



James Smith

By email: [foi+request+-3144-125ffb46@righttoknow.org.au](mailto:foi+request+-3144-125ffb46@righttoknow.org.au)

Our reference: C17/706

Dear Mr Smith,

### Freedom of Information Request

I write in response to your email request dated 23 February 2016, seeking access to documents held by the Australian Public Service Commission (the Commission) under the *Freedom of Information Act 1982* (FOI Act).

You have requested access to the following:

1. *The recommendation to the appropriate delegate (I assume agency head) who awarded the SES pay rises.*
2. *The approval of the delegate, and*
3. *A summary of all SES bonuses awarded.*

*which were created, or relate to, any and all periods from 1 July 2014.*

### Potential apprehension of bias and conflict of interest

The Commission notes that you have requested information regarding its Senior Executive Staff (SES) employees. As discussed in recent correspondence with you relating to a separate FOI request, within the Commission decisions on FOI requests are made by the Group Manager (SES Band 1) holding responsibility for the documents sought. I am the Group Manager of Corporate Group, under which Human Resources sits. I oversaw the preparation and implementation of the documents sought, and can verify the effectiveness of the searches undertaken. It remains the Commission's view that I am best placed to respond to your FOI request.

As I am a Group Manager, your request seeks access to documents that include my own personal information, as well as that of my peers and immediate supervisor. In the circumstances I do not consider it feasible to disqualify myself from considering your request because any other Group Manager in the APSC would be in the same position.

In my opinion, I have considered your request impartially and remain the delegate best placed to respond to you. The Commission also considers that passing delegation to a more junior member of staff would not eliminate the potential for bias or conflict of interest. You are, of course, free to seek external review of this decision.

## Consultation pursuant to section 27A of the FOI Act

Your request was received by the Commission on 23 February 2017. The statutory period for processing an FOI request is 30 days, meaning your decision originally fell due on 25 March 2017.

The Commission informed you on 23 March 2017 that pursuant to section 27A of the FOI Act an extension applied to the timeframe for the processing for your request to allow for consultation with persons concerned with the documents to which you sought access. Your decision then fell due on 24 April 2017. I confirm that such consultations have been finalised.

## Documents relevant to your request

Having undertaken searches for relevant documents across the Commission, I have identified 5 documents falling within the scope of parts 1 and 2 of your request. These documents are listed in the schedule of documents provided at **Attachment A**.

No documents relevant to part 3 of your request were identified.

## Decision

This letter sets out my decision on your request for access. I am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests.

As aforementioned, I have identified 5 documents relevant to your request. Having considered each document, I have decided that Documents 1-5 shall be released in part. The reasons for my decision are set out at **Attachment B** to this letter.

## Review rights

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

## Relevant provisions

I have enclosed copies of the provisions of the FOI Act relevant to your request at **Attachment D** to this letter.

## Publication

The Commission must publish information relating to material that has been released in response to each FOI access request subject to certain exceptions. This publication is known as a 'disclosure log'. The disclosure log requirement does not apply to personal information about any person if it would be unreasonable to publish the information or to information about the business, commercial, financial or professional affairs of any person if publication of that information would be unreasonable. The Commission is not required to consult you on any decision to publish information that is released to you and the decision to publish information is not subject to review internally by the Commission or externally by the Australian Information Commissioner. Any person can however, make a complaint to the Australian Information Commissioner about how an agency handles an FOI request.

## Contacts

If you require clarification of any of the matters discussed in this letter you should contact the Commission's FOI Officer by email at [foi@apsc.gov.au](mailto:foi@apsc.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Clare'.

Clare Page  
Authorised FOI decision maker  
24 April 2017

## SCHEDULE OF DOCUMENTS

Applicant Name: James Smith File No: 011,006			
Document	Date	Description	Comment / FOI Act exemptions applicable
1	August 2015	Letter from Deputy Commissioner to Commissioner re: section 24(1) contracts	22, 47E, 47F
2	August 2015	Letter from Group Manager, Corporate to Commissioner re: section 24(1) contract	47E, 47F
3	November 2015	Letter from Group Manager, Corporate to Commissioner re: section 24(1) contracts & IFAs	22, 47E, 47F
4	August 2016	Letter from Deputy Commissioner to Commissioner re: section 24(1) contracts	22, 47E, 47F
5	August 2016	Letter from Group Manager, Corporate to Commissioner re: section 24(1) contract	47E, 47F



## REASONS FOR DECISION

### Material taken into account

1. In making my decision, I had regard to the following:
  - the terms of your request dated 23 February 2017 as submitted to the Australian Public Service Commission (the Commission);
  - the content of the documents to which you sought access;
  - advice from APSC employees with responsibility for matters concerning the documents you have requested;
  - the purpose for which the documents to which you sought access were created, and where applicable, provided to the Commission;
  - submissions from third parties who were consulted under section 27A of the FOI Act about the release of personal information;
  - the relevant provisions of the FOI Act; and
  - guidelines published by the Office of the Australian Information Commissioner (OAIC) (the FOI Guidelines).

