



Australian Government

Australian Public Service Commission

Cynthia T

By email: foi+request-11097-5102d845@righttoknow.org.au

Our reference: LEX 814

Dear Cynthia

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 **13 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.

Background

3. On 19 October 2023, you previously [requested](#):
any reports on the operations of the Australian Public Service Commission given during the 2022-2023 financial year by the Commonwealth Ombudsman.
4. On 20 November 2023, the FOI decision maker, Ms Melanie McIntyre, made a decision to refuse access to documents under section 24A of the FOI Act, on the basis of no relevant documents being found to exist after reasonable searches.
5. On 16 December 2023, you [sought](#) an internal review of Ms McIntyre's decision.
6. On 18 December 2023, the Office of the Australian Information Commissioner granted the Commission an extension to continue to process your internal review application to 29 January 2024.
7. On 29 January 2024, the FOI internal review decision maker, Ms Sam Montenegro, affirmed Ms McIntyre's decision to refuse access to documents under section 24A of the FOI Act.

Documents relevant to your request

8. In your current request, you have sought access to:

The report issued from the Office of the Commonwealth Ombudsman, dated 15

December 2022, which “includes the Office’s findings, comments and suggestions relating to an investigation, communicated to [the Australian Public Service Commission].”

9. I have identified one (1) document within the scope of your request.
10. The document in question was not within the scope of your previous request as it was not a ‘report’ for the purposes of section 15 of the *Ombudsman Act 1976* (Ombudsman Act).
11. The currently identified document was created under subsection 12(4) of the Ombudsman Act, relating to the provision of *comments* and *suggestions*.
12. As your current request appears to be broader than your previous request and includes further identifying information, I have interpreted the term ‘report’ in your request more broadly to capture any documents that fit within the scope of this request.

Decision

13. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
14. I have decided to refuse access to the document because I consider it is exempt in full under the FOI Act.
15. **Attachment A** sets out the grounds on which the document is exempt.
16. My reasons are set out in **Attachment B**.

Contacts

17. 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

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

Yours sincerely

SM

Authorised FOI decision maker

EL2

12 March 2024

SCHEDULE OF DOCUMENTS

Document	Description	Exemption grounds
1	Commonwealth Ombudsman section 12 notice	Section 47E – Operations of agencies Section 47F – Personal privacy

ATTACHMENT B

Reasons for decision

1. I have decided to refuse access to the documents because I consider that it is exempt in full under the *Freedom of Information Act 1982* (FOI Act).
2. 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 the Commonwealth Ombudsman (Ombudsman); and
 - e) the Freedom of Information Guidelines (FOI Guidelines) issued by the Australian Information Commissioner.

Exemptions

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

Subsection 47E(d) – Certain operations of agencies – substantial adverse effect on the proper and efficient conduct of the operations of an agency

4. Paragraph 47E(d) of the FOI Act provides that a document is conditionally exempt from disclosure if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
5. For this exemption to apply, it is necessary that the predicted effect ‘would, or could reasonably be expected to’ occur.
6. The term ‘could’ in this instance, as the FOI Guidelines state at 5.17, requires an analysis of whether there exists a reasonable expectation that an event, effect or damage could occur. This ‘reasonable expectation’ cannot be a mere risk, possibility or chance of prejudice. It must be based on reasonable grounds, a real, significant or material possibility of prejudice, as the FOI Guidelines at 5.18 state.
7. Paragraph 6.122 of FOI Guidelines also state that paragraph 47E(d) also applies to documents that relate to a complaint made to an investigative body, noting that “the disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the efficient conduct of the investigative body’s operations.”
8. The document found in scope includes material containing findings, comments and suggestions relating to an investigation by the Ombudsman under subsection 12(4) of the *Ombudsman Act 1976*.

