



Australian Government
Australian Public Service Commission

FOI Applicant
Via Right to Know.org.au

By email: foi+request-4172-b3c42854@righttoknow.org.au

Our reference: C17/2064

Dear FOI Applicant

Freedom of Information Request – Access decision on documents

1. I refer to your request received on 30 October 2017, seeking access to documents under the *Freedom of Information Act 1982* (the **FOI Act**), held by the Australian Public Service Commission (the **Commission**).

Scope of your request and documents relevant to your request

2. You requested access to the following:

'...I refer the APSC to my FOI request made of the Office of the Australian Information Commissioner here (the 'OAIC request'):

https://www.righttoknow.org.au/request/precise_salaries_paid_to_the_oaic

By this application I make the same request of the APSC albeit such that every reference to 'OAIC' in the OAIC request should be read as a reference to the 'APSC' for the purposes of this request. I rely on all my submissions contained in the OAIC request, in support of this request made of the APSC under s.15 of the FOI Act.'

3. In your request to the Office of the Australian Information Commissioner (OAIC), which your present request incorporates by reference, you indicated that you would be satisfied with a document prepared in accordance with section 17 of the FOI Act containing the information you seek.
4. By email dated 4 January 2018, you indicated you would be willing to exclude the names of individuals from the scope of your request *"only on the condition that each relevant officer's name be replaced by a single unique identifier such that each relevant SES Officer's precise salary can be tracked over the three relevant financial years (eg. SES Officer #1, SES Officer #2, SES Officer #3 etc)"*.
5. Taking the above into account, and in accordance with section 17 of the FOI Act, the Commission has prepared a document listing the salary paid to each of the Commission's SES Officers in each of the financial years 2014-15, 2015-16 and 2016-17. In this document, the name of each SES Officer has been replaced with identifiers *SES A* through *SES I*. In accordance with section 17 of the FOI Act, your request is treated as if it were a request for this document.

Background – Charges waived

6. On 8 November 2017, the Commission wrote to you advising that there was a requirement to conduct consultation in accordance with section 27A of the FOI Act.
7. On 15 November 2017, the decision maker wrote to you advising that that you would be liable to pay a charge for the processing of your request.
8. On 28 November 2017, you responded to the preliminary charge assessment advising that you wished to seek a review of the charge estimate.
9. On 22 December 2017, the Commission conducted a review of the preliminary charge estimate and advised that the charge decision had been upheld.
10. On 11 January 2018, you wrote to the Commission advising the charges imposed had been wrongly assessed.
11. On 14 February 2018, the Office of the Australian Information Commissioner (OAIC) informed the Commission that you wished to seek a review of the charge assessment.
12. Following consultation with yourself, the OAIC and the Commission, agreement was reached that the charge assessment would be waived on this occasion. Subsequently on 6 April 2018, the OAIC (Ref: MR18/00042) confirmed that you had signed the section 55F document [*Procedure in IC review-review parties reach agreement*], effectively ruling that the charge had been set aside, and processing of your access request would re-commence.
13. In accordance with that agreement, the Commission has now progressed the processing of your FOI access decision.

Access decision

14. I am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests. This letter sets out my decision on your FOI request and provides the reasons for my decision.
15. I have decided that one document can be created in accordance with section 17 of the FOI Act. I have decided that parts of that document are exempt from disclosure. My reasons for that decision are provided below.

Material taken into account

16. In making my decision, I took into account material including the following:
 - the terms of your request, including the terms of the request you made to the OAIC;
 - submissions made by you to the Commission;
 - submissions made by you to the OAIC, including your submissions published on the Right to Know website in respect of your separate request to the OAIC;
 - the content of the documents to which you sought access;
 - the purpose for which the documents to which you have sought access were created;
 - advice from Commission employees with responsibility for matters concerning the documents to which you have sought access;
 - the relevant provisions of the FOI Act;
 - the guidelines published by the Australian Information Commissioner (the FOI Guidelines) under section 93 of the FOI Act; and
 - guidelines published by the Australian Information Commissioner (the APP Guidelines) under the *Privacy Act 1988* (Privacy Act).

