seek access to any email documents contained of Clare Mclean’s and Gordon de Brouwer APSC issued email accounts that contains the word ‘Miragaya’.

Documents failing within the scope of my request can be readily identified by searching Ms Mclean’s and Dr de Brouwer’s APSC issued email accounts (including sent and archived emails) using the search term ‘Miragaya’.

Unless they’ve been destroyed in the commission of a criminal offence under s.24 of the Archives Act, there’ll be a number of documents that fall within the scope of my request.

In accordance with paragraphs 6.153 and 6.154 of the FOI Guidelines I consent to the redaction of the personal information of any person contained within a relevant document except where that person is a public servant or statutory officer.”

5. In that request, you also wrote:

“Given the APSC’s recent history of engaging in, and covering up, politically-motivated corruption, I request that, to the extent possible, the APSC decision-maker for this FOI application process it as if they were an honest and apolitical public servant that conducts themselves with integrity.”

6. On 12 February 2024, the Commission wrote to you to acknowledge receipt of your request and to ask for engagement in a constructive manner:

“We would like to remind you that the Commission processes all FOI applications in line with the FOI Act and will release requested information where no exemptions apply. Where exemptions do apply and information is not released the Commission provides the applicants of reasons why the exemptions are applied. Noting this, we request that any further communication from you is solely in relation to your FOI request (LEX 801). We advise that any commentary on the Commission's employees and integrity will be interpreted as harassment and will not be tolerated by the Commission.

Should you wish to make a formal complaint regarding any previous FOI decisions made to you by the Commission, please direct your complaint to the OAIIC following the instructions on their website.”

7. On 16 February 2024, you wrote back to the Commission with the following:

“Thanks for the gratuitous acknowledgement.

Allow me to return serve.

It’s disappointing that the APSC is continuing with its strategy, as introduced under the direction of former Public Service Commissioner, John Lloyd, of silencing, gaslighting, threatening and persecuting persons with sufficient courage to call out politically motivated and other public sector corruption.

Because under the APSC’s stewardship that approach has served Australia so well over the past decade when it comes to matters of public sector integrity and corruption!!!

If Ms Mclean and Dr de Brouwer have nothing to hide, they have nothing to fear.

Moreover, if anyone at the APSC is uncomfortable giving effect to the obligations imposed on them by the Public Service Act including to conduct themselves accountably, ethically, apolitically and with integrity – I suggest they seek alternative employment.”

8. On 27 February 2024, the Commission wrote to you to advise that a number of documents were captured as part of your request. The Commission requested whether you could clarify the date range, inclusion of duplicates and if there was a particular document you were seeking.

9. On 29 February 2024, you responded with the following:

“Is there a particular date range you are seeking?”

I'm willing to confine my request to relevant emails from 1 July 2023 onwards.

"Are you happy to exclude duplicate documents from your request?"

Yes.

"Noting that your request as it is currently framed is quite broad, would you be able to advise if there is a particular document you are seeking?"

It's not broad – it's highly specific. 'Miragaya' is hardly a commonly used word and there's no one at the APSC with that name. And now, at your request, my FOI application is further confined to only relevant emails from the last 8 months.

As previously mentioned, if Ms Mclean Dr de Brouwer have nothing to hide, they've nothing to fear. I'm happy to set out the wide public interest in the documents the subject of my request in response to a practical refusal notice, a preliminary charges notice and/or a request for internal review of an access refusal decision."

10. On 4th March 2024, the Commission wrote to you to advise that we were consulting a third party in relation to documents within scope of your request and that the timeframe for a decision would be extended by 30 days.

11. On 25th March 2024, we wrote to you to seek a s15AA extension in the following terms:

*"Due to the nature of the request, the Commission is still in the process of undertaking the relevant consultations and wish to seek an extension of time from you to finalise the consultations. Section 15AA of the FOI Act allows an agency to extend the due date of the request by no more than 30 days with the written agreement from the Applicant. So that the Commission can ensure all relevant consultations are undertaken, the Commission would kindly like to request an **extension of 30 days** to process your request."*

12. On 28 March 2024, you wrote back to agree to an extension to 10 April 2024:

"While you've not given any particular reasoning to support your request (for example, that it's complex or voluminous, (noting that it's not), I agree to an extension of seven days such that your decision is due on 10 April 2024."

13. We note the Commission also applied to the OAIC for extension (prior to a response back from you). This was granted on 3 April 2024, with a decision due by 8 April 2024.

Documents relevant to your request

14. Taking into account your initial request and clarified scope (as at 29 February), the Commission has searched for all emails to/from Clare McLean and Gordon DeBrouwer's account, containing the word 'Miragaya', and which are dated 1 July 2023 onwards.

15. I have identified 14 documents (with attachments, as identified in the document schedule) in scope of your request.

Decision

16. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions and have decided to grant partial access to documents within scope of your request.
17. I have decided to refuse access, in full, to documents 1, 1a, 1b,1c, 2, 2a, 3, 3a, 4, 5, 5a, 6, 7, 8, 9, 10, 11, 12, 13, 14 as I am satisfied that they are exempt under sections 47E(c) and (d) and section 47F of the FOI Act. I note that many of these documents relate to a public interest disclosure (PID) under the *Public Interest Disclosure Act 2013* (the PID Act).
18. I have decided to grant access, in full, to document 11a as it is publicly available.
19. **Attachment A** sets out the grounds on which the documents outlined at paragraph 15 are exempt.
20. My reasons are set out in **Attachment B**.

