



6 February 2017

Beth Tender

By email: foi+request-2917-72374a61@righttoknow.org.au

Dear Ms Tender,

Freedom of Information Decision: Ref 16/17-22

I refer to your email received by the Fair Work Commission (**the Commission**) on 6 January 2017, in which you seek access to the following documents under the *Freedom of Information Act 1982 (FOI Act)*:

1. *A list of Commission Members, staff and/or officers who have an entitlement to use ComCar services;*
2. *A copy of any guidelines, rules, policies or procedures regarding ComCar use that the Commission provides to persons within FWC who may be entitled to use ComCar, and/or are provided by other entities to persons within FWC;*
3. *A document containing the total number of instances in which ComCar bookings/reservations made for or by FWC members, staff or officers were cancelled in 2016 (in other words, how many times were ComCars booked and then cancelled);*
4. *A document containing the total number of instances in which ComCar bookings/reservations made for FWC members, staff or officers in 2016 (in other words, the total number of times ComCars were used by FWC in 2016);*
5. *A document containing the total number of instances in which Commission Members, staff and/or officers were required to repay any costs associated with ComCar bookings/reservations made for or by FWC members, staff or officers in circumstances where the ComCar usage was deemed to not be within entitlement (in other words, how many times were persons within FWC asked to repay cost of ComCar usage because they had been used in circumstances where there was no entitlement to do so);*
6. *Records or documents pertaining to Comcar use (including bookings made, trips that took place, and any related information) by FWC Members, staff and/or officers for the days 22nd May 2016, 16th June 2016 and 19th July 2016 for journeys that took place in the States of New South Wales and Victoria?*

The 30 day statutory time period for processing your request commenced on the day after the day your request was received (subsection 15(5) of the FOI Act). The due date to issue a decision on your request is therefore 5 February 2017. As 5 February 2017 is a Sunday, the due date is extended to **6 February 2017**, being the next day that is not a Saturday, Sunday or a holiday.¹

¹ *Acts Interpretation Act 1901 (Cth) s 36(2)*

Decision

A search of the Commission's records was conducted and 15 documents comprising 67 pages were identified as falling within the scope of your request.

My decision is to grant access in part to the documents that fall within the scope of your request. The reasons for my decision are set out in **Attachment A**.

The Schedule of Documents which lists the documents that fall within the scope of your request is at **Attachment B**. Read together, Attachments A and B set out my decision on access and where appropriate, refer to relevant sections of the FOI Act.

The documents to which I am granting access are also attached.

Review rights

Internal review

If you disagree with my decision, you have the right to apply for an internal review by the Commission of my decision. Any request for internal review must be made to the Commission within 30 days of being notified of my decision. The internal review will be conducted by an officer other than the original decision-maker and the Commission must make a review decision within 30 days.

Applications for internal review should be sent to:

Bernadette O'Neill
General Manager
Fair Work Commission
GPO Box 1994
Melbourne VIC 3001

Email: generalmanager@fwc.gov.au

Review by the Office of the Australian Information Commissioner

Under s 54L of the FOI Act, you may apply to the Information Commissioner for review of my decision. An application for review by the Information Commissioner must be made in writing within 60 days of this notice, and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>
email: enquiries@oaic.gov.au

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

How to make a complaint about the handling of this FOI request

You may complain to the OAIC about action taken by the Commission in relation to your FOI request.

Your enquiries to the OAIC can be directed to:

Phone 1300 363 992 (local call charge)
Email enquiries@oaic.gov.au

Information about how to make a complaint to the OAIC can be found at:
<https://www.oaic.gov.au/freedom-of-information/foi-complaints>.

Contacting the FOI Section

If you wish to discuss this matter, I can be contacted by phone or email as below.

Yours sincerely

Haydar Tuncer
Freedom of Information Officer
Reporting, Planning and Legal
Fair Work Commission
Telephone: (03) 8656 4856
Email: foi@fwc.gov.au

Attachments

- Attachment A – Decision Record
- Attachment B – Schedule of Documents
- Documents released to you under the FOI Act.

