



Australian Government  
Australian Taxation Office

Mr James Smith  
C/- Right to know

Reply to: GPO Box 4889  
SYDNEY NSW 2001

Our reference: 1-85DQTML  
Contact officer: Chad Reich  
Phone: (08) 8208 1794

By email:  
[foi+request-1934-6f63579b@righttoknow.org.au](mailto:foi+request-1934-6f63579b@righttoknow.org.au)

17 May 2016

## Decision regarding your Freedom of Information request

Dear Mr Smith,

The purpose of this letter is to provide you with a decision regarding your request for access to documents under the *Freedom of Information Act* (**the FOI Act**) dated 10 May 2016. I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

Your request was for access to:

*All emails sent from the Commissioner, Second Commissioners, or Deputy Commissioners, to any recipient, in the last week of April 2016 (i.e. 25 April onwards), on the topic of communicating messages to all ATO employees about the proposed ATO Enterprise Agreement. Along with any 'toolkits', 'frequently asked questions', 'fact sheets', or similar, which may have been provided to assist managers address employees' questions on the ATO offer.*

## Decision

Twenty-two documents fall within the scope of your request. They include a variety of fact sheets, a toolkit provided to senior staff, and an email sent from the Commissioner of Taxation to his Senior Executive Service (**SES**). Each of the documents contains information relating to the ongoing negotiations surrounding proposals for a new Enterprise Agreement (**EA**). I have decided to release the majority of the documents in full. While the documents each concern the ongoing EA negotiations, the majority of the content is constituted by factual material. The documents include information about proposals made, and the rationale behind those proposals, as well as information regarding other agencies and the agreements they have reached.

In making my decision I have examined various provisions of the FOI Act, including section 3 which outlines the objects of the Act. I consider that releasing the majority of the documents is in line with promoting the objects of the Act, including increasing scrutiny, discussion, and public participation in Government processes to promote informed decision-making.

The guidelines issued by the Australian Information Commissioner, pursuant to section 93A of the FOI Act (**the guidelines**) state that the conditional exemptions under section 47E may be relevant where an agency is considering the release of documents which relate to industrial relations activities.

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to:

- c) have a substantial adverse effect on the management or assessment of personnel by an agency; or
- d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The small portion of content which I have decided to exempt does not relate to factual material, but rather to particular messages, communicated by the Commissioner to his SES. These messages give effect to part of the agency's strategy in the context of ongoing EA negotiations. The negotiation and establishment of a new EA is a key function of a government agency, which has a fundamental impact on the operations of the agency for a significant period of time. I consider that divulging one party's negotiation strategy in the context of a multi-party negotiation would have a substantial adverse effect on the agency's prospects of concluding a bargaining outcome, and would give other parties to the enterprise bargaining process an unfair advantage. Internal communications underlying negotiations are confidential by nature and participants should be able to conduct themselves in such a way. It is unlikely that any party involved in a negotiation would agree to disclose their internal communications, especially those capable of divulging strategy.

In the circumstances I am of the view that disclosing this information would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the ATO. This information is therefore conditionally exempt under section 47E(d) of the FOI Act.

The content which I have decided is exempt, being particular messages communicated by the Commissioner to his SES, also relates to the Commissioner's management of his SES. These messages were not intended for a broader audience. Given that the messages were delivered in the context of the negotiation of an EA which will impact on the majority of the agency's employees, the Commissioner's management of his SES would be undermined if key messages intended only for his SES were disclosed under the FOI Act.

In the circumstances I am of the view that disclosing this information would, or could reasonably be expected to have a substantial adverse effect on the management of personnel by the ATO. This information is therefore conditionally exempt under section 47E(c) of the FOI Act.

While I am satisfied that the content I have decided to exempt meets the specific harm threshold contained in the relevant sections, that is a 'substantial adverse effect', I also need to consider whether release of the information would, at this time, be contrary to the public interest. Once again I have turned my mind to the objects of the FOI Act, and the guidelines.

