



Australian Government

Fair Work OMBUDSMAN

Our reference: FOI-000793

13 March 2018

M Pool

By email to: foi+request-4289-6e4be885@righttoknow.org.au

Dear M Pool

Notice of Decision – Freedom of Information Request

I refer to your request under the *Freedom of Information Act 1982 (FOI Act)* received on 31 December 2017 for:

Access to email correspondence between the Fair Work Ombudsman, Ms Natalie James and the Australian Public Service Commissioner, Mr John Lloyd (in his capacity as Public Service Commissioner or otherwise), between 8 December 2014 and 31 December 2017.

On 10 January 2018 you revised your request scope to remove certain personal information:

Further to my request made of the FWO under s.15 of the FOI Act on 31 December 2017, I am willing to agree to the FWO redacting, from any relevant document, the personal information of any person mentioned in that document, except where that person was, at the relevant time: i) a public servant; or ii) a member of parliament. Noting paragraphs 6.153-6.154 of the FOI guidelines, this refinement of my request should negate any need for the FWO to consult with third parties under s.27A of the FOI Act.

On 24 January 2018, the Fair Work Ombudsman (**FWO**) submitted a request to the Office of the Information Commissioner (**OAIC**) for an extension of time to process your request under section 15AB of the FOI Act due to the complex nature of the request.

On 24 January 2018, OAIC granted an extension to the processing period of 30 days to 1 March 2018 on the basis that your request is complex and substantial consultation was required with the Australian Public Service Commission (**APSC**) and key internal stakeholders at the FWO.

DECISION AND STATEMENT OF REASONS FOR DECISION

I am authorised by the FWO under section 23 of the FOI Act to make decisions on requests for access to documents.

In making my decision I took into account your request for documents, the FOI Act, the Australian Information Commissioner's Guidelines (**the OAIC Guidelines**), feedback from stakeholders including within the FWO and submissions received from the APSC.

The documents falling within the scope of your request are listed in the schedule at **Attachment A** to this letter. The schedule also states my decision for each document and, where access has been refused, the section of the FOI Act under which the material is exempt. Where a document is released in full, the last column states 'Release' and where a document is exempt in part or full, the last column states 'Release with deletions' or 'Exempt' respectively.

Exemptions

I have determined that some documents are exempt under section 47(1)(b) of the FOI Act and are not appropriate to release to you as they contain information that is commercially valuable and is provided to the FWO on a confidential basis. The details of my decision are set out below.

Documents disclosing trade secrets or commercially valuable information

The OAIC Guidelines explain that for a document to be exempt under section 47(1)(b) of the FOI Act a document must satisfy two criteria:¹

1. *the document must contain information that has a commercial value either to an agency or to another person or body, and*
2. *the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

I consider that the documents relating to the 'APS Employee Census – Agency Benchmark Report: FWO' (for years 2016 and 2017) (**Census Reports**) and the 'Australian Public Service (APS) Remuneration Report – Individual Agency Report' (for years 2014, 2015 and 2016) (**Remuneration Reports**) are exempt under section 47(1)(b) of the FOI Act.

The Census Reports benchmark the FWO against other federal government agencies to inform the FWO's strategic direction and achievement of the government's priorities. The Census Reports also function as a tool to assist management review, refine and develop agency policies and procedures to improve employee engagement and efficiency. The Remuneration Reports assist the FWO to achieve a more efficient and capable workforce. The collection and analysis of remuneration data also assists to inform policy development on the APS-wide Work Level Standards and remuneration policy options.

The Census Reports are created by the APSC, as part of its broader APS wide census, and provided to the FWO under a fee-for-service arrangement as outlined in a Memorandum of Understanding between the FWO and the APSC. The Census Reports are only available for purchase to the FWO and their distribution within the agency is very limited. The Remuneration Reports are also provided on a confidential basis by the APSC to the FWO – which is further noted in the email correspondence on pages 005, 077 and 129 – under a fee-for-service arrangement as part of a separate Memorandum of Understanding between the FWO and the APSC.

