



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

4 September 2024

Sarveshcika Yuvaraj
Paralegal, Freedom of Information Branch
Office of the Australian Information Commissioner
GPO Box 5288
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Ms Yuvaraj

**Freedom of Information Review MR24/00737 – FOIBLES
Submission**

I refer to your email of 24 July 2024 to the Federal Court of Australia (**Court**) in which you notified the Court, pursuant to s 54Z of the *Freedom of Information Act 1982* (Cth) (the **FOI Act**), that an application has been made for the Information Commissioner (**IC**) to review a decision of the Court dated 15 April 2024. The application has been made on the basis that the applicant contests the Court's reasons for refusing access to the documents requested.

In your email to the Court, you requested that the Court provide a range of documents relevant to the decision under IC review, as well as submissions in response to the applicant's contentions against the Court's reasons for refusing access to the documents requested. The documents requested by the OAIC have already been provided under separate letter.

Background to the FOI request

1. The FOI applicant's original request for access under the FOI Act was made to the Court on 14 February 2024 (**Attachment 1**) and sought access to the following documents:

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*
- 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.*

Please provide the requested documents by return email.

2. 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 the applicant's FOI request to the FCFCoA because the documents requested under that paragraph directly related to the FCFCoA. A copy of the email exchange between the Court and the FCFCoA is provided to you as **Attachment 2**.
3. The Court advised the applicant of the transfer of paragraph (a) of their request to the FCFCoA in an email dated 11 March 2024 and that the balance of the paragraphs in the request remained with the Court for consideration (**Attachment 3**).
4. A decision was made on paragraphs (b) and (c) of the applicant's original FOI request on 15 March 2024 (**Attachment 4**). The decision-maker determined that the two hundred and forty-eight (248) documents fell within the scope of the applicant's request and are conditionally exempt under ss 47C, 47E and 47F of the FOI Act and, on balance, disclosure would be contrary to the public interest under s 11A(5) of the FOI Act. The original decision-maker determined that it would be futile to provide redacted versions of the documents under s 22 of the FOI Act.
5. The applicant sent an email to the Court on 15 March 2024 requesting an internal review of the decision dated 15 March 2024 (**Attachment 5**). The applicant then sent an email confirming that they had submitted a request for internal review (**Attachment 6**).
6. The Court made a decision on the applicant's request for internal review on 15 April 2024 (**Attachment 7**), which is the decision the subject of review by the IC. The internal review decision-maker determined that the two hundred and forty-eight (248) documents identified as falling within the scope of the applicant's request are conditionally exempt under ss 47C, 47E and 47F of the FOI Act and, on balance, disclosure would be contrary to the public interest under s 11A(5) of the FOI Act. The internal review decision-maker determined that it would be futile to provide redacted versions of the documents under s 22 of the FOI Act.
7. On 24 July 2024, the Court was notified of the present review before the IC. The Court subsequently engaged with the applicant to resolve or narrow the issues in dispute in accordance with paragraphs [3.8] to [3.13] of the [Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews](#) (the **Direction**).
8. During the Court's engagement with the applicant, the applicant modified the scope of their request, and the Court provided access in full to one (1) of the documents requested. This reduced the number of documents at issue in the present IC review. Copies of the Court's engagement with the applicant have been provided as **Attachments 8 and 9**.

The scope of the present IC review

9. The applicant's request for review by the IC, provided to the Court as an attachment to your email of 24 July 2024, is limited to paragraphs (b) and (c) of their FOI request and the documents that remain at issue with respect to those paragraphs.
10. The applicant does not raise any new grounds of review from their request for internal review dated 15 March 2024 (**Attachment 5**), nor does the applicant provide any evidence in support of their contentions. The only contention made by the applicant is that at least some of the information in the documents requested should be provided. The applicant states:

I find it hard to believe that there are 248 documents within scope (see original decision of B Henderson) and not a single document has been released because conditional exemptions apply to each and every document and all aspects of the documents in scope.

The internal review decision maker, Registrar R Muscat, has stated that conditional exemptions ss 47C, 47E and 47F apply but has not satisfactorily explained why they apply. The claims that the conditional exemptions apply are little more than, if not nothing but, unsupported claims.

I would like an independent review of the decision by somebody who is at arm's length.

