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Our reference: LEX 872 (814)

Cynthia T

By email: [foi+request-11097-5102d845@righttoknow.org.au](mailto:foi+request-11097-5102d845@righttoknow.org.au)

Dear Applicant

**Freedom of Information Internal Review Request – LEX 872 (814)**

1. I am writing about your request for internal review, dated 14 March 2024, regarding a decision made by the Australian Public Service Commission (**Commission**) under the *Freedom of Information Act 1982 (FOI Act)*.
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from [www.legislation.gov.au](http://www.legislation.gov.au).

**Background**

3. On 13 February 2024, you requested the following documents from the Commission under the FOI Act:

*“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].”*

4. On 14 March 2024, the Commission sent you an email containing a decision notice from SM, Authorised FOI decision maker, EL2, responding to your request. SM identified one document falling within scope of your request.
5. SM refused access to this document in full on the basis that it is exempt under the FOI Act.
6. In making the decision to exempt the document, SM applied the following exemptions:
  - a) Section 47E(d) – Certain operations of agencies;
  - b) Section 47F – Personal privacy; and
  - c) The public interest factors outlined in section 11B of the FOI Act.
7. On 14 March 2024, you sought an internal review of SM’s decision regarding your request in the following terms:



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*"I request an internal review of your handling of my FOI request 'Report on the operations of APSC' on all ground. The reasons for decision are marred by both factual and legal errors. The legal errors extend to relying on irrelevant authorities."*

**Decision**

8. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions, and I have reviewed your request in accordance with section 54C of the FOI Act.
9. My role is to make a new decision on your request, independently and impartially from the original decision maker. I was not involved or consulted in the making of SM's decision. Internal review is a merits review process and I may exercise all the powers available to an original decision maker.
10. After considering your request and your internal review submissions, under subsection 54C(3) of the FOI Act, I **affirm** SM's earlier decision to refuse your request for access to the document. I have decided to refuse access to the document because I consider that it is exempt in full under the FOI Act.

**Reasons for decision**

11. In making my decision I have had regard to:
  - a) the terms of your request and your internal review submissions;
  - b) the content of the document you requested;
  - c) relevant provisions of the FOI Act;
  - d) consultation submissions received from the Commonwealth Ombudsman (**Ombudsman**);
  - e) the Freedom of Information Guidelines (**FOI Guidelines**) issued by the Australian Information Commissioner;
  - f) the *Public Interest Disclosure Act 2013* (**PID Act**), and
  - g) the *Ombudsman Act 1976* (**Ombudsman Act**).

**Deletion of exempt matter or irrelevant material**

12. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of the request.
13. Paragraph 3.98 of the FOI Guidelines provides further guidance on this issue. It relevantly provides:

*"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*



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*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."*

14. I do not consider it reasonably practicable to prepare an edited version of the document, having regard to the nature and extent of the modification required. I have formed this view because the purpose of providing access to government information under the FOI Act will not be served as extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

**Exemptions**

**Section 47E of the FOI Act – Certain operations of agencies**

15. Section 47E of the FOI Act provides that a document is conditionally exempt if it would, or could, reasonably be expected to, prejudice or have a substantial adverse effect on certain listed agency operations.
16. Relevantly, section 47E(d) conditionally exempts a document 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.
17. Consistent with the original decision, I consider disclosure of the document is likely to have a substantial adverse effect on the ability of the Ombudsman to obtain information for its investigations. In particular, I consider that disclosure could reasonably affect the willingness of people to make complainants to the Ombudsman on matters relating to PIDs out of concern that any information they provide may not be kept private and confidential. In these circumstances, I am of the view that release of the document could undermine the confidentiality provisions set out within both the Ombudsman Act and the PID Act, which are vital to the PID scheme.
18. On this basis, I am satisfied that disclosure of the document relating to the Ombudsman's investigation would, or could, reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Ombudsman.
19. My consideration of the public interest test in respect of the application of section 47E to the document is outlined further at paragraphs 29 to 36.

**Section 47F of the FOI Act – Personal privacy**

20. A document is conditionally exempt if its disclosure under the FOI Act 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:





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- the information or opinion is true or not; and
  - the information or opinion is recorded in a material form or not.
22. In reviewing your request, I am satisfied the document in question contains personal information including the names of public servants and individuals.
23. In determining whether disclosure of the 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. The FOI Guidelines at paragraph 6.143 explain that other relevant factors 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;
  - 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.
25. Having regard to the matters I must consider under subsection 47F(2) of the FOI Act, I have identified the following factors that in my view do not support release of the personal information contained within the document:
- the personal information will identify the individuals, whom are generally not known to be (or to have been) associated with the matters dealt with in the documents as it relates to the findings of a private Ombudsman investigation;
  - the release of the individuals' personal information may cause stress or other detriment to them;
  - the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act; and
  - 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.
26. Noting the above, to the extent the document contains personal information, I have decided that those parts are conditionally exempt from disclosure under section 47F of the



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FOI Act because disclosure would involve the unreasonable disclosure of multiple persons' personal information.

