



**Australian Government**  
**Australian Public Service Commission**

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JS

By email: [foi+request-4109-9bd35a73@righttoknow.org.au](mailto:foi+request-4109-9bd35a73@righttoknow.org.au)

Our reference: C17/1764

Dear JS,

### **Decision on your Freedom of Information Request**

I refer to your request dated 27 September 2017, seeking access to documents held by the Australian Public Service Commission (the **Commission**) under the *Freedom of Information Act 1982* (the **FOI Act**).

You have requested access to the following:

*A document that demonstrates that, between 1 December 2013 and 12 September 2017, the Australian Public Service Commissioner (Mr Sedgwick or Mr Lloyd) and/or the Australian Public Service Commission assessed or otherwise considered whether the behavior of the Director of the Fair Work Building Industry Inspectorate may involve a breach of the Australian Public Service Code of Conduct.*

### **My Decision**

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

Pursuant to section 25 of the FOI Act, the Commission neither confirms nor denies the existence of a document, or documents falling within the scope of your request, as I am satisfied that in the event any documents exist that relate to your request, they are exempt under section 37 of the FOI Act.

Section 37 of the FOI Act provides that a document is exempt if its disclosure would, or could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach of the law or prejudice the enforcement or proper administration of the law or could reasonably be expected to prejudice the effectiveness of the methods or procedures used to investigate, detect or deal with matters arising from breaches of the law.

The reasons for my decision, including the relevant sections of the FOI Act, are set out 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.

## **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



Acting General Counsel  
Authorised FOI decision maker

25 October 2017

## REASONS FOR DECISION

### Your request

1. On 27 September 2017 you requested access to the following:

*A document that demonstrates that, between 1 December 2013 and 12 September 2017, the Australian Public Service Commissioner (Mr Sedgwick or Mr Lloyd) and/or the Australian Public Service Commission assessed or otherwise considered whether the behavior of the Director of the Fair Work Building Industry Inspectorate may involve a breach of the Australian Public Service Code of Conduct.*

### Material taken into account

2. In making my decision, took into account a number of factors, including:
  - the terms of your request as submitted to the Commission;
  - the content of the documents to which you sought access;
  - consultation with agency personnel about the nature of the type of documents sought and the line area's operating environment;
  - public interest considerations;
  - 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 am an officer authorised to make decisions under section 23(1) of the FOI Act.
4. The Commission neither confirms nor denies the existence of a document, or documents falling within the scope of your request, as in the event such documents exist they fall within the scope of section 37 of the FOI Act apply.
5. Section 25 of the FOI Act provides that an agency need not give information about the existence of a document, or documents, including by way of a statement of reasons ordinarily provided under section 26 of the FOI Act in the making of an access decision.
6. I have determined, in this instance, to provide additional commentary in relation to the reasons for my decision, as below.

### Section 37(1) FOI Act

7. Section 37(1)(a) of the FOI Act provides that a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law or prejudice the enforcement or proper administration of the law in a particular instance.
8. Documents relating to any assessment or consideration by the Australian Public Service Commissioner (the **Commissioner**) or the Commission more broadly, of any individual subject to an allegation of a breach, or a review under the Australian Public Service Code of Conduct (the **Code of Conduct**) as prescribed by section 13 of the Public Service Act (1999) (Cth), could reasonably be

expected to prejudice the conduct of a potential investigation, or prejudice the proper administration of the law in relation to future investigative processes.

9. Further, confirmation or denial of the existence of a document, or documents relating to past or present Code of Conduct allegations or review processes could reasonably be expected to prejudice the Commission's methods and procedures for future investigative processes and consequentially prejudice the proper administration of the law as it relates to Code of Conduct investigations.
10. Paragraph 5.82 of the FOI Guidelines provides that a document should have a connection to the process of upholding or enforcing civil law, or administering a law, to be exempt under section 37(1)(a) of the FOI Act. This is not confined to a particular type of action, and extends to the work of agencies in administering legislative schemes, monitoring compliance or investigating breaches.
11. I note that the FOI Act does not provide for controls or restriction on subsequent use or dissemination of information released under the FOI Act. Your request has been submitted via a publically accessible website. Therefore, in the event documents were to exist in relation to your request, release of such information would be release to the world at large.
12. In accordance with paragraph 5.83 of the FOI Guidelines, I have considered the circumstances surrounding the creation of any potential document, or documents that would fall into the scope of your request, and the possible consequences of their release. I have determined that disclosure of the existence of any document, or documents relating to a Code of Conduct allegation, consideration, investigative process or outcomes would, or could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach of the law, prejudice the impartial adjudication of a particular case, or may disclosure lawful methods for investigating or dealing with matters arising from breaches of the law.
13. Accordingly, I have determined that section 37 of the FOI Act would apply in the event documents exist within the scope of your request, and that on reflection it is not appropriate to neither confirm nor deny the existence of such documents in this instance.