11. The applicant does not specifically take issue with any of the conditional exemptions under ss 47C, 47E, and 47F of the FOI Act applied by the Court to the documents at issue, nor does the applicant make specific contentions with respect to the Court's application of the public interest under s 11A(5) of the FOI Act to those documents. To the extent that the IC considers the application of ss 47C, 47E and/or 47F of the FOI Act is at issue in the present review, the Court relies upon the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**).
12. The Court submits that the documents at issue are conditionally exempt from disclosure under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act, and that disclosure would be contrary to the public interest under s 11A(5) of the FOI Act. The Court submits that the documents would retain little or no meaning if redacted copies were provided to the applicant under s 22 of the FOI Act.
13. The Court requests that, in the event the IC determines that the application of additional sections are at issue, or that the applicant's contentions have broader scope than that identified in this submission, and relies on any supporting information outside of the Court's FOI decisions (with the exception of the FOI Act and FOI Guidelines), the IC provide the Court with the opportunity to make further submissions on these sections and contentions as well as any information the IC proposes to take into account when considering them.
14. Before making its submissions on the application of the conditional exemptions and public interest test to the documents at issue, the Court will explain that all reasonable steps were undertaken to identify documents within the scope of the applicant's request.

Reasonable steps to identify the documents relevant to the FOI request – s 24A(1)

15. The Court notes that the applicant has not contested the adequacy of searches undertaken to find all documents within the scope of their request, nor contends that further

documents exist within the scope of their request. Notwithstanding this, the Court submits that the requirements of subsection 24A(1) have been met in that the Court took “*all reasonable steps*”¹ to find documents within the scope of the FOI request.

16. As a result of the searches undertaken, the Court was satisfied that two hundred and forty eight (248) documents, being the documents the subject of the original FOI decision dated 15 March 2024 and internal review decision dated 15 April 2024, fell within the scope of the applicant’s request.
17. The *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the **FOI Guidelines**) provide that agencies should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request, and what constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment. At a minimum, the FOI Guidelines provide that an agency or minister should take comprehensive steps to locate documents, having regard to:²
 - *the subject matter of the documents*
 - *the current and past file management system and practice of destruction or removal of documents*
 - *the record management system in place*
 - *the individuals within the agency who may be able to assist with the location of documents, and*
 - *the age of the documents.*
18. The document sought pursuant to the applicant’s request related to the services of CPM Reviews Pty Ltd in respect of matters that would be in the possession of the People and Culture or Corporate Services teams in the Court.
19. On 15 and 19 February 2024, as early as one (1) day after the FOI request was received, a staff member in the Court’s People and Culture team conducted searches for documents within the scope of the applicant’s request. The searches included searches of the Court’s human resources shared drive, procurement records, and the Court’s employee relations folder. The searches for documents took a total of three (3) hours.
20. On 19 and 20 February 2024, approximately five (5) days after the FOI request was received, a staff member in the Court’s Corporate Services team conducted searches for documents within the scope of the applicant’s request. The searches included searches of email inboxes of senior staff members with responsibility over the matters to which CPM Reviews Pty Ltd provided its services. The searches for documents took a total of three (3) hours.
21. On 15 and 20 February 2024, the original FOI decision-maker discussed the documents found from the searches conducted with relevant staff members, including those who conducted the searches for documents. The discussions included whether the documents found related to this Court or to the FCFCoA, and to ensure that the searches captured all documents that could fall within the scope of the applicant’s FOI request.

¹ Paragraph 24A(1)(a) of the FOI Act.

² FOI Guidelines [3.89].

22. The Court submits that its searches for documents within the scope of the applicant's request demonstrate that the Court took "*all reasonable steps*" to find the documents requested. The Court is unaware of any further steps that could reasonably be taken to identify further documents that might fall within the scope of the applicant's request. Again, the Court notes that the applicant has not specifically contested the adequacy of searches undertaken to find all documents within the scope of their request, nor specifically contends that further documents exist within the scope of their request.
23. The Court's submissions with respect to the application of the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act and the application of the public interest test to those conditional exemptions under s 11A(5) of the FOI Act are below. In making its submissions, and pursuant to the [Submissions Checklist](#) issued by the OAIC on its website, the Court will not restate the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**). The Court will address the specific legislative tests/thresholds relevant to the documents at issue and the applicant's contention that at least some of the information in the documents ought to be released.

