



Our ref: 17/713

26 September 2017

Mr James Smith

By e-mail: foi+request-3998-f5a693c6@righttoknow.org.au

Dear Mr Smith,

Your Freedom of Information Request – Decision

I refer to your email of 8 August 2017, which seeks access under the *Freedom of Information Act 1982* (the FOI Act) to the following documents, should they exist:

[D]ocuments related to the ten most recent instances where an employee has sought information, advice, guidance, or opinion on their social media use in a private capacity.

I limit the scope of documents to:

- *the original request from the employee*
- *the agency/department's response*
- *any follow-up questions and response*
- *only those sent to a relevant HR / conduct / social media (or similar) team (rather than managers across all areas of the organisation)*
- *where the original request was created in the last 2 years.*

This letter sets out my decision on your request for access. I am an authorised decision-maker under section 23 of the FOI Act.

Charges

No charges will be imposed for this decision.

Decision

Having searched ACLEI records and made further enquiries of relevant ACLEI staff, I located one document which relates to your request. It is an email from a staff member seeking guidance on private social media use. It is addressed to the Assistant Director Professional Standards/Agency Security Advisor, and is attached in redacted form at **Attachment A**.

GPO Box 605, CANBERRA ACT 2601
ABN 78796734093

P (02) 6141 2300
F (02) 6141 2351

E contact@aclei.gov.au
W aclei.gov.au

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Section 47F —Public interest conditional exemption —personal privacy

Under section 47F of the FOI Act, information may be conditionally exempt if that disclosure may result in the unreasonable disclosure of personal information about any person. Section 6 of the *Privacy Act 1988* defines 'personal information' as being "information or an opinion [...] whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account the following matters:

- i) the extent to which the information is well known
- ii) 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
- iii) the availability of the information from publicly accessible sources
- iv) any other matter I consider relevant.

The document in question clearly identifies staff members of ACLEI and therefore contains third parties' personal information. The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. ACLEI is of the view that information identifying the names and roles of staff should be protected and not published, as release of this information would unreasonably impinge on an employee's right to privacy. Owing to the law enforcement functions of ACLEI, the information is not known or publicly available. The release of the ACLEI staff members' names and identifying information has the potential to cause detriment to a staff member.

The public interest test

Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest under section 11A(5) of the FOI Act. The Office of the Australian Information Commissioner Guidelines (OAIC Guidelines) provide guidance on the applicable public interest test at 6.4 - 6.6, and I considered that guidance.

There is a single public interest test to apply to each of the conditional exemptions under the FOI Act. This public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account.

The public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest;
- not something of interest to the public, but in the interest of the public;
- not a static concept, where it lies in a particular matter will often depend on a balancing of interest;
- necessarily broad and non-specific; and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.

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It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.

Section 11B(3) of the FOI Act lists some public interest factors favouring access. I had regard to those factors and consider the following factor in favour of disclosure to be of particular relevance:

- *promoting the objects of the Act - particularly through enhancing the scrutiny of the Government's activities.*

The FOI Act does not list any factors to be taken into account weighing against disclosure, however in section 11B(4), it does list factors which may *not* be taken into account. None of the factors in subsection (4) have had a bearing on my decision. The OAIC Guidelines provide a non-exhaustive list of factors against disclosure at 6.29, and I considered those factors.

I considered the following factors against disclosure as relevant:

- *could reasonably be expected to prejudice the protection of an individual's right to privacy.*

In my view, the factor against disclosure outweighs the factor in favour of disclosure. The disclosure of the identifying information in the documents will not contribute to the enhancement of the scrutiny of government activities. By contrast the potential to interfere with the personal privacy of the ACLEI staff member named in the document is in my view significant. Accordingly, I have concluded that disclosure of those names would be contrary to the public interest

Section 11A(5) of the FOI Act provides that access to conditionally exempt information must be given unless it would be contrary to the public interest to do so. For the above reasons, taking into account section 11B, I am satisfied that this information is exempt and have redacted it accordingly in **Attachment A**.

Review rights

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

Relevant provisions

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

Contacts

If you require clarification of any of the matters discussed in this letter you should contact me at foi@aclei.gov.au.

Yours sincerely



Regina Weiss
FOI Officer

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Attachment A

[REDACTED]

From: [REDACTED]
Sent: Monday, 30 November 2015 7:01 am
To: [REDACTED]
Subject: RE: Social media [DLM=For-Official-Use-Only]

For Official Use Only

[REDACTED]

My apology for not responding earlier – I was not able to access the system from home on the weekend.

Our social media policy (TRIM 15#440DOC) allows “access to social media for approved purposes ...”, para 4.2.

A caveat in para 4.3 notes that ACLEI employees must not “disclose their employment at ACLEI”. However this would not apply in your case since [REDACTED] where you work.

Paragraph 4.4 requires ACLEI employees to “declare conflicts of association, **including online associations**”, my emphasis. You have declared your intention to participate in a [REDACTED]

[REDACTED] provides learning opportunities for [REDACTED], in association with Universities and is supported by Governments. [REDACTED]

Provided that you mitigate any potential risks by not:

- posting photograph of the workplace or colleagues
- posting comments that could compromise your ability to fulfil your duties in an apolitical manner
- posting any comments that could be perceived to be made on behalf of the Australian Government or commit ACLEI or the Australian Government to any action or initiative

I see no concern with you participating in a [REDACTED]. It will be a useful continuity to your formal work and assist in maintaining the [REDACTED]

Kind regards

[REDACTED] | Assistant Director Professional Standards/Agency Security Advisor
Australian Commission for Law Enforcement Integrity
Phone: [REDACTED] | **Mobile:** [REDACTED] | **Fax:** 02 6230 7341
E: [REDACTED] | **W:** www.aclei.gov.au

Integrity in law enforcement | Report corrupt conduct here

From: [REDACTED]
Sent: Saturday, 28 November 2015 3:12 PM
To: [REDACTED]
Subject: Social media [DLM=For-Official-Use-Only]

Attachment A

Hi [REDACTED]

[REDACTED] is encouraging [REDACTED] to participate in a [REDACTED]. Can you update me on our social media policy and help me to assess the risks if I were to participate?

Thanks

[REDACTED]

Sent with Good (www.good.com)

ATTACHMENT B - REVIEW RIGHTS

You are entitled to seek review of this decision.

Internal Review

Firstly, under section 54 of the FOI Act, you may apply for an internal review of the decision. Your application must be made 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.

An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be addressed to:

ACLEI FOI
Australian Commission for Law Enforcement Integrity
GPO Box 605
CANBERRA ACT 2601
foi@aclei.gov.au

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

External review by the Australian Information Commissioner

Alternatively, under 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner without first going to internal review. Your application must be made within 60 days of you receiving this notice.

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 Information Commissioner's website www.oaic.gov.au.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commissioner at:

GPO Box 5218
Sydney NSW 2000

Complaints to Ombudsman or Information Commissioner

You may complain to either the Commonwealth Ombudsman or the Information Commissioner about action taken by ACLEI in relation to the application. The Ombudsman will consult with the Information Commissioner before investigating a complaint about the handling of an FOI request.

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Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au

Your enquiries to the Information Commissioner can be directed to:

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

There is no particular form required to make a complaint to the Ombudsman or the Information Commissioner. 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 request should be investigated and identify ACLEI as the relevant agency.

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ATTACHMENT C – RELEVANT FOI ACT PROVISIONS

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (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.

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- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

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.

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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).