### Findings of fact and reasons for decision

2. Where the schedule of documents at **Attachment A** indicates an exemption claim has been applied to a document, or part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document, or part of document, are set out below.

### Deletion of exempt matter or irrelevant material

3. Sub paragraph 22(1)a(ii) of the FOI Act provides that where a decision is made to refuse access to a document on the ground that it contains exempt material, it is possible for an agency to make an edited copy of the document with the exempt, or irrelevant material modified by deletion.
4. You have been provided with such edited copies of documents, with the relevant provisions of the FOI Act under which the exempt material has been deleted identified in the schedule of documents provided at **Attachment A**.
5. It is noted that certain parts of the documents you have requested fall outside of the scope of your request. Section 22 of the FOI Act has been applied to provide you with an edited version of those documents, with the irrelevant material redacted.

### Section 47E – certain operations of agencies

6. Section 47E(c) of the FOI Act provides that a document is conditionally exempt from disclosure if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management of personnel by an agency. A copy of section 47E is included at **Attachment D**.
7. I have applied section 47E to Documents 1-5.
8. The documents you have requested relate solely and directly to the management of senior personnel at the Commission, specifically in the context of remuneration.
9. Senior Executive Service (SES) employees in the Commission are not covered by the Australian Public Service Commission Enterprise Agreement 2015-2018. The terms and conditions of

employment of SES employees within the Commission are a matter of individual negotiation between the Agency Head (the Australian Public Service Commissioner) and each SES employee.

10. In the context of any form of negotiation, the disclosure of confidential information of one party can undermine that party's bargaining position, resulting in a disproportionate outcome. I consider that the effects of disclosure would be both substantial and adverse, in that disclosure would improve outcomes in negotiation for one side only and could ultimately manifest as greater expenditure by the Commission on SES remuneration.
11. In addition, I have considered that APS agency heads, including the Australian Public Service Commissioner are accountable for their expenditure on SES remuneration by way of the preparation of annual financial statements, published in the agency's Annual Report each year and that such reporting does not make public the individual remuneration of each SES employee, rather it provides information in aggregate.
12. Further to the reporting requirements mentioned above and discussed further below, I have determined that the census of Australian Public Service employee remuneration, as conducted annually by the Commission, also provides data on the remuneration of all APS staff, up to SES Band 3, by range and median average. Such information is available publically at the following link: <http://www.apsc.gov.au/publications-and-media/current-publications/remuneration-surveys>
13. I have determined that the disclosure of information regarding specific remuneration paid to the Commission's SES employees could reasonably be expected to have a substantial adverse effect on the Commission's negotiating position with current and future SES employees.
14. Taking the above into account, I am satisfied that the public disclosure of individual SES remuneration data would fundamentally alter the Commission's relative bargaining position, and therefore, pursuant to section 47E(c) I find that parts of Documents 1-5 are conditionally exempt.
15. However, I have determined that where the document, or part of a document relates to remuneration generally, or to the procedures undertaken by the Commission to determine remuneration, that such documents are not reasonably likely to have a substantial adverse effect on the proper and efficient conduct of the agency, nor are they likely to have a substantial adverse effect on the management of personnel by the agency, and therefore such parts of the documents are suitable for release.

#### 47F – Public interest conditional exemptions - personal privacy

16. Section 47F of the FOI Act provides that a document is conditionally exempt from disclosure if such disclosure would involve the unreasonable release of personal information about any person. A copy of section 47F is reproduced at **Attachment D**.
17. I have applied section 47F to parts of Documents 1-5.
18. 'Personal information' is defined in section 4(1) of the FOI Act as follows:

***personal information** means 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.*



19. Documents 1-5 comprise of correspondence between members of the Executive Committee of the Commission relating to determinations of remuneration increases awardable to SES employees. Given this, I have determined that Documents 1-5 contain the personal information of third parties.

20. Section 47F of the FOI Act, as reproduced at **Attachment D**, states that a document is conditionally exempt if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

21. In determining whether the disclosure of a document would involve an unreasonable disclosure of personal information, subsection 47F(2) of the FOI Act provides that an agency must have regard to the following matters (the unreasonableness test):

- 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 information that the agency considers is relevant.

22. Paragraph 6.138 of the FOI Guidelines states the following about the test of unreasonableness in section 47F:

*The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.*

23. I accept that the full names of SES employees are available through public resources, including but not limited to organisation structure charts published by the Commission on its website. Further, I consider that it is well-known that documents would exist relating to the consideration and approval for SES remuneration increases. As such, I consider that such information is suitable for inclusion in response to your FOI request.

