



## FEDERAL COURT OF AUSTRALIA

HARRY GIBBS COMMONWEALTH LAW COURTS BUILDING  
119 NORTH QUAY  
BRISBANE QLD 4000

15 March 2024

FOIBLES  
By email

By email: [foi+request-11098-6ff4608e@righttoknow.org.au](mailto:foi+request-11098-6ff4608e@righttoknow.org.au)

Dear FOIBLES,

### **Request under the Freedom of Information Act**

I refer to your email to the Federal Court of Australia (Court) dated 14 February 2024 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

On 11 March 2024, with the consent of the Federal Circuit and Family Court of Australia (FCFCoA), and in accordance with section 16 of the FOI Act, the Court transferred paragraph (a) of your request to the FCFCoA because that paragraph directly related to the FCFCoA. The Court advised you of the transfer of paragraph (a) of your request to the FCFCoA in an email dated 11 March 2024 and that the Court will consider and respond to the balance of the paragraphs in your request.

For the avoidance of any doubt, this decision relates to paragraphs (b) and (c) of your request, which read as follows:

*Under the Freedom of Information Act 1982 (Cth), I request access to:*

...

- b) *any and all documents associated, in the broadest sense of that term, with the file PA-2023-0137; and*
- c) *any and all documents associated, in the broadest sense of that term, with the file PA-2023-0138.*

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Searches undertaken**

Extensive searches were undertaken by staff of the Court to identify any documents falling within the scope your request. These searches included discussions with senior employees of

the Court, searches of personnel files and other files on the Information Management System including shared drives, the email exchange server, and electronic document and records systems.

As a result of the searches undertaken, a large number of documents were identified as falling within the scope of your request. These documents include confidential and highly sensitive material, including but not limited to, reports and communication between the Court, an external provider and individual employees of the Court. I have decided not to provide specific detail about each document in my decision, as doing so would reveal exempt matter (see subsection 26(2) of the FOI Act).

From the searches undertaken, a total of two hundred and forty-eight (248) documents were identified as falling within the scope of paragraphs (b) and (c) of your request. I have decided not to publish an itemised list of the documents for two reasons:

- Firstly, due to the volume of documents that fell within the scope of paragraphs (b) and (c) of your request; and
- Secondly and more importantly, given the nature of the documents and my decision not to provide specific detail about each document so as not to reveal exempt material<sup>1</sup>.

However, I have decided to provide a list which broadly summarises the types of documents that were captured within the scope of paragraphs (b) and (c) of your request. The documents fall into the following categories of documents:

- Email communication between Court employees;
- Email communication from the Court to an external provider;
- Letters between Court employees;
- Letters between the Court and the external provider;
- Letters from external stakeholders to the Court;
- Procurement documentation – requests for quotes, proposals to meet requirements, contracts and details regarding external providers employee’s qualifications;
- Signed consent forms;
- Investigation reports – draft, preliminary and final;
- Timesheets and invoices;
- Transcripts;
- File notes;
- Close circuit television (CCTV) footage;
- Images/photographs of individuals; and
- Voice recordings.

I am satisfied that by conducting these searches the Court has taken all reasonable steps to identify the documents you have requested.

## **Decision**

I have decided that pursuant to sections 47C, 47E and 47F of the FOI Act, to refuse your request for access to documents that fall within the scope of paragraphs (b) and (c) of your request. I am satisfied that the documents identified are conditionally exempt as they would disclose a deliberative process and/or have an adverse effect on the operations of an agency and/or be an

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<sup>1</sup> Section 26(2) of the FOI Act.

unreasonable disclosure of personal information. Further, and on balance, disclosure would be contrary to the public interest under subsection 11A(5) of the FOI Act.

I have taken the following into account in making my decision:

- the terms of paragraphs (b) and (c) of your request;
- the nature and content of the documents that fall within the scope of your request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the *Freedom of Information (Charges) Regulations 2019*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

## Reasons for Decision

### *Conditional exemption under section 47C of the FOI Act – Deliberative processes – paragraphs (b) and (c)*

I have considered whether the documents found in relation to paragraphs (b) and (c) are conditionally exempt from disclosure under subsection 47C(1) of the FOI Act.

