



Australian Government
**Australian Building and
Construction Commission**

4 May 2018

DB

By email: foi+request-4417-011878e6@righttoknow.org.au

Dear DB

Freedom of Information Request – Decision

Your FOI request

By email dated 5 March 2018, you wrote to the Australian Building and Construction Commission (**ABCC**) and sought access to documents under the *Freedom of Information Act 1982* (**FOI Act**). Your request was in the following terms:

I seek access to email correspondence between the Commissioner of the ABCC, Mr Stephen McBurney, and the Australian Public Service Commissioner, Mr John Lloyd (in his capacity as Public Service Commissioner or otherwise), between the period of 6 February 2018 to the date of this application.

For the avoidance of any doubt, my request refers to email documents (and any related attachments) sent by Mr McBurney to Mr Lloyd, as well as email documents (and any related attachments) sent by Mr Lloyd to Mr McBurney (including where Mr McBurney has been cc'd).

(FOI request)

The FOI request also stated that you were *'willing to agree to the ABCC 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.'*

Timeframe for processing your request & consultation process

The ABCC acknowledged receipt of the FOI request by email on 15 March 2018. In that email the ABCC also informed you that, pursuant to section 15(5) of the FOI Act, the ABCC has 30 days to process your FOI request.

On 28 March 2018, the ABCC notified you that the statutory period was extended by a further 30 days to allow for consultation in accordance with section 15(6) of the FOI Act. The email communicated to you that further time was needed because the ABCC was required to consult relevant parties.

Those consultations are now complete. However, for the purposes of notifying a decision to you and of disclosure of the relevant documents that may follow, it should be noted that relevant parties with whom we consulted are accorded review or appeal rights under the FOI Act. The relevant section is 27A:

“Consultation—documents affecting personal privacy”:

Opportunity to make submissions

- (3) The agency or Minister must not decide to give the applicant access to the document unless:
- (a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
 - (b) the agency or the Minister has regard to any submissions so made.
- (4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

Decision to give access

- (5) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:
- (a) the person concerned;
 - (b) the applicant.

Access not to be given until review or appeal opportunities have run out

- (6) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have **run out**, see subsection 4(1).

... (Original emphasis.)

...

In other words, this section provides that in respect of relevant documents, the review or appeal rights that are available to the consulted parties must expire before access to the documents is provided to the FOI applicant.

Decision

I am authorised to make a decision under the FOI Act (s 23).

In reaching my decision, I have had regard to:

- the terms of your request;
- the document relevant to the request;
- the FOI Act;
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act; and

- consultation responses from third parties consulted in accordance with the FOI Act.

Having undertaken searches in response to your request, the ABCC has identified 1 document within the scope of the FOI request.

My decision is that:

- The document contains information that is conditionally exempt under the FOI Act.
- Under the FOI Act, conditionally exempt information may be withheld from disclosure. In relation to conditional exemptions, further consideration of the public interest must be considered.
- In respect of information for which the conditional exemption applies, I have decided the public interest balance weighs against disclosure.
- However, I have considered whether section 22 of the FOI Act may facilitate disclosure and allay the concern regarding the conditional information by weighing the public interest balance towards disclosure through an edited copy. Considering all relevant matters, I consider it practical to prepare for disclosure an edited copy of the document which removes the conditionally exempt information under s 22.

Therefore, I have decided that access to the document may be facilitated under section 22 of the FOI Act.

I have made this decision following consultation with parties whose personal information is contained in the document.

Attachment A is a schedule that describes the relevant document and my decision.

Section 47F – documents affecting personal privacy

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person. Personal information includes any information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not.

Document 1 (in its unmodified form) contains the ‘personal information’ (as defined in section 4 of the FOI Act) of a public servant (excluding Commissioner Lloyd and Commissioner McBurney). Specifically, document 1 contains the name of one public servant.

Personal information will be conditionally exempt if disclosure would be ‘unreasonable’. In considering whether disclosure would be unreasonable, s 47F(2) of the FOI Act requires me to take into account:

- 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 matter I consider relevant.

