



Australian Government
Australian Public Service Commission

Fliccy

By email: foi+request-4192-53e33be4@righttoknow.org.au

APSC references: C17/2088 and C18/1032

OAIC references: MR18/00654 and MR18/00655

Dear Sir / Madam

Section 55G – substituted decisions

1. I am writing to notify you that I have decided, pursuant to section 55G of the *Freedom of Information Act 1982* (FOI Act), to set aside and substitute two access refusal decisions.
2. The two access refusal decisions I have decided to set aside are:
 - decision dated 7 June 2018 in respect of your freedom of information (FOI) request dated 2 November 2017 (**‘Request A’**);
 - decision dated 19 June 2018 in respect of your FOI request dated 23 May 2018 (**‘Request B’**).
3. The FOI Act is publicly available from www.legislation.gov.au.

Background – Request A

4. You made Request A by email dated 2 November 2017. You requested access to documents in the following terms:

I request access to all documents held by the APSC that relate to the APSC produced document for the IPA.

5. In the decision on Request A, the decision maker advised you as follows:

The document attached to the Commissioner’s email message of 13 April 2015 is not a document which was “produced or created nor prepared for the IPA”. The document attached to the Commissioner’s email was prepared by the Commission’s Workplace Relations Group, in response to an earlier request by the Commissioner, to assist the Commissioner in writing an article. The Commissioner’s email message of 13 April 2015 simply provided the IPA with a copy of a pre-existing document. The document was not “prepared for the IPA”.

6. The decision maker refused your request on the basis that your request was essentially for documents relating to a non-existent document.

Background – Request B

7. You made Request B by email dated 23 May 2018. You requested access to documents in the following terms:

I'd like make an FOI request for access to all documents held by the APSC that relate to the APSC produced document for the IPA.

8. At face value, the scope Request B is identical to Request A. However, in your email of 23 May 2018, you further indicated that Request B should include the following (emphasis added):

*Those documents include, but are not limited to, instant messages (lync, whatsapp or other), text messages, voice mail messages, emails, meeting agendas, meeting minutes, meeting notes, marked-up edits and comments (with authors/editors identified), memos, post it notes **and audit details of active events against relevant documents held in workflow/HPRM/TRIM (demonstrating which APSC staff members accessed, created and modified relevant documents and the changes they may have made and when)** that in any way relate to the APSC produced document for the IPA (whether it be the genesis and preparation of that document, its use, its audience, its recipients (including all third party recipients), its contents, decisions made in respect of the document, its distribution or otherwise.*

9. In my opinion, the scope of your Request B is identical to the scope of your Request A other than the parts I have emphasised in the extracted quote above and the fact that Request B was made over six months later than Request A. The parts I have not emphasised would have been within the scope of Request A.
10. In both Request A and Request B, you have requested documents that “relate to” another specific document. The parts I have emphasised at paragraph 10 are broader than this. Audit details about documents held in HPRM are one step further removed in the sense that these are documents about other documents that “relate to” a specific document.
11. In the decision on Request B, the decision maker again refused your request on the basis that you had essentially requested documents that relate to a non-existent document.

The ‘Examples Document’

12. In your requests, you requested access to documents relating to a document produced for the Institute of Public Affairs (IPA). I agree with the original decisions on your requests: the Commission did not produce a document “for the IPA” and, consequently, no such document exists.
13. Your email message of 2 November 2017 referred to a document released in response to the following FOI request made through the Right to Know website:

https://www.righttoknow.org.au/request/ipa_and_hr_hicholls_society_docu#outgoing-6854

14. The document you referred to was the document at pages 16 to 28 of the following PDF file published on the Right to Know website:

<https://www.righttoknow.org.au/request/3471/response/9986/attach/4/Documents%20C17%201026.pdf>

15. The document was titled “Examples of ‘Soft’ Arrangements in Commonwealth Enterprise Agreements”. For the purposes of my decision, I refer to this document as the ‘Examples Document’.

Scope of your requests

16. As I understand it, the purpose of your email message of 23 May 2018 was primarily to clarify the scope of your Request A. By 23 May 2018, documents that “relate to” the Examples Document would have included any documents connected with your FOI requests, including all of the communications between this office and you. It does not appear to me that it was your intention to expand your Request A to cover these additional materials created after the date of your first request.

17. For the purposes of my decision, I therefore construe your requests as follows:

Request A: all documents, created on or before 2 November 2017, held by the APSC that relate to the Examples Document; and

Request B: documents containing audit details of active events against ‘relevant documents’ held in workflow/HPRM/TRIM (demonstrating which APSC staff members accessed, created and modified relevant documents and the changes they may have made and when), wherein; ‘relevant documents’ means any document in Category 1 above.

