



Telephone: (07) 3248 1100
Facsimile: (07) 3248 1260 (General)
(07) 3248 1240 (Approved for Document Filing)
Email: qldreg@fedcourt.gov.au

**FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Your Ref:
Our Ref:

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

PO BOX 13084
GEORGE STREET
BRISBANE QLD 4003

2 January 2018

By email: foi+request-4188-dce2bbd6@righttoknow.org.au

Dear Sir/Madam

Freedom of Information Act 1982 – Request for Access

I refer to your email of 1 November 2017 to the Federal Court of Australia in which you have sought access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

*I refer the Federal Court 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_oai.*

By this application I make the same request of the Federal Court albeit such that every reference to 'OAIC' in the OAIC request should read as a reference to the 'Federal Court' 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 Federal Court under s.15 of the FOI Act.

The request made to the Office of the Australian Information Commissioner (OAIC) on 2 August 2017 was as follows:

Accordingly, I request documents which detail the precise monies paid to each of the Office of the Australian Information Commissioner's (OAIC's) SES officers in the following financial years - FY2014/15, FY 2015/16 and FY2016/17. That information might be included in the group certificates/end of year PAYG payments summaries issued by the OAIC to its SES officers, or common law contracts relating to the employment of the relevant SES officers or, any relevant determinations made under subsection 24(1) or 24(3) of the Public Service Act 1999 in respect of those relevant SES officers or, perhaps a document prepared pursuant to s. 17 of the FOI Act. Such documents can be quickly and easily identified and retrieved, and will efficiently and accurately provide the information the subject of my request.

I am willing to agree to the decision maker redacting all information contained in any relevant document with the exception of the following:

- information that discloses the relevant SES officer's name;*
- information that discloses that officers precise salary for the relevant financial year; and*

- *information that identifies what the document is (eg. a group certificate/payment summary, an employment contract or a s. 23(1) Determination) and the period that it covers.*

I am further willing to narrow the scope of my request by limiting it to officers employed by the OAIC who, at the time of my application, were categorised as SES officers, meaning that:

- *OAIC staff who were once SES officers at the OAIC, but weren't categorised as such at the time of this application; and*
 - *the documents the subject of my request that pertain to SES officers who are no longer employed by the OAIC;*
- are discounted from the scope of my application.*

On 10 November 2017 the Federal Court acknowledged receipt of your request and advised that as your request covered documents that contained another individual's personal information, the Federal Court was required to consult with those individuals (under section 27A of the FOI Act) before making a decision on the release of the documents. The period for processing your request was accordingly extended by 30 days to 2 January 2018.

Authorised decision-maker

I am authorised under section 23(1) of the FOI Act to make decisions on behalf of the Federal Court in relation to your request.

Decision

I have decided to refuse access to the documents falling within the scope of your request for access.

In making my decision I have had regard to:

- a. the terms of your request;
- b. your submissions contained in the FOI request to OAIC of 2 August 2017;
- c. the usual content of the documents within the scope of your request;
- d. the relevant provisions of the FOI Act and case law considering those provisions;
- e. the FOI Guidelines issued by the Office of the Australian Information Commissioner;
- f. the Annual Reports of the Federal Court of Australia;
- g. the Remuneration Tables published on the Federal Court of Australia website; and
- h. the submissions of the SES employees whose personal information is within the scope of your request.

Reasons for Decision

Conditionally exempt under paragraph 47E(c)

I consider that the documents within the scope of your request contain information that is conditionally exempt under paragraph 47E(c) of the FOI Act which relevantly prescribes that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to... have a substantial adverse effect on the management ... of personnel by the Commonwealth or by an agency.

The *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the Guidelines) provide:

For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety;*
- the assessment of personnel – including the broader performance management policies and activities concerning the competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.¹*

The documents requested are clearly related to the management of personnel, and are, at the very minimum, specifically related to the compensation and recruitment of SES employees of the Court.

