



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2017-137

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Mr M Pool

DECISION BY: Mr Peter Rush
Assistant Secretary
Parliamentary and Government Branch

The FOI request

In an email dated 15 August 2017 to the Department of the Prime Minister and Cabinet (the Department), Mr M Pool (the applicant) made a request under the *Freedom of Information Act 1982* (the FOI Act) in the following terms:

I seek access to correspondence between the Secretary of the Department of Prime Minister and Cabinet, Dr Martin Parkinson, and the Australian Public Service Commission, Mr John Lloyd, between the period of 3 December 2015 to the date of this application, that in any way concerns:

- the Government's Workplace Bargaining Policy for the Commonwealth Public Service;
- the public interest in, or the public disclosure of, the remuneration of SES officers or other highly paid officers in the Commonwealth public service;
- the remuneration of SES officers;
- Mr Lloyd's relationship to any think tanks, lobby groups, employer organisations or political parties;
- any aspect of the Public Service Act 1999, including, but not limited to, the interpretation or application of the APS Values/APS Code of Conduct;
- any aspect of the Freedom of Information Act 1992 or the Public Interest Disclosure Act 2013

On 14 October 2017, the applicant agreed to vary his request to:

"email correspondence only (ie. emails and any attachments to those emails).
Additionally, I am willing for the Department to discard all but the last email in

email chains/threads (but only on the basis that the preceding emails in those email chains will be included in the last email of those email chains).

Having regard to paragraphs 3.81, 3.82 and 3.101 of the FOI Guidelines, limiting the scope of the documents requested to emails only (including the attachments to those emails), will enable the Department to electronically search through those documents using key words and terms relevant to my request which might include: “remuneration”, “aggregated”, “highly paid”, “SES”, “senior executives”, “bargaining”, “policy”, “bands”, “salary”, “EBA”, “public interest”, “privacy”, “disclosure”, “industrial”, “senior executive”, “IPA”, “2%”, “two per cent”, “backpay”, “righttoknow”, “right to know”, “Institute of Public Affairs”, “liberal”, “public service act”, “code”, “values”, “FOI”, “executive remuneration reporting”, “public interest”, “freedom of information”, “morale” and “pay increase”.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department’s Secretary under section 23 of the FOI Act.

Steps taken to identify relevant documents

Having regard to the terms of the FOI request as clarified and where any documents potentially relevant to the FOI request might be found, I arranged for the searches of relevant electronic records to be undertaken.

As a result of these searches, 21 documents were identified as being within the scope of the request and are described in the schedule at Attachment A.

Material taken into account

I have taken the following material into account in making my decision:

- the FOI request;
- the documents that fall within the scope of the request;
- the FOI Act;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982* (the FOI Guidelines);
- advice received from third parties in response to informal consultations with the Australian Public Service Commissioner, Mr John Lloyd PSM and the Secretary of the Department of the Prime Minister and Cabinet, Mr Martin Parkinson AC PSM.

Decision

My decision on access to the documents is set out in the schedule at Attachment A. Copies of the documents to be released to the applicant in accordance with my decision are attached.

Reasons for decision

Section 47C – public interest conditional exemption – deliberative processes

Section 47C of the FOI Act states:

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.

I have taken into account the FOI Guidelines, noting that one consideration in the exemption is whether the documents include content of a deliberative matter.

Upon examination of the documents, I identified that they contained information which, if released, would disclose deliberative matter, namely the sharing of opinions, advice and the general ‘thinking process’ between the Australian Public Service Commissioner (the Commissioner) and the Secretary of the Department of the Prime Minister and Cabinet (the Secretary).

I am of the view that the deliberative information contained in the documents is part of the “process of reflection ... upon the wisdom and expediency of a proposal, a particular decision or a course of action” (*Parnell and Dreyfus and Attorney-General’s Department [2014] AICmr (30 July 2014)*).

In determining which material is deliberative, I have placed particular weight on the ongoing and necessarily close relationship between the Commissioner and Secretary. The relationship is an operational relationship that is not bound by the conventions of formal communication via letters or minutes. The discussions and exchange of information between the Commissioner and Secretary will therefore not always have the hallmarks suggested by the Australian Information Commissioner in *Crowe and the Department of the Prime Minister and Cabinet [2014] AICmr (30 July 2014)* in the nature of formal recommendations. That is, I am satisfied that the nature of the communication is deliberative even in the absence of formal recommendations, distinctive phraseology or formatting such as signature blocks.

I consider in the evolving space of the electronic communications that reflect rapid and flexible working arrangements, a reasonable person would accept that the ebb and flow of discussion, questioning, advising and deliberating would be characterised by informality and conversations that may be punctuated by pauses or use of other communication media.

Taking the above into consideration, I am satisfied that the documents contain deliberative matter that is conditionally exempt under section 47C of the FOI Act.