Documents relevant to your requests

18. In late 2017 and early 2018, staff were asked to provide copies of any documents relevant to your request. In light of my interpretation of the scope of your request, staff have again been asked to provide copies of documents relevant to your requests.
19. I have attached a schedule at **Attachment A** setting out the documents relevant to your request.
20. Almost all documents relevant to your request were retrieved from individuals’ Microsoft Outlook email accounts. One document was stored on an individual’s computer and one document is an extract of the Australian Public Service Commissioner’s correspondence register.
21. No documents relevant to your request were found in the Commission’s electronic records management system (ie. TRIM). It follows that all documents relevant to your requests are within the scope of Request A and no documents within the scope of Request B were identified.

Decision on your FOI request

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

23. In relation to Request A, I have decided that parts of some of the documents you have requested are exempt from disclosure under the FOI Act. My reasons for this decision are set out at **Attachment B**.
24. I have decided to refuse your Request B under section 24A of the FOI Act. Paragraphs 24A(1)(a) and 24A(1)(b) of the FOI Act provide that an agency may refuse a request for access to a document if the agency is satisfied that all reasonable steps have been taken to find the document and the agency is satisfied that the document does not exist.
25. Please note that my reasons for refusing Request B are different to the original decision maker's reasons. I have refused your Request B on the basis that there are no documents containing audit details of active events against documents held in TRIM. On 2 November 2017, all documents relating to the Examples Document were held outside TRIM and all such documents are within the scope of your Request A.

Deletion of exempt matter or irrelevant material

26. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.
27. I have attached to this letter copies of documents relevant to your request. These documents have been edited to remove material that is either exempt material or material that is irrelevant to the scope of your request. The schedule at Attachment A sets out the grounds on which information has been redacted from the documents relevant to your request.

Publication

28. The Commission must publish information relating to material that has been released in response to each FOI access request. This publication is known as a 'disclosure log'.
29. The disclosure log requirement does not apply to personal information about any person if it would be unreasonable to publish the information or to information about the business, commercial, financial or professional affairs of any person if publication of that information would be unreasonable.
30. The Commission is not required to consult you on any decision to publish information that is released to you and the decision to publish information is not subject to review internally by the Commission or externally by the Australian Information Commissioner. Any person can however, make a complaint to the Australian Information Commissioner about how an agency handles an FOI request.

Contacts

31. If you require clarification of any of the matters in this letter you may contact the Commission's FOI co-ordinator by telephone on (02) 6202 3500 or by email at foi@apsc.gov.au.

Review Rights

32. You have requested review by the Information Commissioner (IC) of the access refusal decisions on Request A and Request B. In accordance with subsection 55G(2) of the FOI

Act, I will provide a copy of my decision to the Office of the Australian Information Commissioner (OAIC). As I understand it, your requests for review will then be treated as requests for review of my decision.

Yours sincerely

A handwritten signature in dark ink, reading "Richard Bartlett". The script is cursive and fluid, with the first name and last name clearly distinguishable.

Richard Bartlett
Authorised FOI decision maker

18 June 2019

ATTACHMENT A

C17/2088 and C18/1032 – schedule of documents						
Doc	Folio	Date	Author	Recipient	Description	
1	1	10/04/2015	Redacted	Redacted	Email	47F
2	2	Undated	APSC		Attachment to Document 1	
3	4	8/04/2015	Redacted	Redacted	Email	47F
4	5	10/04/2015	Helen Bull	Redacted	Email	47F
5	6	Undated	APSC		Attachment to Document 5	
6	18	10/04/2015	Redacted	Helen Bull	Email	47F
7	19	Undated	APSC		Attachment to Document 6	
8	25	9/04/2015	Redacted	Helen Bull	Email	47F
9	26	Undated	APSC		Attachment to document no. 8	
10	32	13/04/2015	Helen Bull	John Lloyd	Email	47F
11	33	Undated	APSC		Attachment to document no. 10	
12	46	8/04/2015	Redacted	Redacted	Email	47F
13	47	Undated	APSC		Attachment to document no. 12	
14	55	13/04/2015	Redacted	John Lloyd	Email	47F
15	56	Undated	APSC		Attachment to document no. 14	
16	62	13/04/2015	Redacted	John Lloyd	Email	47F
17	63	Undated	APSC		Attachment to document no. 16	
18	75	4/05/2015	Redacted	Redacted	Email	47F
19	76	Undated	APSC		Attachment to document no. 18	
20	89	9/04/2015	Redacted	Multiple recipients	Email	47F
21	90	Undated	APSC		Attachment to document no. 20	
22	95	8/04/2015	Redacted	Redacted	Email	47F
23	96	9/04/2015	Redacted	Redacted	Email	47F
24	103	9/04/2015	Redacted	Multiple recipients	Email	47F
25	109	9/05/2015	Redacted	Multiple recipients	Email	47F
26	116	9/04/2015	Redacted	Multiple recipients	Email	47F

