



Australian
Human Rights
Commission

Our Ref: FOI-2024/0328114738

29 April 2024

Mr Alex Pentland

By email: foi+request-11282-efe5a1a1@righttoknow.org.au

Dear Mr Pentland

Notice of Decision: Request under the *Freedom of Information Act 1982* (Cth)

1. I refer to your *Freedom of Information Act 1982* (Cth) (FOI Act) request to the Australian Human Rights Commission (Commission) dated 28 March 2024.
2. I confirm that I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests.
3. On 3 April 2024, by email exchange between you and the Commission, you agreed to reduce the scope of your request to correspondence sent between relevant Commission staff who were involved in preparing Commissioner Lorraine Finlay's article in The Nightly 'In silence, anti-Semitism and racism flourishes' published on 27 March 2024 ('Opinion Piece') - ('revised scope').
4. In that correspondence, you also agreed to the redaction of names and personal details of non-SES Commission staff in the documents under s 22 of the FOI Act.
5. From reviewing the Commission's files relating to your complaint, I have identified 28 documents within the revised scope. Where a document has been duplicated, this has been noted in the schedule and not reproduced.
6. I consider that reasonable searches have been undertaken to locate any documents within the revised scope, including searches undertaken by Human Rights Commissioner Lorraine Finlay, the director of the Human Rights team, the director of Strategic Communications and other staff.
7. The **attached** schedule of documents lists and describes each document

within the request's revised scope, and each document's access decision. Each document's access decision has been made with regard to:

- (a) the content of the documents within the revised scope
- (b) the FOI Act
- (c) guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (Guidelines) including guidelines 6.23 and 6.24 on ensuring that irrelevant factors are not taken into account¹
- (d) relevant case law.

1. Decision

- 8. The FOI Act requires documents identified as falling within the scope of an FOI Act request to be produced in response to an FOI request, unless the Act provides an exemption for a particular type of document.¹
- 9. The FOI Act sets out categories of documents that are wholly exempt and categories of documents that are conditionally exempt. Conditionally exempt documents must be produced in response to an FOI Act request unless it would be contrary to the public interest to do so.²
- 10. I have reviewed the relevant documents and have decided as follows:
 - (a) to grant access in full to documents 1, 4, 5, 7, 20, 21, 22, 23, 23A, 24A, 25, 26, 28 and 29
 - (b) to allow partial release of documents 3, 24 and 27, with redactions made under s 22 of the FOI Act.
 - (c) to allow partial release of documents 2, 6, 8, 9 to 15, 16 to 19 being correspondence between Commission staff. The emails have been redacted where applicable, and have been refused under either or both s 47C (deliberative processes) and s 47E (documents affecting certain operations of agencies) of the FOI Act. I have also made redactions pursuant to your consent for the Commission to redact personal

¹ FOI Act ss 11 and 11A.

² FOI Act s 11A(5).

information of non-SES Commission staff, under s 22 of the FOI Act.

(d) refused to release documents 1A, 2A, 5A, 9A and 15A being draft copies of the Opinion Piece under s 47C (deliberative processes) of the FOI Act.

2. Reasons for Decision

2.1 Conditional exemption – documents containing a deliberative process

11. Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure if it contains deliberative matter.

12. Deliberative matter includes an opinion, advice or recommendation that has been obtained, prepared or recorded, or consultation or deliberation that has taken place in connection with a Commonwealth agency's functions. It may include a collection of facts or opinions, the pattern of facts or opinions considered^{1,3} or interim decisions or deliberations.

13. Deliberative matter does not include operational information or purely factual material,⁴ or a decision reached at the end of the deliberative process.⁵

14. The FOI Guidelines explain that a deliberative process involves the exercise of judgment 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.

15. Deliberative processes involve the weighing up or evaluating of competing

³ *Chapman and Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

⁴ Section 47C(2)(b), FOI Act.

