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20 February 2018

By email: foi+request-4279-d02e2ca2@righttoknow.org.au

Dear Sir/Madam,

Notice of decision under the *Freedom of Information Act 1982*

1. I refer to your application under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) received by IP Australia on 22 December 2017.
2. This letter sets out my decision in relation to whether to provide access to the documents you have requested.

Summary of decision

3. I have decided that certain personal information in the documents you requested is exempt from disclosure under the FOI Act.

Background

4. On 4 January 2018, you received an acknowledgement informing you that IP Australia would be consulting with the relevant individuals under section 27A of the FOI Act before making a decision on the release of those documents. For this reason the period for processing your request was extended by 30 days (section 15(6) of the FOI Act).

Documents relevant to your request

5. You requested access to documents detailing the precise salary paid to each of IP Australia's Senior Executive Service (SES) employees for the financial years 2014/15, 2015/16 and 2016/17. In your request you indicated that the PAYG payment summaries issued by IP Australia would be sufficient to provide the information you seek.
6. You confined the scope of your request by agreeing to redaction of all information in any relevant document with the exception of:
 - information that discloses the relevant SES officer's name;
 - information that discloses the precise salary for the relevant financial year; and
 - information that identifies what the document is and the period that it covers.

7. You agreed to narrow the scope by limiting the request to officers employed by IP Australia who, at the time of the application, were categorised as SES officers.
8. I have identified 23 documents relevant to your request. Payment summaries relating to 10 SES officers fall within the scope of the request. IP Australia holds payment summaries for all three financial years in relation to five SES officers. IP Australia holds payment summaries for two financial years in relation to three SES officers. IP Australia holds payment summaries for one financial year in relation to two SES officers.

Material relied upon

9. In making my decision, I have had regard to the following:
 - your application for access to documents received by IP Australia on 22 December 2017;
 - the submissions referred to in the above request dated 2 August 2017;
 - the content of the documents to which you sought access;
 - the views of individuals consulted under section 27A of the FOI Act;
 - the relevant provisions of the FOI Act; and
 - Guidelines issued under section 93A of the FOI Act (**Guidelines**) published by the Office of the Australian Information Commissioner (**OAIC**).

Reasons for Decision

10. I am an officer of IP Australia authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

Exemption under Section 47E - certain operations of agencies

11. 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.
12. The disclosure of the PAYG payment summaries could reasonably be expected to have an adverse effect on IP Australia's negotiating position with current and future SES employees.
13. SES officers in IP Australia are not covered by the agency's Enterprise Agreement. An SES officer's employment agreement is negotiated between the individual SES officer and the agency head for the purposes of the *Public Service Act 1999* (Cth).
14. Information relating to SES salaries is publicly available, generally in an aggregated form.¹ The information the applicant seeks is set out in PAYG summaries which contain more

¹ See paragraphs 29 to 34 below for details.

detailed, individual information about each SES officer's pay and allowances. Disclosure of this information, which relates to several prior years, would also reveal pay progression over time, which could reasonably be expected to have an adverse impact on IP Australia's ability to achieve the best outcomes in future pay negotiations.

15. To release the PAYG summaries for all SES officers would reveal the details of employee remuneration and entitlements negotiated on an individual basis by those SES officers and the agency head. The availability of such information would make it more difficult for the agency to negotiate the terms and conditions of employment on an individualised basis in the future.
16. Accordingly, I am satisfied that disclosure of parts of the requested documents would have a substantial adverse effect on the management of personnel by IP Australia. Consequently, I find that parts of the requested documents are conditionally exempt from disclosure under section 47E of the FOI Act.

Exemption under Section 47F - personal privacy

17. A document is conditionally exempt under section 47F of the FOI Act, where its disclosure could involve the unreasonable disclosure of personal information of any person. Personal information is defined in section 4(1) of the FOI Act to mean information or an opinion (including information forming part of a database), whether true or not and whether recorded in a material form or not about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion. Personal information can include a person's name, address and telephone number.

18. Paragraph 6.138 of the FOI Guidelines states the following about the test of unreasonableness in section 47F:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

19. In determining whether the disclosure of a document would involve an unreasonable disclosure of personal information, subsection 47F(2) of the FOI Act provides that an agency must have regard to the following matters:

- 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.
20. The documents you have requested include personal information about a number of individuals. In addition to the names of individuals, the requested payment summaries include details about individuals' remuneration.
 21. I accept that it is well-known that the relevant individuals are SES officers of IP Australia. I also accept that it is well-known that the relevant individuals, as PAYG taxpayers, would receive payment summaries and would be associated with that information. However, the specific remuneration information in the documents is not well known. Although information on the range of annual salaries paid to IP Australia SES officers is available from public sources, the specific remuneration information in the requested payments summaries is not publicly available.
 22. IP Australia takes its obligations with respect to the confidentiality of employee records, including remuneration information, very seriously. PAYG summaries are not disclosed outside IP Australia unless to the ATO as required by law, or to the relevant employee. The agency maintains policies and systems which strictly limit the sharing of remuneration information to the individual SES officers and employees with a 'need to know', including the Department of Industry, Innovation and Science (DIIS) employees providing payroll services under Shared Services arrangements.
 23. With respect to the factors listed at subsection 47F(2) of the FOI Act, I am satisfied that the specific remuneration information in the documents you have requested:
 - is not well-known;
 - concerns individuals who are not known to be associated with the specific details included in the payment summaries; and
 - is not available from publicly accessible sources.