Further, the documents requested contain specific details of the terms and conditions of employment of those individual employees which have been negotiated directly, and on an individual basis, between those SES employees and the Chief Executive Officer/Principal Registrar (CEO) of the Federal Court. The release of the documents requested would disclose the detail of remuneration and entitlements negotiated on an individual basis by individual SES employees and the CEO.

The release of the precise details of the remuneration of SES employees of the Court would, or could, reasonably be expected to have a substantial adverse effect on the management of personnel by the Court by:

- destroying the trust in the confidentiality of negotiations between SES employees and the CEO of the Court on the terms and conditions of employment for those employees, and potential employees, making future negotiations more difficult, prolonged and adversarial;
- making it far more difficult for the agency to negotiate the terms and conditions of employment on an individual basis, with the bargaining positions of SES employees strengthened by knowing the terms and conditions of employment of their colleagues, manifesting in upward pressure on Commonwealth expenditure;
- permitting remuneration comparisons which create tensions between individual SES employees as well as between SES employees and non-SES employees; and

¹ FOI Guidelines [6.114]

- undermining the morale of SES employees and leading to potential reductions in productivity.

The substantial adverse affects on the trust and morale of SES employees of the Federal Court stem from the fact that those employees would have every expectation that details of their employment negotiations and the precise details of their remuneration would be confidential. Any disclosure of the documents requested or the specific details of an SES employee's remuneration, outside of a disclosure authorised by a specific legislative or regulatory regime, would clearly breach the Court's obligations in respect of privacy and confidentiality of employee records. In addition, there is no legislative or regulatory regime that requires the disclosure of the documents requested.²

The substantial adverse impacts of remuneration disclosure on executive remuneration negotiations have long been recognised, including by the Australian Government Productivity Commission.³

Conditionally exempt under s 47F(1)

I consider that the documents within the scope of your request contain information that is conditionally exempt under subsection 47F(1) of the FOI Act which prescribes that:

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).

The term "personal information" is defined in section 4 of the FOI Act to have the same meaning as in the *Privacy Act 1988* (Cth), that is:

...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 material form or not.*

The documents requested identify individual SES employees and contain information about the income each has received from the Court as their employer in each relevant period. The payment summaries requested also include details such as their home address, Tax File Number, tax withheld and reportable superannuation contributions. The remainder of the documents requested would also contain the terms and conditions of employment for each relevant SES employee of the Court.

Although you have expressed a willingness to agree to the removal of some information, they would still contain the personal information of identified individuals as defined in section 4 of the FOI Act. This decision is consistent with the decision of the Information Commissioner in *'NM' and Department of Human Services (Freedom of Information)* [2017]

² Noting the remuneration details published in the Court's Annual Report and on the Court's website

³ Australian Government Productivity Commission, *Executive Remuneration in Australia*, Productivity Commission Inquiry Report No 49, 19 December 2009 at page 241.

AICmr 134 where it was found that information, including from an employer payment summary, was personal information for the purposes of s 47F.⁴

In considering whether the information is conditionally exempt under subsection 47F(1) I am required to consider whether the disclosure of personal information would be unreasonable.

Section 47(2) of the FOI Act prescribes that:

- (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 publically accessible sources;*
 - (d) *any other matters that the agency or Minister considers relevant.*

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

...whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

The FOI Guidelines also provide:

Documents held by agencies or ministers often include personal information about public servants. For example, a document may include a public servant's name, work email address, position or title, contact details, decisions or opinions.

Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.⁵

The personal information included within the requested documents is however not information included in a document because of the usual duties or responsibilities of these public servants. These are documents that relate to the personal affairs of the Court's SES employees as individuals and taxpayers. I am not satisfied that there exists or should exist any presumption that such documents should be released merely because each SES employee is an employee of the Federal Court and a public servant.

⁴ *'NM' and Department of Human Services (Freedom of Information)* [2017] AICmr 134 at [35] and [36].