As noted above, the document conditionally exempt under s 47F refers to personal information about a third party, in particular their name. Relevantly, the information is not well known or publically available.

I have also taken into account the circumstances in which the information was obtained, and submissions received in relation to the disclosure of their personal information.

The public interest

Section 47F is a conditional exemption whereby a consideration of the public interest balance is required, and having decided that section 47F applies to certain information, I must consider this balance. Relevant public interest grounds to be considered include:

- whether disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
- whether disclosure could potentially prejudice a person's safety or expose them to potential harassment or intimidation;
- whether disclosure will, in any way, inform debate on a matter of public importance or serve any public purpose.

I acknowledge that there is a public interest in documents of the ABCC being made available to the public for the purpose of encouraging public debate and to promote oversight of its activities. However, taking these matters and the public interest considerations into account, I do not consider disclosure of the name of the individual would shed any light on the workings of the ABCC or enhance public accountability or transparency.

Accordingly, I consider the public interest favours against disclosure of certain personal information, particularly given the disclosure would involve an unreasonable impact on the privacy of a public servant.

Taking into account the above matters, on balance, I find that disclosure of the personal information in the document is contrary to the public interest. Accordingly, I have decided that the personal information in the document is exempt under s 47F of the FOI Act.

Nevertheless, I consider the balancing test should be carefully undertaken and not applied restrictively in a way that the FOI Act does not promote. Particularly, where conditional exemptions apply to information that give rise to genuine concerns against disclosure, as this situation entails, a relevant wider view may assist in reaching the balance. This may include, for example, a consideration as to whether section 22 may be invoked as an appropriate measure that facilitates disclosure.

Section 22 provides:

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or

- (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
- (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

The agency or Minister must:

- (a) prepare the edited copy as mentioned in paragraph (1)(b); and
- (b) give the applicant access to the edited copy.

In other words, if an agency decides that the circumstances of subsection 22(1) exists, and further considers it possible for it to prepare a copy (an edited copy) of a relevant document “modified by deletion” (subject to subsection 22(1)(d)), the agency must prepare a copy and provide access.

The OAIC Guidelines provides, under the heading “Deleting exempt or irrelevant content from a document”, that in applying section 22:

an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.¹

I consider that it is practicable and possible for the ABCC to disclose an edited copy of the document that removes exempt information and leaves it comprehensible to you in respect of your FOI request.

My decision is set out in **Attachment A**. In summary, the personal information I propose to exempt (by way of a redaction) is as follows: document 1 – the name of one public servant.

No charges

I confirm that there are no charges for this FOI request.

¹ OAIC FOI Guidelines, paragraph 3.88.

Access to documents subject to third party review rights

Section 27A(6) of the FOI Act provides that an agency must not give access to documents until all the opportunities a third party may have for review have run out, and the decision to give access still stands, or is confirmed. As such, we cannot disclose the document to you until such time that the review period expires, being 30 days from the date of this decision.

Review rights – Internal review

You have the right to apply for an internal review of my decision under Part VI of the FOI Act.

If you wish to apply for an internal review, you must do so in writing within 30 days of receiving this decision.

You may seek an internal review by writing to: **Freedom of Information (ABCC)**, at either of the following contact addresses:

By post: GPO Box 9927, Melbourne, Victoria, 3001
By email: foi@abcc.gov.au

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

Review by the Australian Information Commissioner

Alternatively, under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner. Your application must be made within 60 days of you receiving this notice.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commission at:

GPO Box 2999
Canberra ACT 2601

Contacts

If you have any questions about this matter, please contact the ABCC's FOI Section (foi@abcc.gov.au).

Yours sincerely



Franz Baldo
Australian Building and Construction Commission

ATTACHMENT A - SCHEDULE

Reference	Date	Decision
Document 1	6 February 2018	Disclosure: release in part (s 22) - s 47F