Subsection 47C(1) prescribes that:

*A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

In relation to requests that concern conditionally exempt documents containing deliberative matter, the FOI Guidelines provides the following at 6.52:

*... Deliberative matter is content that is in the nature of, or relating to either:*

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).*

Relevantly, the FOI Guidelines also provide:

*6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.*

*6.58 A deliberative process involves the exercise of judgement in developing and making a selection from different options:*

*The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>2</sup>*

6.59 'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>3</sup>

6.60 The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.<sup>4</sup>

6.61 A deliberative process may include the recording or exchange of:

- opinions
- advice
- recommendations
- a collection of facts or opinions, including the pattern of facts or opinions considered
- interim decisions or deliberations [footnote omitted].

I am required to assess the material to decide if it relates to a deliberative matter or is in the nature of deliberative processes.<sup>5</sup> Upon assessment, I am satisfied that the documents that fall within the scope of your request includes deliberative matter. They consist of:

- letters (including draft letters) to Court employees;
- letters to an external provider;
- confidential draft and preliminary reports (marked "Sensitive: Personal");
- email correspondence relating to draft and/or preliminary reports;
- email communications, including attachments, between Court employees and the Court, and the Court and an external provider in relation to workplace investigations; and
- recordings and exchanges in preparation for and to assist in deciding to procure the services of an external provider. This includes the discussions that took place leading up to and arranging any engagement.

The documents record opinions and processes relating to the workplace investigations and disclose material prepared or recorded as part of that deliberative process before any decision was made regarding those workplace investigations.

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<sup>2</sup> See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

<sup>3</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

<sup>4</sup> See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General's Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

<sup>5</sup> *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

Paragraph 6.67 of the FOI Guidelines provides that “*where material was gathered as a basis for intended deliberations, it may be a deliberative matter*”.<sup>6</sup> The documents that fall within the scope of paragraphs (b) and (c) of your request are documents that were “*gathered as a basis for intended deliberations.*” That is, the Court holds those documents as they formed the basis of material for deliberating on workplace investigations. Further, they contain a collection of facts and opinions relating to those investigations.

In the decision of *Raiz and Professional Services Review* [2021] AATA 4360 (*Raiz and PSR*), the Administrative Appeals Tribunal found that material collected and assessed during the course of an investigation made under the *Health Insurance Act 1973* (Cth) (Health Insurance Act) by the Professional Services Review was deliberative material and conditionally exempt under both sections 47C and 47E(d) of the FOI Act. In relation to the conditional exemption under section 47C, the Tribunal found, at paragraph [87] of that decision:

*I reject Dr Raiz’s arguments that this material is not deliberative material. I refer to paragraph 6.67 of the Guidelines that states that material that is gathered as a basis for intended deliberations may be deliberative matter. It is clear from Mr Topperwein’s evidence that MBS data must be considered as a part of a PSR Committee investigation and further that the Committee must deliberate as to which MBS items to investigate. It is not relevant that the instructions to retrieve certain data technically occurs after the deliberative process as these instructions would reveal the outcomes of deliberations regarding which data to request. Therefore, disclosure of the contents of the requests for data, the data itself, and the staffs’ interactions with the ‘owners’ of the data would all reveal information directly related to deliberations and necessary for the Committee’s continuous deliberations.*

I consider that the investigation under the Health Insurance Act, discussed in *Raiz and PSR*, is comparable to the investigations that are the subject of paragraphs (b) and (c) of your request. The documents record exchanges about the investigations conducted by the external provider and include specific and detailed references to those investigations. All of this occurred before final conclusions/recommendations were reached by either the external provider or the Court.

The recording and/or exchange of those facts and opinions took place prior to the making of a final decision regarding the topic and were part of a wider deliberative process. Therefore, I find that disclosure of the documents would disclose deliberative matter and, for this reason, the documents are conditionally exempt under subsection 47C(1) of the FOI Act.

