



FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

Customer Service
Federal Circuit and Family Court of Australia
GPO Box 9991 in your capital city

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15 March 2024

FOIBLES

by email: foi+request-11098-6ff4608e@righttoknow.org.au

Dear FOIBLES

Your FOI request sent on 14 February 2024

I refer to your email sent to the Federal Court of Australia on 14 February 2024 requesting documents under the *Freedom of Information Act 1982 (Cth)* (the 'FOI Act'). I also refer to the email sent to you from the Federal Court of Australia on 11 March 2024, advising that your request had been partially transferred to the Federal Circuit and Family Court of Australia under s 16 of the FOI Act.

Authorised decision maker

I am authorised under s 23 of the FOI Act to make decisions on behalf of the Federal Circuit and Family Court of Australia in relation to your request.

Scope of request

The scope of your request, as set out in your email sent on 14 February 2024, as transferred to the Federal Circuit and Family Court of Australia, is as follows:

In 2023, the Federal Court of Australia sought the services of CPM Reviews Pty Ltd in respect of human resources management issues.

"CPM Reviews specialises in conducting workplace investigations" and provides "professional and independent reviews of workplace behaviour, administrative actions and employment decisions for the public sector at all levels of government and for other organisations, including universities and private sector organisations": <https://cpmreviews.com.au/index.html>

I am interested in three files associated with the services that the Federal Court sought from CPM Reviews. These files contain documents of the Federal Court of Australia in relation to the services that the Federal Court sought from CPM Reviews.

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

a) *any and all documents associated, in the broadest sense of that term, with the file PA-2023-0130; and*

Searches undertaken

Searches were undertaken to identify documents of an administrative nature within the scope of your request. These searches included conversations with senior employees of the Court, searches of personnel files, searches of other files on the Information Management System including shared drives, searches of the email server, and searches of the electronic document and records systems.

I am satisfied that all reasonable steps to identify the documents you have requested has been undertaken.

As a result of the searches undertaken, a substantial number of documents were identified as falling within the scope of your request. Over 1,200 pages of documents were identified as falling within the scope your request. This includes highly sensitive and confidential material including, but not limited to, communication and reports between Court staff, individual employees and the external provider.

In accordance with sub-section 26(2) of the FOI Act I have not provided a complete list of the documents or specific particulars about each document in my decision, as to do so would reveal exempt matters.

However, I do provide a list which summarises the types of documents that were identified as being within the scope of your request:

- Extensive communications between Court employees (including both emails and letters)
- Extensive communication between Court employees to an external provider (including both emails and letters)
- Medical certificates and reports
- File notes and interview notes
- Transcripts
- Submissions
- Investigation reports – draft, preliminary and final
- Procurement documentation – memorandums, requests for quotes, contracts, statement of requires and details regarding external providers employee’s qualifications and resumes
- Invoices and timesheets

Decision

I have decided to refuse your request pursuant to sections 47C, 47E and 47F of the FOI Act as I am satisfied that the documents are conditionally exempt. Further, disclosure would be contrary to the public interest pursuant to s 11A(5) of the FOI Act.

In making my decision I have had regard to:

- a. the terms of your request set out in your email sent to the Federal Court of Australia on 14 February 2024;
- b. the relevant provisions of the FOI Act and case law considering those provisions; and
- c. the FOI Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the ‘Guidelines’).

Reasons for decision

Section 47C of the FOI Act

Subsection 47C provides that:

*(1) 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;*

The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines) provide at paragraph 6.55:

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.

The Guidelines further provide at paragraphs 6.58 and 6.59:

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.^[39]

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.^[40]

The Guidelines also provide at paragraphs 6.63:

6.63 ‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document.^[44] There is no reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.^[45]

I consider the documents that fall within the scope of your request include deliberative matters.

The documents record processes, opinions, advice and recommendation obtained, prepared or recorded as part of the deliberative process with respect to a workplace investigation.

The FOI Guidelines provides at Paragraph 6.67 that “where material was gathered as a basis for intended deliberations, it may be a deliberative matter”.¹ The documents that fall within the scope of your request are documents that were “gathered as a basis for intended deliberations” of a workplace investigation.

I have determined that the disclosure of the documents would disclose deliberative matter and the documents are, therefore, conditionally exempt under subsection 47C(1) of the FOI Act.

