



Australian Government
Australian Public Service Commission

BZ

By email:

foi+request-11239eea16f1c@righttoknow.org.au

Our reference: LEX 876

Dear Applicant

Freedom of Information request

1. I am writing about your Freedom of Information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) made on **17 March 2024** for access to documents held by the Australian Public Service Commission (the **Commission**).
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au.

Documents relevant to your request

3. You requested access to documents in the following terms:

“There is a redacted document published on the APSC’s FOI disclosure log. The reference is LEX 695. The document’s date of access was 27 November 2023 and the document is described as a public interest disclosure report regarding the recruitment of registrars of the Federal Court of Australia: <https://www.apsc.gov.au/sites/default/files/2024-01/LEX%20695%20-%20Document.pdf>”

Pursuant to the Freedom of Information Act 1982 (Cth), I request an unredacted copy of that report regarding the recruitment of registrars of the Federal Court of Australia.”

4. I have identified one document falling within scope of your request. This document was in the possession of the Commission when your request was received.

Decision

5. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
6. I have decided that parts of the document you have requested are exempt from release under subsections 47E(c), 47E(d) and section 47F of the FOI Act. My reasons are set out in **Attachment A**. The copy of the requested document that I am releasing to you has been edited to remove the material that is exempt.

Contacts

7. If you require clarification on matters in this letter please contact the Commission's FOI Officer by telephone on (02) 6202 3720 or by email at foi@apsc.gov.au.

Review rights

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

Yours sincerely

SM

Authorised FOI decision maker

EL2

9 April 2024

Reasons for decision

1. In making my decision I have had regard to:
 - the terms of your request;
 - the content of the document you requested;
 - the relevant provisions of the *Public Interest Disclosure Act 2013 (PID Act)* and the *Public Service Act 1999 (PS Act)*;
 - the FOI Act; and
 - the FOI Guidelines issued by the Australian Information Commissioner.
2. I note that you have requested access to a document previously released in relation to three other access requests (one of which you have specifically referred to in your request, being LEX 695). In all three instances, content of the document has been edited to remove material that is exempt from disclosure.
3. I have, however, considered your request on its own terms, keeping in mind the bias rule, as outlined in paragraph 3.18 of the FOI Guidelines:

‘An FOI decision maker must approach each decision with an open mind... Generally, a decision maker is not prevented from making a decision by reason of having dealt previously with a similar issue or applicant, or having expressed a view about FOI Act principles or requirements.’

Subsections 47E(c) and 47E(d) FOI Act – Certain operations of agencies

4. Subsections 47E(c) and 47E(d) of the FOI Act provide that a document is conditionally exempt from disclosure if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the management or assessment of personnel by an agency, or on the proper and efficient conduct of the operations of an agency.
5. For this exemption to apply, it is necessary that the predicted effect ‘would, or could reasonably be expected to’ occur.
6. The term ‘could’ in this instance, as the FOI Guidelines state at 5.17, requires an analysis of whether there exists a reasonable expectation that an event, effect or damage could occur. A ‘substantial adverse effect’ is an adverse effect which the FOI Guidelines at paragraph 5.20 describe as ‘sufficiently serious or significant to cause concern to a properly concerned reasonable person’.
7. The Australian Public Service Commissioner (**Commissioner**) and the Commissioner’s delegates have a number of inquiry functions under the PS Act. One of these inquiry functions is in relation to the investigation of certain public interest disclosures under the PID Act.
8. It is important that the Commissioner and his delegates are able to properly undertake activities under the PID Act. The PID scheme promotes integrity and accountability across the Commonwealth public sector and provides a protected space for all current and former public officials (**‘disclosers’**) to make disclosures relating to suspected wrongdoing or misconduct within the Australian Public Service (**APS**).
9. I have considered that under the PID scheme:
 - disclosers are supported and protected from civil, criminal or administrative liability

- and reprisals;
 - information collected during the course of a PID investigation is protected under section 65 of the PID Act; and
 - the identity of a discloser is protected under sections 20 and 21 of the PID Act.
10. Accordingly, I have decided that release of the document in full under the FOI Act, would likely undermine the confidentiality protections provided under the PID scheme, and could discourage current and former public officials to make PID disclosures or to involve themselves in PID investigations. The success of any PID investigation process relies heavily on the willingness of individuals to participate in the PID scheme in a frank and open manner. I consider that if future disclosers, witnesses and any person against whom a disclosure is made lose faith in the ability of the Commission to protect confidential and protected information, it will have a substantial adverse effect on the ability of the Commission to properly undertake activities under the PID Act.
 11. Further, I consider that the release of the document would also likely have a larger effect of inhibiting or discouraging Commission staff to openly and effectively communicate on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation, with confidence that such communication will not become public. As expressed by the Acting FOI Commissioner in *'YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021) (YU) at paragraph 30, *'candour is important in the context of an internal workplace investigation'*. Should individuals be unwilling or unable to effectively participate in the PID scheme, I consider that this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act, including its ability to ensure that allegations of misconduct against public officials are diligently investigated, and where necessary, appropriate action taken in an efficient manner.
 12. The importance of protecting information collected during a PID investigation process was upheld in the decision of YU, where the Acting FOI Commissioner accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
 13. I have therefore decided disclosure of information relating to allegations, inquiries and investigations under the PID scheme would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of Commission staff and on the proper and efficient conduct of the operations of the Commission.
 14. My consideration of the public interest test in respect of the application of section 47E to the document is outlined further at paragraphs 24 to 29.