Deletion of exempt matter or irrelevant material

21. 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.
22. 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.
23. I consider the objects of the FOI Act will not be served by providing access to an edited version of the document because extensive editing is required that would leave only a skeleton of the former document, conveying little of its content or substance.
24. I also consider it is not reasonably practicable to prepare edited versions of the document, having regard to the nature and extent of the modifications required, and the resources available to modify the documents.

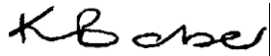
Contacts

25. 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

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

Yours sincerely

Handwritten signature of Kylie Barber in black ink, followed by a vertical line.

Kylie Barber
Authorised FOI decision maker

8 April 2024

SCHEDULE OF DOCUMENTS

Document	Description	Exemption grounds
1	Email dated 27 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
1a	Attachment to email dated 27 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
1b	Attachment to email dated 27 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
1c	Attachment to email dated 27 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
2	Email dated 28 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
2a	Attachment to email dated 28 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
3	Email dated 28 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
3a	Attachment to email dated 28 July 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
4	Email dated 3 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
5	Email dated 7 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
5a	Attachment to email dated 7 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
6	Email dated 7 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
7	Email dated 9 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information

8	Email dated 10 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
9	Email dated 10 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
10	Email dated 10 August 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
11	Email dated 16 November 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
11a	Attachment to email dated 16 November 2023	Publicly available at: https://consultations.ag.gov.au/integrity/pswr-stage2/#:~:text=The%20second%20stage%20of%20ref%20orms,supports%20for%20whistleblowers%20are%20needed.
12	Email dated 6 December 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
13	Email dated 6 December 2023	Section 47E – Operations of Agencies Section 47F – Personal Information
14	Email dated 7 December 2023	Section 47E – Operations of Agencies Section 47F – Personal Information

ATTACHMENT B

Reasons for decision

1. I have decided to refuse access to documents 1, 1a, 1b,1c, 2, 2a, 3, 3a, 4, 5, 5a, 6, 7, 8, 9, 10, 11, 12, 13, 14 as I am satisfied that they are exempt, in full, under sections 47E(c) and (d) and section 47F of the FOI Act. These documents relate to a disclosure under the PID Act and there are special protections and obligations that apply.
Document 11 relates to internal processes around legislative amendments and contains personal information.
2. I have decided to grant access to document 11a and note that this is publicly available material.
3. In making my decision I have had regard to:
 - a) the terms of your request;
 - b) the content of the documents;
 - c) the FOI Act;
 - d) consultation with relevant third parties and agencies; and
 - e) the Freedom of Information Guidelines (FOI Guidelines) issued by the Australian Information Commissioner.

Exemptions

4. In making the decision to exempt the documents, I have applied the following exemptions:
 - (a) paragraph 47E(c) and (d) – Certain operations of agencies; and
 - (b) section 47F – Personal Privacy.

Section 47E- Certain operations of agencies

5. Under section 47E(c) a document is conditionally exempt if its disclosure would, or could be reasonably expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency.
6. 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.
7. I consider disclosure of content of the documents, outlined in Attachment A, 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.

8. In coming to this conclusion, I have considered that under the PID scheme:
 - Disclosers are supported and protected from civil, criminal or administrative liability and reprisals;
 - The identity of a discloser is protected under sections 20 and 21 of the PID Act;
 - The PID Act is an important mechanism for staff of the Commission and other agencies to raise issues to the Commission.
9. The Australian Public Service Commissioner (the Commissioner) and his delegates have responsibility for a number of inquiry functions, including in relation to certain disclosures under the PID Act.
10. In order to discharge these functions, it is vital that the Commissioner and his delegates are able to properly undertake activities under the PID Act. I consider that the release of the document would be likely to have a larger effect of inhibiting or discouraging staff from freely and effectively communicating on matters relating to PID, including in the consideration and assessment of material subject to a PID investigation, with confidence that such communication will not become public.
11. Further, I consider disclosure of the information contained in these documents could reasonably affect the willingness of people to make complaints or raise concerns to the Commission under the PID Act.
12. 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.
13. Importantly, I also note section 65 of the PID Act which provides that, if a person obtains information in performing a function or exercising a power under the PID Act, they must not use or disclose that information except in certain circumstance (none of which I consider to apply here).
14. The importance of protecting information collected during a PID investigation process was affirmed in the case of 'YU' and Bureau of Meteorology (Freedom of Information) [2021] AICmr75 (29 November 2021).
15. In that case, the Bureau of Meteorology refused access to documents on the following basis: *'It is submitted that disclosure under the FOI Act of information provided confidentially as part of a PID investigation would have both a substantial adverse effect on the management of employees of the Bureau (s 47E(c)) and on the Bureau's ability to administer and enforce the PID Act, including the undertaking of investigations (s 47E(d)).*

The Bureau has in place processes and procedures for the administration and enforcement of the PID Act. Employees are aware that any PID disclosure, and any subsequent investigation, is treated in the strictest confidence and steps will be taken to ensure the protection of their identity in accordance with the obligations in the PID Act.

