



James Smith

By email: foi+request-3145-4d202a51@righttoknow.org.au

Our reference: C17/708

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:

This is an FOI request for:

1. Any emails received from APS employees not published at the following URL:
<https://www.apsc.gov.au/working-in-the-aps/making-public-comment/making-public-comment-what-youve-said>
2. The latest version of any reports or summaries of the feedback received

Further submissions

By way of email dated 31 March 2017, you clarified the scope of your request, as follows:

I am happy to exclude the names, email addresses, phone numbers, and job titles of all individuals from the scope of this request.

In addition, any information which might reasonably identify a particular individual can also be excluded. For example, if an employee were to write 'I am the Director of Team A in Newcastle'.

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 **9** documents falling within the scope of your request.

Documents 1-3 respond to part 1 of your request, while Documents 4-9 respond to part 2.

These documents are listed in the schedule of documents provided at **Attachment A**.

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 **9** documents relevant to your request. Having considered each document, I have decided that the following shall apply:

Document 4 is released in full;
Documents 1-3, 7 and 8 are released in part; and
Documents 5, 6 and 9 are withheld in full.

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.

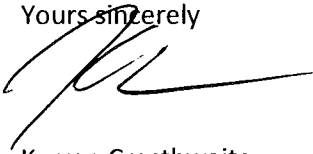
Publication

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.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Kerren Crosthwaite', written over the typed name.

Kerren Crosthwaite
Authorised FOI decision maker
24 April 2017

SCHEDULE OF DOCUMENTS

Applicant Name: James Smith. File no: 12/709			
Document	Date	Description	Comment / FOI Act exemptions applicable
1	16 November 2016	Submission received by APSC 'making public comment' page	S22
2	21 November 2016	Submission received by APSC 'making public comment' page	S22
3	22 November 2016	Submission received by APSC 'making public comment' page	S22
4	Undated	Comments from individuals	-
5	-	Deliberative process	S47C
6	-	Deliberative process	S47C
7	Undated	Analysis of comments from individuals	S47C
8	January 2017	Review of social media guidance 2016	S47C
9	-	Deliberative process	S47C

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);
 - submissions made by you in your subsequent email dated 31 March 2017;
 - the content of the documents to which you sought access;
 - the purpose for which the documents to which you sought access were created and provided to the Commission;
 - submissions from third parties who were consulted under section 27A of the FOI Act about the release of personal information;
 - advice from APSC employees with responsibility for matters concerning the documents you have requested;
 - 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 determining to apply the exemption provision are set out below.

Section 22 – Access to edited copies with exempt or irrelevant matter deleted

3. Section 22 of the FOI Act provides that it is possible for an agency to prepare an edited copy of a document, where to otherwise give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access and where it is reasonably practicable for the agency to prepare such an edited document.
4. Pursuant to section 22(3), you are hereby notified that such edits have been made to Documents 1-3 with your consent, in light of your email submissions dated 31 March 2017.

Section 47C – Deliberative processes

5. Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose certain matter of a deliberative nature. A copy of section 47C is provided at **Attachment D**.
6. I have applied section 47C to Documents 5-9.
7. 'Deliberative matter' is described as matter in the nature of, or relating to:
 - opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a consultation or deliberation that has taken place;

in the course of, or for the purposes of, a deliberative process involved in the functions of the agency.

8. Section 47C does not, however, extend to operational information (as defined by section 8A of the FOI Act) or purely factual information. I have therefore determined that portions of Documents 7 and 8 are suitable for release, in that they contain information that is otherwise publically available, or of a factual nature.
9. In determining whether the disclosure of a document would disclosure matter of a deliberative nature, I have considered the substance of each document and determined whether the information contained involves the exercise of judgment in developing and making a selection from different options. It is relevant to consider previous determinations issued by the Office of the Australian Information Commissioner (the OAIC) and the Administrative Appeals Tribunal (AAT) when considering whether information is deliberative in nature. For example, the AAT has stated:

*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.*¹
10. I note that, unique to the application of section 47C it is not a requirement to identify specific harm that will result from disclosure. However, for the purposes of determining the public interest factors for and against disclosure it is useful to acknowledge any such identifiable harm, as discussed further below.
11. In considering the substance of Documents 5-9 I have determined that harm would likely result from disclosure, in that there would be a breach of the reasonable expectation of confidence held by persons and agencies engaging in the consultation process for the Social Media: where is the line? Campaign and that the release of information not otherwise publically available would likely undermine the Commissions' deliberations of the feedback received.
12. One of the Commissioner's functions, as set down at paragraph 41 of the *Public Service Act 1999* (Cth) (PS Act) is to uphold the high standards of integrity and conduct in the Australian Public Service (APS), and particularly, pursuant to subsection 41(2)(e) of the PS Act, to promote the APS Values, the APS Employment Principles and the Code of Conduct.
13. The recent campaign regarding which you have requested documents, titled 'Social Media: where is the line?' provides employees of the APS, Public Service Agencies and others the opportunity to provide submissions regarding the recently published discussion paper relating to the use of social media by APS employees. In their ordinary duties, the Commissioner provides guidance for agencies and employees on making public comments, including via social media.
14. The OAIC's guidelines note that the deliberative process must relate to the functions of an agency (paragraph 6.60). Noting that the Commissioner's functions are expressly stated by the PS Act to include upholding the high standards of integrity and conduct in the Australian Public Service, including promotion of the APS Values, Employment Principles and the APS Code of Conduct, I am satisfied that the documents you have requested were created as part of a deliberative process that relates to the functions of the Commissioner. I note, further, it is accepted that deliberative matter is shorthand for 'opinion, advice and recommendation' and 'consultation and deliberation'² and that the deliberative process to which the documents refer may relate to the administration or

¹ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67.

² Paragraph 6.63 of the Guidelines published by the Office of the Australian Information Commissioner

implementation of a policy, including the development of policy or non-policy processes where such policy or processes relate to the functions of the Commission.³

15. I have considered the substance and content of the documents you have requested and I am satisfied that Documents 5, 6 and 9 contain entirely deliberative matter, and that Documents 7 and 8 contain a portion of deliberative matter, all of which relates to, or is in the nature of, the deliberative processes of the Commission, created for the purpose of the Commissioner's intended deliberations relating directly to the functions of the agency. Therefore, pursuant to section 47C of the FOI Act such documents are conditionally exempt.
16. However, as aforementioned, where I have determined that part of a document relates to operational or factual information, such parts of a document have been deemed suitable for release.

Section 11A – public interest considerations

17. 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).
18. As set out above, I have determined that parts of the documents you have requested are conditionally exempt under sections 47C of the FOI Act.
19. 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; 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 release may promote public participation in debate leading to better informed decision-making;
 - promote effective oversight of public expenditure, by the provision of information relating to the functions of the Commission.
20. 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**.
21. 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;

³ Paragraph 6.60 of the Guidelines published by the Office of the Australian Information Commissioner

- the extent to which disclosure could reasonably be expected to affect the effective and efficient functioning of government;
 - the extent to which disclosure could breach the reasonable expectation of confidence held by persons and agencies engaging in the consultation process regarding which you have requested documents;
 - the extent to which disclosure during the deliberative process may undermine or otherwise effect the Commission performing its functions, including for the reasons set out above in my consideration of the application of section 47C;
 - the extent to which disclosure could reasonably be expected to prejudice an individual's right to privacy; and
- the extent to which disclosure would have a substantial adverse effect on the attainment of the objects of the consultation process conducted by the Commission.
22. In making my decision, I have further taken into consideration part 6 of the FOI Guidelines with respect to documents subject to deliberative processes and the application of the public interest factors.
23. In weighing up the considerations mentioned above I have concluded that, on balance, disclosure of Documents 5, 6 and 9 in full, and Documents 7 and 8 in part, 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 efficient functioning of the Commission.

Conclusion

24. For the reasons set out above, I am satisfied that Documents 5-9 contain information that is conditionally exempt under section 47C of the FOI Act. Further, I have concluded that, on balance, it would be contrary to the public interest to release Documents 5, 6 and 9 in full, and parts of Documents 7 and 8. You have been provided with edited versions of Documents 7 and 8 pursuant to section 22 of the FOI Act, whereby exempt information may be removed and an edited document provided.
25. For clarity, it is therefore my decision that Documents 1-3, 7 and 8 shall be released in part, that Document 4 shall be released in full, and that Documents 5, 6 and 9 are withheld in full, with irrelevant materials deleted where appropriate pursuant to section 22 of the FOI Act.

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

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.

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

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

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.

47C Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
 - (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

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