⁵ FOI Guidelines at [6.152] and [6.153]

In considering the provisions of subsection 47F(2), the personal information contained within the payment summaries of SES employees of the Court is not well known and would, in ordinary circumstances, be limited to those entitled by law to receive it or entrusted with it at the discretion and with the consent of the individual SES employee.

This information is not available from publicly accessible sources. The Federal Court's Annual Report provides salary ranges by classification and provides details of the total remuneration for senior management, but does not provide details on an individual basis. Further details of the remuneration of senior executives and other highly paid officials are published on the Federal Court's website at: <http://www.fedcourt.gov.au/about/corporate-information/executive-remuneration>. This information includes the total remuneration for executives between specific income levels, average reportable salary, average contributed superannuation and average total remuneration.

In considering any other matters that might be relevant pursuant to paragraph 47F(2)(d) and a consideration of all the circumstances as guided by *Re Chandra and Minister for Immigration and Ethnic Affairs*, I note firstly that the disclosure of the personal information contained within the payment summaries may also have an adverse effect on the individual SES employees. These effects would, or could reasonably be expected, to include those discussed in respect of section 47E above such as destroying the trust in the confidentiality of negotiations, creating tensions between individual SES employees as well as between SES employees and non-SES employees and undermining the morale of SES employees. Other employees may also lose trust and confidence in the ability of the Court to maintain confidentiality over their personal information.

The Court has significant obligations with respect to the confidentiality of employee records, including those relating to remuneration. None of the documents requested are disclosed to anyone other than authorised staff, the Australian Taxation Office (ATO) where required by law, or to the relevant employee.

In addition, some SES employees exercise judge delegated functions. The release of personal information of SES employees who exercise these functions would, or could reasonably be expected, to increase security risks associated with the performance of those functions and potentially make it more difficult to exercise those functions in an independent and impartial manner, and without fear of personal retribution. It is noted that this would be mitigated to some degree by the redaction of certain information for which you have expressed a willingness to agree.

In circumstances where the ATO is restricted from disclosing a document under the secrecy provisions of the taxation legislation, at least in respect of payment summaries, and where each of the relevant SES employees has objected to the release of their personal information, I have concluded that the information requested contains information that is conditionally exempt under subsection 47(F)(1) of the FOI Act.

Public Interest Test

Subsection 11A(5) of the FOI Act provides:

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.

In considering that “public interest test”, a number of factors set out in subsection 11B(3) of the FOI Act must be taken into account. These 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; and
- allow a person to access his or her personal information.

Disclosure would broadly promote the objects of the FOI Act by providing to the Australian community access to information held by the Government, increasing knowledge about Government activities and enhancing the scrutiny of Government decision-making. Disclosure may also promote oversight of public expenditure in revealing the remuneration paid to SES public servants. Such public expenditure, particularly in the context of the ongoing enterprise bargaining within the Australian Public Service, is a matter of some public importance and its disclosure may inform public debate.

However, there is a range of material that is already publicly available in relation to SES remuneration, including that within the Court’s Annual Reports, and on its website, and also within the Australian Public Service Commission’s Remuneration Reports (available at <http://www.apsc.gov.au/publications-and-media/current-publications/remuneration-surveys>). Disclosure of the documents requested is unlikely to serve the public interest any more than this publicly available information.

Whilst significant weight is therefore given to the promotion of the objects of the FOI Act, little weight is given to the ability of this information, should it be released, to inform debate on a matter of public importance and promote effective oversight of public expenditure to any significant degree above that information that is already publicly available.

This is not an instance where the applicant is seeking access to their own personal information.

The public interest factors weighing against a finding that it would be in the public interest to disclose the information within the scope of the request for access are a development of those issues identified previously.