Section 47E – Public interest conditional exemption – Certain operations of an agency

Section 47E of the FOI Act states:

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, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

On examination of the documents, I consider that they contain information which, if released, could reasonably be expected to prejudice the operation of the proper and efficient conduct of an agency. The documents outline matters relevant to the Australian Public Service Commission's role under the Australian Government's *Workplace Bargaining Policy 2015*. I am satisfied that the documents contain information which is material to the factors considered by the Government in response to an application for exemption for a particular entity from the Workplace Bargaining policy.

While the decision of Government in granting the exemption is in the public domain, the factors relevant to the decision and the specific terms of the exemption are not. I consider that the document provides information which, if released, would damage the ability of the Australian Public Service Commission (APSC) to operate effectively in supporting the Government to implement its Workplace Bargaining Policy concerning the APS.

As outlined above, the factors relevant to the decision, and the terms of the exemption awarded to the entity concerned are not widely known and have been distributed within the APS in a strictly limited way. Should this information become widely known, the capacity of the APSC to undertake a considered view of each case, unfettered by debate about precedent or previous decisions would be damaged. I am satisfied that the capacity of the APSC to make recommendations on matters where each applicant is required to make a case based on the merits only, rather than those precedents, would be severely damaged.

More generally, I have decided that certain documents which contain, in my view, deliberative information, are also conditionally exempt on the basis that their release would have a substantial adverse impact on the operations of an agency. In this context, I acknowledge that the terms of the request are limited to email correspondence between the Secretary and the Commissioner. I consider that both officers carry a specific and unique role in the administration of the APS and in leading their agencies in the effective, efficient and ethical operation of the APS.

Both the Commissioner and the Secretary should be able to work together to exchange views and information in a concise and informal manner. In the case of the significant issues facing the Australian Public Service in managing workplace bargaining, remuneration of senior staff and code of conduct matters, it is reasonable that deliberative processes are therefore rapid, informal and flexible.

The operations of both agencies would be significantly affected should there be a requirement that deliberative processes and operational arrangements between the Commissioner and the Secretary be reduced to formal minutes and correspondence.

Section 47F – Public Interest Conditional Exemption – Personal Privacy

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Does the document contain personal information?

Section 4(1) of the FOI Act states that 'personal information' has the same meaning as in the *Privacy Act 1988* (the Privacy Act). Section 6(1) of the Privacy Act defines 'personal information' to mean 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 consider that the information in the document is personal information. It contains information or an opinion about an identified individual.

Would disclosure of the personal information be unreasonable?

Section 47F(2) of the FOI Act states that in determining whether disclosure of a document would involve the unreasonable disclosure of personal information, an agency must have regard to the following matters:

- 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;
- any other matters that the agency or Minister considers relevant.

Having regard to the matters that section 47F(2) of the FOI Act requires me to have regard to, I am of the view that disclosure of the personal information would be unreasonable. I find that the disclosure of the information could unreasonably jeopardise an individual's right to privacy and procedural fairness in relation to a confidential employment matter.

I therefore find that the personal information is conditionally exempt within the meaning of section 47F(1) of the FOI Act.

Section 11A(5) - Public interest test

Section 11A(5) of the FOI Act provides that an agency must give access to a 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.

In assessing whether access to a conditionally exempt document would, on balance, be contrary to the public interest, section 11B(3) of the FOI Act sets out four factors favouring access which must be considered, if relevant. They are that disclosure would:

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure;
- allow a person to access his or her personal information.

I consider that disclosing the conditionally exempt information may promote some of the objects of the FOI Act as information held by the Government is a national resource and members of the community have a right to access to Government documents.

I accept that there is a public interest in assessing the nature of the exchanges between the Secretary and Commissioner, who both have significant responsibilities for the operation of the Australian Public Service. I accept and acknowledge the significant responsibilities vested in the APS for its efficient, ethical, and effective operation and the public interest in ensuring that these responsibilities are met, particularly at senior levels.

However, the matters considered by the Secretary and Commissioner for which the conditional exemptions are sought are relevant to the efficient and effective operation of the APS as a workforce and in the capacity of both Officers in advising the Government on the management of the APS workforce. There is a stronger public interest in ensuring that the specific issues discussed and considered by the Secretary and Commissioner are not released to the public at large.

There is a strong public interest in the Secretary and the Commissioner being able to engage with each other in a forthright and expedient manner over the way in which the APS is operating. Finally, there is a strong public interest in the APS being able to use its resources towards its policy objectives, and the reduction of internal red tape is an integral part of the APS ability to utilise available resources to achieve substantive outcomes.

Finally, there is a strong public interest in the capacity of the Secretary and the Commissioner to protect individuals from an interference with their personal privacy

Deletion of exempt or irrelevant matter

Section 22 of the FOI Act provides that exempt or irrelevant information may be deleted from a copy of a document, and access granted to such an amended copy where it is reasonably practicable to do so, unless it is apparent that the applicant would not wish to have access to such a copy.