The question of whether disclosure would or would not be contrary to the public interest under subsection 11A(5) of the FOI Act is considered separately in the relevant section below.

***Conditional exemptions under section 47E(c) and 47E(d) of the FOI Act – Operations of an agency – paragraphs (b) and (c)***

I have also considered whether the documents that fall within the scope of paragraphs (b) and (c) are conditionally exempt from disclosure under subsections 47E(c) and 47E(d) of the FOI Act.

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<sup>6</sup> *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

Section 47E(c) and (d) relevantly provide that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, do any of the following:

...

- (c) *have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines provides the following in relation to subsection 47E(c):

*6.113 Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:*

- *an effect would reasonably be expected following disclosure*
- *the expected effect would be both substantial and adverse.*

*6.114 For this exemption to apply, the documents must relate to either:*

- *the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- *the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.*

[footnotes omitted]

Paragraph 6.123 of the FOI Guidelines provides guidance on section 47E(d):

*The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.*

The documents which were identified as falling within the scope of paragraphs (b) and (c) of your FOI request relate to both the:

- *“management of personnel”* in the sense of relating to human resources policies, procedures and activities, and workplace investigations undertaken by or on behalf of the Court; and
- *“assessment of personnel”* in the sense of containing an assessment of the facts, opinions and circumstances of the incidences and Court employees involved in the workplace investigations.

For the reasons outlined below, I am satisfied that the documents captured by paragraphs (b) and (c) of your FOI request are conditionally exempt, as disclosure under the FOI Act would have a substantial adverse effect on the management or assessment of personnel by the Court and on the proper and efficient operations of the Court under subsections 47E(c) and 47E(d) of the FOI Act.

In reaching this conclusion I have also considered “*the context of the document and the integrity of the system*” that require these documents.<sup>7</sup> All of the documents captured by paragraphs (b) and (c) of your FOI request relate specifically to the Court’s human resources policies, procedures and activities, and workplace investigation processes. For example, the documents include letters to employees outlining the process, and engagement and appointment documents for the external provider. In this context, the release of this information would clearly have an adverse impact on the integrity of the Court’s workplace investigation processes. It would likely result in the Court being a less attractive employer to prospective or existing employees, and impact on the free communication between internal and external stakeholders about such processes. Such information is usually communicated on the understanding that it will remain confidential and not be made publicly accessible upon the making of an FOI request.

The decision of ‘*YU* and Bureau of Meteorology (Freedom of Information) [2021] AICmr75 (29 November 2021) (*YU*) upheld the importance of protecting information collected during a Public Interest Disclosure (PID) investigation process. While the present circumstances do not relate to PID investigations, the principles outlined in this case are relevant as the concept of “*other investigations into alleged misconduct*”<sup>8</sup> is also addressed. In *YU*, the Information Commissioner accepted the Bureau of Meteorology’s submission, at paragraph [31], as follows:

*The PID Act provides public officials who make a disclosure under that Act with legislative protection from reprisals. I agree with BOM’s submission that certain operations of the agency may be undermined if the confidentiality established under the PID Act was circumvented by a request for information under the FOI Act. I am also satisfied disclosure may result in employees losing confidence in BOM’s ability to maintain confidentiality during a PID or other investigation into allegations of misconduct, which may have a substantial adverse effect on the Bureau’s ability to manage its staff.*

I conclude that certain operations of the Court could be undermined if the confidentiality required for the Court to properly conduct workplace investigations was circumvented by an access application made under the FOI Act. The case of *YU* also refers to other relevant case law that highlights the importance of agencies being able to undertake confidential investigative processes, and the fact that the need for confidentiality will often extend past the time period of the investigation itself, since disclosure would likely undermine participation in future investigative processes by agency staff and/or members of the public.<sup>9</sup>

It is an important aspect of the operation of Commonwealth agencies that they can properly undertake activities that relate to workplace investigations, and in doing so, resolve disputes, identify any wrongdoing, and enable employees to feel supported and able to freely participate in a process that leads to fair, objective, and informed decision-making.