Section 47E of the FOI Act

Subsections 47E(c) and (d) of the FOI Act relevantly provides that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to...

(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.

With respect to the substantial adverse effect on management or assessment of personnel, the Guidelines provide:

¹ *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

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,^[88] 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.

6.115 The terms 'would reasonably be expected' and 'substantial adverse' have the same meanings as explained in Part 5. If the predicted effect would be substantial but not adverse or maybe even beneficial, the conditional exemption does not apply.^[89] It would be unlikely for the potential embarrassment of an employee to be considered to be an effect on an agency.^[90]

6.116 The predicted effect must arise from the disclosure of the documents that are being assessed.^[91] The decision maker may also need to consider the context of the document and the integrity of a system that may require those documents, such as witness statements that are required to investigate a workplace complaint,^[92] or referee reports to assess job applicants.^[93]

I consider that the documents are conditionally exempt from disclosure because the materials would, or could reasonably be expected to, have a substantial and 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.

The documents within the scope of your request relate to broader human resources policies and activities, including a workplace investigation. I consider that the disclosure of the documents would undermine the confidential investigative process of a workplace investigation.

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

- undermining the confidentiality required for the Court and individuals to properly engage in workplace investigations and thus impacting on participation in future workplace investigations;

- discouraging individuals from making a complaint or disclosing workplace misconduct by Court employees by undermining their expectation of protection of their privacy;
- impacting the Court's ability to carry out its legislative responsibilities (including but not limited to its responsibilities to employees under workplace legislation) and its ability to ensure that allegations of misconduct are properly investigated;
- adversely impact the ability to support, manage, assess or investigate staff and negatively impact relationships between court staff, their colleagues and supervisors
- adversely affect the health and wellbeing of the employees and other individuals involved in the workplace investigation, including by causing them stress and anxiety associating them with the workplace investigations and/or allegations contained within the investigation;
- creating a risk of individuals involved having their personal details (including medical details) and the circumstances of their involvement in the workplace investigation known by their colleagues, other stakeholders and the general public;
- impact on the ability of the Court to attract and retain high quality candidates due to concerns about their privacy.

Further, the documents include details and documents of a number of Court staff who were directly and indirectly involved in the workplace investigations. Disclosure of the names of individuals and/or information in the documents about those individuals could impact their performance and morale. This would adversely effect the proper and efficient conduct of the operations of the Court generally if the performance and morale of the individuals involved was impacted.

I find that disclosure 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 and have a substantial adverse effect on the proper and efficient conduct of the operations of the Court.

Section 47F of the FOI Act

Subsection 47F(1) of the FOI Act provides 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).

Subsection 47F(2) further provides 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.*

I consider that the documents within the scope of your request include personal information. It includes full names, email addresses (both work and personal), telephone numbers (both work and personal), signatures, details about personal circumstances (including medical information) and details about their involvement in the workplace investigation.

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

Other factors to be considered include any detriment the disclosure may cause to the person to whom the information relates; the nature, age and current relevance of the information; any opposition to disclosure held by the person to whom the personal information relates to; 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; and whether the disclosure might advance the public interest in government transparency and integrity (*'FG' and National Archives of Australia* [2015] AICmr 26 at [47]).

In considering the factors set out in the legislation and case law, I consider it would be unreasonable for the information contained in the document to be released for the following reasons:

- The information contained in the documents is not well known nor are the persons to whom the information relates known to be (or to have been) associated with the matters dealt with in the document
- The information is not available from other public sources
- The documents contain the full names and details of a number of court staff across a range of roles which is not information that is well known
- The identity of court staff is readily apparent and/or readily ascertainable
- It is not known to what use the information may be put

- Court staff are involved in highly sensitive and emotive court matters (particularly in family law matters) and the release of personal information could create a risk to the individuals, including safety risks
- The disclosure may have an adverse effect on staff members, including with respect to their health and wellbeing

Whilst I have not consulted with all the individuals, I consider the individuals would not consent to the disclosure of these documents to the FOI requester. I consider that a similar view would be held by the Australian community generally.

Public interest test – s 11B of the FOI Act

Even though the Court considers that the documents are conditionally exempt pursuant to the above sections of the FOI Act for the reasons set out above, as a result of s 11A(5) of the FOI Act, access to them must nevertheless be given unless in the circumstances that it would be, on balance, contrary to the public interest to do so.