Attachment A – Decision Record

Commission records within scope

Category 1

1. List of persons within the Commission who have access to a ComCar account, comprising 2 pages.

Category 2

2. Official Travel Policy (Associate Handbook), comprising 11 pages.
3. Domestic Travel Policy (draft), comprising 12 pages.
4. Member Code of Conduct, comprising 12 pages.
5. Remuneration Tribunal Determination 2016/07, comprising 10 pages.

Category 4

6. Document containing the total number of instances in which ComCar services were used by the Commission in the 2016 calendar year, comprising 1 page.

Category 6

7. Tax Invoice for Commissioner Tim Lee, comprising 2 pages.
8. Tax Invoice for Senior Deputy President Ian Watson, comprising 2 pages.
9. Tax Invoice for Commissioner Leigh Johns, comprising 2 pages.
10. Tax Invoice for Senior Deputy President Matthew O'Callaghan, comprising 3 pages.
11. Tax Invoice for Commissioner Leigh Johns, comprising 2 pages.
12. Tax Invoice for Senior Deputy President Jonathan Hamberger, comprising 2 pages.
13. Tax Invoice for Deputy President Geoff Bull, comprising 2 pages.
14. Tax Invoice for Senior Deputy President Lea Drake, comprising 2 pages.
15. Tax Invoice for Deputy President Val Gostencnik, comprising 2 pages.

Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access documents.

Information considered

In reaching my decision, I have considered the following:

- the *Freedom of Information Act 1982 (FOI Act)*;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- the terms of your request;
- relevant case law; and
- the Commission documents within scope (identified above).

Reasons for decision

Category 1 - A list of Commission Members, staff and/or officers who have an entitlement to use ComCar services

Section 17 of the FOI Act - Requests involving use of computers etc.

(1) Where:

...

(c) *the agency could produce a written document containing the information in discrete form by:*

(i) *the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information;*

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

I have consulted with the Commission's Finance & Resources area and the General Manager in relation to your request for a "list of Commission Members, staff and/or officers who have an entitlement to use ComCar services". I am informed that Commission Members and the General Manager have access to a ComCar account.

For the purposes of s 17, I consider that it is possible to produce a document within the scope of your request, by collating a list of "Commission Members, staff and/or officers" with access to a ComCar account (Document 1).

Category 2 - A copy of any guidelines, rules, policies or procedures regarding ComCar use that the Commission provides to persons within FWC who may be entitled to use ComCar, and/or are provided by other entities to persons within FWC

Four documents have been identified as relevant to your request (Documents 2 – 5).

Section 47E(d) of the FOI Act

Section 47E(d) of the FOI Act relevantly provides:

A document is conditionally exempt if its disclosure under this Act would, or could be reasonably be expected to, do any of the following:

(d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines relevantly explain:

There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.² The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial

² FOI Guidelines at [5.18].

*loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal.'*³

The FOI Act does not limit or restrain the use of released documents.⁴ The Information Commissioner has noted that developments in information technology make it considerably easier for information disclosed under the FOI Act to be disseminated widely.⁵

I have found that the Official Travel Policy and the Domestic Travel Policy (draft) contain contact information of internal booking agents that is not publicly available.

Release of this information poses a risk to the Commission in that the information could be used in an attempt to create fraudulent travel authorisations. This would constitute a substantial adverse effect on the proper and efficient conduct of the operations of the Commission.

These issues have the potential to cause disruption to the Commission's operations or undermine the Commission's ability to carry out its functions in a timely and efficient manner. Accordingly, I consider that there is "a real, significant or material possibility of a substantial adverse effect" on the proper and efficient conduct of the Commission's operations if access is granted to this material.