The application of s 47C of the FOI Act to the documents at issue

24. The applicant does not make any specific contention that s 47C of the FOI Act does not apply to the documents at issue nor provides any material in support of such a contention. To the extent that the IC considers the application of s 47C of the FOI Act is at issue in the present review, the Court seeks to rely upon the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**) in addition to making the following submissions.
25. The threshold question under s 47C of the FOI Act is whether the documents would disclose "*deliberative matter*". Deliberative matter is content that is in the nature of, or relating to, an opinion, advice or recommendation that has been obtained, prepared or recorded, or a consultation or deliberation that has taken place in the course or for the purpose of a deliberative process of the Court.³
26. The Court submits that the conditional exemption under s 47C of the FOI Act applies to most of the documents at issue. The documents record the exchange of opinions, advice, recommendations, and discussions that were gathered as a basis for intended deliberations with respect to confidential workplace investigations. Those documents, including the documents related to the procurement of services for the confidential workplace investigations, formed part of deliberative processes that had bearing upon the courses of action taken by the Court in its functions as an employer.
27. Given the FOI Act deals with access to documents, not information, an entire document will be conditionally exempt if only specific information in the document satisfies the threshold in s 47C of the FOI Act. Notwithstanding, the applicant contends that at least some of the information in the documents should be provided. The Court rejects this contention in full.
28. The Court submits that it cannot make artificial distinctions between certain information in the documents at issue being deliberative and information that is not. Each document in its entirety was created for the purpose of deliberations with respect to the workplace

³ FOI Guidelines [6.47].

investigations, and the entirety of the documents were considered as part of those deliberations.

29. The Court submits that most of the documents at issue are clearly conditionally exempt from disclosure under s 47C of the FOI Act. In any event, the Court submits that the documents at issue remain exempt from disclosure due to the operation of the conditional exemptions under ss 47E and 47F of the FOI Act.

The application of ss 47E(c) and 47E(d) of the FOI Act to the documents at issue

30. The applicant does not make any specific contention that ss 47E(c) and 47E(d) of the FOI Act do not apply to the documents at issue nor provides any material in support of such a contention. To the extent that the IC considers the application of ss 47E(c) and 47E(d) of the FOI Act are at issue in the present review, the Court seeks to rely upon the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**) in addition to making the following submissions.
31. The Court submits that the conditional exemptions under ss 47E(c) and 47E(d) of the FOI Act apply to each of the documents at issue.
32. Paragraphs 47E(c) and 47E(d) of the FOI Act provide:

A document is conditionally exempt if its disclosure under this 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.*

33. The legislative test under ss 47E(c) and 47E(d) of the FOI Act requires:

- in respect of s 47E(c), the documents at issue must relate to the “*management*” or “*assessment*” of personnel;⁴
- in respect of s 47E(d), the documents at issue must relate to Court’s expected activities undertaken in an expected manner, and not unlawful or inefficient activities;⁵
- the effect must reasonably be expected following disclosure,⁶ meaning there must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice;⁷ and
- the expected effect to be both “*substantial*” and “*adverse*”,⁸ meaning the effect must be adverse and to a degree that is sufficiently serious or significant to cause concern to a reasonable person.⁹

⁴ FOI Guidelines [6.103].

⁵ FOI Guidelines [6.115].

⁶ FOI Guidelines [6.13] to [6.16].

⁷ FOI Guidelines [6.16].

⁸ FOI Guidelines [6.17].

⁹ FOI Guidelines [6.18] citing *Re Thies and Department of Aviation* [1986] AATA 141 [24].

