



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2018/015

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: WF

DECISION BY: Mr Peter Rush
Assistant Secretary
Parliamentary and Government Branch

The FOI request

By email dated 27 January 2018, WF (the applicant) made a request to the Department of the Prime Minister and Cabinet under the *Freedom of Information Act 1982* (the FOI Act) in the following terms:

I refer the Department of the Prime Minister and Cabinet (PMC) to the following media coverage:

<http://www.canberratimes.com.au/national/public-service/john-lloyd-pinup-boy-of-impartiality-20171102-gzdade.html>

<https://www.crikey.com.au/2017/10/24/libertarians-get-a-helping-hand-from-government/>

<http://www.canberratimes.com.au/national/public-service/aps-commission-refuses-to-release-records-of-john-lloyds-contacts-with-ipa-20180107-h0evs7.html>

which intimates that the Public Service Commissioner, Mr John Lloyd, has acted corruptly, unlawfully and/or otherwise improperly.

One would expect, and the public interest would require, that in the normal course of an ethical and apolitical public service, that the Secretary of PMC, being the head of the public service, would take an interest in such allegations.

Accordingly, I seek access to documents held by the Secretary of PMC that concern the matters alluded to in the articles mentioned above.

Appreciating the volume of documents held by the Secretary, the scope of my request is limited to:

- documents that exist as emails (including any attachments);

- documents that fall within the date range 23 October 2017 to the date of this application; and
- documents that contain the words: a)"John Lloyd" and/or "Lloyd"; as well as b) "IPA" and/or "Institute of Public Affairs".

Further, I'm happy for the personal information of anyone who's not a public servant/MP/Minister to be redacted from relevant documents.

On the basis of the tightly defined scope set out above, the Department need only conduct a handful of searches (using the key terms referred to above) of *ALL* items (my emphasis) in the Secretary's email client (likely Microsoft Outlook) to quickly determine whether the Secretary holds any documents the subject of my request (and whether the Secretary has, in the general public interest, considered and/or inquired into the misconduct described)

By email dated 13 March 2018, the Department sought the applicant's advice about whether the applicant would be willing to exclude the following documents from the scope of the FOI request:

- daily media summaries
- where an email is contained in a later email chain, exclude the earlier email as a duplicate.

By email dated 14 March 2018, the applicant responded as follows:

Where a relevant email is contained in a later email chain, I am willing to exclude the earlier email as a duplicate.

I am not willing to exclude relevant daily media summaries because there is a wide public interest in knowing when the Secretary/head of the APS was put on notice of corrupt conduct engaged in by a senior public servant who is the head of an agency within the portfolio for which the Secretary has oversight.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the department's Secretary under section 23 of the FOI Act.

Steps taken to find potentially relevant documents

Having regard to the terms of the FOI request, I arranged for searches of the email account of the Secretary of the Department of the Prime Minister and Cabinet, Dr Martin Parkinson AC PSM. Documents relevant to the FOI request identified as a result of these searches are described in the schedule at [Attachment A](#).

Decision

My decision on access to the documents is set out in the schedule at [Attachment A](#).

I note that section 26(2) of the FOI Act states that a notice prepared under section 26 (which requires an agency to give to an applicant reasons and other particulars of decision) is not required to contain any matter that is of such a nature that its inclusion in a document of an

agency would cause that document to be an exempt document. This decision omits reference to any matter that is of such a nature that its inclusion would cause this decision to be exempt under the FOI Act. In particular, certain findings and reasons for this decision have been omitted because inclusion would require disclosure of information contained in the documents that I have decided are exempt.

In making this decision, I have had regard to the following material:

- the FOI request;
- the documents identified as relevant to the FOI request;
- the FOI Act;
- the ‘Guidelines issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*’ (the FOI Guidelines);
- comments received in response to a courtesy consultation with an agency;
- comments received from the Department’s Communications Branch; and
- comments received from a third party.

Reasons for decision

Section 37 Documents affecting enforcement of law and protection of public safety

Documents 2 and 3

Section 37(1)(a)

Section 37(1)(a) of the FOI Act provides that a document is an exempt document if its disclosure would, or could reasonably be expected to, prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.

I am satisfied that disclosure of the documents could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law in a particular instance.

I am therefore satisfied that the documents are exempt under section 37(1)(a) of the FOI Act.

Section 37(2)(a)

Section 37(2)(a) of the FOI Act provides that a document is an exempt document if its disclosure would, or could reasonably be expected to, prejudice the fair trial or the impartial adjudication of a particular case.

I am satisfied that disclosure of the documents could reasonably be expected to prejudice the impartial adjudication of a particular case.

I am therefore satisfied that the documents are exempt under section 37(2)(a) of the FOI Act.

Section 47C Public interest conditional exemptions—deliberative processes

Document 2

Section 47C(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose 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, a Minister, the Government of the Commonwealth, or the Government of Norfolk Island.

I am satisfied that part of Document 2 would disclose deliberative matter that has been prepared or recorded in the course of, or for the purposes of, the deliberative processes of the Department of the Prime Minister and Cabinet.

Section 47C(2) of the FOI Act provides that deliberative matter does not include either operational information or purely factual material. I am satisfied that the document contains no operational information. In relation to purely factual material, I find that while there appears to be factual information in the document it appears to me that it is an integral part of the deliberative content and purpose of the email, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.¹³

I am therefore satisfied that part of Document 2 is conditionally exempt under section 47C(1) of the FOI Act.