For these reasons, I have decided that the Official Travel Policy and Domestic Travel Policy (draft) are conditionally exempt in part under s 47E(d) of the FOI Act.

Public Interest Test

Having decided that the Official Travel Policy and the Domestic Travel Policy (draft) are conditionally exempt in part under s 47E(d), I am required to consider whether disclosure of the conditionally exempt material would be contrary to the public interest test outlined in s 11A(5) of the FOI Act. Subsection 11B(3) of the FOI Act lists factors that favour access when applying the public interest test. The Guidelines include a non-exhaustive list of further factors that favour disclosure.⁶ The only public interest factor favouring disclosure in this case is that disclosure would promote the objects of the FOI Act by facilitating and promoting public access to information. The Guidelines also include a non-exhaustive list of factors against disclosure.⁷ In this case, I am satisfied that disclosure could reasonably be expected to prejudice the security of the Commission. I consider that the public interest is weighted more heavily against disclosure and therefore giving access to the conditionally exempt material would, on balance, be contrary to the public interest.

Section 47F of the FOI Act

Section 47F of the FOI Act relevantly provides:

General rule

- (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).*

³ *ibid* at [5.20].

⁴ FOI Guidelines at [3.38]. See also *'FG' and National Archives of Australia* [2015] AICmr 26.

⁵ *'BA' and Merit Protection Commissioner* [2014] AICmr 9 at [81].

⁶ *ibid* at [6.19].

⁷ *ibid* at [6.22].

- (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.*

The term, “personal information”, is defined in s 4 of the FOI Act to have the same meaning as in the *Privacy Act 1988* (Cth) (Privacy Act). Section 6 of the Privacy Act defines personal information as:

information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) *Whether the information or opinion is true or not; and*
- (b) *Whether the information or opinion is recorded in a material form or not.*

I also consider that the final page of the Domestic Travel Policy (draft) includes the mobile phone number of the Director, Corporate Services Branch. Previous decisions of the Information Commissioner have found that it would generally be unreasonable to disclose mobile phone numbers of public servants.⁸ While the Director’s landline work phone number is publicly available, her mobile phone number is not. I therefore consider that disclosure of her mobile phone number would be unreasonable.

Public Interest Test

Having decided that the Domestic Travel Policy (draft) is conditionally exempt in part under s 47F, I am required to consider whether disclosure of the conditionally exempt material would be contrary to the public interest test outlined in s 11A(5) of the FOI Act. The only factor in favour of access is that disclosure would promote the objects of the FOI Act by facilitating and promoting public access to information. Factors against disclosure that are relevant are that the disclosure:

- could reasonably be expected to prejudice the protection of an individual’s right to privacy; and
- could reasonably be expected to harm the interests of an individual or group of individuals.

I consider that the public interest is weighted more heavily against disclosure and therefore giving access to the conditionally exempt material would, on balance, be contrary to the public interest.

For these reasons, I have decided to release Documents 2 and 3 in part, and Documents 4 and 5 in full.

⁸ See *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 at [27]

Category 3 - A document containing the total number of instances in which ComCar bookings/reservations made for or by FWC members, staff or officers were cancelled in 2016 (in other words, how many times were ComCars booked and then cancelled)

Section 24A of the FOI Act

Section 24A of the FOI Act relevantly provides:

Document lost or non-existent

- (1) *An agency or Minister may refuse a request for access to a document if:*
- (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found; or*
 - (ii) *does not exist.*

I have consulted with the Commission's Finance & Resources area in relation to this request, and am informed that the invoices delivered to the Commission by ComCar do not record whether a booking was cancelled. I have also conducted a search of the Commission's electronic records and was unable to find any documents falling within the scope of your request.

I am therefore satisfied that the requested document does not exist.

Category 4 - A document containing the total number of instances in which ComCar bookings/reservations made for FWC members, staff or officers in 2016 (in other words, the total number of times ComCars were used by FWC in 2016)

For the purposes of s 17 of the FOI Act, a document has been produced from information in each tax invoice issued by ComCar relating to a ComCar trip in 2016, recording the total number of instances in which ComCar was used by the Commission (by Commission Members) in 2016 (Document 6).

