



Sarah McAndrew

By email: foi+request-3650-d1476289@righttoknow.org.au

Our reference: C17/1273

Dear Applicant,

Freedom of Information Request

I write in response to your email request dated 21 June 2017, 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:

please provide me with the reports provided by the APSC to the Australian Electoral Commission with the results, both departmentally and by branch of the 2016 APS Staff Census Survey.

Third Party Consultation Process

On 20 July 2017 the Commission wrote to you to advise that due to the nature of the documents falling within the scope of your request, section 27 of the FOI Act applied, and the Commission would undertake a consultation with the organisation concerned before making a decision on the release of those documents.

The timeframe for processing your request was extended by 30 days in order to allow the Commission time to consult with the abovementioned third parties. I can confirm that such consultation has been finalised.

My 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.

Having undertaken searches for relevant documents across the Commission, I have identified **30** documents as falling within the scope of your request. These documents comprise of reports provided by the Commission to the Australian Electoral Commission (AEC) under a fee-for-service agreement after participation by the AEC in the APS employee census (the Census).

Due to the nature of the documents sought, I have decided to refuse access in full to all documents. The reasons for my decision are set out at **Attachment A** to this letter.



Review Rights

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

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

General Counsel
Authorised FOI decision maker
21 August 2017

REASONS FOR DECISION

Your request

1. You requested access to the following:

please provide me with the reports provided by the APSC to the Australian Electoral Commission with the results, both departmentally and by branch of the 2016 APS Staff Census Survey.

Material taken into account

2. In making my decision, took into account a number of factors, including:
 - the terms of your request dated 21 June 2017 as submitted to the Commission;
 - the content of the documents to which you sought access;
 - the purpose for which the documents to which you sought access were created, and where applicable, provided to the Commission;
 - the ordinary method the documents to which you have sought access are distributed;
 - the communications made to third parties at the time of collection of the information contained within the relevant documents;
 - whether release of the material is in the public interest;
 - the relevant provisions of the *Freedom of Information Act 1982 (Cth)* (FOI Act); and
 - guidelines published by the Office of the Australian Information Commissioner (OAIC) (the FOI Guidelines).

Findings of fact and reasons for decision

3. I have determined that section 47 of the FOI Act apply in full to each document falling within the scope of your request. My findings of fact and reasons for deciding that the exemption provision applies to each document are set out below.

Section 47 – Commercially valuable information

4. Section 47 of the FOI Act provides that a document is exempt if its disclosure would disclose information having a commercial value that would be, or could reasonably be expected to be diminished if the information were disclosed.
5. The documents to which you have sought access are reports provided by the Commission to the AEC under a fee for service arrangement, through participation in the Census. Where an agency elects to participate in the Census they are referred to as a responding agency.
6. The documents to which you have sought access are not publically available, nor are they available for purchase by an agency other than the responding agency. I have therefore determined that the documents requested wholly contain information that has a commercial value to the Commission, the responding agency and more generally to the Commonwealth.
7. Due to highly limited audience to whom the requested documents are available, and particularly due to the provision of the requested documents being linked to the service offering accepted by the responding agency, the commercial value of the reports, should access be available by means other than the service offering, would be greatly diminished, if not destroyed.

8. If bypassing the service arrangement with the Commission were to be accepted, and release be available by means such as requests under Freedom of Information legislation, to persons or organisations other than the responding agency, and more generally to the world at large (noting that release under the FOI Act is to 'the world at large', in line with the intentions of the FOI Act), the value in the service arrangement would be diminished or destroyed, as it is foreseeable that agencies would no longer be willing to provide funding toward the facilitation of the APS employee census if the offerings provided under the arrangements no longer held value. Such effects would have a substantial and adverse impact on the functions of the Commission, contrary to the public interest.
9. The functions of the Australian Public Service Commissioner (the Commissioner) are set out in the Public Service Act 1999 (Cth), and include at section 41(2)(c) the function of developing, reviewing and evaluating APS workforce management policies and practices and managing appropriate databases. Further, section 44 notes the Commissioner's function of annually reporting to Parliament on the state of the Australian Public Service (APS). Such functions are substantially reliant on the evaluation of data provided by Commonwealth agencies and APS employees participating in the Census.
10. As noted in the Commission's privacy policy, research consultants are engaged by the Commission as the service provider for the annual Census. The service provider supplies the technical solutions and support required to administer and report on the Census. The provider does this on a fee-for-service arrangement. Were the commercial value of the service offerings to the responding agency to be diminished or destroyed, by way of an alternate means to access the reporting analysis, it is foreseeable that the functions of the Commission would be detrimentally and substantially affected as alternate means of financing the facilitation of the Census would need to be arranged.

Additional considerations -conditional exemptions

11. For completeness, while the Commission at this time is not electing to rely on the following arguments, I note that the conditional exemptions provided at sections 47D and 47E of the FOI Act both apply to the documents sought.
12. Section 47D of the FOI Act provides that documents are conditionally exempt where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth.
13. Such interests include revenue-generating activities of an agency, with paragraph 6.90 of the FOI Guidelines expressly including intellectual property within the financial and property interest exemption.
14. As mentioned above, there is a real risk to the functions of the Commission if confidential documents, holding a commercial value to both the Commission and the responding agency were to be made available via alternate means such as the FOI Act.
15. Section 47E of the FOI Act provides that documents are conditionally exempt where disclosure would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
16. As discussed at paragraph 8, should the commercial value in the service arrangements supporting the Census be undermined or diminished, it is foreseeable that agencies may not participate, having a substantial and adverse consequence on the Commission's ability to fulfil its statutory functions.

17. On consideration, I am satisfied that were it necessary to apply the conditional exemptions described above, that both section 47D and 47E would apply to the Documents, and that on balance, the public interest factors in favor of disclosure are outweighed by the factors against disclosure.

Conclusion

18. For the reasons set out above, I am satisfied that each of the Documents contain commercially valuable information subject to exemption under section 47 of the FOI Act. Accordingly, I have determined that the documents are exempt in full.

19. Further, I am satisfied that each of the Documents contain information that is conditionally exempt under sections 47D and 47E of the FOI Act. I have further concluded that, on balance, it would be contrary to the public interest to release this information. Accordingly, supplementary to the application of the section 47 exemption described above, I have determined that the conditional exemptions described at section 47D and 47E of the FOI Act apply to the Documents.

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)