Would disclosure be contrary to the public interest?

Section 11A(5) of the FOI Act provides that access must generally be given to a conditionally exempt document unless it would, on balance, be contrary to the public interest.

Public interest factors favouring disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:¹⁴

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her personal information.

Having regard to the nature of the conditionally exempt information, I am satisfied that disclosure may promote the objects of the FOI Act and inform a debate on a matter of public importance.

Public interest factors favouring non-disclosure

I consider that public interest factors favouring non-disclosure include that disclosure could reasonably be expected to:

¹³ See FOI Guidelines, 'Part 6 – Conditional Exemptions', (Version 1.3, December 2016), [6.73].

¹⁴ See section 11B(3) of the FOI Act and FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.17].

- inhibit the provision of frank and candid advice;
- prejudice the protection of an individual's right to privacy.¹⁶
- prejudice the fair treatment of individuals;¹⁷
- harm the interests of an individual.¹⁸

Balancing the public interest

In balancing the public interest factors for and against disclosure, I attach greater weight to the factors against disclosure. I am satisfied that, on balance, release of the conditionally exempt information would be contrary to the public interest.

Section 47E(d) Public interest conditional exemptions-certain operations of agencies

Documents 2 and 3

Section 47E(d) of the FOI Act provides that a document is 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.

I am satisfied that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency other than the Department.

I am therefore satisfied that the documents are conditionally exempt under section 47E(d) of the FOI Act.

Would disclosure be contrary to the public interest?

Section 11A(5) of the FOI Act provides that access must generally be given to a conditionally exempt document unless it would, on balance, be contrary to the public interest.

Public interest factors favouring disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:²⁰

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her personal information.

Having regard to the nature of the conditionally exempt information, I am satisfied that disclosure may promote the objects of the FOI Act and inform a debate on a matter of public importance.

¹⁶ See FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.22].

¹⁷ Ibid.

¹⁸ Ibid.

²⁰ See section 11B(3) of the FOI Act and FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.17].

Public interest factors favouring non-disclosure

I consider that public interest factors favouring non-disclosure include that disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy;²¹
- prejudice the fair treatment of individuals;²²
- could reasonably be expected to harm the interests of an individual;²³
- impede the flow of information to an agency;
- prejudice the ability of an agency to obtain confidential information;
- prejudice the ability of an agency to obtain similar information in the future.

Balancing the public interest

In balancing the public interest factors for and against disclosure, I attach greater weight to the factors against disclosure. I am satisfied that, on balance, release of the conditionally exempt information would be contrary to the public interest.

Section 47F Public interest conditional exemptions—personal privacy

Documents 2 and 3

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

I am satisfied that the documents contain personal information and that disclosure of the personal information would be unreasonable.

I am therefore satisfied that the documents are conditionally exempt under 47F(1) of the FOI Act.

Would disclosure be contrary to the public interest?

Section 11A(5) of the FOI Act provides that access must generally be given to a conditionally exempt document unless it would, on balance, be contrary to the public interest.

Public interest factors favouring disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:²⁶

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her personal information.

²¹ See FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.22].

²² Ibid.

²³ See FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.22].

²⁶ See section 11B(3) of the FOI Act and FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.17].

Having regard to the nature of the conditionally exempt information, I am satisfied that disclosure may promote the objects of the FOI Act and inform a debate on a matter of public importance.

Public interest factors favouring non-disclosure

I consider that public interest factors favouring non-disclosure include that disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy.²⁷
- prejudice the fair treatment of individuals;²⁸
- could reasonably be expected to harm the interests of an individual.²⁹

Balancing the public interest

In balancing the public interest factors for and against disclosure, I attach greater weight to the factors against disclosure. I am satisfied that, on balance, release of the conditionally exempt information would be contrary to the public interest.

Publication of the documents

Under section 11C of the FOI Act, the Department will make arrangements to publish the documents that can be released to the applicant on the Department's web site in its FOI Disclosure Log.

Review rights

Information about the applicant's rights of review is attached to this decision.

Complaint rights

The applicant may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/foi-complaints>.



Peter Rush
Assistant Secretary
Parliamentary and Government Branch

27 April 2018

²⁷ See FOI Guidelines, 'Part 6 – Conditional Exemptions' (version 1.3, December 2016), [6.22].

²⁸ Ibid.

²⁹ Ibid.

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SCHEDULE OF DOCUMENTS

FOI

Document	Date	Description	Number of pages	Decision
1	07/11/2017	Email with subject line 'FW: PMC Daily Briefing Tuesday 07 November 2017'	11	Release in full.
2	20/12/2017	Email	5	Exempt in full under section 37(1)(a), section 37(2)(a), section 47C, section 47E(d) and section 47F of the FOI Act. Exempt in part under section 47C of the FOI Act.
3	22/12/2017	Email	30	Exempt in full under section 37(1)(a), section 37(2)(a), section 47E(d) and section 47F of the FOI Act.
4	09/01/2017	Email with subject line 'FW: PMC Daily Briefing Tuesday 09 January 2018'	11	Release in full.



Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see [How do I make an FOI complaint?](#)

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 5218, Sydney NSW 2001
fax: +61 2 9284 9666
email: enquixxx@xxxx.xxv.au
in person: Level 3
175 Pitt Street
Sydney NSW 2000



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: xxxxxxxxx@xxxx.xxx.au

write: GPO Box 5218, Sydney NSW 2001
or visit our website at **www.oaic.gov.au**