24. However, as aforementioned in my consideration of the application of section 47E of the FOI Act, specific remuneration information of APS employees generally, or SES employees specifically, is not well-known, is not available from publically accessible sources and, more generally, is ordinarily considered to be private to an individual, disclosure of which could be construed as an unreasonable invasion of an individual's privacy.

25. I have determined that while an approximate remuneration range may be deduced from documents released publically, such as via the annual APS Remuneration report (accessible at the following link: <http://www.apsc.gov.au/publications-and-media/current-publications/remuneration-surveys>) it is inappropriate to release specific remuneration data in response to your FOI request.

26. With respect to the factors listed at subsection 47F(2) of the FOI Act, I am satisfied that the specific personal information contained in the document you have requested:

- is not well-known;

- is not available from publicly accessible sources; and
- is personal information relating to employment.

27. I have additionally had regard to further relevant factors as set out at paragraphs 6.142 and 6.143 of the FOI Guidelines and note the following:

- your requested document only contains the personal information of other individuals;
- in my opinion, particularly given the publically available data which provides a remuneration range for SES staff within the Australian Public Service, little to no public purpose would be achieved through the release of specific remuneration data as contained within the documents sought;
- you have sought documents from 1 July 2014 to the date of your request. Therefore, I consider that the nature, age and current relevance of the documents is a factor against disclosure;
- disclosure would cause a detriment to the relevant individuals, in that private information pertaining to each individual's employment would be publically revealed;
- disclosure of the requested documents would, to a certain degree, advance the public interest in government transparency & integrity;
- the relevant information was created or collected in the course of the Commission's management of personnel and records;
- no other law requires public disclosure of the documents to which you have sought access; and
- disclosure to you would result in the immediate publication of the documents on the Right to Know website, noting that the FOI Act does not provide for control or restriction on subsequent use or dissemination of information released under the FOI Act.

28. In light of the factors mentioned above, I have determined that parts of Documents 1-5 are conditionally exempt under section 47F of the FOI Act.

#### Section 11A – public interest considerations

29. As set out above, I have determined that parts of the documents you have requested are conditionally exempt under sections 47E and 47F of the FOI Act.

30. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless (in the circumstances) access to the document would, on balance, be contrary to the public interest (the public interest test).

31. When weighing up the public interest factors for and against disclosure under section 11A(5) of the FOI Act, I have taken the following factors into consideration in favor of disclosure, reflecting on the extent to which disclosure would:

- promote the objects of the FOI Act (including all the matters set out in sections 3 and 3A) including:
  - inform the community of the operations of the Commission;
  - enhance the scrutiny of decision-making as it relates to remuneration of SES staff; and
  - increase recognition that, where appropriate, information held by the Commission is a national resource.
- promote agency transparency;
- inform debate on a matter of public importance, such as:
  - the extent to which SES remuneration increase are consistent with remuneration of APS employees generally;
  - the extent to which SES remuneration within the Commission is consistent with the *Bargaining Policy 2015*;



- promote effective oversight of public expenditure, by the provision of specific information regarding remuneration of senior staff within the Commission.
32. For clarity, I confirm that I have not considered any factors deemed to be irrelevant to determining whether access would be in the public interest, as set down at section 11A(4) of the FOI Act, reproduced at **Attachment D**.
33. I have also considered the following factors against disclosure, reflecting on the extent to which disclosure would:
- Release into the public forum information which is not otherwise well known;
  - protect the effectiveness of the Commissioner's functions;
  - the extent to which disclosure could reasonably be expected to prejudice an individual's right to privacy;
  - the extent to which disclosure would have a substantial adverse effect on the management of personnel by the Commission, including for the reasons set out above in my consideration of section 47E;
  - the interest in preserving the efficient and proper functioning of Government;
  - the extent to which disclosure would involve an unreasonable disclosure of personal information, including for the reasons set out above in my consideration of section 47F;
  - protect the legitimate expectation of confidence held by persons engaging in employment with the Commission or the Australian Public Service at large.; and
  - the publically available materials regarding a range of accountability measures that exist, as set out in my considerations above, to ensure that agency heads across the Commonwealth public sector act appropriately in the determination of remuneration for SES employees.
34. In making my decision, I have further taken into consideration part 6 of the FOI Guidelines with respect to both the operations of agencies and personal privacy and the application of the public interest factors to both.
35. In weighing up the considerations mentioned above I have concluded that, on balance, disclosure of the document would be contrary to the public interest, as the potential benefit to the public resulting from disclosure is outweighed by the benefit to the public in preserving the integrity individual's right to privacy.