34. A total of eleven (11) substantial adverse effects that would, or could reasonably be expected to, follow disclosure of the documents at issue were listed on page 8 of the Court's original FOI decision dated 15 March 2024 (**Attachment 4**). Each of those substantial adverse effects were adopted in internal review decision dated 15 April 2024 (**Attachment 7**). The Court submits that each of those substantial adverse effects satisfy the test set out in paragraph [33] above in that each of the effects have a material possibility of prejudice to the Court's operations that is both substantial and adverse. The Court provides the following information to assist the IC in their consideration of these substantial adverse effects.
35. In the original FOI decision dated 15 March 2024 (**Attachment 4**), the decision-maker referred to various obligations of the Court under legislation including the *Public Service Act 1999* (Cth) and *Workplace Health and Safety Act 2011* (Cth). Those obligations include the duties to provide workplaces "free from discrimination"¹⁰ and to ensure the health and safety of workers by eliminating risks to health and safety as far as is reasonably practicable.¹¹ The Court submits that providing the present FOI applicant with access to the confidential workplace investigation documents at issue risks breaching these statutory obligations and therefore could give rise to legal claims by aggrieved individuals. For example, disclosure to an unknown FOI applicant of details about workplace matters could reasonably be expected to cause stress and anxiety to the employees to whom those matters relate, exposing them to the same health and safety risks that the Court is meant to mitigate.
36. The same or similar obligations are also set out in the Court's internal policy that governs the Court's expectations about respectful workplace behaviour and the steps that can be taken to address concerns of unacceptable behaviour in the workplace. A copy of that internal policy was provided in full to the applicant during the Court's engagement with them under paragraph 2.17 of the Direction to resolve or narrow the issues in the present IC review. The document is titled "*Respectful-Workplace-Behaviour-Policy-13-October-2021*" and provides, at paragraphs [31] and [46]:

The Court must also, as far as reasonably practicable, maintain a safe system of work that is without risk to health and safety and that minimises the risk of Staff being discriminated against, or being harassed or bullied.

Staff who are not the person alleging discrimination, harassment or bullying, or who have not been identified as potential witnesses to such behaviour, should not involve themselves in a matter. In particular, Staff should be aware of the need to maintain confidentiality and not breach the privacy of other employees.

37. The Court submits that if it releases information about confidential workplace investigations in direct conflict with its own policies on handling investigations, this could reduce employee trust in those processes and deter the reporting of workplace matters and/or participation in investigations. Senior Member Isenberg in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2016] AATA 230 (**De Tarle**) phrases this as "reluctance", both in terms of a reluctance to provide information and reluctance to cooperate with investigators.¹² Senior Member Isenberg was satisfied that reluctance constitutes a substantial adverse effect to the management or assessment of personnel.

¹⁰ Section 10A(f) of the *Public Service Act 1999* (Cth).

¹¹ Sections 17 and 19 of the *Work Health and Safety Act 2011* (Cth).

¹² *De Tarle* at [32]-[43].

38. The principles in *De Tarle* have been affirmed by the acting Freedom of Information Commissioner, Ms Elizabeth Hampton, in *'YU' and Bureau of Meteorology (Freedom of information)* [2021] AICmr 75 (29 November 2021) (*YU*).¹³ As relied upon in the original FOI decision dated 15 March 2024 (**Attachment 4**), Ms Hampton considered that disclosure of documents concerning a confidential investigation was substantial and adverse because disclosure “*may result in employees losing confidence in [the] ability to maintain confidentiality during a PID or other investigation into allegations of misconduct*”.¹⁴ Ms Hampton considered that “*candour*” is important in the context of an internal workplace investigation¹⁵ which is achieved through the confidential use and participation in investigative processes, and therefore found it necessary to preclude access to the documents under s 47E(c) of the FOI Act.
39. With respect to the applicant’s contention that at least some of the information in the documents should be released, the Court rejects this contention in full. The Court submits that the documents all relate to confidential workplace investigations. Disclosure of any part of the documents may give credence to matters raised throughout the course of those investigations. Disclosure may cause mental distress to those individuals by causing them to re-live those matters. Disclosure may compromise the integrity and rigour of the investigations process. Disclosure may encourage public conjecture about particulars of the workplace investigations in circumstances where the matters have already been finalised through formal investigative channels.
40. In addition, disclosure risks subjecting individuals who were the subject of the investigations, or otherwise involved in those investigations, to online discrimination, harassment, or bullying. These risks are very real having already been experienced by Court staff in recent experiences with FOI requests made anonymously through the Right to Know website.¹⁶ Given disclosure to the applicant of any of the documents at issue or information in those documents would automatically be disclosure to the world at large through the Right to Know website, the Court submits that disclosure would send a public message that the Court does not value confidentiality over investigative processes nor follow its own protocols with respect to those processes. The Court submits that this would or could reasonably be expected to further compound the substantial adverse effects explained above.
41. The Court submits that confidentiality is a hallmark of workplace investigative processes. Confidentiality is required over the entire process to ensure that individuals feel protected enough to report matters and comfortable enough to participate openly and honestly in investigations. The Court submits that there is a reasonable expectation that the operations of the Court would or could be undermined if the necessary confidentiality was circumvented by a request for information under the FOI Act. The Court submits that jeopardising that confidentiality would cause at least a real, significant, or material possibility of prejudice that could compromise the investigative process and cause the Court to breach its non-disclosure and other legal obligations.
42. Having regard to all the above, the Court submits that the documents at issue are conditionally exempt from disclosure under ss 47E(c) and 47E(d) of the FOI Act. The