Disclosing the information that I consider conditionally exempt may, similar to the information I am releasing, promote the objects of the Act, including increasing scrutiny, discussion, and public participation in Government processes to promote informed decision-making. The information may also inform debate on a matter of public importance.

However, abrogating confidentiality in relation to the Commissioner's strategic communications, in the context of ongoing negotiations, would prejudice the ATO's ability to effectively manage its negotiation strategies. This would negatively impact upon the ATO's ability to negotiate which in turn could reasonably be expected to have a lasting and serious impact on the proper and efficient conduct of the operations of the ATO. Further, disclosing the conditionally exempt information would also have a substantial adverse effect on the management of personnel by the agency because it could impact upon and limit the nature of communications between agency staff.

I am releasing the majority of the information in the documents subject to your request. This assists in the promotion of the objects of the Act, particularly by increasing public participation in Government processes. Additionally, there is a wide variety of information publicly available in relation to the general topic of enterprise bargaining, and specifically, recent Government activities in the ATO and in other agencies.

Taking into consideration the fact that I am releasing the majority of information subject to your request, disclosing the small portion of content which I have decided to exempt is likely to have a relatively insignificant effect on promoting Australia's representative democracy. Conversely, the information could reasonably be expected to prejudice both the management and industrial relations functions of the agency and have a lasting impact on the proper and efficient conduct of the operations of the ATO. In the circumstances I consider the factors against disclosure of the conditionally exempt information to be significant, and to outweigh the factors in favour of disclosure.

The information is therefore exempt under sections 47E(c) and 47E(d) of the FOI Act.

#### **Material taken into consideration**

In reaching my decision I have considered and relied upon the following:

- content of the identified documents;
- terms and scope of your request;
- relevant provisions of the FOI Act, including the objects of the Act in section 3, the public interest test in sections 11A and 11B, and sections 47E(c) and 47E(d);
- consultation with relevant areas and representatives within the ATO; and
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

#### **Fees and Charges**

I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents. As per Guideline 4.6 of the Office of the Australian Information Commissioner guidelines, I have made no charge for this application.

#### **Your review rights**

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### **Internal review**

Under section 54 of the FOI Act, you may apply in writing to the ATO for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, quoting our reference number at the top of this letter, and lodged in one of the following ways:

email: **FOI@ato.gov.au**  
post: Australian Taxation Office, General Counsel, GPO Box 4889, Sydney  
NSW 2001.

Where possible please attach reasons why you believe review of the decision is necessary.

The internal review will be carried out by another officer within 30 days. If you have not been informed of the outcome of the review within that time, you may apply to the Australian Information Commissioner under section 54L of the FOI Act.

#### **Information Commissioner review**

Under section 54L of the FOI Act, 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/aba/oaic/foi-review/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 5218, Sydney NSW 2001  
in person: Level 3, 175 Pitt Street, Sydney NSW

Your application must include a copy of this letter (and any attachments), an address where notices can be sent to you (e.g. your email address) and particulars of the basis on which you dispute the decision.

Visit the Australian Information Commissioner website, [www.oaic.gov.au/freedom-of-information/foi-reviews](http://www.oaic.gov.au/freedom-of-information/foi-reviews), for more information about Information Commissioner review.

#### **Complaints**

Any complaint about the processing of your FOI request can be directed to the Commonwealth Ombudsman. The complaint should set out the action you consider should be investigated. Complaints may be lodged in one of the following ways:

Phone: 1300 362 072\*  
Indigenous Line phone number: 1800 060 789\*  
In writing: GPO Box 442 Canberra ACT 2601  
or by fax (02) 6276 0123  
Online: [www.ombudsman.gov.au/pages/making-a-complaint/](http://www.ombudsman.gov.au/pages/making-a-complaint/)

Visit [www.ombudsman.gov.au](http://www.ombudsman.gov.au) for further details.

#### **For more information**

If you have any questions, or would like to discuss this decision, please contact me directly on the number provided above.

Yours faithfully



**Chad Reich**  
Senior Lawyer  
General Counsel