



Australian Government
Australian Public Service Commission

Our reference: LEX 954

‘BZ’

By Email: foi+request-11239-eea16f1c@righttoknow.org.au

Dear BZ

Notice of internal review decision- Freedom of Information- LEX 954 (876)

1. The purpose of this letter is to advise you of my decision following your request for internal review of the Australian Public Service Commission (the Commission’s) decision to grant partial access to a document you requested under the *Freedom of Information Act 1982* (FOI Act).

Background

2. On 17 March 2024, you requested the following from the Commission under the FOI Act:

“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.”

3. One (1) document was identified that fell within scope of your request. This document was within the possession of the Commission when your request was received on 17 March 2024.
4. On 9 April 2024, the original decision maker, SM, EL2, granted partial access to the document within scope. In making this decision, SM determined that some of the material was exempt from release under sections 47E(c) and (d) and section 47F of the FOI Act.
5. A copy of your internal review request is attached.

Decision

6. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions, and I have reviewed your internal review request in accordance with section 54C of the FOI Act.



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7. My role is to make a new decision on your request, independently and impartially from the original decision maker. Internal review is a merits review process and I may exercise all the powers available to an original decision maker.
8. After considering your request, under subsection 54C(3) of the FOI Act, I affirm SM's earlier decision to refuse access to the document in part because I am satisfied there are relevant exemptions (sections 47E(c), 47E(d) and 47F) that apply to the document.
9. My reasons are set out in **Attachment A**.

Contacts

10. If you require clarification on matters in this letter, please contact the Commission's FOI Officer by email at xxx@xxxx.xxx.xx

Review rights

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Melanie McIntyre', with a long horizontal line extending to the right.

Melanie McIntyre
Authorised FOI decision maker
15 May 2024



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ATTACHMENT A

Reasons for Decision

1. In reaching my decision, I have considered:
 - the terms of your FOI request;
 - the relevant document;
 - your internal review request dated 15 April 2024;
 - consultation submissions received from the Commonwealth Ombudsman (**Ombudsman**);
 - the FOI Act;
 - the Freedom of Information Guidelines (**FOI Guidelines**) issued by the Australian Information Commissioner;
 - the *Public Interest Disclosure Act 2013* (**PID Act**); and
 - the *Ombudsman Act 1976* (**Ombudsman Act**).

Section 47E- Certain operations of agencies

2. Under section 47E(c) a document is conditionally exempt if its disclosure would, or could be reasonably expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency.
3. Section 47E(d) states that a document is conditionally exempt if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
4. Consistent with the original decision, I consider disclosure of the document in full would be likely to have a larger effect of inhibiting or discouraging Commission staff and other Commonwealth staff to freely and effectively communicate on the assessment of matters under the PID Act.
5. In coming to this conclusion, I have considered that under the PID scheme:
 - Disclosers are supported and protected from civil, criminal or administrative liability and reprisals;
 - The identity of a discloser is protected under sections 20 and 21 of the PID Act; and
 - The PID Act is an important mechanism for staff of the Commission and other Commonwealth agencies to disclose wrongdoing by public officials. This in turn, serves to uphold high standards of integrity and ethical conduct across the Australian Public Service.
6. The Australian Public Service Commissioner (the **Commissioner**) and his delegates have responsibility for a number of inquiry functions, including in relation to certain disclosures made under the PID Act.



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7. In order to discharge these functions, it is vital the Commissioner and his delegates are able to properly undertake activities under the PID Act. Relevantly, one of the objects of the PID Act includes ensuring that disclosures are properly investigated and dealt with (section 6). I consider that the release of the document in full would be likely to have a larger effect of inhibiting or discouraging staff from freely and effectively communicating on matters relating to PID, including in the consideration and assessment of material subject to a PID investigation, with confidence that such communications will not become public.
8. Should individuals be unwilling or unable to effectively participate in these matters, I consider 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 are investigated and, where necessary, take appropriate action in a proper and efficient manner.
9. I note your internal review submission that you consider section 47E(d) does not apply in the circumstances because "*the PID report is riddled with errors and falsehoods*" and the conditional exemption cannot apply where disclosure of documents reveals unlawful activities or inefficiencies. In making this comment you refer to paragraph 6.123 of the FOI Guidelines. Paragraph 6.123 makes clear that the predicted effect must bear on the agency's 'proper and efficient' operations to apply. That is, the agency undertaking its **expected activities in an expected manner** [emphasis added]. I consider that this limb of the test is met because the document relates directly to the Commission's PID functions, the disclosure of which, could reasonably affect the willingness of people to make complaints to the Commission, which would have a substantial adverse effect on the Commission's future ability to undertake investigations under the PID Act.
10. As outlined in the original decision, the importance of protecting information collected during a PID investigation process was affirmed in the case of *'YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021) ('YU').
11. You have stated in your internal review submissions that the case of 'YU' is not relevant because the facts are materially different. I have considered this case and in my opinion it is relevant because the applicant in that matter requested documents relating to a PID investigation, and the Acting Freedom of Information Commissioner agreed with the Bureau of Meteorology'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 consider that reasoning and rationale applies equally here.
12. I agree with the submissions of the Bureau of Meteorology in 'YU' refusing access to documents on the following basis: *'It is submitted that disclosure under the FOI Act of information provided confidentially as part of a PID investigation would have both a*



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substantial adverse effect on the management of employees of the Bureau (s 47E(c)) and on the Bureau's ability to administer and enforce the PID Act, including the undertaking of investigations (s 47E(d)).

