



Australian Government

Fair Work OMBUDSMAN

Our reference: FOI-784

12 February 2018

Anonymous requestor

By email to: <mailto:foi+request-4227-ab34b185@righttoknow.org.au>

Dear Sir/Madam

Notice of Decision – Freedom of Information Request

I refer to your request under the *Freedom of Information Act 1982* (**FOI Act**) to the Office of the Fair Work Ombudsman (**FWO**), received on 1 December 2017.

In your request you advised that you were making the same request as that which was made to the Office of the Australian Information Commissioner (the **OAIC request**) received on 2 August 2017,¹ albeit such that every reference to 'OAIC' in the OAIC request should be read as a reference to 'FWO'. The OAIC request sought access to:

'Documents which detail the precise salary 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.*

¹ See: <https://www.righttoknow.org.au/>

I am willing to further 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 28 September 2017 the Office of the Australian Information Commissioner (**OAIC**) released its decision to the OAIC request, noting you had later agreed to refine the scope of your initial request to further exclude the names of individual SES Officers.

A confirmation email was sent to you on 1 December 2017, in which confirmation of the scope of your request was sought, and a response was provided by you on 12 December 2017 in which you agreed to refine the scope of your request to only include:

The salary paid to SES officers currently employed by the FWO (who at the time of the request are categorised as SES officers) and that you also consent to the deletion of any personal information other than:

- *Information that discloses the officers precise salary for the relevant financial years; and*
- *Information identifying what the document is (e.g. a group certificate/payment summary, an employment contract or a s.23(1) Determination) and the period that it covers.*

DECISION AND STATEMENT OF REASONS FOR DECISION

I am authorised by the Fair Work Ombudsman, under s. 23 of the FOI Act, to make decisions on requests for access to documents.

I have identified that the FWO holds a number of documents within the scope of your request following inquiries with officers able to identify relevant documents.

I have decided that the documents are conditionally exempt under ss. 47E(c) and 47F(1) of the FOI Act. Pursuant to s. 11A(5) I have further decided disclosure would be, on balance, contrary to the public interest and therefore that access will be refused. The details of my decision are set out below.

In making my decision, I took into account:

- your request;
- information in the documents falling within the scope of your request;
- the FOI Act;
- the Australian Information Commissioner's Guidelines (OAIC Guidelines);
- consultation with officials about the nature of the documents and the Agency's operating environment; and
- the FWO's annual reports and executive remuneration published on its website.

Certain operations of agencies

Section 47E(c) of the FOI Act provides 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 or assessment of personnel by the Commonwealth, by Norfolk Island or by any agency'.

The precise salary of officers engaged as Senior Executive Service (**SES Officers**) over three financial years is information relating to the management of personnel. The salary of SES Officers is determined through a process of negotiation between the Agency Head and each individual SES Officer.

I am satisfied that disclosure of the precise salary paid to individual SES Officers would substantially and adversely effect the FWO's management of personnel, namely the recruitment, promotion and compensation of SES Officers, in the following ways:

- the FWO's bargaining position in current and future negotiations would or could reasonably be expected to be undermined, as SES Officers (or potential SES Officers) will be able to benchmark their salary against others prior to negotiating their terms and conditions; and
- SES Officers may compare precise salaries paid to other individual SES Officers and this may adversely effect the confidence of individuals as to the confidentiality of salary negotiations between individual SES Officers and the Agency.

I have therefore determined that this material is conditionally exempt under s. 47E(c) of the FOI Act.

Personal privacy

Section 47F(1) of the FOI Act provides 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).'

In considering whether the information is conditionally exempt under s. 47F(1) I am required to consider whether the disclosure of personal information would be unreasonable. Section 47(2) of the FOI Act provides a list of matters that must be regarded when determining whether the disclosure would involve the unreasonable disclosure of personal information. This includes whether it is well known, whether it is available publicly, 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, and any other relevant matters.

Section 4 of the FOI Act states that 'personal information' has the same meaning as in the *Privacy Act 1988*. Section 6 of the *Privacy Act 1988* states:

personal information means 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 a material form or not.*

In determining whether the scope of your request includes personal information, I have considered the OAIC Guidelines to determine whether the individual SES Officers are reasonably identifiable in the particular circumstances.²

The documents requested identify individual SES Officers and contain information about the salary each individual was paid in relevant financial years by the FWO as their employer. Payment summaries contain information such as tax information, reportable superannuation, home address and employee numbers. They are prepared to comply with the obligations of the FWO under Commonwealth taxation laws.

