



Australian Government
Australian Public Service Commission

JS

By email: foi+request-4109-9bd35a73@righttoknow.org.au

Our reference: C17/2117

Dear JS,

Freedom of Information Request – Internal Review Decision

1. I refer to your correspondence dated 15 November 2017, received by the Australian Public Service Commission (the **Commission**), requesting an internal review of the decision made on 25 October 2017 (C17/1764) (the **Primary Decision**) under the Freedom of Information Act 1982 (Cth) (the **FOI Act**).
2. Specifically, you asked that consideration be given to the application of sections 25 and 37 of the FOI Act. I note that you have provided a number of submissions in support of your request for internal review in the content of your correspondence.
3. I am an officer authorised under section 23(1) of the FOI Act to make internal review decisions. I confirm that I have made a fresh decision in accordance with section 54C of the FOI Act and that I am not the original decision maker.

Background

4. The Commission received your original FOI request on 27 September 2017, where you sought access to the following documents:

I seek access to 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.

5. The department considered your request, and on 25 October 2017 released its decision relating to your request.

Decision

6. During the course of the internal review process, I have carefully and seriously considered the various submissions you put forward in your correspondence.

7. On review, I have decided to neither confirm nor deny the existence of documents the subject of your request.
8. My findings of fact and reasons for my decision are provided at Attachment A.

Information Commissioner review

9. If you are dissatisfied with my decision, you are entitled to seek merit review of this decision by way of application to the Australian Information Commissioner.
10. An application for merit review by the Information Commissioner must be made in writing within 60 days of the date of this decision, and be lodged in one of the following ways:

Online: www.oaic.gov.au
Email: enquiries@oaic.gov.au
Post: GPO Box 5218 Sydney NSW 2001
In person: Level 3, 175 Pitt Street Sydney NSW

11. More information about the Information Commission review process is available on the Office of the Australian Information Commissioner website: www.oaic.gov.au.
12. If you are unhappy with the way your request for internal review has been dealt with, you may complain to the Australian Information Commissioner or the Commonwealth Ombudsman. More information is available on the Office of the Australian Information Commissioner website: www.oaic.gov.au.

Contact

13. 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



Jenet Connell
Authorised FOI decision maker
13 December 2017

REASONS FOR DECISION

Your request

14. You seek access to a document in existence during the period 1 December 2013 and 12 September 2017 that demonstrates if the Australian Public Service Commissioner (the **Commissioner**), and/or the Australian Public Service Commission (the **Commission**), assessed or considered if the behaviour of the Director of the Fair Work Building Industry Inspectorate (the **Director**) may have involved a breach of the Australian Public Service Code of Conduct (**Code of Conduct**).

Findings of fact and reasons for decision

15. I am an officer authorised under section 23(1) of the FOI Act to make internal review decisions. I confirm that I have made a fresh decision in accordance with section 54C of the FOI Act and that I am not the original decision maker.
16. Section 26(2) of the FOI Act provides that an agency is not required to include in a statement of reasons any matter that is of such a nature that its inclusion would cause the statement of reasons to be an exempt document.
17. I have determined that section 26(2) of the FOI Act applies to the circumstances of this request.
18. In *Secretary, Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Ltd* [2010] FCA 1442, the Federal Court held that s 26(2) of the FOI Act could extend, in appropriate cases, to allow an agency to refuse access to documents (if in existence) and issue a statement of reasons, without revealing whether any of the documents requested were in its possession, if revealing that information would cause the notice to be exempt.
19. I have decided neither to confirm nor deny the existence of any document because to do so would identify that a person either had, or had not, been involved in an assessment of whether his or her conduct may have involved a breach of the Code of Conduct.
20. In the event documents exist within the scope of your request I have determined that they would be exempt in full under ss 45, 47E(d) and 47F of the FOI Act.

Section 45 – Material obtained in confidence

21. Section 45 of the FOI Act permits exemption of a document if its disclosure would found an action, by a person, for breach of confidence.
22. Paragraph 5.158 of the guidelines published by the Office of the Australian Information Commissioner (the **Guidelines**) clarifies that the FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity. This exemption operates as a separate and independent protection for confidential relationships,

notwithstanding that such relationships may also fall within the scope of further exemptions.

23. The Commissioner undertakes inquiries into alleged breaches of the Code of Conduct by Agency Heads as a function of the agency, pursuant to section 41A of the *Public Service Act 1999* (Cth) (the **PS Act**).
24. Section 72A of the PS Act provides for the protection of information obtained in connection with the performance of particular functions, duties or exercise of powers, expressly including section 41A of the PS Act. Section 72A(2) additionally places a prohibition on disclosure of other use of such information, and contemplates that unauthorised or improper disclosure of information by Commonwealth officers can amount to an actionable offence.
25. I have considered the circumstances that surround the creation of any document that would fall within the scope of your request, or the collection of information that would be contained in such documents and have determined that such information would fall within the contemplation of s72A(2) of the PS Act.
26. The strict secrecy provisions contained in s72A mandate that such information is protected from disclosure unless particular exceptions apply. Publicly salaried officers understand that the Commission is under a statutory obligation not to disclose their personal information and expect that their confidentiality will be protected. For these reasons, confidentiality is an important feature of the work undertaken by the Commission.
27. I affirm the considerations put forward in the primary decision in relation to section 45 of the FOI Act. I determine that 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. I note that such documents are not communicated widely. Documents relating to any alleged breach of the Code of Conduct, including where such documents do not fall within an investigative process, would only be accessible, at times in redacted form or in part, to a limited class of persons with direct involvement in the matter.
28. Further, in the event documents exist in the scope of your request, I affirm that any information contained within such a document would have been communicated and received on the basis of a mutual understanding of confidence. Accordingly, any disclosure would likely cause the confider to suffer a detriment, and the confidentiality would be actionable.