The release of the precise details of the remuneration of SES employees of the Court would, or could, reasonably be expected to have a substantial adverse effect on the management of personnel by the Court by:

- destroying the trust in the confidentiality of negotiations between SES employees and the CEO of the Court on the terms and conditions of employment for those employees, and potential employees, making future negotiations more difficult, prolonged and adversarial;

- making it more difficult for the agency to negotiate the terms and conditions of employment on an individual basis, with the bargaining positions of SES employees strengthened by knowing the terms and conditions of employment of their colleagues, manifesting in upward pressure on Commonwealth expenditure.
- permitting remuneration comparisons which create tensions between individual SES employees as well as between SES employees and non-SES employees; and
- undermining the morale of SES employees and leading to potential reductions in productivity.

The personal information provided within the documents requested relate to the personal affairs of each SES employee as an individual, and in the case of payment summaries, as a taxpayer. I am not satisfied that there exists or should exist any presumption that such documents should be released merely because each SES employee is an employee of the Federal Court and a public servant. The personal information is not information about the performance of the usual duties or responsibilities of the individual SES employees of the Court.

The disclosure of the personal information contained within the requested documents may also have an adverse effect on the individual SES employees and prejudice the rights of those individuals to privacy. These effects would, or could reasonably be expected, to include those discussed in respect of section 47E above such as destroying the trust in the confidentiality of negotiations, creating tensions between individual SES employees as well as between SES employees and non-SES employees and undermining the morale of SES employees. Other employees may also lose trust and confidence in the ability of the Court to maintain confidentiality over their personal information.

The impact upon the Court and the Court's employees from the release of information within the scope of the request is significant and within the public interest.

These are factors for which I give significant weight.

Some SES employees exercise judge delegated functions. The release of personal information of SES employees who exercise these functions would, or could reasonably be expected, to increase security risks associated with the performance of those functions and potentially make it more difficult to exercise those functions in an independent and impartial manner, and without fear of personal retribution. It is noted that this would be mitigated to some degree by the redaction of certain information for which you have expressed a willingness to agree.

After considering the mitigating impact of any potential redaction this is a factor to which I give some weight.

After considering each of these factors and the weight given to each, and where disclosure would otherwise be inconsistent with the Federal Court's obligations under the Privacy Act, I am not satisfied that disclosure of the information within the scope of the request for access would be in the public interest.

Redaction not appropriate

Where access to the requested documents is refused, section 22 of the FOI Act provides that an edited copy of the documents may be provided if it is possible to redact exempt information. Under that section, irrelevant information may also be redacted.

You have indicated a willingness to agree to the redaction of all information contained in any relevant document with the exception of the following:

- *information that discloses the relevant SES officer's name;*
- *information that discloses that officer's precise salary for the relevant financial year; and*
- *information that identifies what the document is (eg. A group certificate/payment summary, an employment contract or a s. 23(1) Determination) and the period that it covers.*

In light of my findings above, a redaction of all exempt information would render the document meaningless for the purposes of your request. Consequently, I have decided that this would not be an appropriate response to your request for access.

Section 17 of the FOI Act not applicable

Section 17 of the FOI Act provides:

- (1) *Where:*
- (a) *A request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirement of subsection 15(2) to an agency;*
 - (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and*
 - (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
 - (c) *the agency could produce a written document containing the information in discrete form by:*
 - (i) *the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
 - (ii) *the making of a transcript from a sound recording held in the agency;*
- the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.*

The FOI request as made is a request for discrete documents, namely documents which detail the precise salary paid to each of the Federal Court's SES officers over a number of financial years. The request went further to detail the documents where such information might be included, namely:

- group certificates/end-of-year PAYG payments summaries issues by the Court to its SES officers;
- common law contracts relating to the employment of relevant SES officers; or
- any relevant determinations made under s 24(1) or 24(3) of the Public Service Act 1999 in respect of those relevant SES officers.

As the Court holds these documents in a discrete form the request is outside the scope of section 17 pursuant to paragraph 17(1)(b) of the FOI Act.

Charges

You have not been charged for the processing of your request

Your Review Rights

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Federal Court for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Officer of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Yours sincerely



Scott Tredwell

Deputy District Registrar