

GPO Box 1797, Melbourne VIC 3001



Australian Government
Australian Taxation Office

Ms Sarah Van Winkle
C/- Right to know
Via email:
foi+request-2031-5c6e9ea4@righttoknow.org.au

Our reference: 1-8PX0KAF
Contact: 13 28 69
foi@ato.gov.au

5 August 2016

Dear Ms Van Winkle,

FREEDOM OF INFORMATION ACT 1982 – Notice of Decision

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

You requested access to documents on 2 July 2016. Specifically you sought access to documents created in the last 12 months which address patronage and nepotism in ATO recruitment processes. You advised that this includes matters such as:

- *Any complaints or concerns raised*
- *Any ATO response to such complaints including reports and/or recommendations made to delegates*

We have created 1 table to release to you in response to this request. The table provides the number of complaints or disclosures received in the 12 month period. We did not find any other general documents which address patronage and nepotism in ATO recruitment processes or which would otherwise fall within the scope of your request.

Over and above any generic documents on this subject, any specific documents that we have about the complaints (or concerns raised), including any responses, or reports created in response to the complaints, consist of information protected by the *Public Interest Disclosure Act 2013* (PID Act). Section 65 of the PID Act provides that a person commits an offence if they have obtained information in the course of conducting a disclosure investigation and discloses that information to another person. It is my opinion that any complaint or concern raised in relation to patronage or nepotism in the ATO recruitment process, whether it identifies itself as a public interest disclosure or not, would in fact be a public interest disclosure and covered by the PID Act.

Moreover I find that any specific information relating to complaints that would be caught by your request would be exempt under the FOI Act because its disclosure would be an unreasonable disclosure of personal information, both about the complainant and the subject of the complaint, and would be contrary to the public interest. I also consider that we would have an obligation of confidence in relation to much of this information and to breach that confidence could found an action by a person for breach of confidence.

More information is set out below.

DECISION AND REASONS FOR DECISION

Material taken into account

I have taken the following material into account in making my decision:

- the FOI Act, in particular sections 45 and 47F
- the PID Act, in particular section 65
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act

Section 47F of the FOI Act - conditional exemption - personal privacy

The relevant part of s.47F provides as follows:

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*
 - (a) the extent to which the information is well known;*
 - (b) 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;*
 - (c) the availability of the information from publicly accessible sources;*
 - (d) any other matters that the agency or Minister considers relevant.*

Section 4 of the FOI Act defines 'personal information' as "information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion."

I am satisfied that the information in the documents relating to specific complaints is exempt under s 47F as it is information about an individual other than yourself, whose identity is apparent, or can reasonably be ascertained from the information. Namely, all of the information in documents relating to specific complaints is about, and would identify, the subject of the complaint. Much information will also identify the person making the complaint, and other persons involved (for instance witnesses). I am also satisfied that disclosing such information would involve the unreasonable disclosure of personal information because:

- such personal information, being contained on confidential files belonging to the ATO, is not generally available to other persons;

- the information is not otherwise available from publicly accessible sources; and
- the individuals to whom the personal information relates to are likely to have an expectation that information about them contained on ATO files relating to such complaints will not be made available to others.

As I am satisfied that documents are conditionally exempt pursuant to s 47F, s.11A(5) of the FOI Act requires me to consider whether providing you access to those documents would, on balance be contrary to the public interest.

I have decided that the following public interest factor favours access to the conditionally exempt documents being provided to you:

- access to the documents would give you access to information held by a Commonwealth agency. This information is a national resource and managed for public purposes. However given the sensitive and confidential nature of the information contained in the documents themselves I give this factor little weight.

I have found the following public interest factors do not favour access to the documents being provided to you:

- access to the conditionally exempt documents would give you access to personal information relating to a person other than yourself. Due to the sensitive nature of information relating to such complaints I give this factor considerable weight.
- access to the conditionally exempt documents would result in the breach of an expectation held by members of the community that public interest disclosures provided by them to the Australian Government will not be disclosed to anyone outside of those officers duly authorised to handle such disclosures. I give this factor considerable weight.
- disclosure of the conditionally exempt documents could reasonably be expected to discourage people from making these types of disclosures in future. I give this factor considerable weight.

Having considered the public interest factors set out above, I have decided that providing you with access to the documents that are conditionally exempt under s.47F would, on balance, be contrary to the public interest.

As such, I have decided the documents are exempt documents.

Section 45 – Documents containing material obtained in confidence

I have also decided that some of the information in documents relating to specific complaints are subject to an obligation of confidence.

A document is exempt under section 45 if:

... its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.

At paragraph 5.143 of the Australian Information Commissioner's Guidelines it states that:

To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual understanding of confidence*
- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

You have requested 'complaints, or concerns raised, in relation to patronage or nepotism in the ATO recruitment process', and any 'responses to such complaints'. The very nature of a public interest disclosure is that it has the character of a confidential disclosure, both communicated and received with an understanding of confidence, which is consistent with the protections afforded by the PID Act. There are limited people to whom an officer can disclose a PID, and you are not a person to whom disclosure is authorised. Additionally, I consider that disclosing such information to you will cause detriment to the complainants and the persons complained about, both with respect to their expectations that such information would be kept confidential, and the attention they might receive from third parties.

As such, I find that disclosure of the documents could found a breach of confidence and, therefore, the documents are exempt pursuant to section 45 of the FOI Act.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or review by the Information Commissioner 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.

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.

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 sent to:

post: GPO Box 5218, Sydney NSW 2001

email: enquiries@oaic.gov.au

More information about review by the Information Commissioner is available on the Office of the Australian Information Commissioner website, www.oaic.gov.au.

You may also apply to the Information Commissioner if you have not been informed of the outcome of an internal review within 30 days.

Complaints

Any complaint about the processing of your FOI request can be forwarded to the Information Commissioner. The complaint needs to be in writing and identify the agency against which the complaint is made. There is no particular form required to make a complaint, however using the online form is preferable.

online: https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1

email: enquiries@oaic.gov.au

post: GPO Box 5218, Sydney NSW 2001

in Level 3, 175 Pitt Street, Sydney NSW
person:

The Information Commissioner can be contacted on 1300 363 992 for the cost of a local call.

For more information

If you have any questions, please phone 13 28 69 between 8.00am and 5.00pm, Monday to Friday and ask for ATO General Counsel.

Yours sincerely

ATO General Counsel

Tel: 13 28 69

Email: foi@ato.gov.au