9. The Ombudsman is an investigative agency, involved in administering and enforcing the *Public Interest Disclosure Act 2013* (PID Act).
10. Pursuant to subsection 8(2) of the Ombudsman Act, Ombudsman investigations are dealt with in private and the protection of those who make disclosures is central to the Public Interests Disclosure (PID) Scheme.
11. I consider that the release of this document is likely to have a larger effect of inhibiting or discouraging staff from freely and effectively communicating with investigative agencies on matters relating to PIDs.
12. I am satisfied that public detriment could reasonably be expected if the Ombudsman is compromised in its ability to obtain confidential information as part of future investigations.

Section 47F – Personal privacy

13. Section 47F of the FOI Act conditionally exempts a document where “its disclosure would involve the unreasonable disclosure of personal information about any person.” Access must be provided unless access would, on the balance, be contrary to the public interest. (subsection 11A(5) of the FOI Act).
14. Personal information means information or an opinion about an identified individual, of an individual who is reasonably identifiable:
 - whether the information or opinion is true or not; and
 - whether the information or opinion is recorded in a material form or not.
15. I consider that the document contains such matter; specifically, the names of individuals.
16. In considering what is unreasonable, the Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at [51] stated:

...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...
17. Other factors to be considered include the nature, age and current relevance of the information, any opposition to disclosure held by the person that the personal information relates to, and the circumstances of an agency’s collection and use of the information (‘FG’ and *National Archives of Australia* [2015] AICmr 26 at [47]).
18. I note that in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020), Deputy President S A Forgie found (at [130]):

An individual may include his or her direct telephone number in correspondence directed to other persons. Unless published on an agency's website or made public in some other way, such as on a pamphlet or report available to the public, I consider that disclosure of an individual's telephone number in his or her place of employment is unreasonable. Its disclosure will provide an avenue by which others may choose to express their displeasure with the individual or with that for which he or she is responsible but its disclosure does not make any positive contribution to increasing public participation in Government processes or in increasing scrutiny, discussion, comment and review of the Government's activities.

19. In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines provide, at paragraph 6.144:

For example, in Colakovski v Australian Telecommunications Corp, Heerey J considered that '... if the information disclosure 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'. This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access to contrary to s 11(2).

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

21. I have identified the following factors that, in my view, do not support the release of this personal information under section 47F of the FOI Act:

- 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 as it relates to the findings of a private Ombudsman investigation;
- the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;
- the disclosure of this information will not advance scrutiny of any decisions falling within scope of your FOI request;
- the disclosure of this information could expose concerned individuals to unsolicited and inappropriate approaches by external parties;
- release of the individuals' personal information may cause stress for them or other detriment; and
- disclosure would prejudice the individuals' right to privacy.

22. I have therefore decided to the extent that the document includes personal information of individuals, those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of their personal information.

Section 11A – Public interest test

23. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless access to the document would, on balance, be contrary to the public interest.
24. I have considered the public interest exemption factors in favour of disclosure at subsection 11B(3) of the FOI Act, including the extent to which access to the document would promote the objects of the FOI Act and inform debate on a matter of public importance.
25. I have identified the following factors as weighing against disclosure:
 - disclosure of individuals' personal information will not advance scrutiny of any decisions falling within the scope of your FOI request;
 - disclosure would prejudice individuals' right to privacy;
 - disclosure could lead to unwarranted approaches to the individuals which would adversely impact their ability to perform their role and functions.
 - disclosure would reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information;
 - disclosure would reasonably be expected to prejudice the proper and efficient conduct of the investigations by the Ombudsman; and
 - disclosure could be expected to undermine the confidentiality provisions which are central to the PID Scheme.
26. Subsection 11B(4) of the FOI Act lists factors that are irrelevant to determining whether access would be in the public interest. I have not considered these factors.
27. On balance, I find disclosure of the document would be contrary to the public interest. To the extent that the material contained in the document is conditionally exempt under paragraph 47E(d) and section 47F of the FOI Act, those parts are exempt from disclosure.
28. I am satisfied that these factors outweigh disclosure for the purposes of promoting the objects of the FOI Act, including to inform the community of Government operation and inform on a matter of public confidence.

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