Paragraph 6.122 of the FOI Guidelines further elaborates on the applicability of the conditional exemption in section 47E(d) of the FOI Act, stating the following:

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<sup>7</sup> FOI Guidelines, paragraph 6.116.

<sup>8</sup> ‘*YU* and Bureau of Meteorology (Freedom of Information) [2021] AICmr75 (29 November 2021) at [31].

<sup>9</sup> See, for example, *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2016] AATA 230; ‘*HJ* and Australian Federal Police [2015] AICmr 71; *Australian Broadcasting Corporation and Australian Federal Police (Freedom of information)* [2020] AICmr 23; ‘*YA* and Australian Taxation Office (Freedom of Information) [2021] AICmr 49; ‘*YB* and Department of Veterans’ Affairs [2021] AICmr 52.

*The exemption may also apply to documents that relate to a complaint made to an investigative body. 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 proper and efficient conduct of the investigative body's operations. [footnote omitted].*

The release of the documents captured by paragraphs (b) and (c) of your request would clearly bear on the Court's "*proper and efficient operations*". Not only do the documents relate to two confidential workplace investigations, and thereby the proper and efficient operations of the Court, but the documents contain personal information that was collected as part of those investigative processes. This information relates to employees of the Court who are critical to the Court's proper and efficient operations. Employees, of all classifications, support the operations of the Court by performing important functions including adhering to the policies and procedures of the Court and the APS Code of Conduct. The documents, thereby relate to the Court's ability to assess and investigate its staff.

I now turn to the question of whether disclosure of the documents in relation to paragraphs (b) and (c) of your FOI request would or could reasonably be expected to have a substantial adverse effect on the management and assessment of Court staff and on the Court's proper and efficient conduct of operations.

The release of the documents would, or could reasonably be expected to, have a substantial adverse effect on the management and assessment of personnel by the Court, as well as on the Court's operations, by:

- putting at risk the confidentiality required for the Court and individuals to properly engage in workplace investigations;
- discouraging individuals from disclosing suspected wrongdoing by Court employees;
- undermining participation in future investigative processes by Court employees and/or individuals external to the Court;
- compromising the Court's ability to carry out its obligations under various legislation<sup>10</sup> and its ability to ensure that allegations of misconduct are properly investigated;
- adversely impact the Court's ability to support, manage, assess or investigate its own staff;
- prejudicing the relevant individuals' right to privacy, including undermining the expectations of Court employees regarding the protection of their privacy;
- negatively impact the ability of the relevant employees to perform their current role;
- adversely affect the health and wellbeing of the relevant employees, including by causing them stress and anxiety by linking them to a particular workplace investigations and/or allegations;
- exposing the relevant individuals to the risk of having their personal details and the circumstances of their involvement in workplace investigations the subject of speculation and publicity;
- damaging the relevant individuals' relationships with colleagues and peers; and
- damaging the relevant individuals prospects of future employment.

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<sup>10</sup> Including but not limited to the *Public Service Act 1999* (Cth), *Fair Work Act 2009* (Cth), *Australian Human Rights Commission Act 1986* (Cth), *Workplace Health and Safety Act 2011* (Cth), *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).



I also note that disclosure of the information requested may likely breach the Court's privacy and confidentiality obligations under the *Privacy Act 1988* (Cth) (Privacy Act).

Further, the confidential written communication relates to a number of employees who were directly involved in the workplace investigations. Disclosure of the names of multiple individuals and/or information in the documents concerning those individuals could impact their performance and morale. In addition, disclosure may lead to disharmony between them and other staff of the Court. This would, in turn, have a substantial adverse effect on the proper and efficient conduct of the operations of the Court generally, and could result in employees choosing to leave the employ of the Court.

For the reasons above, I consider that the documents captured by paragraphs (b) and (c) of your request relate to the operations of the Court and, if disclosed, would or could reasonably be expected to have a substantial adverse effect on both the "*management or assessment*" of personnel and the "*proper and efficient conduct of the operations*" of the Court. Accordingly, I have determined that the documents are conditionally exempt under subsections 47E(c) and 47E(d) of the FOI Act.