Findings of fact and reasons for decision

17. Where the document indicates an exemption claim has been applied to the document, or part of the document, my findings of fact and reasons for deciding that the exemption provision applies to the document, or part of the document, are as set out below.

Deletion of exempt matter or irrelevant material

18. Where a decision is made to refuse access to a document on the ground that it is an exempt document, sub-paragraph 22(1)(a)(i) of the FOI Act allows an agency to make an edited copy of the document with the exempt material deleted. You have been provided with an edited copy of the document created under section 17 of the FOI Act.

Personal information in the requested document

19. Notwithstanding the replacement of individuals' names with the unique identifiers *SES A* through *SES I*, it is my opinion that the document you have requested contains personal information about each of the Commission's SES Officers.
20. The Privacy Act, including the Australian Privacy Principles (APPs), regulates the collection, use and disclosure of personal information by entities including the Commission. The Australian Information Commissioner has published guidelines on the APPs which include "*the Information Commissioner's interpretation of the APPs, including the matters that the Office of the Australian Information Commissioner may take into account when exercising functions and powers relating to the APPs*".
21. The Privacy Act defines personal information as follows (emphasis added):
- "personal information means information or an opinion about an identified individual, or an individual who is **reasonably identifiable**..."*
22. Paragraphs B.91 to B.94 of the APP Guidelines provide information about the meaning of the expression 'reasonably identifiable'. Paragraphs 6.131 to 6.135 of the FOI Guidelines also provide information about whether a person is 'reasonably identifiable'.
23. The information provided by the FOI Guidelines is consistent with the information provided by the APP Guidelines.
24. As noted at paragraph B.91 of the APP Guidelines, the question whether an individual is reasonably identifiable from particular information will depend on a range of considerations including, if the information is publicly released, whether a reasonable member of the public would be able to identify the individual.
25. Paragraph B.93 of the APP Guidelines states the following:
- Even though it may be technically possible to identify an individual from information, if doing so is so impractical that there is almost no likelihood of it occurring, the information would not generally be regarded as 'personal information'. An individual may not be reasonably identifiable if the steps required to do so are excessively time-consuming or costly in all the circumstances.*
26. Lastly, paragraph B.94 of the APP Guidelines states that "[w]here it is unclear whether an individual is 'reasonably identifiable', an APP entity should err on the side of caution and treat the information as personal information".

27. The Commission is a relatively small agency with a small number of SES Officers. The requested document refers to only nine individuals and lists each individual's salary for each of the three specified financial years. The identities of the Commission's SES Officers are publicly known from the Commission's web site and other sources. For example, the Commission's structure chart lists each of the Commission's SES Officers by name.
28. Four of the nine individuals were not paid a salary by the Commission for each of the three specified financial years because they were not employed by the Commission for all three of those years. In other words, by reference to the Commission's structure chart (and other publicly-available information) it would be apparent that certain individuals joined the Commission at certain points in time. This information could be cross-referenced against the information in the requested document to identify the relevant individuals.
29. The information in the requested document refers to one individual at SES Band 3 level, one individual at SES Band 2 level and seven individuals at SES Band 1 level. The identity of the SES Band 3 individual and the SES Band 2 individual would be readily apparent from the requested document simply because it is quite obvious that the salary paid to these individuals would correspond with different ranges of salary in accordance with the *APS Executive Remuneration Management Policy*.
30. In my opinion, five of the individuals referred to in the requested document are reasonably identifiable with little effort by a reasonable member of the public. With respect to the remaining four individuals referred to in the document, I am not aware of the full range of publicly available information that could potentially be used to identify these individuals. Therefore, I am taking a cautionary approach in accordance with paragraph B.94 of the APP Guidelines, I consider that this information is personal information.

