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**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

A.B.N. 49 110 847 399

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

26 March 2018

DB

by email to 'foi+request-4390-4d719c5a@righttoknow.org.au'

Dear DB,

Freedom of information Request – Decision on Access

I refer to my email sent to you on 23 February 2018 acknowledging receipt of your request under the *Freedom of Information Act 1982* (FOI Act). As advised in that email, I am authorised under section 23(1) of the FOI Act to make decisions under that Act on behalf of the Federal Court.

I am writing to advise you of my decisions on your request.

Your Request

You requested access to email correspondence between the Chief Executive Officer and Principal Registrar (CEO) of the Federal Court, Warwick Soden, and the Australian Public Service Commissioner (Commissioner), John Lloyd, (in his capacity of Public Service Commissioner or otherwise) during the period 1 January 2015 to the date of your application (i.e. 23 February 2018). You explained that, to avoid doubt, your request referred to email documents and any related attachments sent by the CEO to the Commissioner as well as email documents and any related attachments sent by the Commissioner to the CEO, including where the CEO was “cc’d” (i.e. a copy sent to him).

You also explained that documents falling within the scope of your request could be quickly identified and retrieved by searching all items (including archived items) in the CEO’s email account profile according to the persons sent to, and received from.

You also advised that, noting paragraphs 6.153-6.154 of the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act, to negate the need to consult relevantly under section 27A of that Act, you agree to the redaction from any relevant document of personal information of any person mentioned in that document, except where that person was at the relevant time a public servant or a member of parliament.

Searching

An electronic search was conducted across the CEO’s email account by his Executive Assistant for current and archived messages sent to or received from the Commissioner. The results were then manually assessed to identify only items sent or received during the period from 1 January 2015 to 23 February 2018.

Some of the messages identified were sent by staff of the Australia Public Service Commissioner (APSC) expressly on behalf of the Commissioner and, in a chain of messages, included responses made by staff of the Federal Court or the APSC expressly on behalf of the CEO and the Commissioner respectively. I interpret your request as including email correspondence expressly sent on behalf of the CEO or the Commissioner by staff reporting to either of them and, accordingly, treat all such messages as within the scope of your request.

In all 13 messages (including two chains of messages) were identified as within scope of your request some of which included attachments.

The attached schedule of documents provides a description of each such message and any attachment to it. It also sets out briefly the decision I have made in respect of each such message and attachment to it to either grant or refuse access. More information, including the reasons for my decisions, is set out below.

Decisions and reasons for those decisions

With regard to the documents identified in the attached schedule, I have decided:

- to grant access in full to documents numbered 1, 3 to 8 and 10 to 13 with exempt matter deleted under section 22 of the FOI Act
- to grant access in full to the email and the 2015 APS Remuneration Report in the document numbered 2 and to the email and 2016 APS Remuneration Report in the document numbered 9 with exempt matter in each of the emails deleted under section 22 of the FOI Act
- to refuse access to the confidential 2015 Agency Remuneration Report in the document numbered 2 and the confidential 2016 Agency Remuneration Report in the document numbered 9 as each is either or both exempt under section 47 of the FOI Act and/or conditionally exempt under 47E(c) and/or (d) and providing access to them would be contrary to the public interest.

I have taken the following into account in making my decision:

- your request
- the content of the documents that fall within the scope of your request
- the FOI Act (specifically sections 11, 11A, 11B, 15, 29, 31A, 31B, 47, 47E and 47F)
- the *Freedom of Information (Charges) Regulations 1982* (FOI Charges Regulations) (specifically regulation 3)
- the guidelines issued by the Australian Information Commissioner (Information Commissioner) under section 93A of the FOI Act.

I consulted with the APSC about personal information in the identified documents regarding staff employed in that agency and the confidential 2015 and 2016 Agency Remuneration Reports. I also consulted some Federal Court staff about personal information in the relevant documents regarding them.

The schedule indicates each document to which access is refused. My reasons for refusing access are given below.

Public Interest Conditional Exemption – Personal Privacy

Section 47F of the FOI Act protects the personal privacy of all people in the community by conditionally exempting documents from disclosure under the FOI Act if this would unreasonably disclose personal information of any person. The section sets out a number of matters that must be considered in deciding whether disclosure is unreasonable or not and these include if the personal information is well known, the person to whom the information relates is known to be associated with matters dealt with in the documents, the information is available from publicly accessible sources and any other matters that the agency dealing with a request considers relevant.

Personal information means any information about an identified individual or an individual who is reasonably identifiable (see section 4 of the FOI Act and section 6 of the *Privacy Act 1988*).