The Bureau has in place processes and procedures for the administration and enforcement of the PID Act. Employees are aware that any PID disclosure, and any subsequent investigation, is treated in the strictest confidence and steps will be taken to ensure the protection of their identity in accordance with the obligations in the PID Act. Confidential and protected information is made available only to officers who are authorised or delegated under the PID Act and information is stored securely. Employees provide information, and participate in PID investigations, on the understanding that their personal and confidential information will be used and disclosed only for the purpose of a PID Act investigation.

If employees become aware that information obtained under the strict secrecy regime of the PID Act is able to be accessed under the FOI Act, the Bureau considers employees will lose confidence in the ability of the Bureau to protect this confidential and protected information. If privacy and confidentiality cannot be assured, I believe employees would be less willing to make a disclosure, or participate in a PID investigation. I believe this would damage the relationship of trust between the Bureau and its employees which, in turn, would have a significant impact on the ability of the Bureau to manage employees, particularly in the context of complaint management.

If the ability of the Bureau to efficiently and effectively manage complaints and PID disclosures is adversely affected, I consider it would substantially adversely affect the ability of the Bureau to effectively and efficiently carry out its other important public functions.

Further, if employees lose faith in the ability of the Bureau to protect confidential and protected information, I believe it will have a substantial adverse effect on the ability of the Bureau (and other agencies more broadly) to efficiently and effectively administer and enforce the PID Act. I believe employees would be less likely, and willing, to make disclosures or participate in investigations. If the integrity of the PID Act is eroded in this way, it will reduce the statutory effectiveness of the PID process.

The Bureau believe these adverse effects to be substantial and not insignificant.'

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 sections 47E(c) and 47E(d) to the document is outlined further at paragraphs 24 to 29.



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Section 47F- Personal Privacy

15. Section 47F of the FOI Act provides that a document is conditionally exempt if it would involve the unreasonable disclosure of personal information about 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
 - the information or opinion is recorded in a material form or not.
17. I am satisfied that the documents contain personal information about identified individuals; including, amongst other things, their names and employment details.
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. This further 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] emphasised:
- '...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...'*
20. I have considered the above factors, and identified the following factors that in my view do not support release of this personal information:
- 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 document as it relates to the findings of a confidential investigation. 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 FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;



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- 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;
- release of the individuals' personal information is likely to cause stress for them or other detriment having regard to the circumstances under which the information was collected; and
- disclosure would prejudice the individuals' right to privacy.

21. Taking into account the above factors that do not support release of the information, I find that disclosure of the personal information contained in the document would be unreasonable. I am also not satisfied there would be public interest served in disclosure of this particular information, versus the public interest in maintaining personal privacy.

22. You have submitted that section 47F does not apply in the circumstances because "*the names of the registrars have been published repeatedly in documents that have been released under the FOI Act*". I note that the bias rule is relevant to all decision making under the FOI Act and requires an FOI decision maker to approach each decision with an open mind and on its own merits. Therefore, I am not necessarily precluded from finding material exempt just because another decision maker has released it, or because that material has made its way online somehow. I further note you have not provided any links to the documents released under FOI which you say contains the names of the registrars so there is no way for me to verify your claims. In the absence of any compelling evidence that the substance of the personal information contained in the document is widely available or well-known, I am of the view that disclosure of the personal information at this time would be unreasonable and is likely to cause detriment to the individuals noting the circumstances in which the information was obtained in the context of a confidential PID investigation.

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.

Public interest considerations

24. Subsection 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. In weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure at section 11B(3). In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act;
- inform debate on a matter of public importance; and
- promote effective oversight of public expenditure.



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26. I have also taken into account the material referred to in your internal review request, including the Questions on Notice submitted to the Federal Court of Australia during the last round of Senate Estimates regarding its recruitment practices.
27. I have identified the following factors as weighing against disclosure of the personal information:
- disclosure could reasonably be expected to prejudice the privacy of third party individuals;
 - the disclosure of certain information could be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission (and could reasonably be expected to prejudice the Commission's ability to obtain confidential information/conduct investigations in the future);
 - disclosure of any third party individual's personal information will not advance the scrutiny of the Commissioner's inquiry functions and processes under the *Public Service Act 1999* (Cth) or the PID Act;
 - disclosure could be expected to undermine the confidentiality provisions which are fundamental pillars of the PID scheme; and
 - disclosure could be expected to adversely affect the management and assessment of staff of the Commission.
28. On balance, I consider the public interest factors weigh 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.
29. I have ultimately decided that disclosure of the conditionally exempt material in the document would be contrary to the public interest at this time. To the extent that the material contained in the document is conditionally exempt under sections 47E(c), 47E(d) and 47F of the FOI Act, those parts of the requested document are thus conditionally exempt from disclosure under the FOI Act.

PID report previously disclosed under FOI

30. I also note your internal review submission:
'The report has been released under the FOI Act by the Office of the Commonwealth Ombudsman.

A substantially unredacted copy of Kate McMullan's PID report has been released by the Office of the Commonwealth Ombudsman and is, as you have conceded about many of the documents relating to this request, been published online, according to law. Therefore, it is pointless and, on a legal level, unlawful to refuse to grant access to anything that is more redacted than the published version. I'll spare the APSC the embarrassment of the



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link to the document but will gladly provide it during the IC review stage if the APSC does not publish the PID report on internal review.'

31. Noting you have not provided any links to the substantially unredacted version of the document which you say has been released online via FOI, I consulted the Ombudsman regarding this. The Ombudsman has confirmed that that they do not believe the PID report has been released by their office previously under FOI.
32. In light of the above, I **affirm** SM's decision of 9 April 2024 to grant partial access to the document in scope and apply relevant exemptions under sections 47E(c), 47E(d) and 47F of the FOI Act.



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ATTACHMENT B

Rights of Review

Asking for a full explanation of a Freedom of Information decision

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

Applying for external review by the Australian Information Commissioner

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

You can **lodge your application**:

- Online: www.oaic.gov.au
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