Section 45 – Documents containing material obtained in confidence

31. Section 45 of the FOI Act provides “[a] document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence”.
32. For the reasons explained above, it is my opinion that notwithstanding the use of identifiers in place of individuals' names, the requested document discloses personal information about each individual SES Officer. Namely, the requested document discloses the salary of each of the Commission's SES Officers. In my opinion, the disclosure of this information would found an action by each of those officers for breach of confidence.
33. The FOI Guidelines at paragraphs 5.158 and 5.159 state that:

A breach of confidence is the failure of a recipient to keep confidential, information, which has been communicated in circumstances giving rise to the obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.
34. To found an action for breach of confidence (which means s45 would apply), the following five criteria must be satisfied in relation to the information:
 - it must be specifically identified;
 - it must have the necessary quality of confidentiality;
 - it must have been communicated and received on the basis of a mutual understanding of confidence;
 - it must have been disclosed or threatened to be disclosed, without authority; and
 - unauthorised disclosure of the information has or will cause detriment.
35. Each of these criteria are discussed under the following headings.

The information must be specifically identified and have the necessary quality of confidentiality

36. The information in the requested document is specifically identified as the salary of individual SES APS employees.
37. SES APS employees in the Commission are not covered by the Commission's enterprise agreement (EA). The terms and conditions of employment, including the salary paid to each SES employee is confidentially negotiated between each individual employee and the agency head.
38. Information about the salary of SES APS employees is treated as private and confidential information. Access to records including this information is restricted to each individual and to relevant personnel management staff only.
39. The information in the requested document has not been disclosed by the Commission to anyone outside the Commission other than the Australian Taxation Office (ATO), as required by law. The ATO is prohibited from disclosing the information by income tax legislation. Following consultation as required by section 27A of the FOI Act, none of the relevant employees has consented to disclosure of the information.
40. I am satisfied that the information in the requested document has the necessary quality of confidentiality.

The information must have been communicated and received on the basis of a mutual understanding of confidence

41. As noted above, the terms and conditions of employment, including remuneration, are a matter of individual negotiation between the agency head and each SES employee. As SES employees are not covered by the Commission's EA, the employment relationship between the Commission and its SES employees is therefore contractual in nature.
42. There is a mutual understanding between individual SES employees and the Commission that details of the contractual relationship, particularly details of their individual salaries, will be kept confidential. All employees of the Commission understand that the Commission is bound by the APPs to keep personal information, including the salaries of its staff, confidential and to only disclose such information in accordance with the APPs. Staff can access only their own personal salary information through a secure online system.
43. I am satisfied that the information in the requested document was communicated and received on a mutual understanding of confidence.

The information must have been disclosed or threatened to be disclosed, without authority

44. None of the relevant employees have consented to the disclosure of their salaries in response to your FOI request. I am satisfied that disclosure of the individual salaries of SES Officers in the Commission is not otherwise authorised and would be in breach of the mutual understanding of confidence.

The unauthorised disclosure of the information will cause detriment

45. The Commission's SES employees do not wish for their individual salaries to be disclosed. I am therefore satisfied that the unauthorised disclosure of their individual salaries would cause at least some degree of distress.

46. The right to privacy is recognised as a human right. Australia is a party to the International Covenant on Civil and Political Rights, which prohibits interference with privacy and attacks on personal reputation. The Privacy Act provides for the protection of personal information under Australian law. The unauthorised disclosure of the requested salary information would breach these individuals' right to privacy.
47. Moreover, the disclosure of differences between the salaries paid to individual SES employees at the same classification may affect the reputation and future negotiating position of individuals. Third parties may draw unwarranted conclusions about the relative merits of SES Officers based on their relative salaries.
48. Taking the above into account, I am satisfied that disclosure of the individual salaries would cause detriment to each of the Commission's SES Officers.

Conclusions on section 45

49. I am satisfied that each of the five criteria to found an action for breach of confidence would be met if the requested document was disclosed in full. I therefore find that parts of the document are exempt from disclosure under section 45 of the FOI Act. In particular, I find that the specific individual salaries paid to the Commission's SES Officers are exempt from disclosure.