As discussed in the relevant section below, I am satisfied that disclosure would be contrary to the public interest under subsection 11A(5).

***Conditional exemption under section 47F of the FOI Act – Personal privacy – paragraphs (b) and (c)***

I have considered whether the documents that fall within the scope of paragraphs (b) and (c) of your FOI request are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act.

Subsection 47F(1) prescribes that:

*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).*

The term "*personal information*" is defined in subsection 4(1) of the FOI Act to have the same meaning as in section 6 of the Privacy Act that is:

*...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 material form or not.*

To determine whether personal information is conditionally exempt under subsection 47F(1), I am required to consider whether disclosure of that personal information would be unreasonable.

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 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...*

In relation to the matters that ought to be taken into account in determining whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act prescribes that:

*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.*

In relation to requests for documents that contain personal information about public servants, the FOI Guidelines stipulate the following:

*6.156 A document may, however be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.*

I have determined that the documents that fall within the scope of paragraphs (b) and (c) of your request are conditionally exempt under subsection 47F(1) of the FOI Act as they contain information that is “*personal information*” as defined in subsection 4(1) of the FOI Act and for which disclosure of that personal information would be “*unreasonable*” under subsection 47F(1) of the FOI Act.

The “*personal information*” contained in the documents includes full names, work and personal email addresses, work telephone numbers, mobile telephone numbers, signatures, references to individual employment arrangements, images including CCTV and photographs, voice recordings, details of individuals’ personal (non-work related) circumstances, and details of their involvement in the investigations. The documents also consist of confidential email communication (some with attachments) exchanged during the investigations. In addition to the types of personal information mentioned above, these documents contain information about individuals, including details of their current employment, working arrangements, workplace incidences and suitability for certain roles. Such information is clearly personal, and disclosure would have detrimental effects on the privacy of those individuals. Employees of the Court have a right to privacy around their personal details, employment arrangements and involvement in any workplace investigation. Other individuals and external providers also have a right to privacy around information provided to the Court in circumstances where it would not reasonably be expected to be made publicly available.

This information is clearly “*personal information*” that would be “*unreasonable*” to disclose under subsection 47F(1) of the FOI Act. Not only is the disclosure unreasonable, but disclosure may also render the Court in breach of its obligations to protect the personal privacy of its staff and other individuals concerned. The information contained within the documents is personal and specific to the individuals and I conclude that much of this information makes them easily

identifiable.<sup>11</sup> It is also likely that the Australian community would reasonably regard it as sensitive personal information in which there is no legitimate public interest.

Further, none of these documents would normally be made publicly available. They are, by their very nature, internal and/or highly sensitive communication that would carry a reasonable expectation that they be confidential in nature. Documents relating to employment, a person's suitability for a certain role, their working arrangements and their involvement in any workplace investigation are rarely disseminated in a public forum. It is reasonable to conclude that with respect to the investigations undertaken and the correspondence (including any attachments) that was received and responded to, was done so on a confidential and need-to-know basis. Release of such information would be in direct conflict with the Court's privacy obligations under the Privacy Act and would damage the public's trust in the Court's ability to keep such matters confidential. Release of the information could also jeopardise the identity of persons who have made disclosures and participated in the workplace investigations.

For completeness, I consider that even if some of the personal information was published in one context, this does not mean it is not personal information for the purposes of the Privacy Act. The FOI Guidelines provide guidance on the issue of who is reasonably identifiable. At paragraph 6.135 it is said that "*whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.*" At paragraph 6.136 the FOI Guidelines provide that:

*The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person's name or signature may, however, reveal personal information about them depending on the context ... [footnote omitted]*

Information provided in employment related documentation relating to specific individuals and their involvement in any workplace incidences usually contains information that is intended to "*convey or say something about a person*". Again, looking at the context in which this personal information was provided, much of it will be identifying due to its detailed nature and the purpose of its provision.