27	123	9/04/2015	Redacted	Multiple recipients	Email	47F
28	129	Undated	APSC		Document	
29	135	13/04/2015	John Lloyd	Multiple recipients	Calendar entry	47F
30	136	9/02/2015	Helen Bull	John Lloyd	Email	47F
31	142	21/01/2015	Australian Taxation Office	Australian Public Service Commission	Attachment to document no. 32	47C, 47E
32	213	Undated	Department of Human Services	Australian Public Service Commission	Attachment to document no. 32	47C, 47E
33	260	Undated	Department of Employment	Australian Public Service Commission	Attachment to document no. 32	47C, 47E
34	316	13/04/2015	Redacted	John Lloyd	Email	47F
35	317	Undated	APSC		Attachment to document no. 36	
36	330	13/04/2015	John Lloyd	John Roskam	Email	47F
37	331	Undated	APSC		Attachment to document no. 38	
38	344	13/04/2015	Helen Bull	John Lloyd	Email	47F
39	345	Undated	APSC		Attachment to document no. 40	
40	358	24/10/2017	Redacted	Redacted	Email	47F
41	359	Undated	APSC		Attachment to document no. 42	
42	372	28/05/2015	John Lloyd	John Lloyd	Email	47F
43	373	Undated	APSC		Attachment to document no. 44	
44	386	13/04/2015	John Lloyd	John Roskam	Email	47F
45	388	25/10/2017	John Lloyd	Multiple recipients	Email	47F
46	390	10/4/2015	APSC		Extract of Commissioner's correspondence register	

REASONS FOR DECISION

1. Where the Schedule at **Attachment A** indicates an exemption has been applied to a document or part of a document, my findings of fact and reasons for determining the specified exemption applies are set out below.

Section 47F – personal privacy

2. 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.
3. I have had regard to the matters set out at subsection 47F(2) of the FOI Act and I have also had regard to the factors set out at paragraphs 6.142 and 6.143 of the Australian Information Commissioner's FOI Guidelines.
4. As noted at paragraph 6.153 of the Information Commissioner's FOI Guidelines (emphasis added):

*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.*

5. You have alleged, publicly on the Right to Know website, that any person involved in the preparation of the Examples Document has likely acted illegally. In my opinion, the fact you have publicly made such allegations gives rise to special circumstances.
6. Disclosure of individuals' names in the present circumstances would not simply be the disclosure of public servants performing their usual duties. In the context of your public allegations of illegal conduct, disclosure of the individuals' names would connect those individuals' identities directly and permanently to defamatory information which would harm their reputations. On this basis, I consider that disclosure of the names of individuals involved in preparing the Examples Document would generally be unreasonable.
7. I am aware of paragraph 6.154 of the FOI Guidelines, which states:

When considering whether it would be unreasonable to disclose the names of public servants, there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether his or her name would be unreasonable to disclose. In seeking to claim the exemption an agency needs to identify the special circumstances which exist rather than start from the assumption that such information is exempt.

8. I have not started from an assumption that the names of non-SES officers are exempt from disclosure. As explained above, my starting position is that disclosure of names, in the particular circumstances of your public allegations, would be unreasonable.

9. However, in the Australian Public Service Commission, it is generally well-understood by SES-level officers that their roles are subject to greater scrutiny and accountability. For example, it is generally well-understood that SES-level officers may be required to attend and provide evidence to Senate Estimates hearings. As a general rule, there is no such expectation placed on non-SES officers.
10. In light of the generally well-understood expectation that SES-level officers are subject to higher degrees of scrutiny and accountability, I find that it would not be unreasonable to disclose the names of SES-level officers involved in the preparation of the Examples Document.
11. In addition to the above, the documents you have requested include a small amount of personal information such as personal telephone numbers or personal email addresses. The direct contact information of the non-SES officers would circumvent the Commission's publicly available channels for communicating with the public, noting also that the relevant officer's names and contact details are not publicly known. In my opinion, disclosure of these types of personal information is likely to cause stress for the relevant individuals.
12. Taking into account the matters above, I find that disclosure of the names of non-SES officers, personal telephone numbers and personal email addresses in the documents you have requested would involve an unreasonable disclosure of personal information. I therefore find that parts of the documents you have requested are conditionally exempt from disclosure under section 47F of the FOI Act.