Section 47F FOI Act – Personal privacy

15. Section 47F of the FOI Act provides a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information of any person.
16. Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
 - whether the information or opinion is true or not; and
 - whether the information or opinion is recorded in a material form or not.
17. I am satisfied the document you have requested contains personal information including the names of APS staff members who were considered as part of the PID investigation, including witnesses in the relevant PID investigation, with information about their qualifications and employment history.

18. In considering whether disclosure of that personal information would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:
- the extent to which the information is well known;
 - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - the availability of the information from publicly accessible sources; and
 - any other matter I consider relevant.
19. The FOI Guidelines at paragraph 6.143 explain that other relevant factors include:
- the nature, age and current relevance of the information;
 - any detriment that disclosure may cause to the person to whom the information relates;
 - any opposition to disclosure expressed or likely to be held by that person;
 - the circumstances of an agency's collection and use of the information;
 - the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
 - any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
 - whether disclosure of the information might advance the public interest in government transparency and integrity.
20. This analysis requires consideration of all of the circumstances. The Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 AT [51] outlined:
- '...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...'*
21. Having regard to the matters I must consider under section 47F(2) of the FOI Act, I have identified the following factors that in my view do not support release of the personal information contained in the documents:
- notwithstanding the fact that it is public knowledge that a PID investigation was conducted by Kate McMullan into the FCA's recruitment processes, and that some documents related to this process have been made available online, the substance of the personal information contained within the document is not widely available or well-known. Further, the disclosure of the personal information would not, in my view, advance scrutiny of any decisions falling within scope of your FOI request;
 - the personal information will identify the individuals, whom are not known to be (or to have been) associated with the matters dealt with in the documents;
 - the disclosure of information about persons who may be the subject of certain allegations, including unsubstantiated allegations are not matters that concern normal duties or responsibilities ('BA' and Merit Protection Commissioner [2014] AICmr 9);
 - release of individuals' information in connection with the subject matter of the document would likely cause them stress or other detriment;
 - the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act. In this regard, I note that many of the documents released under FOI in connection with the FCA recruitment processes and subsequent PID investigation have been made available online through various sources; and
 - disclosure would be contrary to the confidentiality protections afforded under the PID Act and the associated policies, procedures and expectations which those individuals would expect to be protected by.

22. I have therefore decided to the extent that the document includes personal information of individuals, those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of their personal information.
23. My consideration of the public interest test in respect of the application of section 47F to the document is outlined further at paragraphs 24 to 29.

Sections 11A and 11B - Public Interest Test

24. Section 11A(5) of the FOI Act provides:

'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'.

25. I have considered the public interest factors favouring disclosure under section 11B(3) of the FOI Act, including the extent to which access to the document would:

- promote the objects of the FOI Act;
- enhance the scrutiny of government decision making; and
- promote effective oversight of public expenditure.

26. I have identified the following factors as weighing against disclosure:

- disclosure of any third party individual's personal information will not advance the scrutiny of the Commissioner's inquiry functions and processes under the PS Act or the PID Act;
- disclosure would prejudice individuals' right to privacy;
- disclosure could be expected to prejudice the Commission's ability to obtain confidential information from disclosers, complainants, witnesses, staff and other third parties;
- disclosure could be expected to adversely affect the management and assessment of staff of the Commission;
- disclosure could reasonably be expected to undermine the confidentiality provisions which are vital to the PID scheme; and
- disclosure could be expected to adversely affect the proper and efficient operations of the Commissioner and the Commission in performing statutory functions and powers under the PS Act and the PID Act.

27. I consider the public interest factors weigh strongly against disclosure of the conditionally exempt material in the document. The specific details of the PID investigation, including the disclosure of personal information and the likely substantial adverse effect on the Commission's PID scheme operations outweigh the public interest factors favouring disclosure. In coming to this conclusion, I have also had regard to the Acting FOI Commissioner's comments in YU where she stated:

'[T]here is strong public interest in ensuring the confidentiality protections under the PID Act are maintained. As discussed above... the PID Act provides individuals with statutory protections from retribution when reporting misconduct. This includes by operation of s 65 of the PID Act, which is a general secrecy provision to protect information that a person obtains in the course of conducting a disclosure investigation, or in connection with the performance of a function or exercise of a power under the PID Act.'

28. Section 11B(4) of the FOI Act lists factors that are irrelevant to determining whether access would be in the public interest. I have not considered these factors.

29. On balance, I find disclosure of the document would be contrary to the public interest. To the extent that the material contained in the document is conditionally exempt under subsections 47E(c), 47E(d) and section 47F of the FOI Act, those parts are exempt from disclosure.

Rights of Review

Asking for a full explanation of a Freedom of Information decision

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

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission; and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au
Post: The FOI Officer
Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

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

You can lodge your application:

Online: www.oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au