Other relevant factors

24. 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	My observation
Whether the author of the document is identifiable	I do not consider this factor to be relevant.
Whether the documents contain third party personal information	The requested documents contain personal information about SES employees of IP Australia.

Whether release of the documents would cause stress on the individuals whose personal information you have requested.	In my opinion, disclosure of the requested documents may cause stress to some of the relevant individuals.
Whether any public purpose would be achieved through release	In my opinion, disclosure of the requested documents would provide a certain degree of oversight of government expenditure.
The nature, age and current relevance of the information.	The information in the requested documents is connected with government expenditure and the age of the information is such that the information has current relevance.
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 stress to the individuals. Disclosure would reveal the individuals' remuneration 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 IP Australia in the course of managing its personnel. The payment summaries were issued to the individuals because IP Australia is required to do so.
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 to IP Australia.
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.

25. 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.

In this regard, I note that the information you have requested is ordinarily regarded as confidential and the relevant individuals would not expect that the specific information requested would be open to public scrutiny.

26. Paragraph 6.153 of the FOI Guidelines states the following:

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.

27. In this regard, I do not consider it unreasonable to disclose the names of IP Australia's SES officers because this information is publicly available. As APS employees are also taxpayers, the fact that these individuals are issued with payment summaries would be unsurprising to members of the public. However, payment summaries are not documents produced by SES employees as a part of their usual duties or responsibilities. Payment summaries are documents issued to SES employees because IP Australia, as an employer, is required to do so for the personal taxation purposes of the individuals.
28. In addition to the factors above, I consider it relevant that measures have been put in place regarding public disclosure of SES remuneration.
29. All Commonwealth Reporting entities, of which IP Australia is one, are required to prepare annual financial statements. IP Australia's financial statements are published in its Annual Report. Rule 27 of the *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015* specifies the financial reporting required in respect of senior executive remuneration. Rule 27 does not require reporting of individuals' specific remuneration.
30. Information on the range of salaries paid to IP Australia SES officers is available from the DIIS Annual Report for each of the financial years to which the request relates.² The information is reported in aggregate, specifying the APS Classification level of the employee (including SES Band 1, 2 and 3) and the salary range associated with the relevant classification.
31. Noting that the Parliament has imposed financial reporting requirements on APS agencies, I consider it relevant the Parliament has not imposed a requirement to report the specific remuneration of individual SES employees.

² Commonwealth of Australia, *Department of Industry and Science Annual Report 2014-15*, Table 11; Commonwealth of Australia, *Department of Industry, Innovation and Science Annual Report 2015-2016*, Table 20; Commonwealth of Australia, *Department of Industry, Innovation and Science Annual Report 2016-17*, Table 24.

32. It is acknowledged that information relating to certain very senior positions is published via determinations of the Remuneration Tribunal. Recently more detailed information about the salaries of SES officers has been published by IP Australia. IP Australia, along with other Australian Public Service entities, has disclosed information regarding the annual remuneration of its executives and other highly paid staff, starting from the 2016-17 reporting period. On 31 July 2017, IP Australia published a document entitled *Remuneration disclosure for executive and other highly paid staff* for the financial year 2016-17 (the 2017 Remuneration Report).³
33. Table A of the 2017 Remuneration Report sets out remuneration paid to 'executives'⁴ during the reporting period. This provides averaged remuneration information for all of the executives within a particular salary band. There is only one executive in each of the top two salary bands listed in the Report. The remuneration information for each band is therefore specific to an individual, however names are not provided. Where there is more than one executive within a particular band, the information is presented on an aggregated basis and does not reflect the specific remuneration given to each individual executive.
34. Accordingly, information regarding SES salaries at IP Australia is publicly available for the relevant timeframe.

Conclusions on section 47F

35. Taking the above into account, it is apparent that there are a wide range of factors relevant to the question whether disclosure of the requested documents would involve an unreasonable disclosure of personal information. Some of the factors support a conclusion that disclosure would not be unreasonable, while some of the factors support a conclusion that disclosure would be unreasonable.
36. In weighing these factors, it is my opinion that disclosure 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

37. I have found that parts of the documents you have requested 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.
38. Subsection 11B(3) of the FOI Act lists certain factors as favouring access to a document in the public interest. These factors include whether access to the document would:

³ <https://www.ipaustralia.gov.au/tools-resources/publications-reports/remuneration-disclosure-2016-17>

⁴ For the purposes of the disclosure, 'executives' are defined as substantive Senior Executive Service (SES) employees – see at p 2.

