

Mr Phil Richards

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

Dear Mr Richards,

Notice of internal review outcome - s54C(4) of the *Freedom of Information Act 1982* (Cth)
Freedom of information request no: FOI129-0518

1. I refer to your email correspondence dated 8 June 2018, and received by Airservices Australia (**Airservices**) on that same date. You have sought an internal review of the decision dated 8 June 2018 made by Mr Shan Gunawardena, FOI Coordinator in relation to your original request (FOI129-0518) (the **Primary Decision**).
2. I am an officer authorised under section 23(1) of the FOI Act to make decisions and conduct internal reviews in relation to FOI requests

The original FOI Request and Primary Decision

3. Airservices received your original request on 9 May 2018 for access to the following documents under the FOI Act:

Copies of all final investigation reports conducted by external parties relating to ARFF only where a complaint was made by an ARFF Officer/employee or about an ARFF Officer/employee (bullying/harassment, etc) for the period 1 Jan 2017 to current date.
4. A total of five documents were identified as being relevant to the request. Access to all five documents was refused on the basis that the documents contained information which was considered conditionally exempt under section 47C (deliberative), section 47E(c) (certain operations of an agency, and section 47F (personal privacy) of the FOI Act and that disclosure of that information would be contrary to the public interest.

Section 47C – Public interest conditional exemption – Deliberative material

5. 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.
6. After having reviewed the documents identified in the Primary Decision, I am satisfied that they contain deliberative material in the nature of opinions, advice, suggestions and recommendations that were obtained or prepared for the purpose of undertaking an investigation into alleged breaches of the Airservices Code of Conduct. In particular, the deliberation relates to Airservices decision making processes in determining whether or not the allegations were substantiated.

7. I further note, while there is information that appears to be operational or factual in nature, this information is intertwined with deliberative information and is necessarily part of a deliberative process. Accordingly, partial release via redactions is not feasible.
8. Therefore, subject to the application of the public interest test, I am satisfied the documents are conditionally exempt under section 47C of the FOI Act.

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

9. A document is conditionally exempt if its disclosure would, or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth.
10. The FOI Guidelines state that the section 47E(c) exemption will apply 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.
11. After having reviewed the documents identified in the Primary Decision, I am satisfied they each relate to Airservices' assessment of personnel including activities concerning the competency, appraisals, underperformance, counselling, and feedback as they include information about investigations in to alleged breaches of the Airservices Code of Conduct.
12. Therefore, subject to the application of the public interest test, I am satisfied the documents are conditionally exempt under section 47E(c) of the FOI Act.

Section 47F – Public interest conditional exemption – Personal Privacy

13. A document is conditionally exempt under this section if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).
14. 'Personal information' is defined in section 4 of the FOI Act to mean information or an opinion (including information forming part of a database), whether it is true or not, and whether recorded in a material form or not, about a individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.
15. After having reviewed the documents identified in the Primary Decision, I am satisfied that they contain personal information about numerous individuals, other than yourself. This information includes:
 - names, positions, ranks, and locations;
 - deliberations and findings about individuals other than yourself;
 - statements by individuals about other individuals; and
 - other information of a personal nature.
16. Disclosure of this information would be unreasonable, on the basis the information is not available publically or otherwise well known, and release may cause some concern to a number of individuals. The individuals who contributed to and assisted with the workplace investigations did so on the understanding and expectation of confidentiality.
17. Redaction of the personal information is not feasible in this case as pieces of information could be linked to identify the individuals involved. Accordingly, subject to the application of the public interest test, I am satisfied the documents are conditionally exempt under section 47F of the FOI Act.

Section 11A(5) – Public Interest Test

18. 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.
19. For the reasons discussed above, I have found that certain documents contain information which is conditionally exempt under sections 47C (deliberative material), 47E(c) (certain operations of an agency) and 47F (personal privacy).
20. 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.
21. 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.
22. In this case, I accept the following public interest factors favour disclosure:
 - promote the objects of the FOI Act;
23. 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.

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

Internal Review Decision

25. On the basis of the above analysis, I have decided to affirm the Primary Decision.

Yours sincerely,



Leah Kennedy
General Counsel
6 July 2018

Your review rights

If you are dissatisfied with the internal review, you may apply to the Australian Information Commissioner for review. 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-/>
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.