

Mr Phil Richards

By email: foi+request-4564-f78411c3@righttoknow.org.au

Office of General Counsel
GPO Box 367
CANBERRA CITY ACT 2601
www.airservicesaustralia.com

ABN 59 698 720 886

Dear Mr Richards

Your Freedom of Information Request – Notice of Decision on Access

I refer to your email dated 09 May 2018 in which you requested access under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to :

"Copies of all final investigation reports conducted by external parties relating to ARFF only where a complaint was made by a ARFF Officer/employee or about an ARFF Officer/employee (bullying, harassment, etc) for the period 1 Jan 2017 to current date. "

Decision

Airservices Australia (**Airservices**) has identified five documents, consisting of 346 pages, as falling within the scope of your FOI request. These documents, and my decision in relation to each document, are set out in the schedule of documents at **Attachment A (the Schedule)**.

I have decided to:

- refuse access to the five documents.

I have found that the documents, as identified in the Schedule, contain material which is:

- conditionally exempt under section 47C (Deliberative), section 47E (c) (Certain operations of an agency) and section 47F (personal privacy)] of the FOI Act, and disclosure of that information would be contrary to the public interest.

Reasons for decision

The reasons for my decision are set out in the Statement of Reasons at **Attachment B**.

Review rights and complaints

If you are unhappy with my decision, information about your rights of review, and how you can make a complaint about the handling of your request, is at **Attachment C**.

Contact

If you wish to discuss my decision, please contact me via email at legal@airservicesaustralia.com.

Yours sincerely

A handwritten signature in black ink, appearing to read "Shan".

Shan Gunawardena
FOI Coordinator & Authorised FOI Decision Maker
08 June 2018

**FOI Decision
SCHEDULE OF DOCUMENTS**

Doc No.	No.of Pages	Date	Description	Decision	Exemption
1.	46		Investigation related document	Exempt in Full	Section 47C, Section 47E (c) and Section 47F
2.	33		Investigation related document	Exempt in Full	Section 47C, Section 47E (c) and Section 47F
3.	24		Investigation related document	Exempt in Full	Section 47C, Section 47E (c) and Section 47F
4.	200		Investigation related document	Exempt in Full	Section 47C, Section 47E (c) and Section 47F
5.	43		Investigation related document	Exempt in Full	Section 47C, Section 47E (c) and Section 47F

**FOI Decision
STATEMENT OF REASONS**

YOUR FOI REQUEST

On 09 May 2018, you requested access to the following documents under the *Freedom of Information Act 1982 (Cth)* (**FOI Act**):

“Copies of all final investigation reports conducted by external parties relating to ARFF only where a complaint was made by a ARFF Officer/employee or about an ARFF Officer/employee (bullying, harassment, etc) for the period 1 Jan 2017 to current date. “

DECISION MAKER

I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

My decision and reasons for decision are set out below.

DECISION

In relation to the five documents relating your request (identified in the Schedule at **Attachment A**), I have decided to:

- refuse access to all five documents.

I have found that the documents, as identified in the Schedule, contain material which is:

- conditionally exempt under section 47C (Deliberative), section 47E (c) (Certain operations of an agency) and section 47F (personal privacy)] of the FOI Act, and disclosure of that information would be contrary to the public interest

MATERIAL ON WHICH MY FINDINGS ARE BASED

In reaching my decision, I have relied on the following material:

- the terms of your FOI request;
- consultation undertaken by Airservices in relation to the potential release of documents concerning those agencies or third parties;
- consultations with Airservices officers about the nature of the requested documents, Airservices' operating environment and functions (including normal business and record-keeping practices) and searches that have been undertaken;
- the FOI Act;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

REASONS FOR DECISION

Section 47C – Public interest conditional exemption – Deliberative processes

Section 47C relevantly provides:

- (1) *A document is conditionally exempt if its disclosure under this Act 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:*
- (a) *an agency.*

The documents relevantly identified in the Schedule include allegations, witness statements and investigation findings.

I am satisfied that these documents contain deliberative matter in the nature of opinions, advice, suggestions, or recommendations that were obtained or prepared, or consultation or deliberation that took place, for the purposes of undertaking a code of conduct investigation (deliberative process). In particular, in this case the deliberation relates to the decision making processes of determining whether or not the allegations were substantiated.

I therefore find that the relevant documents identified in the Schedule are conditionally exempt under section 47C of the FOI Act.

Section 47E – Public interest conditional exemption – Certain operations of agencies

Section 47E of the FOI Act provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) *prejudice the effectiveness of procedures or methods for the conduct or tests, examinations or audits by an agency;*
- (b) *prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by the agency;*
- (c) *have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;*
- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines provide that the section 47E(c) exemption applies to documents that relate to either:

- *the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- *the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.*

The documents identified in the Schedule contain information that relates to “*the assessment of personnel including activities concerning competency, appraisals and underperformance, counselling and feedback*” as they include information about investigations into alleged breaches of the Airservices’ Code of Conduct and employee behaviour.

It is a fundamental operational requirement for Airservices to be able to identify and address issues relating to breaches of its Code of Conduct. It is important that personnel involved in such investigations are able to have candid and robust communications, and provide a full and frank account of their views so that a fully informed assessment of staff can be undertaken.

Further, individuals who provide input into the investigation have a legitimate expectation that their frank submissions and statements are confidential, and will not be made available to other individuals. Therefore the documents contain information that was obtained in circumstances where there was an expectation of confidentiality.