¹³ *'YU'* at [24] and [30].

¹⁴ *'YU'* at [31].

¹⁵ *'YU'* at [30].

¹⁶ The Court can provide further information to the IC about the instances of online harassment upon request.

Court notes that if the IC disagrees with any of the substantial adverse effects listed in the original FOI decision dated 15 March 2024 (**Attachment 4**), the balance of the substantial adverse effects continue to apply to conditionally exempt the documents at issue from disclosure under ss 47E(c) and 47E(d) of the FOI Act, in addition to the other conditional exemptions under ss 47C and 47F of the FOI Act.

The application of s 47F of the FOI Act to the documents at issue

43. The applicant does not make any specific contention that s 47F of the FOI Act does not apply to the documents at issue nor provides any material in support of such a contention. To the extent that the IC considers the application of s 47F of the FOI Act is at issue in the present review, the Court seeks to rely upon the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**) in addition to making the following submissions.
44. The Court submits that the conditional exemption under s 47F of the FOI Act applies to each of the documents at issue.
45. The threshold question under s 47F of the FOI Act is whether disclosure of the “*personal information*” would be “*unreasonable*”.
46. What constitutes “*personal information*”¹⁷ will vary depending on whether an individual can be identified or is reasonably identifiable in the circumstances.¹⁸ The personal information contained in the documents at issue is set out in the original FOI decision dated 15 March 2024 (**Attachment 4**). In addition, and in relation to the procurement-related documents at issue, the Court submits that the personal information in the documents include flight details, work profiles, and the value of services estimated for the services to be performed.
47. The Court submits that there may be other information in the documents at issue which could reasonably identify individuals given the contents of the documents, the relatively small size of the Court as an agency, the fact the documents were created for handling specific workplace matters in specific registries of the Court, and the uniqueness of pieces of information.¹⁹ The Court draws to the attention of the IC the parts of the original FOI decision dated 15 March 2024 (**Attachment 4**) that explain the context of the information in the documents and how it renders much of the information personally identifying. Namely, the information is detailed in nature and the purpose for which the information was gathered relates to specific instances of workplace investigations in particular registries of the Court.
48. In addition, the Court considers that it is more likely this information can reasonably identify individuals because disclosure to the applicant would be disclosure to the world at large through the Right to Know website. This increases both the prospect that the information would be viewed by persons who may know the individuals involved in the workplace investigations and the ability to connect information and identify third parties from that information.

¹⁷ See the definition for “*personal information*” under s 4(1) of the FOI Act.

¹⁸ FOI Guidelines [6.126].

¹⁹ See FOI Guidelines [6.147] in relation to disclosure of the first name alone of public servants.