I consider the Census Reports and Remuneration Reports are of commercial value to the APSC, the FWO, and more generally to the Commonwealth, and which would be greatly diminished, if not destroyed, were they freely accessible to the 'world at large' by way of an FOI request. Further, the release of these documents could reasonably be considered to

¹ OAIC Guidelines, [5.202] – [5.205].

impede the Australian Public Service Commissioner's (**the Commissioner**) ability to undertake the function of developing, reviewing and evaluating the Australian Public Sector workforce management policies as is required under section 41(2)(c) of the *Public Service Act 1999*. The data and information provided by the FWO, and contained within these reports, substantially assists the Commissioner in his performance of these functions, as does the funding obtained by way of a service offering. Were these reports released, the FWO and other agencies could reasonably be expected to reconsider their willingness to purchase future Census Reports and Remuneration Reports from the APSC, as well as reduce the quality of information and candid nature of responses provided by employees participating in the annual Census, were they be aware their responses could later be made publicly available.

Conditional exemptions – Census Reports and Remuneration Reports

I have determined that some of the documents in the Census Reports and Remuneration Reports would also be conditionally exempt under sections 47D, 47E and 47F of the FOI Act. While not seeking to rely on these conditional exemptions at this time, I note that I consider that some of these documents would also be contrary to the public interest to release.

The reasoning provided for the documents' exemption under section 47 of the FOI Act would also apply to the conditional exemptions outlined in sections 47D and 47E of the FOI Act. Section 47D of the FOI Act provides that a document is conditionally exempt where disclosure would have a substantial adverse effect on the financial interests of the Commonwealth or an agency. In this case, the release of these confidential documents could reasonably be expected to reduce the ability of the APSC to generate revenue through its intellectual property, derived from preparing the reports and providing them to agencies under a fee-for-service arrangement.

Section 47E of the FOI Act conditionally exempts documents where disclosure would, or could reasonably be expected to, have a substantial adverse effect on certain agency operations.² Each year employees of the APS complete the census, and the responses – which are provided on a confidential basis – are aggregated across participating agencies for the preparation of the APS census report. This report assesses capability and capacity of the APS to meet the governments priorities, strategic goals and service delivery standards, and is submitted each year to the Minister Assisting the Prime Minister for the Public Service for presentation to the Parliament for consideration.

Were the Census Reports released and their commercial value diminished, the reduced funding provided to the APSC would reasonably be expected to have a substantial adverse effect on the Commissioner's ability to fulfil his statutory functions to update the Parliament on the state of the Australian Public Service.

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).

Section 4 of the FOI Act states that 'personal information' has the same meaning as in the

² OAIC Guidelines, [6.95].

Privacy Act 1988. Section 6 of the *Privacy Act 1988* notes that personal information includes where an individual is reasonably identifiable.³

The Remuneration Reports include some information that would reasonably identify an individual, to employees within the agency or those familiar with staffing arrangements. This applies where there are a limited number of employees in a particular category (for example, those in receipt of certain allowances or salary sacrificing arrangements). While a public servant's personal information does not generally include personal information included in a document because of their usual duties or responsibilities,⁴ this does not include information relating to their precise financial affairs.

Conditional Exemptions – other documents

I have determined that other documents are conditionally exempt under sections 47C(1) and 47E of the FOI Act. The details of my decision and assessment of the public interest factors relevant to these conditional exemptions is set out below.

Deliberative Matter

Section 47C of the FOI Act states:

(1) A document is conditionally exempt if its disclosure 'would disclose a matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth.

(2) 'Deliberative matter' does not include operational information or purely factual material'.

I have decided some documents are conditionally exempt from disclosure because they would disclose discussions and deliberations, relating to the exchange of opinions and reflections on a particular proposed decision or course of action, between Mr Lloyd and Ms James about the Service Delivery Office (**SDO**).

I acknowledge that parts of the information contained within these documents contains purely factual material or operational information, as well as information that in and of itself may not, on balance, be contrary to the public interest. In accordance with the OAIC Guidelines, I have decided to release information where I consider this information can reasonably be separated from the deliberative matter.⁵

Certain Operations of Agencies

Section 47E(d) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to

³ See also: OAIC Guidelines, [6.131] – [6.135].

⁴ OAIC Guidelines, [6.153].

⁵ OAIC Guidelines [6.74]; see also: [2013] AICmr69 at [83].

....