Disclosure of these submissions and statements could reasonably be expected to have an adverse impact on the level of candour in future investigation processes, which would compromise the quality of the investigation and assessment of staff actions and behaviour. This in turn will have a substantial and adverse effect on the proper and efficient conduct of Airservices operations.

For these reasons, Airservices considers that disclosure of the documents would have a substantial adverse effect on the management or assessment of personnel by Airservices, and therefore the documents relevantly identified in the Schedule are conditionally exempt under section 47E(c) of the FOI Act.

Section 47F – Public interest conditional exemption – Personal privacy

Section 47F of the FOI Act relevantly provides:

- (1) 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).*
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*
 - (a) the extent to which the information is well known;*
 - (b) 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;*
 - (c) the availability of the information from publicly available sources;*
 - (d) any other matters that the agency or Minister considers relevant.*

'Personal information' is defined in section 4 of the FOI Act as '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'.

Certain documents (as identified in the Schedule) contain personal information about individuals other than yourself. This information includes names, positions, deliberations and findings about individuals other than yourself, statements by individuals about other individuals and other information of a personal nature.

I am satisfied that disclosure of this information would be unreasonable, on the basis that the personal information is not publicly available or well-known, and release may cause concern to a number of the affected individuals.

I therefore find that the relevant personal information is conditionally exempt under section 47F(1) of the FOI Act.

Further, the individuals who provided input into the investigation provided this information with the expectation that it would be treated confidentially.

Moreover, I am satisfied that disclosure of this information would be unreasonable, on the basis that this personal information, that includes statements made by the individuals as part of an investigation process, their names and positions are not publicly available or well-known, and release may cause concern to a number of the affected individuals.

Conditional exemptions – Public interest test

Section 11A(5) of the FOI Act requires access to a conditionally exempt document to be granted unless (in the circumstances) access to the document at that particular time would, on balance, be contrary to the public interest.

For the reasons discussed above, I have found that all five documents contain information which is conditionally exempt under section 47E (c) and section 47 F.

In applying the public interest test, I am required to have regard to the FOI Guidelines and the following factors listed in section 11B(3) of the FOI Act, which relate to whether the granting of access would:

- 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 own personal information.

The following irrelevant factors (set out in subsection 11B(4)) must not be taken into account in deciding whether access would be contrary to the public interest:

- access to the document could result in embarrassment to the Commonwealth Government or Norfolk Island, or cause a loss of confidence in the Commonwealth Government or Norfolk Island;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- the author of the document was (or is) of high seniority in the agency to which the FOI request was made;
- access to the document could result in confusion or unnecessary debate.

In this case, I accept the following public interest factors favour disclosure:

- promote the objects of the FOI Act;

However, I consider that these factors are outweighed by the following public interest factors against disclosure:

- prejudice to the protection of another individual's right to privacy;
- prejudice the fair treatment of individuals (where the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct);
- the reasonable expectation that disclosure would impede the administration of justice (including, for example, procedural fairness);
- prejudice to Airservices' ability to obtain similar information in the future;
- the harm to the interests of an individual or group as a result of disclosure;
- prejudice to Airservices' management functions, including the ability for Airservices to obtain information from complainants and witnesses in future investigations, and the integrity of those investigation processes;
- the adverse impact that disclosure would have on the willingness of staff to consult with others and/or engage in frank discussions, which in turn could have an adverse effect on the quality of decision making in relation to code of conduct investigations.

In the circumstances, I am satisfied that disclosure of the documents would, on balance, be contrary to the public interest.

I therefore find that access to the conditionally exempt documents (or parts of documents) identified in the Schedule should be refused.

Shan Gunawardena
FOI Coordinator & Authorised FOI Decision Maker

INFORMATION ON REVIEW RIGHTS

The *Freedom of Information Act 1982* (the **FOI Act**) gives you the right to apply for a review of this decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of this decision by:

- (a) an internal review officer in Airservices Australia; or
- (b) the Australian Information Commissioner (**Information Commissioner**).

Internal Review

If you apply for internal review, it will be carried out by a different decision-maker who will make a fresh decision on your application. An application for review must be:

- (c) made in writing;
- (d) made within 30 days of receiving this letter; and
- (e) sent to legal@airservicesaustralia.com.

No particular form is required, but it is desirable to set out in the application the grounds upon which you consider the decision should be reviewed.

If the internal review officer decides not to grant you access to all of the documents to which you have requested access, you have the right to seek a review of that decision by the Information Commissioner. You will be further notified of your rights of review at the time you are notified of the internal review decision.

Please note that if you apply for an internal review and a decision is not made by an internal review officer within 30 days of receiving the application, you have the right to seek review by the Information Commissioner for a review of the original FOI decision on the basis of a 'deemed refusal' decision. An application for Information Commissioner review in this situation must be made within 60 days of the date when the internal review decision should have been made (provided an extension of time has not been granted or agreed).

Information Commissioner review

If you want to seek direct review by the Information Commissioner (and not internal review), you must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

<p>Online: www.oaic.gov.au Post: GPO Box 2999, Canberra ACT 2601 Fax: +61 2 9284 9666 Email: enquiries@oaic.gov.au</p>	<p>In person: Level 3, 175 Pitt Street, Sydney NSW 2000</p>
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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.

Complaints to the Commonwealth Ombudsman and Information Commissioner

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.

Information Commissioner

You may also complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au