Section 47E – Certain operations of agencies

13. Subsection 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.
14. The Commission's Workplace Relations Group administers the *Workplace Bargaining Policy 2018* (the Bargaining Policy). The Bargaining Policy sets out Australian Government policy as it applies to workplace relations arrangements in Australian Government employment.
15. The Commission provides advice to Government and to agencies about the Bargaining Policy. Under the Bargaining Policy, the Commission has a role in reviewing and approving draft enterprise agreements. The Commission has had similar advisory and approval roles under previous versions of the Bargaining Policy.
16. Documents 31, 32 and 33 listed in the schedule at Attachment A are draft enterprise agreements. These draft enterprise agreements were provided to the Commission confidentially for the purpose of seeking either advice or approval in respect of compliance with the Bargaining Policy.
17. Enterprise bargaining, like other forms of bargaining, is inherently a process involving multiple parties with different interests reaching an agreed outcome. In the context of any

form of bargaining, the disclosure of sensitive or confidential information of one party can severely undermine that party's bargaining position resulting in an unfair outcome.

18. The disclosure of draft enterprise agreements would essentially disclose confidential information about the bargaining position of one of the parties in enterprise bargaining. This information could be used to the detriment of the Commonwealth in future bargaining.
19. Moreover, disclosure of this information would undermine the Commission's ability to provide advice to Government and to agencies about the Commonwealth's bargaining position. Disclosure of confidential bargaining information could be expected to restrict the free flow of information between the Commission and the Government and between the Commission and agencies. This would curtail the Commission's ability to provide advice to the Minister about managing sensitive negotiations with key stakeholders.
20. Further, public examination of confidential bargaining information of the Commonwealth and other parties could reasonably be expected to impede the Commission's ability to engage in future confidential discussions with other potential bargaining parties. This would have the effect of undermining the Commission's relationships with stakeholders and further curtail the Commission's ability to provide advice to Government and to agencies.
21. For the reasons above, I have formed the view that there is a real risk that disclosure of the draft enterprise agreements would have a substantial adverse effect on the proper and efficient operations of the Commission. For this reason, and the reasons above, I have decided that the draft enterprise agreements are conditionally exempt from disclosure under section 47E of the FOI Act.

Section 47C – deliberative matter

22. Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure if it would disclose certain matter of a deliberative nature. Essentially, deliberative matter is content that is in the nature of, or relating to:
 - an opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a consultation or deliberation that has taken place;in the course of, or for the purposes of, a deliberative process of the agency, a Minister or the Government of the Commonwealth.
23. As explained above, draft enterprise agreements were provided to the Commission confidentially for the purpose of seeking either advice or approval in respect of compliance with the Bargaining Policy.
24. As noted at paragraph 6.55 of the FOI Guidelines:

The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.

25. In my opinion, the Commission's role in either giving advice or approval of draft enterprise agreements is clearly a deliberative process of the Commission. This process involves considering and providing opinion, advice or recommendation about the content of draft agreements. The draft enterprise agreements themselves constitute material gathered as part of the Commission's deliberative processes relating to administration of the Bargaining Policy.
26. For the reasons above, I find that the draft enterprise agreements listed in the schedule at Attachment A are conditionally exempt from disclosure under section 47C.

Section 11A – public interest considerations

27. For reasons provided above, I have determined that parts of the documents you have requested are conditionally exempt from disclosure under sections 47C, 47E and 47F of the FOI Act.
28. Subsection 11A(5) of the FOI Act requires that I give access to those parts of the documents unless, in the circumstances, access would, on balance, be contrary to the public interest.
29. I have had regard to the factors set out at subsection 11B(3) of the FOI Act as being public interest factors in favour of granting access to a document. I have not had regard to the factors set out at subsection 11B(4) of the FOI Act which are deemed to be irrelevant in determining whether access would be in the public interest.
30. I have identified the following public interest factors in favour of disclosure of the information I have found to be conditionally exempt from disclosure:
- disclosure would provide the public with information about how the Commission undertakes its functions;
 - disclosure would provide the public with information about the review and approval of draft enterprise agreements.
31. I have identified the following public interest factors as weighing against disclosure of parts of the documents you have requested:
- disclosure would adversely affect individuals' rights to privacy;
 - disclosure would connect specific individuals to defamatory allegations publicly made by you on the Right to Know website, thereby harming the reputation of those individuals;
 - not disclosing non-SES officer's personal information would not detract from an understanding of the documents or shed any light on the workings of government;

- disclosure would undermine the flow of information between agencies and the Commission in connection with the administration of the Bargaining Policy;
- disclosure would have a substantial adverse effect on the Commission's operations because disclosure would undermine the Commission's capacity to administer the Bargaining Policy.

In my opinion, the public interest factors against disclosure outweigh the public interest factors in favour of disclosure. Therefore, I find that it would, on balance, be contrary to the public interest to disclose the conditionally exempt parts of the documents you have requested. These parts of the documents are therefore exempt from disclosure under the FOI Act.