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

39. 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 any such factors into account.

Public interest submissions made by you

40. In your submissions dated 2 August 2017, you provided material relating to the public interest in remuneration paid to public officials. In this regard, you referred to the following decisions and provided extracts of several of these:

- *Re Ricketson and Royal Women's Hospital* (1989) 4 VAR 10;
- *Re Forbes and Department of Premier & Cabinet* (1993) 6 VAR 53;
- *Re Stewart and Department of Transport* (1993) 1 QAR 227;
- *Re Thwaites and Metropolitan Ambulance Service* (unreported, 13 June 1997);
- *Re Milthorpe and Mt. Alexander Shire Council* (1997) 12 VAR 105;
- *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University & Ors* [2001] WAICmr 1; and
- *Asher and Department of State and Regional Development* [2002] VCAT 609.

41. As these decisions are decisions of State tribunals, I presume they were not decided under the Commonwealth FOI Act. Nevertheless, I acknowledge that decisions of State tribunals may be relevant in considering matters pertaining to the public interest.

42. I have not had regard to the full text of these decisions. I have had regard to the extracts of the cases that you quoted in your email message.

43. Your submissions also contain links to numerous reports and articles. I note that some of the links are not currently operating or access is only available by paid subscription. I have not had regard to the full text of all the reports and articles to which you refer. I have had regard to the comments you have provided in relation to these reports and articles.

44. I have also had regard to your submissions as a whole as they relate to matters of public interest.

45. Taking the above into account, I agree that there is a legitimate public interest in the remuneration paid to SES APS employees.

Public interest factors in favour of disclosure

46. I have identified the following public interest factors in favour of disclosure of the documents you have requested:

- 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 IP Australia, in particular, remunerates its 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 IP Australia is consistent with the Bargaining Policy 2015; and
 - the matters put forward by you in your request to IP Australia and submissions; and
- disclosure would promote oversight of public expenditure by providing specific information about the remuneration of SES employees in IP Australia.

Public interest factors against disclosure

47. 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 IP Australia, 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; and
- with respect to the remuneration of SES employees in IP Australia, a range of information is publicly available in relation to the relevant timeframe.

48. After consideration of factors both in favour and against disclosure, I am of the opinion that the damage to the public interest is not outweighed by any value that could be attributed to the release of parts of the documents you have requested in informing debate or generating transparency in public administration. Taking these matters into account, I find that it would, on balance, be contrary to the public interest to release parts of the documents you have requested.

Release of documents

49. I have decided that certain personal information in the documents you requested is exempt from disclosure. In reaching this decision, I gave consideration to whether the documents you requested could be de-identified without removing the relevant figures. In light of the relatively small number of SES employees in IP Australia and publicly available information identifying the SES employees of IP Australia, I consider that the risk of re-identification is too great.
50. Moreover, I consider that section 47E would also apply to this information in circumstances where the individuals' names have been removed. For the reasons explained above, disclosure of this information even in a de-identified form would have a substantial and adverse effect on the management of personnel in IP Australia.
51. 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. Attached to this letter are such edited copies of documents.

Your review rights and release of documents

52. If you are dissatisfied with this decision, you may apply for Information Commissioner review of this decision. This can be done by making an application in writing to the Commissioner, within 60 days of being notified of the decision. An application for review by the Commissioner should be directed to:

Office of the Australian Information Commissioner

GPO Box 2999

CANBERRA ACT 2601

Fax: +61 2 9284 9666

Email: enquiries@oaic.gov.au

53. It is also open to you to make a complaint to the OAIC or the Commonwealth Ombudsman if you have any concerns regarding the way in which IP Australia has managed this request. Information regarding how to contact the Commonwealth Ombudsman is available at <http://www.ombudsman.gov.au/>.
54. Further information about your review rights is available in FOI Fact Sheet 12 published by the OAIC and a copy is attached to this letter.

Publication of information on IP Australia's disclosure log

55. IP Australia is required to publish details of information released under the FOI Act on its website, unless publication would be unreasonable.

56. As I have decided to grant access to the documents in part, I am now obliged to consider whether pursuant to section 11C of the FOI Act, these documents should be published in the form I have decided appropriate to release.
57. I have considered the operation of section 11C of the FOI Act and the Guidelines, as well as submissions from the individuals consulted, and have decided that it would be unreasonable to publish the relevant documents.
58. The disclosure log requirement does not apply to personal information about any person if it would be unreasonable to publish the information, nor does it apply to information about the business, commercial, financial or professional affairs of any person if publication of that information would be unreasonable. IP Australia 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 IP Australia or externally by the Australian Information Commissioner. Any person can, however, make a complaint to the Australian Information Commissioner about how an agency handles a FOI request.

Questions about this decision

59. If you have any questions regarding this notice, please do not hesitate to contact me by email at olc@ipaustralia.gov.au.

Yours sincerely,



Elizabeth Carroll

Chief Legal Counsel
Office of Legal Counsel
IP Australia