Section 47E – certain operations of agencies

50. Subsection 47E(c) of the FOI Act provides that a document is conditionally exempt from disclosure if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management of personnel by an agency.
51. As noted above, the terms and conditions of employment of SES employees in the APSC are a matter of individual negotiation between the Agency Head (the Australian Public Service Commissioner) and each SES employee.
52. The disclosure of the specific salaries paid to each of the Commission's SES Officers would amount to the disclosure of confidential information about one party's negotiating position. Namely, disclosure of this information would unfairly disadvantage the Agency Head in future salary negotiations with SES APS employees. The effect of this would be to fundamentally alter, to the Agency Head's detriment, the relative bargaining position of the parties in future negotiations.
53. The effect of disclosure of the specific individual salaries would be both substantial and adverse because SES Officers in future could unfairly take advantage of this information in future salary negotiations. This would lead to greater expenditure by the Commission on remuneration of SES employees to the detriment of the Commission's other functions.
54. In light of the above, I am satisfied that disclosure of the specific individual salaries of the Commission's SES employees would have a substantial adverse effect on the management of personnel by the Commission. Therefore, I find that this information is conditionally exempt from disclosure under section 47E of the FOI Act.

Section 47F – personal privacy

55. Section 47F of the FOI Act provides that a document is conditionally exempt from disclosure if disclosure would involve the unreasonable disclosure of personal information about any person.

Subsection 47F(2) factors

56. Subsection 47F(2) of the FOI Act provides that an agency must have regard to the following matters in determining whether disclosure would involve an unreasonable disclosure of personal information:

- 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; and
- any other information that the agency considers is relevant.

57. The requested document includes the specific salaries paid to nine individuals. For reasons explained above, I consider that the individuals are reasonably identifiable from this information.

58. The specific remuneration information in the documents you have requested was not well-known. Although the approximate remuneration of SES employees may be deduced from public sources, the specific remuneration paid to each individual is not publicly known.

59. With respect to the factors listed at subsection 47F(2) of the FOI Act, I am satisfied that the specific salary information in the document you have requested:

- is not well-known;
- concerns individuals who are not known to be associated with the specific information for each of the requested years; and
- is not available from publicly accessible sources.

Other relevant factors

60. I have had regard to the factors set out at paragraphs 6.142 and 6.143 of the FOI Guidelines. Those factors and my consideration of those factors are set out in the following table.

Factor	Comment
Whether the author of the document is identifiable.	This factor is not relevant.
Whether the documents contain third party personal information.	For reasons explained above, the document prepared under section 17 contains personal information about SES employees in the Commission.
Whether release of the documents would cause stress on the third party.	In my opinion, disclosure of the document prepared under section 17 would cause stress on the individuals whose personal information is included in the document.
Whether any public purpose would be achieved through release.	Disclosure of the requested documents would provide the public with information about the specific salaries paid to SES APS employees in the Commission.
The nature, age and current relevance of the information.	The information in the requested documents is relevant to the previous three years' expenditure on SES salaries by the Commission.
Any detriment that disclosure may cause to the person to whom the information relates	In my opinion, disclosure of the requested documents would cause detriment to the relevant individuals. Disclosure would breach the privacy of individuals and would cause some degree of distress to the individuals. Disclosure would reveal the

	individuals' specific salaries to their peers and to the public.
Any opposition to disclosure expressed or likely to be held by that person.	None of the relevant individuals has consented to disclosure of the requested documents.
The circumstances of an agency's collection and use of the information.	The relevant information was created by the Commission in the course of managing its staff. The Commission is required by various laws to maintain records about staff entitlements, including the records about the specific salaries of individual staff members.
The fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act	Disclosure of the document created under section 17 would result in the immediate publication of the specific salaries of all of the Commission's SES staff on the Right to Know web site.
Any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information.	I have taken into account the submissions you have made in your request and related correspondence.
Whether disclosure of the information might advance the public interest in government transparency and integrity.	In my opinion, disclosure of the requested documents would advance, to a certain degree, the public interest in government transparency and integrity.

61. Paragraph 6.145 of the FOI Guidelines states the following:

Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future.

62. As explained above, the specific salaries paid to SES employees are ordinarily regarded as confidential and none of the employees had any expectation that the specific information would be made available to their peers and to the public.

63. In addition to the factors above, I consider it relevant that APS agency heads are accountable in various ways for their expenditure on SES remuneration and that this accountability does not require the publication of the specific remuneration of individual SES employees.