⁵ *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

arguments.⁶ One person may deliberate on their own.⁷

16. For documents to be conditionally exempt pursuant to s 47C of the FOI Act, the deliberative process must relate to a Commission function, and the processes undertaken in carrying out Commission functions. Part of the Commission's functions as a Commonwealth 'agency' is to fulfil obligations under the FOI Act including consider and respond to request for access to documents under the FOI act make decisions on whether .⁸

17. In my view, documents 2, 6, 8, 9 to 15, 16 to 19, and 1A, 2A, 5A, 9A, 15A in the Schedule of documents contain deliberative matters and are conditionally exempt.

18. The documents include the following content:

- (a) email correspondence between Commissioner Finlay and other Commission staff (including the President of the Commission (Rosalind Croucher), the Chief Executive (Leanne Smith), Race Discrimination Commissioner (Giridharan Sivaraman), director of the Human Rights team, director of the Strategic Communications and senior policy executive of Human Rights and Strategy), regarding the drafting of the opinion piece
- (b) working drafts of the 'Opinion Piece' (documents 1A, 2A, 5A, 9A, 15A)
- (c) discussions including expressing opinions, deliberating options, and providing advice and recommendations regarding the Commission's position and function in relation to the opinion piece and related issues.

19. I consider that the above discussions form part of the operational function of the Commission: s 11(g) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

20. However, a document that is conditionally exempt under s 47C of the FOI Act, must be disclosed unless disclosure would be contrary to the public interest.⁹

⁶ *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67; *British American Tobacco Australia Ltd and Australia Competition and Consumer Commission* [2012] AICmr 19; *Dreyfus and Secretary Attorney-General's Department (Freedom of Information)* [2015] AATA 962.

⁷ *Smith and Aboriginal and Torres Strait Islander Commission* [2000] AATA 512.

⁸ Section 11 of the FOI Act.

⁹ s 11A(5), FOI Act.

(a) Contrary to the public interest to disclose

21. In my view, the disclosure of the material (marked with redactions) contained within these documents and the drafts of the Opinion Piece, would be contrary to the public interest. I have taken the following matters into consideration.
22. I consider that disclosure may promote the objects of the FOI Act, however I am not satisfied that disclosure would meaningfully inform public debate on a matter of public importance given the preliminary and contemplative nature of these documents.
23. I consider that there is public interest in protecting drafts of opinion pieces intended for publication and related discussions, allowing for frank consideration of the issues and open collaboration between Commission staff (including the President and Commissioners). The draft Opinion Piece contains preliminary views by its author and was not intended to be viewed or published in that form, the draft opinion piece therefore represents the thinking process prior to producing the final product. I consider there is public interest in protecting the integrity of decision-making, to separate material that was contemplative in nature and the final decision.
24. In addition, the disclosure of these documents could reasonably be expected to prejudice the management functions of the Commission as an agency.¹⁰ The list of factors set out in the Guidelines is non-exhaustive.
25. Relevant management functions of the Commission include promoting an understanding and acceptance, and the public discussion, of human rights in Australia.¹¹ The Opinion Piece drafted by Commissioner Finlay, as the Human Rights Commissioner, addresses human rights issues on racism, specifically anti-semitism. The redacted materials in the email correspondence contain discussions, deliberations and consideration of relevant issues by senior Commission staff that relate to the exercise of these functions of the Commission.

¹⁰ Australian Information Commissioner, FOI Guidelines [6.22(n)].

¹¹ *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(g).

26. I am satisfied that disclosure of the deleted material could reasonably be expected to inhibit the effectiveness of the evaluation and decision-making processes of the Commission relevant to exercising these functions.
27. Having regard to all of these matters, I am satisfied that disclosure of the redacted material in these documents and the drafts of the Opinion Piece would be contrary to the public interest. Accordingly, I have refused to release the working drafts of the Opinion Piece.
28. However, in relation to documents 2, 6, 8, 9 to 15, 16 to 19, I consider that the internal email correspondence can be prepared to remove the deliberative material, with appropriate redactions and these documents have been provided in the bundle of documents.