I consider that it is reasonably practicable to copy the documents with the exempt and irrelevant information deleted, and that the applicant would wish to be granted access to the documents with the deletions.

In accordance with the Department's policy as advised to the applicant in the Department's email dated 18 August 2017, I find that the following information wherever it occurs in the documents to be irrelevant to the FOI request: any person's signature; the names and contact details of Australian Public Service Officers not in the Senior Executive Service; and the mobile or direct numbers of SES officers.

Processing and access charges

I have decided not to impose processing charges in respect of the applicant's request.

Publication of Documents

Under section 11C of the FOI Act, the Department will make arrangements to publish the documents released to the applicant on the Department's website in its FOI Disclosure Log.

Review rights

Information about the applicant's rights of review is attached to this decision.

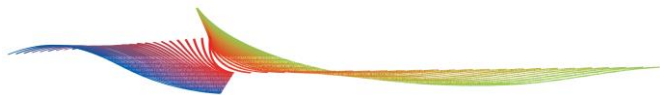
Complaint rights

The applicant may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/foi-complaints>.



Peter Rush
Assistant Secretary
Parliamentary and Government Branch

18 December 2017



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CORRESPONDENCE, SECRETARY PMC AND APS COMMISSIONER – MR M POOL

FOI

Document	Date	Description	Number of pages	Decision
1	17/02/2016	Email	3	Fully exempt, material exempted under sections 47E and 47F of the FOI Act
2	13/07/2016	Enterprise Bargaining	1	Partially exempt, irrelevant material deleted under section 22 of the FOI Act and material exempted under sections 47C and 47E of the FOI Act.
3	14/07/2016	Accepted: enterprise bargaining discussion	1	Release with irrelevant material deleted under section 22 of the FOI Act.
4	26/07/2016	Secretary's Performance Framework	4	Release with irrelevant material deleted under section 22 of the FOI Act.
5	02/08/2016	APS Remuneration Report 2015 and Individual Agency Report – PM&C	97	Release with irrelevant material deleted under section 22 of the FOI Act.
6	12/08/2016	Email	2	Partially exempt, irrelevant material deleted under section 22 of the FOI Act and material exempted under sections 47C and 47E of the FOI Act.
7	12/08/2016	SES Terminations	1	Release with irrelevant material deleted under section 22 of the FOI Act.
8	17/08/2016	Enterprise Bargaining	1	Release with irrelevant material deleted under section 22 of the FOI Act.
9	14/09/2016	Australian Public Service Commissioner's Directions 2016	3	Release with irrelevant material deleted under section 22 of the FOI Act.
10	06/10/2016	Workplace Bargaining Policy	1	Release with irrelevant material deleted under section 22 of the FOI Act.
11	02/12/2016	Australian Public Service Commissioner's Directions 2016	1	Release with irrelevant material deleted under section 22 of the FOI Act.
12	12/04/2017	Executive Remuneration – as discussed	3	Partially exempt, irrelevant material deleted under section 22 of the FOI Act and material exempted under sections 47C and 47E of the FOI Act.
13	04/05/2017	Email – bargaining policy	3	Partial release – material exempted under section 47E of the FOI Act and irrelevant material deleted under section 22 of the FOI Act.

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14	05/05/2017	Reporting of terminations for misconduct	1	Release with irrelevant material deleted under section 22 of the FOI Act.
15	23/05/2017	Compulsory transfers	1	Release with irrelevant material deleted under section 22 of the FOI Act.
16	09/06/2017	APS Remuneration Report 2016 and Individual Agency Report – PM&C	95	Release with irrelevant material deleted under section 22 of the FOI Act.
17	13/06/2017	APS Remuneration Report 2016 – Publicly released	73	Release with irrelevant material deleted under section 22 of the FOI Act.
18	20/06/2017	Gazettal of Code of Conduct Terminations	2	Release with irrelevant material deleted under section 22 of the FOI Act.
19	07/07/2017	Approval of High Executive Remuneration	9	Release with irrelevant material deleted under section 22 of the FOI Act.
20	10/08/2017	APS Bargaining	2	Partially exempt, irrelevant material deleted under section 22 of the FOI Act and material exempted under sections 47C and 47E of the FOI Act.
21	15/08/2017	Guidance on Participation in the Discussions around Same Sex Marriage	10	Release with irrelevant material deleted under section 22 of the FOI Act.



Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see [How do I make an FOI complaint?](#)

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 5218, Sydney NSW 2001
fax: +61 2 9284 9666
email: enquixxxx@xxxx.xxv.au
in person: Level 3
175 Pitt Street
Sydney NSW 2000



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: xxxxxxxxx@xxxx.xxx.au

write: GPO Box 5218, Sydney NSW 2001
or visit our website at www.oaic.gov.au