The documents identified contain information about the names of persons who are holders of public office or employees of the APSC or the Federal Court as well as their direct phone numbers, personal agency email addresses and (for the CEO of the Federal Court) his mobile phone number.

I am satisfied that this information is all personal information.

I have conducted searches of government directories as well as internet searches and am satisfied from these that information about the names, offices held, direct phone numbers and personal agency addresses of the CEO, Commissioner, the individuals who hold Group Manager positions in the APSC and two staff of the Department of Social Services and Department of Health (respectively) are well known and available from publicly accessible sources and, at least at times that they are associated with matters dealt with in the documents. However, I am also satisfied from these searches that the names, positions held, direct phone numbers and personal agency addresses of other support staff in the APSC and Federal Court whose personal information is contained in the identified documents are not well known or available from publicly accessible sources and that they are not associated with matters dealt with in the documents. Similarly, I am satisfied that the CEO's mobile phone number is not well known or available from publicly accessible sources.

In making any decision under the FOI Act, I am required to have regard to the Guidelines issued by the Information Commissioner under section 93A of the FOI Act. As you referred to in your request, the Information Commissioner discusses personal information of agency employees at paragraphs 6.152-6.157 of these guidelines and suggests that where agency employees person information is included in a document because of their usual duties or responsibilities it would not be unreasonable for this to be disclosed (paragraph 6.53). The Information Commissioner goes on to make it clear that, while a careful consideration of any possible exemption is required, there are circumstances where it would be unreasonable to disclose an agency employees name and other details (see paragraphs 6.156 and 6.157).

You have made your FOI request through the very prominent and publicly available "Right to Know" website and, in accordance with your request, access to relevant documents will be

provided to you through that website. As a result the documents will be very easily searched and widely available. Both the APSC and the Federal Court deal with many individuals who are obsessive in their pursuit of grievances and concerns. I am satisfied that it would be unreasonable to disclose the personal information I have referred to above concerning relevant support staff as well as the CEO's mobile phone number.

Accordingly, I am satisfied that that personal information is conditionally exempt.

Section 11A of the FOI Act provides that an agency must provide access to a conditionally exempt document unless access would, on balance, be contrary to the public interest. Section 11B sets out the factors to be considered in favour of providing access (which include, as relevant promoting the objects of the FOI Act, informing debate on a matter of public importance and promoting effective oversight of public expenditure) and factors which are irrelevant to any such consideration (which include embarrassment to or loss of confidence in the Government, the potential for misinterpretation or misunderstanding of the document, seniority of the author of the document and confusion or unnecessary debate caused by the release of the document) and requires, particularly, that an agency consider the Information Commissioner's section 93A Guidelines when considering the public interest test.

The relevant guidelines in regard to that test are at paragraphs 6.4-6.28.

I have weighed the factors in favour of disclosure (particularly that this would promote the objects of the FOI Act) and the factors against release but am satisfied, on balance, that the latter outweigh the former (particularly as I am satisfied that relevant agency staff, like all members of the community, are entitled to personal privacy and should not be subject to the risk of direct unwanted contact from obsessed individuals). In weighing up these competing factors, I have not had regard to any of the irrelevant factors set out in section 11B.

I am therefore satisfied that each of the relevant documents is exempt, each being conditionally exempt under section 47F and disclosure being contrary to the public interest. That however is not the end of the matter.

Section 22 of the FOI Act requires that, if it is possible to prepare an edited copy of exempt documents with the exempt matter deleted, such edited copy must be prepared and access to it provided unless it is clear from the request that this is unacceptable.

Although referring to other personal information, it is clear from your request that redaction of personal information from any document provided to you is acceptable. Accordingly I am satisfied that section 22 of the FOI Act can apply and that appropriately redacted copies of the documents should be prepared and provided to you.

Exemption – Commercially Valuable Information
Public Interest Conditional Exemption – Documents Affecting Operation of Agencies

Section 47 of the FOI Act exempts documents from disclosure if that disclosure would, or could reasonably be expected to, destroy or diminish the value of the information in the document.

The Federal Court and the APSC have entered into a Memorandum of Understanding (MoU) for funding for Learning and Development and support for the Workplace Relations

Framework. The APSC prepares annual remuneration reports across the Australian Public Service (APS) as part of the Commissioner's statutory functions (under section 41 of the *Public Service Act 1999*) to develop, promote, review and evaluate APS employment policies and practices, co-ordinate and support APS-wide training and career development opportunities within the APS and to facilitate continuous improvement in people management through the APS. The functions of the APSC are partly funded through the MoU with the Federal Court and similar MoUs with other APS agencies.