3.2 Conditional exemption (documents affecting certain operations of the agency)

29. Section 47E(d) of the FOI Act provides that a document is conditionally exempt from disclosure if disclosure 'would, or could reasonably be expected to ... have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'. The Commission is an agency for the purposes of the FOI Act.
30. I have formed the view that disclosure of the documents (or parts of the documents), namely documents 2, 7, 9, 14, 15, 16, 17, 18, 19 and 20 could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Commission's function to promote an understanding and acceptance, and the public discussion, of human rights in Australia, consistent with s 11(1)(g) of the AHRC Act.
31. The Guidelines provide that:
- (a) the phrase 'could reasonably be expected to' requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document, and
 - (b) the use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable

expectation that an effect has occurred, is presently occurring, or could occur in the future.¹²

32. A central function of the Commission is to promote an understanding and acceptance, and the public discussion, of human rights in Australia. It is therefore essential for senior management staff at the Commission (including Commissioners and directors) can communicate with one another in a candid and open manner as part of internal deliberative processes, when considering how to best serve the functions of the Commission.
33. For these reasons I find that disclosure of the (redacted material) in documents 2, 7, 9, 14, 15, 16, 17, 18, 19 and 20, could reasonably be expected to have a substantial and adverse effect on the proper and efficient conduct of the operations of the Commission.
34. Pursuant to s 11A(5) of the FOI Act, a document must be disclosed even if it is conditionally exempt, unless disclosure of the document would be contrary to the public interest. In my view, disclosure of the documents in question would be contrary to the public interest.
35. Section 11B(3) of the FOI Act sets out factors favouring disclosure of documents. These include:
 - promoting the objects of the Act
 - informing debate on a matter of public importance
 - promoting effective oversight of public expenditure
 - allowing a person to access his or her own personal information.
36. I have considered whether disclosure would promote the objects of the FOI Act. The objects of the FOI Act relevantly include the objects of:
 - increasing scrutiny, discussion, comment and review of the Government's activities
 - increasing recognition that information held by the Government is to be managed for public purposes, and is a national resource

¹² Re Maksimovic and Australian Customs Service [2009] AATA 28.

- facilitating and promoting public access to information, promptly at the lowest reasonable cost.
37. In my view, disclosure of the withheld information may, to some limited extent, promote the objects of the FOI Act and increase recognition that information held by Government is to be managed for public purposes and is a national resource. However, I do not consider that the contents of the documents in question would particularly increase scrutiny, discussion, comment and review of the Government's activities.
38. I have considered whether disclosure would inform debate on a matter of public importance. Following my review of the comments and discussions over email correspondence between senior management, I do not consider those matters would inform public debate. Neither do I consider that disclosure would promote oversight of public expenditure.
39. I have also had regard to the OAI Guidelines which outline public interest factors favouring disclosure and public interest factors against disclosure. The OAI Guidelines at 6.22 relevantly specify that disclosure may be contrary to the public interest where disclosure could reasonably be expected to:
- impede the flow of information to ... [a] regulatory agency
 - prejudice an agency's ability to obtain confidential information
 - prejudice an agency's ability to obtain similar information in the future
 - harm the interests of an individual or group of individuals.
40. I consider that the release of the redacted material would impede the Commission's ability to carry out its functions, as it could reasonably deter senior Commission staff, from fully and candidly participating in important deliberative decision-making processes.
41. In my view, the factors against disclosure of the withheld materials outweigh the factors in favour of disclosure. Accordingly, it is my view that disclosure would be contrary to the public interest. However, I consider it possible to produce copies of the documents with the material redacted and have

provided these in the bundle of documents.

42. Your review rights

Internal Review

43. You may apply for an internal review of my decision by writing to the Commission within 30 days of the date of this letter stating the reasons why you believe the review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner Review

44. You may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email:

foidr@oaic.gov.au

Post:

GPO Box 5218, Sydney NSW 2001

In Person:

Level 3, 175 Pitt Street, Sydney NSW

Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/> for

more information about a review by the Information Commissioner.

Yours sincerely



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