The identity of the SES Officers can be inferred from the information falling within the scope of your request through a process of deductive reasoning, even where the identity of individuals is replaced by an identifier and removal of some personal information occurs. For example:

- disclosing an individual's salary paid to them over a period of time may disclose personal information such as periods of unpaid leave;
- the identity of SES Officers will be particularly apparent to those familiar with the movements of SES Officers, and when they were engaged across the three financial years. The FWO has a small SES cohort. As the appointment of SES Officers is publicly available information, the personal information will not necessarily only be known to a small number of employees within the agency familiar with staff movements.

I note that the OAIC Guidelines state that the public servants' personal information does not generally include personal information included in a document because of their usual duties or responsibilities.³ The precise salary paid to each SES Officer is not information associated with the performance by them of their usual duties and responsibilities, rather it relates to the personal financial affairs of those individuals. It is not well-known or available publicly.⁴ Consistent with the obligations of the Agency under the *Privacy Act 1988*, access to personal information of employees is limited to a very small number of authorised individuals, and otherwise is considered and kept confidential as with all other employee records. Disclosure would be inconsistent with these obligations.

I have therefore determined that the documents are conditionally exempt under s. 47F(1) of the FOI Act because disclosure would be unreasonable.

The public interest test

The exemptions in ss. 47E(c) and 47(F) are 'public interest conditional exemptions' and s. 11A(5) of the FOI Act requires that I give you access to a conditionally exempt document unless it would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act lists four factors that favour access when applying the public interest test. In this instance, there are three relevant factors when deciding whether to disclose the information in the documents to you:

- to promote the objects of the FOI Act;

² OAIC Guidelines, [6.131] - [6.135].

³ OAIC Guidelines, [6.153].

⁴ The Agency publishes information about SES salary and highly paid officials on its website (see further below), however this is not provided on an individual basis.

- inform debate on a matter of public importance; and
- promote effective oversight of public expenditure.

The OAIC Guidelines contain a non-exhaustive list of further factors favouring disclosure.⁵ In my view, none of these factors is relevant here. The FOI Act does not list any factors against disclosure, however the Guidelines contain a non-exhaustive list of factors against disclosure.⁶

Disclosure would broadly promote the objects of the FOI Act by providing access to information held by the Government, and may generally promote oversight of public expenditure by revealing the precise salary paid to SES Officers. It may inform debate in the context of enterprise bargaining occurring within the Australian Public Service, a matter of some public importance.

The objects of the FOI Act can be attained, not just through access to information held by the Government, but by referring to publicly available sources which includes material regarding SES salaries. The FWO website lists a summary of the remuneration paid to SES employees during the 2016-17 financial year. A copy is available from the FWO website at: <https://www.fairwork.gov.au/ArticleDocuments/725/Executive-remuneration-2016-2017.pdf.aspx>.

In addition, the FWO's annual reports also contain information about remuneration paid to its staff, including SES Officers, for each of the relevant financial years as follows:

- 2014/15 Annual Report, at page 47: <https://www.fairwork.gov.au/ArticleDocuments/710/fair-work-ombudsman-annual-report-2014-15.pdf.aspx>
- 2015/16 Annual Report at: <https://www.fairwork.gov.au/annual-reports/annual-report-2015-16/03-management-and-accountability/workforce-management>
- 2016/17 Annual Report at: <https://www.fairwork.gov.au/annual-reports/annual-report-2016-17/04-management-and-accountability/workforce-management>

Further, the Australian Public Service Commission (APSC) conducts an annual census across Australian Public Service (APS) agencies that informs APS-wide remuneration practices. A copy of these annual reports (from 2010) is available from the APSC website at <http://www.apsc.gov.au/publications-and-media/current-publications/remuneration-surveys>.

I am not satisfied that disclosure of the information you have requested would serve the public interest in any greater way than the material referred to above that is publicly available.

A relevant factor against disclosure is that release of the information could reasonably be expected to prejudice the protection of a person's right to privacy. This is particularly relevant where disclosure could be reasonably considered to reveal information about private and confidential matters to the SES Officers that are of a sensitive nature.

The personal information, namely the precise salary of SES Officers, is not widely known. While the salary information of SES Officers is broadly summarised on the FWO's website, the precise salaries paid to SES Officers in each financial year are not. The nature of the information is sensitive and it is reasonable to assume that these employees expect their

⁵ OAIC Guidelines [6.19].