49. Turning now to what constitutes “*unreasonable*” disclosure of personal information, this requires a consideration of all the circumstances of the case.²⁰ Regard must be had to the matters in s 47F(2) of the FOI Act and paragraphs 6.135 to 6.138 of the FOI Guidelines, in the context of the documents.²¹ It requires a balance of the object of the FOI Act to promote transparency in government processes and activities against the purpose of s 47F to protect personal privacy.²²
50. The case of *Re McCallin and Department of Immigration* [2008] AATA 477 sets out four factors which the FOI Guidelines mark as “*key*” for determining whether disclosure is unreasonable.²³ The key factors are:
- a) *the author of the document is identifiable*
 - b) *the document contains third party personal information*
 - c) *release of the document would cause stress to the third party*
 - d) *no public purpose would be achieved through release.*
51. The Court submits that each of the key factors for determining whether disclosure is unreasonable are satisfied in respect of each of the documents at issue in the present request. The reasons that support disclosure of the personal information in the documents being unreasonable in the circumstances were comprehensively set out in the original FOI decision dated 15 March 2024 (**Attachment 4**) over pages 9 to 12. The Court reiterates and relies on those reasons and submits that disclosure of information about confidential workplace investigations has the capacity to definitively link individuals to the matters the subject of those investigations.
52. The Court’s original FOI decision dated 15 March 2024 (**Attachment 4**) also referenced the principle that the FOI Act “*does not control or restrict any subsequent use or dissemination of information released*” which influences the weight to be attached to whether disclosure would be unreasonable: ‘*BA*’ and *Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014) (**BA**). The Court repeats these reasons and, by extension, submits that disclosure of the documents at issue could pose a risk to personal security. Relevantly, in considering personal information disclosed online, the IC found in *BA* at paragraph 82:
- There is also a growing and understandable concern that personal information that is made available on the web can be misused or used differently by others, for example, for identity profiling or theft or unwanted contact. Here I note that the documents in this case include the applicant’s five page curriculum vitae, which lists her qualifications, employment history, award recognition, personal attributes and skills, hobbies and interests, and referees. Even deleting her date of birth and contact details, as the MPC proposed to do, may not impede someone else from building a larger profile of the applicant or even finding her date of birth and contact details from other sources.*
53. While the principles espoused in *BA* were made with respect to personal information in vocational assessment documents, the Court submits that the same or similar risks also present themselves if the extensive amounts of personal information the subject of confidential workplace investigations is disclosed to the public.

²⁰ FOI Guidelines [6.134] citing *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 [259]; (1984) 6 ALN N257.

²¹ FOI Guidelines [6.152].

²² ‘*BA*’ and *Merit Protection Commissioner* [2014] AICmr 9 at [64].

²³ FOI Guidelines [6.137].

54. In the circumstances, the Court submits that disclosure of the personal information in the documents at issue is “*likely to do no more than excite or satisfy the curiosity*” of others.²⁴ The Court submits that disclosure of the personal information would be unreasonable and therefore the documents at issue are conditionally exempt from disclosure under s 47F of the FOI Act.

The application of the public interest test to ss 47C, 47E(c), 47E(d) and 47F of the FOI Act

55. The applicant does not make any specific contention in relation to the application of the public interest test in relation to ss 47C, 47E(c), 47E(d) or 47F to the documents at issue nor provides any material in support of such a contention. To the extent that the IC considers the application of the public interest test s 11A(5) of the FOI Act is at issue in the present review, the Court seeks to rely upon the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**) in addition to making the following submissions.

56. Subsection 11A(5) of the FOI Act requires the disclosure of a document that is conditionally exempt unless, in the circumstances, and at the time of the decision, it would be contrary to the public interest to give access to the document.

57. Paragraph 6.228 of the FOI Guidelines explain that the following procedural steps are involved in applying the public interest:

- *Identify the factors favouring access*
- *Identify any factors against access*
- *Review to ensure no irrelevant factors are taken into account*
- *Weigh the relevant factors for and against access to determine where the public interest lies (noting that the public interest test is weighted in favour of disclosure).*

58. The original FOI decision dated 15 March 2024 (**Attachment 4**) identified the factors favouring access and factors against access, including references to factors that must be taken into account and additional factors that can be considered. The internal review decision dated 15 April 2024 (**Attachment 7**) adopted the factors identified by the original decision-maker and set out further factors that weigh against disclosure of the documents the subject of the present IC review. The Court relies on and repeats the reasons given in its earlier decisions and submits that any public interest in disclosure of the documents is outweighed by the factors against disclosure.

59. In respect of the applicant’s contention that at least some of the information in the documents at issue should be released, the Court rejects this contention in full. Two (2) of the documents at issue are final investigation reports in files PA-2023-0137 and PA-2023-0138. In *De Tarle*, Senior Member Isenberg cited with approval earlier case law and the IC’s findings that disclosure of final investigation reports would be contrary to the public interest.²⁵

60. In the first case, the IC was satisfied that disclosure of the report may promote some of the objects of the FOI Act, but disclosure would not increase public participation or increase scrutiny of the Government's processes or activities, and therefore giving the applicant access was contrary to the public interest: *‘EH’ and Department of*

²⁴ *‘BA’ and Merit Protection Commissioner* [2014] AICmr 9 at [64].