In addition to the personal information outlined above, the documents also include the names, titles, signatures, work email addresses and direct telephone numbers of public servants. Publication of the names and titles of public servants is one thing, but revealing telephone numbers and email addresses that give direct access to them is another.<sup>12</sup> Those direct contact details are, generally, not well-known nor available from publicly accessible sources. Disclosure would provide an avenue to express displeasure with those individuals, and a means to pursue matters through them when there is no need for those individuals to be contacted. Although some of the direct contact details are included in some of the documents because of the individuals' usual duties or responsibilities, I consider that, in the circumstances, such direct contact information is unreasonable to disclose.

Overall, I am not satisfied that there exists or should exist any presumption that the documents should be released merely because the personal information in them relates to employees of the Court and public servants. The information contained in the documents is personal, confidential, and highly sensitive in nature. Where that information concerns workplace investigations, the names and the assessment of an individual's personal and professional

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<sup>11</sup> FOI Guidelines, paragraph 6.131.

<sup>12</sup> See Warren; Chief Executive Officer, Services Australia and (Freedom of information) [2020] AATA 4557 (9 November 2020) at [128], per (Deputy President S A Forgie).

attributes are not included in the emails because of their usual duties or responsibilities. They are included because of some connection with an investigation. Disclosure would ultimately prejudice these individuals' right to privacy.

I also consider that disclosure of the names, direct contact details and other identifying information could cause significant distress to the people concerned. Other effects would, or could reasonably be expected, to include destroying Court employees trust in the confidentiality of workplace investigation processes and undermining the morale of employees. Disclosure may fetter the ability of public servants to deliberate as part of such investigative processes and could ultimately prejudice the individual protection of the right to privacy.

I turn to one final consideration in determining whether the personal information within the documents that fall within the scope of paragraphs (b) and (c) of your request would be unreasonable to disclose. In *'BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner held at paragraph 81:

*... the FOI notion of 'disclosure to the world at large' has different meaning with developments in information technology. It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information ... Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.*

I give considerable weight to the fact that the FOI Act *"does not control or restrict any subsequent use or dissemination of information released"* (per paragraph 6.143 of the FOI Guidelines above). This is an important consideration.

Given the nature of the documents captured by paragraphs (b) and (c) of your FOI request, I consider that disclosure of the personal information in those documents would constitute an *"unreasonable disclosure of personal information"*. Accordingly, the documents you have requested are conditionally exempt under subsection 47F(1) of the FOI Act.

As discussed below, I am satisfied that disclosure would be contrary to the public interest under subsection 11A(5) of the FOI Act.

### ***Public interest test***

In finding that the documents falling within paragraphs (b) and (c) of your FOI request are conditionally exempt pursuant to sections 47C, 47E and 47F of the FOI Act, I am required to consider under subsection 11A(5) of the FOI Act whether it would be contrary to the public interest to give you access at this time. This test is applied in addition to any public interest considerations already discussed above and may result in the need to consider one or more factors twice.<sup>13</sup>

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

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<sup>13</sup> FOI Guidelines, paragraph 6.138.

*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.*

There are a number of factors that must be taken into account in considering the public interest test, which are set out in subsection 11B(3) of the FOI Act. There are also certain factors which must not be taken into account (see subsection 11B(4) of the FOI Act). The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19), and factors against disclosure (see paragraph 6.22), that may be relevant in certain circumstances.

Paragraph 6.5 of the FOI Guidelines provide the following elaboration on the “public interest test”:

*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 a substantial section of the public [footnotes omitted].*

Importantly, and as provided in paragraph 6.5 of the FOI Guidelines, the test requires more than something merely being of “interest” to the public. Rather, the question is whether disclosure of the document/s is “*in the interest*” of the public and such interests must be balanced.