## Conclusion

36. For the reasons set out above, I am satisfied that Documents 1-5 contain information that is conditionally exempt under section 47E of the FOI Act. In addition, I have determined that Documents 1-5 contain information that is conditionally exempt under section 47F(1) of the FOI Act.
37. I have further concluded that, on balance, it would be contrary to the public interest to release this information. An edited version of Documents 1-5 are therefore provided to you, pursuant to section 22 of the FOI Act.
38. For clarity, it is therefore my decision that Documents 1-5 shall be released in part.

## REVIEW RIGHTS

If you are dissatisfied with this decision, you have certain rights of review available to you.

### Internal Review

Section 54 of the *Freedom of Information Act 1982* (FOI Act) gives you a right to apply for an internal review of this decision. The review will be conducted by a different person to the person who made the original decision.

If you wish to seek an internal review of this decision you must apply for the review, in writing, by whichever date is the later between:

- 30 days of you receiving this notice; or
- 15 days of you receiving the documents to which you have been granted access.

No particular form is required for an application for internal review, but to assist the decision-maker you should clearly outline the grounds upon which you consider the decision should be reviewed.

Applications for internal review can be lodged in one of the following ways:

**Email:** [foi@apsc.gov.au](mailto:foi@apsc.gov.au)

**Post:** The FOI Coordinator  
Australian Public Service Commission  
16 Furzer Street  
WODEN ACT 2606

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commission for review of the internal review decision if required.

### Review by the Office of the Australian Information Commissioner

Section 54L of the FOI Act gives you a right to apply directly to the Australian Information Commissioner (the Information Commissioner) for review of certain decisions made under the FOI Act. If you wish to have the decision reviewed by the Information Commissioner you must apply for the review within 60 days of receiving this notice (decision).

The Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Australian Information Commissioner's website [www.oaic.gov.au](http://www.oaic.gov.au).

To assist the Information Commissioner, your application should include a copy of this decision and your contact details. You should also clearly set out why you are objecting to the decision. You can also complain to the Information Commissioner about how an agency handled an FOI request, or about other actions the agency took under the FOI Act.

You can contact the Information Commissioner to request a review of a decision or lodge a complaint in one of the following ways:

**Email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

Post: GPO Box 2999  
CANBERRA ACT 2601

**\*Please note:** On 13 May 2014, the Australian Government announced a decision to disband the Office of the Australian Information Commissioner (OAIC). However, the OAIC remains operational until further notice. Information on the OAIC public website advises that Information Commissioner Reviews will continue to be handled by the OAIC and FOI complaints will be referred to the Commonwealth Ombudsman. Please contact the OAIC on the details above if you require further information.

### The Commonwealth Ombudsman

You can complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

The Ombudsman will consult with the Information Commissioner before investigating a complaint about the handling of an FOI request.

A complaint to the Commonwealth Ombudsman may be made orally or in writing. No particular form is required to make a complaint to the Ombudsman, but the request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the FOI request should be investigated. The Ombudsman may be contacted in one of the following ways:

Email: [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

Post: 1300 362 072 (local call charge)

FREEDOM OF INFORMATION ACT 1982  
RELEVANT PROVISIONS

11A Access to documents on request

- ...
- (5) 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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

**11B Public interest exemptions—factors**

*Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

- (2) This section does not limit subsection 11A(5).

*Factors favouring access*

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

*Irrelevant factors*

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
  - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;



- (d) access to the document could result in confusion or unnecessary debate.

#### *Guidelines*

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

## 22 Access to edited copies with exempt or irrelevant matter deleted

#### *Scope*

- (1) This section applies if:
  - (a) an agency or Minister decides:
    - (i) to refuse to give access to an exempt document; or
    - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
  - (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:
    - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
    - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
  - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
    - (i) the nature and extent of the modification; and
    - (ii) the resources available to modify the document; and
  - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

#### *Access to edited copy*

- (2) The agency or Minister must:
  - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
  - (b) give the applicant access to the edited copy.

#### *Notice to applicant*

- (3) The agency or Minister must give the applicant notice in writing:
  - (a) that the edited copy has been prepared; and
  - (b) of the grounds for the deletions; and
  - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

#### 47E Public interest conditional exemptions—certain operations of agencies

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

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

**Note:** Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

#### 47F Public interest conditional exemptions—personal privacy

##### *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).
- (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.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

##### *Access given to qualified person instead*

- (4) Subsection (5) applies if:
  - (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
  - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that

information, is not to be given to the applicant but is to be given instead to a qualified person who:

- (a) carries on the same occupation, of a kind mentioned in the definition of **qualified person** in subsection (7), as the first-mentioned qualified person; and
- (b) is to be nominated by the applicant.

(6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.

(7) In this section:

**qualified person** means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

**Note:** Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).