Category 5 - A document containing the total number of instances in which Commission Members, staff and/or officers were required to repay any costs associated with ComCar bookings/reservations made for or by FWC members, staff or officers in circumstances where the ComCar usage was deemed to not be within entitlement (in other words, how many times were persons within FWC asked to repay cost of ComCar usage because they had been used in circumstances where there was no entitlement to do so)

I have interpreted the scope of this request as extending to any instance where a person was asked to repay the cost of ComCar usage since the Commission commenced on 1 January 2013.⁹

I have consulted with the Commission's Finance & Resources area in relation to this request, and am informed that there are no records of instances "in which Commission Members, staff and/or officers were required to repay any costs associated with ComCar bookings/reservations ..." since 1 January 2013.

I have also conducted a search of the Commission's electronic records and was unable to find any documents falling within the scope of your request.

⁹ *Fair Work Act 2009 (Cth) s 575*

I am therefore satisfied that the requested document does not exist.

Category 6 - Records or documents pertaining to Comcar use (including bookings made, trips that took place, and any related information) by FWC Members, staff and/or officers for the days 22nd May 2016, 16th June 2016 and 19th July 2016 for journeys that took place in the States of New South Wales and Victoria

Your request for documents in category 6 is broadly expressed. I have interpreted the scope of this request as relating to the Commission's official ComCar records (the ComCar tax invoices) for trips undertaken on those dates in New South Wales or Victoria. The ComCar tax invoices record the booking and trip details, as follows: State of travel, date of travel, reservation number, passenger reference/client name, booking time, pick-up and drop off suburbs, car plate number, service description and cost of each trip. I have not conducted a broader search for any incidental information in relation to these trips as part of this request.

In relation to your request for documents pertaining to ComCar use on 22 May 2016, I have examined every 2016 ComCar invoice and have been unable to find any record of a trip taking place on 22 May 2016. I am therefore satisfied that the requested document does not exist, pursuant to s 24A of the FOI Act.

In relation to your request for documents pertaining to ComCar use on 16 June 2016 and 19 July 2016 for journeys that took place in New South Wales and Victoria, nine (9) documents have been identified within the scope of your request (Documents 7 – 15).

I have found that each tax invoice contains the ComCar account number assigned to the relevant Commission Member. Release of this information poses a risk to the Commission as it could be used by unauthorised persons to attempt to make ComCar bookings. This would constitute a substantial adverse effect on the proper and efficient conduct of the operations of the Commission. In reaching this view I have consulted with the Commission's Finance & Resources area.

I therefore consider documents 7-15 to be conditionally exempt in part under s 47E(d) of the FOI Act.

I have also found that the four tax invoices for Commissioner Lee, Senior Deputy President Hamberger, Deputy President Bull and Senior Deputy President Drake (Documents 7, 12, 13 and 14) contain information identifying their residential suburb; that is, "personal information" for the purposes of s 47F of the FOI Act.

In relation to unreasonable disclosure, the FOI Guidelines relevantly explain:

There needs to be careful consideration of the [s 47F] exemption where the personal information does not relate to the public servant's usual duties and responsibilities. For example, if a document included information about an individual's disposition or private characteristics, disclosure is likely to be unreasonable.¹⁰

Previous decisions of the Information Commissioner have found that it would be unreasonable to disclose home addresses of public servants.¹¹ I have also considered that the information is not well known or publicly available, could reasonably be expected to

¹⁰ Ibid at [6.157]

¹¹ See 'AF' and Department of Immigration and Citizenship [2013] AICmr 54 at [59]-[60] and 'JZ' and Department of the Prime Minister and Cabinet [2016] AICmr 78 at [35].

cause detriment to the individuals concerned, and the individuals concerned would be likely to oppose disclosure.