64. Some of these measures of accountability include:

- a) the Commission is required to include information in its financial statements published each year in its Annual Report about senior executive remuneration;
- b) the APS Executive Remuneration Policy imposes restrictions on the remuneration that can be paid to SES employees;
- c) APS Agency Heads are financially accountable under the *Public Governance, Performance and Accountability Act 2013* for the expenditure of public money; and
- d) APS Agency Heads are directly accountable to Parliament through Senate Estimates committees for the expenditure of public money.

Conclusions on section 47F

65. In weighing the factors referred to above, I have formed the view that disclosure of the specific salaries of individual SES APS employees in the Commission would involve an unreasonable disclosure of personal information. Therefore, I find that parts of the documents you have requested are conditionally exempt under section 47F of the FOI Act.

Section 11A – the public interest

66. I have found that parts of the document created under section 17 are conditionally exempt from disclosure under sections 47E and 47F of the FOI Act. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless (in the circumstances) access to the document would, on balance, be contrary to the public interest.

67. Subsection 11B(3) lists certain factors as favouring access to a document in the public interest. These factors include whether access to the document would:

- promote the objects of this Act (including all the matters set out in sections 3 and 3A);
- inform debate on a matter of public importance; and
- promote effective oversight of public expenditure.

68. Subsection 11B(4) of the FOI Act lists factors that are irrelevant to determining whether access would be in the public interest. I have not taken these factors into account.

Public interest factors in favour of disclosure

69. I have identified the following public interest factors in favour of disclosure of the documents created under section 17:

- disclosure would promote the objects of the FOI Act, including all the matters set out in sections 3 and 3A;
- disclosure would inform debate on matters of public importance including:
 - the manner in which the Commission determines remuneration of its own SES employees;
 - the extent to which SES remuneration increases are consistent with remuneration of APS employees more generally;
 - the extent to which SES remuneration in the Commission is consistent with the Government’s bargaining policy;
- disclosure would promote effective oversight of public expenditure by providing specific information about the expenditure on salaries of SES employees in the Commission.

Public interest factors against disclosure

70. I have identified the following public interest factors as weighing against disclosure of parts of the documents you have requested:

- disclosure would have a substantial adverse effect on the management of personnel by the APSC, including for the reasons set out above in my consideration of section 47E;
- disclosure would involve an unreasonable disclosure of personal information, including for the reasons set out above in my consideration of section 47F;
- a range of accountability measures already exist to ensure that agency heads act appropriately in determining the remuneration of SES employees.

71. I attach strong weight to the fact that the remuneration of the Commission’s SES employees is already reported in an aggregated form and that this strikes an appropriate balance between achieving transparency and accountability while protecting individual privacy.

72. After considering the factors in favour and against disclosure, it is my opinion that the damage to the public interest is not outweighed by any value that could be attributed to the release of the specific individual salaries of SES employees of the Commission. Therefore, I find that it would, on balance, be contrary to the public interest to release parts of the document created under section 17.

Review Rights

73. If you are not satisfied with this decision, you are entitled to seek review. Your review rights are set out at **Attachment A** to this letter.

Legislation

74. A copy of the FOI Act is available from the website at <https://www.legislation.gov.au/Details/C2018C00016>

75. If you are unable to access the Act from this site, please contact our office.

Contacts

76. If you require clarification of any of the matters discussed in this decision, you should contact the Commission's FOI Officer by email at foi@apsc.gov.au.

Yours sincerely



Donna Tait
Acting Group Manager, Corporate
7 May 2018

Enclosures:

Attachment A - Rights of Review

Attachment B – Document prepared under section 17 of the FOI Act

**INFORMATION ON RIGHTS OF REVIEW
FREEDOM OF INFORMATION ACT 1982**

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of an FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct any misunderstandings.

Asking for a formal review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an Officer in the Commission; and/or
2. a review by the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter to;

Email: foi@apsc.gov.au

Post: The FOI Coordinator
Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review decision maker to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the Commission within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner from the date in which you received the decision.

You can **lodge your application**:

Online: www.oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au
- If you have one, you should include with your application a copy of the Commission's decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the Commission's decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman
Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.