- d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I have determined that certain contact details of both Ms James and Mr Lloyd and their offices are conditionally exempt under section 47E(d) of the FOI Act.

The agencies have established dedicated contact avenues for the public to ensure the large volume of enquiries received are managed efficiently and effectively. Releasing the contact details of senior public servants and their offices could result in members of the public directing their enquiries through these offices instead. This could reasonably be expected to adversely affect both the ability of both agencies to manage contact with the public in a method that best supports the agencies' core duties, as well as the efficient management of individual officers' workloads.

The public interest test – Other Documents

The exemptions in sections 47C(1) and 47E(1)(d) are 'public interest conditional exemptions'. Section 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:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) inform debate on a matter of public importance;*
- (c) promote effective oversight of public expenditure;*
- (d) allow a person to access his or her own personal information.*

The OAIC Guidelines contain a non-exhaustive list of further factors favouring disclosure.⁶ In my view, none of these factors are relevant here.

The FOI Act does not list any factors against disclosure, however the OAIC Guidelines contains a non-exhaustive list.⁷

Regarding the contact details of senior officials and their offices, while I acknowledge that the open and public disclosure of information promotes the objects of the FOI Act, I consider this factor outweighed by the prejudice caused to the management function of the agencies.

The disclosure of the deliberative content would promote the objects of the FOI Act by providing a right of access to documents and increasing public participation in Government processes. However, I consider this factor is outweighed by the prejudice that would result from the agencies' ability to obtain similar information in the future relating to the establishment and operations of shared services across Government, namely through limiting future frank and candid deliberative communications preliminary to an ultimate decision between senior officials of government agencies.

⁶ OAIC Guidelines [6.17] – [6.19].

⁷ OAIC Guidelines [6.22].

Taking into account the factors for and against disclosure, I have determined that giving access to the information in the documents would, on balance, be contrary to the public interest.

Deletion of exempt material

Under section 22 of the FOI Act, when a document contains both exempt and non-exempt information, the exempt information can be deleted from the document so that the rest of the document can be disclosed (where reasonably practical to do so). I have arranged for exempt material to be deleted from a number of documents so that you can be provided with edited copies.

I have determined that the following information to be irrelevant to the FOI request, and accordingly, has been deleted wherever it occurs in the documents: names and contact details of Australian Public Service Officers involved in facilitating the correspondence between Ms James and Mr Lloyd; the names of Australian Public Service Officers involved in processing the FOI request; and any personal information related to individuals not falling within your revised request scope of 10 January 2018. I have also determined that any documents not directly related to correspondence between Ms James and Mr Lloyd to be irrelevant to the FOI request. This includes the correspondence between representatives of the Department of Finance and Ms James. The documents containing exempt information under section 22 of the FOI Act are listed at Attachment A.

Further, I have determined that it would be impracticable to provide edited copies of a number of documents that are exempt in full or outside the request scope. Having regard to the nature and extent of the modifications required to the documents and available resources, I have determined that the number of deletions would be so many that the value of the remaining released documents would be reduced. The documents that have been withheld on these grounds are listed in the schedule at Attachment A.

Review Rights

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

Website Publication

Subject to certain exceptions, section 11C of the FOI Act requires agencies to publish online any information released in response to freedom of information requests.

Section 11C contains some exceptions to this general requirement. These exceptions include when the document contains business or personal information that it would be unreasonable to publish.

In this instance, I have decided that it is appropriate to publish a copy of the edited documents as there is no personal or sensitive business information that has not already been redacted in accordance with section 22 of the FOI Act. As a result, they will shortly be made available on the Fair Work Ombudsman's website (www.fairwork.gov.au/about-us/accessing-information).

Contact details

If you need further information, please direct your enquiries to Cameron Hankins by email to foi@fwo.gov.au. Mr Hankins processed your FOI request and can answer any questions you might have.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sally Dennington', enclosed in a thin black rectangular border.