### **Additional considerations**

14. While the Commission is not electing, in this instance, to rely on the following arguments, in the event that documents exist relating to assessment, allegation, consideration, determinations or investigative processes of breaches of the Code of Conduct, I consider it likely that the exemptions provided at sections 45, 47C, 47E(d) and 47F of the FOI Act would otherwise apply.
15. Section 45 of the FOI Act provides that a document is exempt if its disclosure would found an action by a person for breach of confidence.
16. In the event documents exist that relate to an assessment or consideration of an alleged breach of the Code of Conduct, such documents would be inherently confidential, in that they would only be accessible, at times in redacted form or in part, to a limited class of persons with direct involvement in the investigative process.
17. Further, based on feedback from the appropriate Director within the Commission, I have determined that in the event documents existed in relation to an investigative process relating to an alleged breach of the Code of Conduct, that such information would have been communicated and received on the basis of a mutual understanding of confidence, and disclosure would be likely to cause the confider to suffer a detriment.

18. Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose deliberative matter in the nature of opinion, advice or recommendations prepared, or considerations that have occurred, in the course of a deliberative process involved in the function of the Commission.
19. In accordance with the Commissioner's statutory functions under section 41 of the *Public Service Act 1999* (Cth), the Commission promotes the APS Values and the Code of Conduct.
20. In the event documents existed concerning whether an individual may have breached the Code of Conduct, such documents would likely contain information that involves the exercise of judgment in developing an outcome or course of action. Accordingly section 47C of the FOI Act would likely apply.
21. I note that the application of sections 47C, 47E(d) and 47F are dependent on public interest considerations for and against disclosure. These considerations include an individual's right to privacy and the potential for information to adversely affect or harm the interests of an individual or the ability of release of documents to promote the objects of the FOI Act or inform public debate.
22. Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its 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.
23. In the event documents existed that related to an alleged breach of the Code of Conduct, it is reasonable to expect that release of such information, such as persons involved in the investigative process, the methods used or the allegation made would have the capacity to undermine the conduct of the Commission's operations and may lead to reluctance in participating in investigative processes, or reluctance to provide information leading to such investigations.
24. As such, it is foreseeable that disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Commission, by reducing its ability to robustly consider and assess any allegations made or to obtain similar information in the future.
25. Section 47F 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.
26. In the event documents exist that relate to any allegation, assessment, consideration, determination or investigative process in a Code of Conduct review, such documents would potentially wholly comprise of personal information about an individual, and potentially include personal information about third parties such as the details of the person making any allegation and persons interviewed during an investigative process.

## **Conclusion**

27. For the reasons set out above, I am satisfied that sections 25 and 37 of the FOI Act apply to your request. Accordingly, it is unsuitable to confirm or deny whether or not documents exist in relation to your request.
28. In the event that documents were to exist in relation to any assessment, consideration or investigative process undertaken by or on behalf of the Commissioner in relation to any alleged breach of the Code of Conduct such documents would be exempt under section 37(1) of the FOI Act.

29. In the alternative, I have determined that further to the application of section 37(1) of the FOI Act, in the event documents exist in relation to any allegation, assessment, consideration, determination or investigative process relating to breach of the Code of Conduct such documents would also be considered exempt under section 45 of the FOI Act, or conditionally exempt under sections 47C, 47E(d) and 47F 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](mailto:foi@apsc.gov.au)

**Post:** The FOI Coordinator  
Australian Public Service Commission  
B Block, Treasury Building  
Parkes Place West  
PARKES ACT 2600

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

### **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)