²⁵ See *De Tarle* at [39]-[40].

Defence [2015] AICmr 2.²⁶ The IC found that disclosure could lead to staff reluctance to raise concerns or provide candid information in the future, and therefore would prejudice the Department's ability to efficiently and properly conduct investigations and inquiries into personnel in the future. The Court submits that it is against the public interest to disclose the final reports in the present IC review for these same reasons. The Court further submits that these reasons extend to the transcripts, file notes, and correspondence between Court employees, given the present applicant also seeks access to that material, and that material heavily forms the basis of the final reports.

61. In the second case, the IC was satisfied that the public interest in safeguarding the integrity of incident management and investigation outweighed the public interest in disclosure: *'DX' and National Offshore Petroleum Safety and Environmental Management Authority* [2014] AICmr 132.²⁷ The IC found that disclosure would result in investigations not being able to be conducted properly and comprehensively, thereby substantially and adversely affecting the effectiveness of those processes. The Court submits that it is against the public interest to disclose the final reports in the present IC review for these same reasons. The Court further submits that these reasons extend to the transcripts, CCTV footage, and correspondence between Court employees, given the present applicant also seeks access to that material, and that material heavily forms the basis of the final reports.
62. In *De Tarle*, Senior Member Isenberg also cited a more recent decision of the IC in *'EK' and Department of Human Services* [2015] AICmr 6.²⁸ The IC in that decision found that disclosure of a report containing staff statements relating to a particular incident would be contrary to the public interest.²⁹ This included because disclosure would affect the willingness of people to provide evidence and the ability of the Department to obtain information to support its investigations. The Court submits that this strengthens its reasons that disclosure of the documents at issue in the present IC review are against the public interest.
63. The balance of the documents at issue include correspondence from the Court to an external provider, timesheets and invoices, and documents related to the procurement of services of those external parties for the relevant investigations. Each of these documents relate to the confidential workplace investigations and contain specific details of the matters investigated and how those investigations occurred or intended to proceed. The Court submits that there is little public interest in opening these documents up to public scrutiny in circumstances where there is nothing to indicate that the investigations were not properly conducted. Proper processes and safeguards exist to ensure fairness, integrity, and propriety in workplace investigation processes.³⁰ The Court submits that disclosure will not positively contribute to that regime, but could instead materialise the very real and grave risks identified earlier in this submission.
64. Further, the applicant made their FOI request through the Right to Know website and advised, during the Court's engagement with them under paragraphs [3.8] to [3.13] of the Direction to resolve or narrow the issues in dispute, that they want all communications to

²⁶ See [40]-[46].

²⁷ See [60].

²⁸ See *De Tarle* at [41].

²⁹ *'EK' and Department of Human Services* [2015] AICmr 6 at [32] and [39].

³⁰ See *'BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014) at [86]. Although this principle was stated in relation to selection processes, the Court considers that the same principles are equally applicable to confidential workplace investigations.

be through their Right to Know email address. Any correspondence with the applicant therefore automatically gets published online, so the disclosure of confidential workplace investigation documents to the applicant would be disclosure to the world at large.

65. At no time has the Court released the documents at issue or information within them, except for the specific and limited purpose to fulfil its procurement reporting obligations. Even then, the information published does not disclose any of the contents of the documents at issue. The internal review decision dated 15 April 2024 (**Attachment 7**) directed the applicant to the general information available online in this regard, which notes the services that were sought by the Court from CPM Reviews and the contract value for those services in relation to files [PA-2023-0137](#) and [PA-2023-0138](#). The Court submits that there are no legislative or other requirements that it release further information in respect of these matters.
66. For all the reasons above, the Court submits that documents related to confidential workplace investigations may be something of interest to the public, but disclosure of those documents is not “*in the interest of the public*” (emphasis added).³¹ There are statutory provisions and an internal Court policy that enforce a strict confidentiality regime in handling workplace investigations. The provision of documents in connection with confidential workplace investigations is reasonably expected to undermine the ability to manage and assess the Court’s staff, which are essential to its operations, compromise the ability of the Court to deliberate as part of the investigative process, and breach the personal privacy of third parties. Any public interest in disclosure of the documents at issue is heavily outweighed by the public interest in upholding the confidentiality of workplace investigative processes. This need for confidentiality, as the decision in *YU* makes clear, extends past the time of the investigation itself.³² Acting Freedom of Information Commissioner Ms Elizabeth Hampton held, at paragraph [43]:

... In particular, I consider that there is strong public interest in protecting the ability of BOM to manage staff by ensuring that allegations against officers in public employment are fully investigated, and for the involvement of BOM staff in those investigations to remain confidential and not be subsequently disclosed.

67. The Court gives significant weight to each of the factors against disclosure set out in its original FOI decision dated 15 March 2024 (**Attachment 4**), internal review decision dated 15 April 2024 (**Attachment 7**), and this submission, which carry with them a very real and serious risk of harm to the Court’s operations, its deliberations, and third parties. The Court submits that the factors against disclosure outweigh the factors favouring disclosure such that the benefit to the public resulting from disclosure is outweighed by the benefit to the public from withholding that information. The Court submits that the documents at issue are exempt from disclosure under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act.

The application of s 22 of the FOI Act to the documents at issue

68. The only contention made by the applicant in the present IC review is that at least some of the information in the documents at issue should be released. The applicant provides no material in support of this contention. The applicant appears to make this contention

³¹ FOI Guidelines [6.224], citing *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

³² See *YU*.

on the assumption that the quantity of documents found from the searches conducted means that something should be provided to them, stating:

I find it hard to believe that there are 248 documents within scope (see original decision of B Henderson) and not a single document has been released because conditional exemptions apply to each and every document and all aspects of the documents in scope.

69. The Court rejects the applicant's contentions in full. The Court seeks to rely upon the reasons given in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**) in addition to making the following submissions.
70. Section 22 of the FOI Act requires the Court to consider whether it would be reasonably practicable to prepare edited copies of the documents at issue for release by deleting the material in those documents that is irrelevant to the applicant or exempt from disclosure.³³ Whether the preparation of edited copies is reasonably practicable is to be approached as a matter of "common sense", and will not be required if the number of deletions would be so many that the remaining documents would be of little or no value to the applicant, or if only a skeleton of the former documents is left conveying little of their content or substance.³⁴
71. The Court submits that the documents at issue contain information that is exempted from disclosure in its entirety, or information that is mostly exempt with the balance having little or no value to the applicant, or conveying little of the content or substance of the documents.
72. The Court submits that there is no correlation between the quantity of documents found from the searches conducted and the number of documents that should be released to FOI applicants. The Court submits that it would be dangerous to proceed from the basis that a high number of documents means some of those documents should be released. The volume of documents in the present case merely indicates that the confidential workplace investigations were extensive and that all reasonable steps were taken to find the documents requested by the applicant.
73. The Court submits that, in all the circumstances, it would not be reasonably practicable to prepare edited copies of the documents at issue, and futile to provide such copies to the applicant.
74. To the extent that the unsupported contentions made by the applicant are being considered under the present IC review, the Court reiterates the reasons for refusing access to the documents as set out in its original FOI decision dated 15 March 2024 (**Attachment 4**) and internal review decision dated 15 April 2024 (**Attachment 7**). The Court submits that it properly applied to the documents at issue the conditional exemptions under ss 47C, 47E(c), 47E(d) and 47F of the FOI Act, as well as correctly applied the public interest test under s 11A(5) of the FOI Act to each of the conditional exemptions. The Court repeats that, after deletion of the exempt information from the documents, the remaining information would have little meaning or value to the applicant, and therefore redacted versions of the documents would be futile to provide

³³ FOI Guidelines [3.95].

³⁴ FOI Guidelines [3.98].

under s 22 of the FOI Act. If the IC disagrees with any of these submissions, the Court reserves its right to provide further submissions.

75. If you have any queries in respect of these submissions, or require any additional information, please do not hesitate to contact the Court.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Rohan Muscat', with a stylized flourish at the end.

Rohan Muscat
Registrar