Confidential and protected information is made available only to officers who are authorised or delegated under the PID Act and information is stored securely. Employees provide information, and participate in PID investigations, on the understanding that their personal and confidential information will be used and disclosed only for the purpose of a PID Act investigation.

If employees become aware that information obtained under the strict secrecy regime of the PID Act is able to be accessed under the FOI Act, the Bureau considers employees will lose confidence in the ability of the Bureau to protect this confidential and protected information. If privacy and confidentiality cannot be assured, I believe employees would be less willing to make a disclosure, or participate in a PID investigation. I believe this would damage the relationship of trust between the Bureau and its employees which, in turn, would have a significant impact on the ability of the Bureau to manage employees, particularly in the context of complaint management.

If the ability of the Bureau to efficiently and effectively manage complaints and PID disclosures is adversely affected, I consider it would substantially adversely affect the ability of the Bureau to effectively and efficiently carry out its other important public functions.

Further, if employees lose faith in the ability of the Bureau to protect confidential and protected information, I believe it will have a substantial adverse effect on the ability of the Bureau (and other agencies more broadly) to efficiently and effectively administer and enforce the PID Act. I believe employees would be less likely, and willing, to make disclosures or participate in investigations. If the integrity of the PID Act is eroded in this way, it will reduce the statutory effectiveness of the PID process.

The Bureau believe these adverse effects to be substantial and not insignificant.'

16. I agree that the adverse effect of releasing the documents, for the purposes of your request, would be substantial and not insignificant.

17. Relevantly, in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2016] AATA 230 ('De Tarle'), Senior Member Isenberg also considered whether material in an investigation report were exempt under s 47E(c). In finding that the material was exempt under s 47E(c), Senior Member Isenberg said:

'I accept that candour is essential when an agency seeks to investigate complaints.... [however] staff may be reluctant to provide information and cooperate with investigators if they were aware that, the subject matter of those discussions would be disclosed and made public. That then would, in my view, have a substantial adverse effect on the management of the agency's personnel.'

18. I have considered the above and am satisfied that the section 47E(c) and 47E(d) exemptions apply to documents 1, 1a, 1b,1c, 2, 2a, 3, 3a, 4, 5, 5a, 6, 7, 8, 9, 10, 12, 13, 14 given that disclosure of information relating to allegations, inquiries and investigations under the PID scheme would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of Commission staff and on the proper

and efficient conduct of the operations of the Commission.

19. In relation to document 11, I am satisfied that internal discussions around legislative reform and amendment are a key part of the proper and efficient conduct of the operations of the Commission. This is different to public facing consultations and play a key part in the reform process.

Section 47F- Personal Privacy

20. 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.

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

22. I am satisfied that the documents, as outlined in Attachment A, contain personal information about identified individuals; including, amongst other things, their names, contact details and employment details.

23. 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.

24. 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...’

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

- the substance of the personal information contained in the documents is not widely available or well-known;
- the personal information will identify the individuals, whom are not known to be (or to have been) associated with the matters dealt with in the documents;

- the disclosure of information about persons who may be the subject of certain allegations, including unsubstantiated allegations, are not matters that concern normal duties or responsibilities ('BA' and Merit Protection Commissioner [2014] AICmr 9);
- the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;
- disclosure would be contrary to the confidentiality protections afforded under the PID Act and the associated policies, procedures and expectations which those individuals would expect to be protected by;
- release of the individuals' personal information may cause stress for them or other detriment; and
- disclosure would prejudice the individuals' right to privacy.

26. Taking into account the above factors that do not support release of the information, I find that disclosure of the personal information contained in the documents would be unreasonable. I am also not satisfied there would be public interest served in disclosure of this particular information, versus the public interest in maintaining personal privacy.

27. 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

28. 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'.

29. 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.

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

- disclosure could reasonably be expected to prejudice the privacy of third party individuals;
- 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);
- disclosure of any third party individual's personal information will not advance the scrutiny of the Commissioner's inquiry functions and processes under the PID Act.
- 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;

- disclosure could be expected to undermine the confidentiality provisions which are fundamental pillars of the PID scheme;
- disclosure could be expected to adversely affect the management and assessment of staff of the Commission; and
- disclosure could be expected to adversely affect the proper and efficient operations of the Commissioner and the Commission in performing statutory functions and powers, as well as in relation to legislative amendment processes.

31. On balance, I consider the public interest factors weigh strongly against disclosure of the conditionally exempt material in the documents. The disclosure of sensitive personal information and the likely substantial adverse effect on the Commission's PID scheme and legislative amendment operations outweigh the public interest factors favouring disclosure.

32. I have ultimately decided that disclosure of the conditionally exempt material in the documents would be contrary to the public interest. Those documents are thus conditionally exempt, in full, from disclosure under sections 47E(c), 47E(d) and section 47F of 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 agency authorised officer 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