Section 11B(3) outlines the factors favouring access to the document. Section 11B(4) provides certain factors which must not be taken into account.

Paragraph 6.19 of the Guidelines identifies factors favouring access. This includes:

- a. *promotes the objects of the FOI Act, including to:*
 - i. *inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community*
 - ii. *reveal the reason for a government decision and any background or contextual information that informed the decision*
 - iii. *enhance the scrutiny of government decision making*
- b. *inform debate on a matter of public importance, including to:*
 - i. *allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official*
 - ii. *reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct*
 - iii. *reveal deficiencies in privacy or access to information legislation*
- c. *promote effective oversight of public expenditure*
- d. *allow a person to access his or her personal information, or*
 - i. *the personal information of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests*
 - ii. *the personal information of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household)*
- e. *contribute to the maintenance of peace and order*
- f. *contribute to the administration of justice generally, including procedural fairness*

- g. contribute to the enforcement of the criminal law*
- h. contribute to the administration of justice for a person*
- i. advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies*
- j. reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment*
- k. contribute to innovation and the facilitation of research.*

The integrity of public servants is a matter of some public interest and therefore factors (a) and (b) have some relevance and weight. I note that in my view factors (c), (d), (e), (g), (j) and (k) are not relevant.

I do not consider that the documents you have requested would contribute to the administration of justice (factor (f)) or the administration of justice for a person (factor (h)). Indeed, as noted below, I consider that the disclosure of names could impact on the administration of justice. Similarly, I do not consider the disclosure of the documents would advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies (factor (i)). Indeed, I consider the disclosure of the documents would undermine the fair treatment of individuals.

Paragraph 6.22 of the Guidelines provides a non-exhaustive list of factors against disclosure, including, relevantly to my decision, where disclosure:

- could reasonably be expected to prejudice the protection of an individual's right to privacy, including where:
 - the personal information is that of a government employee in relation to personnel management and the disclosure of the information could be reasonably considered to reveal information about their private disposition or personal life.^[19]
- could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct
- could reasonably be expected to impede the administration of justice generally, including procedural fairness
- could reasonably be expected to impede the administration of justice for an individual
- could reasonably be expected to prejudice an agency's ability to obtain confidential information
- could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
- could reasonably be expected to harm the interests of an individual or group of individuals
- could reasonably be expected to prejudice the management function of an agency

There are a range of factors indicating that access would be contrary to the public interest. In particular, Court staff are involved in highly sensitive and emotive court matters (particularly in family law matters) and the release of personal information could create a risk to the individuals, including safety risks, which are not in the public interest.

I am of the view that the public interest factors against disclosure significantly outweigh the public interest factors favouring disclosure.

As such I consider the release of the information would be contrary to the public interest.

Whether redaction is appropriate – s 22 of the FOI Act

Section 22 of the FOI Act requires me to consider whether it would be reasonably practicable to prepare an edited copy of the document for release to the applicant, that is, a copy with relevant deletions.

I do not consider redaction to be appropriate having regard to paragraphs 3.98 of the Guidelines which 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 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.^[45]

I consider a redaction of the exempt material would result in the remaining documents being of little or no value and would convey little of its contents or substance.

Charges

You have not been charged for the processing of this 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 the decision. You are encouraged to seek internal review as a first step.

1. Internal review

Under s 54 of the FOI Act, you may apply in writing for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. Where possible, attach reasons why you consider a review is necessary. Any internal review will be carried out by another officer within 30 days of receipt of any request for review.

Application for a review of the decision should be addressed to:

The FOI Officer
Federal Circuit and Family Court of Australia
GPO Box 9991
CANBERRA ACT 2601
by email: customer.service@fcfcoa.gov.au

2. Information Commissioner review

Under s 54L of the FOI Act you may apply to the Australian Information Commissioner to review the decision. An application under this section must be made in writing within 60 days of the date of this letter in one of the following ways:

- online (www.oaic.gov.au/freedom-of-information/foi-review-process)
- post (Australian Information Commissioner GPO Box 2999 Canberra ACT 2601)
- in person (Level 3, 175 Pitt Street Sydney NSW 2000)

Yours sincerely



Amanda Morris
National Judicial Registrar
Freedom of Information Officer