Sally Dennington
Director (A/g) – Customer Feedback and Information Access
Fair Work Ombudsman

Attachment A

Pages	Date	Author	Addressee	Description	Decision	Exemptions Applied
001-002	12.12.14	Natalie James (the FWO)	John Lloyd (the APSC)	Email Chain and Attachment: – Appointment of Australian Public Service Commissioner	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer. s. 47E(d) – certain operations of agencies (FWO CEO’s office contact details).
003-004	23.12.14	John Lloyd (APSC)	Natalie James (FWO)	Email – Resignation of chair of the Fair Work Building Industry Inspectorate.	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer. s. 47E(d) – certain operations of agencies (FWO & APSC CEO’s office contact details).
005-043	5.6.15	John Lloyd (APSC)	Natalie James (FWO)	Email – APS Remuneration Survey and Individual Agency Report	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & non-SES officer names. s. 47 - Documents disclosing trade secrets or commercially valuable information – FWO Individual Agency Remuneration Report 2014 (pages 6 – 31 withheld).
044	23.7.15	Natalie James (FWO)	John Lloyd (APSC)	Email – State of the Service Survey	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer. s. 47E(d) – certain operations of agencies (FWO CEO’s office contact details).

045-076	22.7.15	John Lloyd (APSC)	Natalie James (FWO)	Email – 2016 APS employee census – Results for the Office of the Fair Work Ombudsman	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & non-SES officer names. s. 47 - Documents disclosing trade secrets or commercially valuable information – FWO 2016 APS Agency Benchmark Census Report (pages 61—76 withheld).
077-120	2.8.16	John Lloyd (APSC)	Natalie James (FWO)	Email – APS Remuneration Report 2015 and Individual Agency Report – FWO	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & non-SES officer names. s. 47 - Documents disclosing trade secrets or commercially valuable information – FWO Individual Agency Remuneration Report 2015 (pages 92 – 120 withheld).
121	23.9.16	Natalie James (FWO)	John Lloyd (APSC)	Email - EA	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer.
122-124	23.5.17	Natalie James (FWO)	John Lloyd (APSC)	Email – FWO SES Cap – letter from NJ to Commissioner Lloyd	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & names of other non-APS persons. s. 47E(d) – certain operations agencies (FWO CEO’s office contact details)
125-126	24.5.17	JL	FWO	Email – FWO SES Cap – letter from NJ to Commissioner Lloyd	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer. s. 47E(d) – certain operations of agencies (FWO & APSC CEO’s office contact details)

127-128	24.5.17	FWO	JL	Email – FWO SES Cap – letter from NJ to Commissioner Lloyd	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer. s. 47E(d) – certain operations of agencies (FWO & APSC CEO’s office contact details)
129-239	9.6.17	JL	FWO	Email – APS Remuneration Report 2016 and Individual Agency Report – Office of the Fair Work Ombudsman	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & non-SES officer names. s. 47 - Documents disclosing trade secrets or commercially valuable information - FWO Individual Agency Remuneration Report 2016 (pages 211—239 withheld)
240-250	30.6.17	FWO	JL	Email – Correspondence: establishment of the SDO Board and Governance Committees	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & emailed information provided by the Department of Finance. s. 47C – Deliberative Processes
251-254	5.7.17	JL	FWO	Email – Correspondence: establishment of the SDO Board and Governance Committees	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer, non-SES officer names & emailed information provided by the Department of Finance. s. 47C – Deliberative Processes s. 47E(d) – Certain operations of agencies (FWO CEO’s office contact details)

255-257	6.7.17	FWO	JL	Email – Correspondence: establishment of the SDO Board and Governance Committees	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer, non-SES APSC names & information provided by the Department of Finance. s. 47C – Deliberative Processes s. 47E(d) – certain operations of agencies (FWO CEO's office contact details)
258-292	27.7.17	JL	FWO	Email – 2017 APS employee census – Results for Office of the Fair Work Ombudsman	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & junior APSC officer name s. 47 - Documents disclosing trade secrets or commercially valuable information – FWO APS Agency Benchmark Census Report 2017 (pages 259 – 292 withheld)
293-294	11.10.17 - 12.10.17	NJ	JL	Email Chain:– catch up in CBR next week?	Release with deletions	s. 22 Irrelevant Information - Removal of name of FWO FOI officer & non-SES officer names. s. 47E(d) – certain operations of agencies (FWO & APSC CEO's office contact details)

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

Ph: (03) 9603 0947

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 12 issued by the Office of the Australian Information Commissioner (<https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-fact-sheets/foi-factsheet-12-your-review-rights>). 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.