For these reasons, I consider that disclosure of this information would be unreasonable and that the four tax invoices are conditionally exempt in part under s 47F of the FOI Act.

Public Interest Test

Having decided that all tax invoices are conditionally exempt in part under s 47E(d), and four of the tax invoices conditionally exempt in part under s 47F, I am required to consider whether disclosure of the conditionally exempt material would be contrary to the public interest test outlined in s 11A(5) of the FOI Act. The only factor in favour of access is that disclosure would promote the objects of the FOI Act by facilitating and promoting public access to information. A factor against disclosure of the ComCar account numbers is that the disclosure could reasonably be expected to prejudice the security of the Commission. Factors against disclosure of the residential suburbs of Members are that disclosure:

- could reasonably be expected to harm the interests of an individual or group of individuals;
- could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- could reasonably be expected to prejudice the management function of the Commission.

I consider that in each case, the public interest is weighted more heavily against disclosure and therefore giving access to the conditionally exempt material would, on balance, be contrary to the public interest.

Section 22 of the FOI Act – Deletion of exempt matter or irrelevant material

Section 22(2) of the FOI Act requires an agency to give an applicant access to an edited copy of a document, with the exempt matter deleted, if it is reasonably practicable for the agency to prepare the edited copy, having regard to:

- the nature and extent of the modification (s 22(1)(c)(i)); and
- the resources available to modify the document (s 22(1)(c)(ii)).

I have considered that it is reasonably practicable to prepare an edited copy of the documents that I have found exempt.

I have also considered that the Official Travel Policy and the Domestic Travel Policy (draft) contain information that is not about ComCar use and is therefore irrelevant to category 2 of your request, and that the tax invoices contain information that does not relate to ComCar use on the specified dates and locations and is therefore irrelevant to category 6 of your request. Pursuant to s 22(2), I have considered that it is reasonably practicable to prepare an edited copy of the documents with the irrelevant material deleted.

Attachment B – Schedule of Documents

Document number	Description of document	Decision
1	List of persons within the Commission who have access to a ComCar account	Release in full
2	Official Travel Policy	Irrelevant information s 22 Exempt in part s 47E(d)
3	Domestic Travel Policy (draft)	Irrelevant information s 22 Exempt in part s 47E(d), s 47F
4	Member Code of Conduct	Release in full
5	Remuneration Tribunal Determination 2016/07	Release in full
6	Document containing the total number of instances in which ComCar services were used by Commission Members in 2016	Release in full
7	Tax Invoice for Commissioner Tim Lee, dated 30 June 2016	Irrelevant information s 22 Exempt in part s 47E(d), s 47F
8	Tax Invoice for Senior Deputy President Ian Watson, dated 30 June 2016	Irrelevant information s 22 Exempt in part s 47E(d)
9	Tax Invoice for Commissioner Leigh Johns, dated 30 June 2016	Irrelevant information s 22 Exempt in part s 47E(d)
10	Tax Invoice for Senior Deputy President Matthew O'Callaghan, dated 30 June 2016	Irrelevant information s 22 Exempt in part s 47E(d)

11	Tax Invoice for Commissioner Leigh Johns, dated 31 July 2016	Irrelevant information s 22 Exempt in part s 47E(d)
12	Tax Invoice for Senior Deputy President Jonathan Hamberger, dated 31 July 2016	Irrelevant information s 22 Exempt in part s 47E(d), s 47F
13	Tax Invoice for Deputy President Geoff Bull, dated 31 July 2016	Irrelevant information s 22 Exempt in part s 47E(d), s 47F
14	Tax Invoice for Senior Deputy President Lea Drake, dated 31 July 2016	Irrelevant information s 22 Exempt in part s 47E(d), s 47F
15	Tax Invoice for Deputy President Val Gostencnik, dated 31 July 2016	Irrelevant information s 22 Exempt in part s 47E(d)