Annually, on a strictly confidential basis, the Federal Court is provided with an individual agency remuneration report specific only to it. That report is provided directly to the CEO and distributed only to those Federal Court staff expressly authorised by the CEO to receive that report.

The information within each such agency-specific remuneration report is not publicly available and includes comparative data specific to the relevant agency along with explanatory material. Agency-specific remuneration reports are not available for purchase by any other entity, within or external to the Commonwealth, and are not and have never been publically available. It could reasonably be expected that the release of such reports into the public domain could compromise or otherwise diminish the value and, arguably, the credibility of future versions of the report.

It is also reasonably foreseeable that disclosure of any such individual agency remuneration report, in full or in part, in response to FOI requests to the Federal Court or to other agencies that also receive similar agency specific reports could impact on the commercial value of such reports to the Federal Court and/or other agencies and, as a result, the Federal Court and other agencies could reasonably be expected to cease its or their participation under the MoU(s) with the APSC.

As a result, it could therefore be reasonably expected that this would have a substantial adverse effect on the Commissioner's abilities to undertake his statutory functions under section 41 of the Public Service Act by reducing significantly the funding derived from MoUs and the preparation of agency-specific reports which would be available to the APSC for section 41 work.

In addition, the information in the Federal Court's remuneration reports is commercially sensitive to it and each report in its entirety is highly relevant to the performance of its statutory functions and its commercial and operational activities (particularly in the management of its human resources). Disclosure of these reports could be expected to damage or diminish the value of that sensitive information.

I am therefore satisfied that the 2015 and 2016 Agency Remuneration Reports are exempt under section 47 of the FOI Act.

Section 47E of the FOI Act conditionally exempts documents from disclosure if that disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or have a substantial effect on the proper and efficient conduct of the operation of an agency.

For the reasons outlined above, disclosure of agency-specific remuneration reports could be reasonably expected to adversely affect the ability and capability of the APSC (which of

course is a part of the Commonwealth) to perform its statutory functions. In addition and again for the reasons outlined above, disclosure of the Federal Court's agency-specific remuneration report could be reasonably expected to have a substantial effect on the proper and efficient conduct of the management of the Court's human resources and, in turn, the operation of the agency.

I am therefore satisfied that the 2015 and 2016 Agency Remuneration Reports are also conditionally exempt under paragraphs 47E(c) and (d) of the FOI Act.

As explained in relation to personal privacy above, a conditionally exempt document must still be disclosed unless access would, on balance, be contrary to the public interest. The requirements and process for considering the public interest test are also explained in relation to personal privacy.

I have weighed the factors in favour of disclosure (particularly that this would promote the objects of the FOI Act) and the factors against release but am satisfied, on balance, that the latter outweigh the former (particularly because of the adverse effect that disclosure could reasonably be expected to have on the ability and capability of the APSC to perform its statutory functions). Again, in weighing up these competing factors, I have not had regard to any of the irrelevant factors set out in section 11B.

I am therefore satisfied that each of the 2015 and 2016 agency remuneration reports documents are also exempt, each being conditionally exempt under section 47F and disclosure being contrary to the public interest

For the reasons also explained in relation to personal privacy above, I have given consideration under section 22 of the FOI Act to whether it is possible to prepare an edited copy of the two reports with the exempt matter deleted but decided that the modifications required to do so would be so extensive as to make the resultant edited copy of each meaningless.

I have decided therefore that edited copies of each report should not be prepared and provided.

Charges

In my discretion under regulation 3 of the *Freedom of Information (Charges) Regulations 1982*, I have decided not to impose a charge for processing your request and providing access to the documents that I have decided should be released to you.

Release of Documents

I have also decided that the documents which are to be released to you as above should be provided electronically in PDF format. These are attached.

Your review rights

If you are dissatisfied with my decisions, you may apply for internal review or Information Commissioner review of those decisions. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to Court for an internal review of my decisions. The internal review application must be made within 30 days of the date of this letter. A request for internal review can be sent to the Court by email at foi@fedcourt.gov.au. Where possible please attach reasons why you believe review of the decisions is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decisions. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: [https://forms.business.gov.au/aba/oaic/foi-review-/](https://forms.business.gov.au/aba/oaic/foi-review/)
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Questions about this decision

If you wish to discuss this decision, please contact me by phone on the number shown in the letterhead above or by email at foi@fedcourt.gov.au.

Yours sincerely



John Mathieson
Deputy Principal Registrar

Attachments

1. Schedule of documents
2. Documents 1, 3 to 8 and 10 to 13 and emails and 2015 APS Remuneration Report and 2016 APS Remuneration Report respectively from documents 2 and 9 as identified and with redactions as shown in the schedule of documents