⁶ OAIC Guidelines [6.22].

salary, and negotiations concerning the terms of their employment, to be treated in confidence. Disclosure could reasonably be expected to adversely impact the interests of the individuals.

Another relevant factor against disclosure is when the release of information could reasonably be expected to prejudice the management function of the agency. SES Officers are not covered by the *Fair Work Ombudsman Enterprise Agreement 2016 – 2019* and SES Officers directly negotiate their salary with the Agency Head. Release of precise individual salary information would undermine the FWO's bargaining position and ability to negotiate salary confidentially with individual SES Officers.

The significant impact upon the Agency and the affected employees from the release of information within the scope of the request is a matter of public interest.

I have not taken any irrelevant factor set out in s. 11B(4) of the FOI Act in deciding whether access to the document would on balance be contrary to the public interest.

Having considered each of the factors for and against release, and afforded weight to each of them, I have determined it is not in the public interest to release the information within the scope of the request for access. I do however refer you to the information referenced above that is published by the FWO and that relates to SES salary for each financial year.

Additional comments

Where access to the requested documents is refused, s. 22 of the FOI Act provides that an edited copy of the documents may be provided if it is possible to redact exempt information. While your request identified that the FWO could redact all information other information that discloses each SES Officer's precise salary for the relevant financial year and information that identifies what the document is, based on my determinations above, the redactions would make the document meaningless and therefore would not be appropriate to release.

I have further considered a document created to meet the terms of your request pursuant to s. 17 of the FOI Act. Section 17 of the Act applies where:

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

As documents containing the information requested exist in a discrete form, the request does not fall within s. 17(1)(b) of the FOI Act.

Review Rights

I have attached a document setting out your rights of review of this decision (**Attachment A**).

Contact details

If you need further information, please direct your enquiries via email to foi@fwo.gov.au where a member of the Customer Feedback & Information (CFIA) team familiar with your FOI request and can answer any questions you might have.

Yours sincerely



Michelle Carey
A/g Executive Director – Finance, Assurance & Business Services
Fair Work Ombudsman

INFORMATION ON RIGHTS OF REVIEW & COMPLAINTS

Rights of review

If you are dissatisfied with this decision you can apply for internal review by this agency (Option 1 below) or external review by the Australian Information Commissioner (IC Review) (Option 2 below).

You do not have to apply for internal review before seeking IC review. However, the Information Commissioner has expressed the view that it is preferable for a person to seek internal review by the agency before applying for IC Review. If you choose Option 1 (internal review), you can also apply for IC review of the internal review decision within 60 days after receiving notice of our decision.

Option 1 – Internal review

You can seek internal review of the decision. An application for internal review must be made in writing within 30 days after the date you were notified of the decision, or within such further period as the Fair Work Ombudsman allows. The internal review will be conducted by a senior officer who had no involvement in the initial decision.

There is no particular form required to make a request for internal review. However, it would help the reviewer if you said, in writing, why you think the decision should be reviewed.

An application for an internal review of the decision should be sent to:

Email: foi@fwo.gov.au

Fax: (02) 6204 2364

Ph: (02) 8293 4681

FOI Manager
GPO Box 9887
MELBOURNE VIC 3001

Option 2 – Review by the Australian Information Commissioner

Alternatively, you can apply in writing to the Australian Information Commissioner for IC review of the decision. An application for IC Review must be made within 60 days after the day you were given notice of this decision.

In making your application, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. It would also help the Australian Information Commissioner if you set out the reasons for seeking IC review in your application.

To apply for IC review, please refer to the FOI Fact Sheet 13 issued by the Office of the Australian Information Commissioner (http://www.oaic.gov.au/images/documents/freedom-of-information/foi-factsheets/FOI_factsheet12_your-rights_online_July2012.pdf). You can file your application online at <https://forms.business.gov.au/aba/oaic/foi-review/> or download a review form from the OAIC's website www.oaic.gov.au.

Complaints

You can complain to the Australian Information Commissioner about action taken by the Fair Work Ombudsman in relation to your freedom of information request. Your complaint must be in writing and it is the Information Commissioner's preference that an online complaint form be completed. The form can be found at https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1. Alternatively, you can send a letter to the Office of the Australian Information Commissioner, GPO Box 5218, Sydney NSW 2001 or send an email to enquiries@oaic.gov.au.