I accept that there is a public interest in the integrity of public sector processes and that disclosure of documents in relation to workplace investigations would go some way to promoting the objects of the FOI Act. Specifically, certain aspects of the workplace investigations documents could be considered to promote “*better-informed decision-making*” by the public sector<sup>14</sup> and to enhance “*scrutiny, discussion, comment and review*” of public sector activities.<sup>15</sup>

Whilst disclosure of certain documents might be considered to promote the objects of the FOI Act, there are several factors that weigh against a finding that it would be in the public interest to disclose the specific documents requested. In considering the public interest test, I have taken many factors into account. The factors weighing against disclosure are that disclosure could reasonably be expected to:

- prejudice the protection of an individual’s right to privacy, including where that privacy is protected under the Privacy Act. The documents contain sensitive personal information about numerous individuals. The information does not necessarily concern their usual duties/responsibilities and is not well-known or available from publicly accessible sources;
- undermine the confidentiality and trust that are fundamental tenants of the Court being able to properly conduct workplace investigations;

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<sup>14</sup> Subsection 3(2)(a) of the FOI Act.

<sup>15</sup> Subsection 3(2)(b) of the FOI Act.

- fetter the ability of public servants to deliberate on matters in relation to confidential internal investigations;
- undermine the protection of people who make, or wish to make, complaints, which could deter disclosures of suspected wrongdoing, thereby having a substantial adverse effect on the management and assessment of staff of the Court;
- have a substantial adverse effect on the success of the Court's investigation processes, given it relies on the willingness of individuals to participate in a frank and candid manner. This could also damage the Court's ability to support, manage, assess or investigate its own staff;
- compromise the impartiality and independence of people who investigate workplace matters, including because of fear of risk that their opinions, findings and recommendations may be disclosed publicly;
- have a substantial adverse effect on the willingness of public servants to provide evidence for future investigations, which would have a substantial adverse effect on the Court's capacity to manage and assess its personnel;
- harm the interests of the individuals to whom the documents relate, including in relation to their individual wellbeing, and their relationships with colleagues;
- prejudice the management function of the Court by destroying trust in the Court's ability to keep investigative processes and employee information confidential;
- lower the morale of employees and lead to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court;
- lead to unwarranted approaches to public servants which would adversely impact their ability to perform their role and functions; and
- potentially result in misuse and cause harm and anxiety for the persons concerned because the FOI Act does not restrict any subsequent dissemination of information disclosed or the release of the documents into the public domain.

I give significant weight to each of the above factors, and after careful consideration, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. On balance, it appears that the matter is not necessarily *"of common concern or relevance to all members of the public, or a substantial section of the public."*<sup>16</sup>

Therefore, I have decided that the disclosure of the documents subject to the conditional exemptions would be contrary to the public interest and, on that basis, access to the documents should be refused.

### ***Redaction not appropriate under section 22 of the FOI Act***

Section 22 of the FOI Act requires me to consider whether access may be granted to edited copies of the documents, with exempt or irrelevant matter deleted. Notwithstanding my findings, detailed above, to refuse access to the documents in paragraphs (b) and (c) of your request, on the basis that they are exempt under the FOI Act, section 22 requires me to consider whether access may be granted to the documents following the redaction of exempt information.

In relation to section 22 of the FOI Act, the FOI Guidelines explain, at paragraph 3.98:

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<sup>16</sup> FOI Guidelines, paragraph 6.5.

*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.*

I consider that, under section 22, upon redacting the exempt information due to the conditional exemptions of deliberative processes, operations of an agency and personal privacy, the relevant documents pertaining to paragraphs (b) and (c) retain no value or meaning. It would therefore be futile to grant you access to a redacted copy of the documents as they would convey very “*little of its content or substance.*”

## **Charges**

You have not been charged for the processing of your request.

## **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### ***Internal review***

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online:

email: [foi@oaic.gov.au](mailto:foi@oaic.gov.au)

post: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at: <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/freedom-of-information-reviews/information-commissioner-review-process>.

## **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to

the online complaints form which the OAIC recommends using for complaints, at:  
<https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-11-investigations-and-complaints>

Yours sincerely,

A handwritten signature in blue ink that reads "B Henderson".

**B Henderson**  
**FOI Officer**