Section 47E(d) - Substantial adverse effect on the proper and efficient conduct of agency operations

29. Section 47E(d) of the FOI Act permits conditional exemption of documents containing information the disclosure of which would, or could, reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

30. As noted above, a function of the Commission is to inquire into an alleged breach of the Code of Conduct by an Agency Head. This function, set out at section 41A of the PS Act, invokes section 72A of the PS Act, which provides protection of information collected or obtained in connection with the designated function.
31. Pursuant to section 72A of the PS Act, when the Commission receives information about matters concerning its functions, it is under a statutory obligation to protect that information from disclosure. In particular, section 72A(6) of the PS Act provides that the Commission has a statutory obligation to protect the identity of an individual unless it is satisfied the disclosure is fair and reasonable. Section 72A(2) of the PS Act also provides that unauthorised disclosure can attract criminal penalties.
32. An assertion, allegation or consideration that a person may have breached the Code of Conduct is a serious allegation, particularly if that person is a senior statutory office-holder. Public disclosure could have serious reputational consequences for a person, including damaging future employment prospects.
33. Further, I believe maintenance of confidentiality is essential to upholding trust between the Commission and the relevant agency, including its employees and statutory office holders; this includes any information about Code of Conduct investigations being protected from public disclosure.
34. If the Commission is unable to assure agencies, or the subjects of allegations, that it can protect sensitive, confidential information from disclosure, I believe agencies would be less willing to provide the same amount of information about employees and statutory office holders in the future. If the Commission is unable to maintain good working relationships with other agencies, it will undermine and prejudice the ability of the Commission to continue to undertake its function to review and assess Code of Conduct investigations efficiently and effectively.
35. I affirm the considerations put forward in the primary decision; that in the event documents exist within the scope of the request, it is reasonable to expect that release of such information would have the capacity to undermine the conduct of the Commission's operations and may lead to difficulties in the Commission undertaking a statutory function.
36. I agree that 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.
37. I have determined that such an effect is both substantial and adverse. I find that such documents would be conditionally exempt under s 47E(d) of the FOI Act. I consider the public interest below.

Section 47F – Documents affecting personal privacy

38. Section 47F conditionally exempts a document if disclosure would involve the unreasonable disclosure of personal information about any person. Personal information includes any

information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not.

39. I believe that disclosing the existence of documents relevant to your request would be an unreasonable disclosure of personal information. This is because it would reveal that a person was, or was not, involved in matters concerning Code of Conduct investigations. These are not matters that concern normal duties or responsibilities ('BA' and Merit Protection Commissioner [2014] AICmr 9).
40. I affirm the considerations in the primary decision, that 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, or individuals; including the confider and the accused. I note that such documents would likely include personal information about additional third parties.
41. In considering whether disclosure would be unreasonable, I reflect on section 72A of the PS Act, noting the Commission is under a statutory obligation to protect information collected or obtained in connection to the performance of the relevant function.
42. I have determined that disclosure could prejudice the protection of an individual's right to privacy in relation to confidential employment matters. I do not believe it would be fair or reasonable to disclose such personal information, particularly in circumstances where the information will be disclosed to the world at large by way of release through FOI.
43. I find such disclosure of personal information would be unreasonable and such documents would be conditionally exempt under s 47F of the FOI Act. I consider the public interest below.

Public interest

44. Subsection 11A(5) of the FOI Act provides that conditionally exempt matter must be disclosed unless, in the circumstances, access to that document would, on balance, be contrary to the public interest.
45. In balancing the public interest in this case, I have taken into account that disclosing information about Code of Conduct assessments could increase scrutiny, comment or review of the Commission's activities or could contribute to ensuring the accountability of publically salaried officials. However, I have formed the view that the disclosure of such personal information is outweighed by the public interest in protecting the privacy of individuals.
46. I believe that there is a strong public interest in protecting individuals from unreasonable interferences with their privacy; in particular where there are reasonably held expectations of confidentiality, including statutory obligations of secrecy imposed onto the relevant agency.

47. I also consider that there is a strong public interest in making sure the Commission protects the relationship of trust between its agency and public office holders of agencies who rely on the Commission to protect personal and confidential information that it receives or creates as part of its functions.
48. I have concluded that disclosure of any document, or documents, would, on balance, be contrary to the public interest.