27. I note your submission that SM relied on irrelevant authorities in the primary decision which amounts to a legal error. As you have not specified which authorities you regard as irrelevant, I have considered all of the authorities relied upon by SM in the original decision. The authorities referenced by SM in support of her finding that parts of the document are exempt under section 47F are taken directly from the FOI Guidelines. Section 93A of the FOI Act requires Australian Government agencies to have regard to these guidelines when performing a function or exercising a power under the FOI Act. I also note that the case of *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 was recently cited by the Administrative Appeals Tribunal when determining whether family names of staff members are conditionally exempt under section 47F of the FOI Act: *Shafraan; Secretary, Department of Veterans Affairs and* [2024] AATA 115 (5 February 2024) at [53]. I therefore do not agree with your submission that the authorities considered by SM are irrelevant in the context of determining whether or not parts of the document in question are exempt under section 47F of the FOI Act.
28. My consideration of the public interest test in respect of the application of section 47F to the document is outlined further at paragraphs 29 to 36.

**Sections 11A and 11B of the FOI Act – Public Interest test**

29. An agency must give access to a 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 (Subsection 11A(5) of the FOI Act).
30. I have considered the public interest factors set out in section 11B of the FOI Act.
31. I have considered the public interest factors favouring disclosure under 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.
32. However, I consider the following factors do not favour disclosure:
- disclosure would undermine the confidentiality and secrecy provisions fundamental to the PID Scheme;
  - disclosure would prejudice individuals' right to privacy;
  - 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 investigations by the Ombudsman;
  - disclosure may undermine the Commission's relationship with the Ombudsman; and
  - disclosure of individuals' personal information will not advance scrutiny of any decisions falling within the scope of your request.





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33. I have not had regard to any irrelevant factors as set out in subsection 11B(4) of the FOI Act.
34. In this instance, I consider that the public interest factors against disclosure of the document outweigh the public interest factors favouring providing access.
35. I therefore find that the document is subject to conditional exemptions under sections 47E and 47F of the FOI Act and that disclosure is not in the public interest.
36. On this basis, I affirm the original decision made by SM.

**Additional information – Details of Authorised decision maker**

37. Lastly, I note you made the following comments in your internal review request:

*"I note that paragraph 26(1)(b) of the FOI Act 1982 (Cth) provides that 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, where the decision relates to a document of an agency, state the name and designation of the person giving the decision.*

*"SM" is not a name; they are initials. Please ensure that the person who conducts the internal review decision provides his or her name and designation as required by law."*

38. In response, I draw your attention to the Office of the Australian Information Commissioner's *Freedom of Information Investigation Outcomes* where the Information Commissioner found that the inclusion of a given name, position number and designation of the relevant staff member in a decision notice (in the context of the Department of Veterans' Affairs' specific circumstances) is reasonable and results in the giving of valid notices under section 26 of the FOI Act.
39. I note that there are a small number of FOI decision makers at the EL2 level within the Commission. As a result, these staff members would be reasonably identifiable if their given names were to be included within decision notices. Employees of the Commission have been personally targeted and subjected to online abuse and harassment when processing access requests. In order to protect staff from risk of harm, the Commission has adopted the practice of providing the initials, designation and classification of decision makers at the EL2 level. The inclusion of these details ensures the decision maker is able to be easily identified within the Commission for accountability purposes, whilst balancing the Commission's obligations under the *Work Health and Safety Act 2011* to protect staff against risk of psychosocial harm.



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40. Taking into account the information provided within SM's decision notice and the relevant factors described in the preceding paragraphs, I consider the decision notice issued by SM is a valid notice under section 26(1)(b) of the FOI Act.

**Contacts**

41. If you require clarification on matters in this letter, please contact the Commission's FOI Officer by email at [foi@apsc.gov.au](mailto:foi@apsc.gov.au).

**Review Rights**

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

Yours sincerely

A handwritten signature in black ink, appearing to be 'SM' or similar initials.

Sam Montenegro  
Authorised FOI decision maker  
15 April 2024



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**ATTACHMENT A**

## **Rights of Review**

### **Asking for a full explanation of a Freedom of Information decision**

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

### **Applying for external review by the Australian Information Commissioner**

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

#### **You can lodge your application:**

Online: [www.oaic.gov.au](http://www.oaic.gov.au)  
Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001  
Email: [enquiries@oaic.gov.au](mailto: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](http://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](http://www.ombudsman.gov.au)