

READ,Amber

From: DAVIDSON,Mark
Sent: Tuesday, 5 June 2018 14:22
To: LLOYD,John
Subject: HPE CM: Complaint under section 50(1)(b) Public Service Act received 4 June 2018 [DLM=Sensitive:Personal]
Attachments: 05062018 Letter to Mr Lloyd.pdf

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence in respect of the above matter.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)
Office of the Merit Protection Commissioner

Australian Public Service Commission
PO Box 20636, World Square Post Office, SYDNEY NSW 2002
P: +612 82395326 | W: <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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Sensitive: Personal

The Hon John Lloyd PSM
Public Service Commissioner
Australian Public Service Commission
Treasury Building
B Block Level 4
Parkes Place West
Parkes ACT 2600

Dear Mr Lloyd

Complaint under section 50(1)(b) of the *Public Service Act*

On 4 June 2018 a complaint was received in my Office under section 50(1)(b) of the *Public Service Act*.

A copy of the complaint is **enclosed** (redacted for reasons of personal privacy).

I have acknowledged receipt of the complaint and have informed the person who has made the complaint of my substantive position as an employee of the Australian Public Service Commission.

I now need to consider options for progressing the matter. Taking into account my conflict of interest, this may involve referral to an independent person for consideration.

As you are aware, complaints of this nature are usually handled by a two-stage decision making process. The first is a consideration of whether there is a prima facie case for inquiring into the alleged conduct and the second stage is any investigation that results from that consideration.

I will write to you when I have decided on the most appropriate option for progressing the matter. I do not require any information from you at this time unless you wish to provide any to me.

Please also find **enclosed** a privacy notice.

Yours sincerely



Mark Davidson
Merit Protection Commissioner (A/g)
5 June 2018

From: REDACTED

Sent: Sunday, 3 June 2018 8:06 AM

To: APSC - Review <review.APSC@apsc.gov.au>

Subject: CComplaint regarding John Lloyd's breaches of the APS Code of Conduct

Dear Merit Protection Commissioner

I am writing to lodge a complaint, and request that the Merit Protection Commissioner inquire into, alleged breaches of the APS Code of Conduct by the Public Service Commissioner, John Lloyd.

In support of my allegations, I refer to an article published by the Crikey news service last week concerning Mr Lloyd's conduct: <https://www.crikey.com.au/2018/05/23/john-lloyd-and-the-fine-art-of-shooting-oneself-in-the-foot/>

The article (copied below), including the information and other articles linked to in the article, provides a concise summary of Mr Lloyd's behaviour and how that behaviour contravenes the obligations imposed on Mr Lloyd by the Public Service Act. I rely on all of the information contained in that article (and linked to from that article) in support of my complaint that Mr Lloyd, by his actions described in the article, has contravened section 13(1), 13(4), 13(7), 13(8), 13(10) and 13(11) of the Public Service Act.

The article refers to an email sent by Mr Lloyd from his APSC email address, to his manager at the Liberal Party aligned, Institute of Public Affairs, Mr John Roskam, immediately after he was questioned at Senate Estimates in October last year regarding his improper dealings and communications with the IPA while in his role as Public Service Commissioner.

A copy of that email, sent by Mr Lloyd, to Mr Roskam, is set out here:
<https://twitter.com/jennymcallister/status/998507017907060737>

In addition to my contentions above, I contend that no public servant acting in accordance with the Public Service Act (including the obligation to behave impartially and apolitically) would send such an email to a political lobby group with which they are associated (particularly where that email is sent from a government issued email address).

If I'm wrong, and Mr Lloyd's conduct is acceptable, this will open up a world of opportunity for public servants to engage in political activity while at work and outside of work.

I'm a public servant and so I'd prefer to remain anonymous for the purposes of this complaint (I'd be sacked if anyone found out).

Please let me know, by reply email, if further information is required.

John Lloyd and the fine art of shooting oneself in the foot

<https://www.crikey.com.au/2018/05/23/john-lloyd-and-the-fine-art-of-shooting-oneself-in-the-foot/>

Public Service Commissioner John Lloyd is adamant that criticising shadow ministers in private emails is a breach of the public service code of conduct. Which — oops — seems to be exactly what he did.

Is Australian Public Service Commissioner John Lloyd under investigation? After initially refusing to answer questions about being under investigation on Monday in the wake of the *Canberra Times*' [revelation](#) about FOI documents, Lloyd decided yesterday that he *was* going to answer them, and the answer was “no”.

Earlier yesterday, officials from the Department of Finance said a complaint about Lloyd had been referred to the Merit Protection Commissioner. So Lloyd has been *referred* for investigation in relation to his emails with the IPA and the fact that Lloyd did research for the [right-wing thinktank on taxpayer time](#), but he says he's not *under* investigation. Which of course makes one wonder why he declined to answer in the first place. Possibly just because he's not under investigation *now* doesn't mean he may not come under investigation.

What's clearer is why he changed his mind about not answering. Witnesses can't simply refuse to answer questions at Estimates, they have to make a public interest immunity claim that the answer would not be in the public interest. The government decided not to help Lloyd out by making a claim on his behalf.

"I am not inclined to make a Public Interest Immunity claim," Senate president Scott Ryan — who looks ever more impressive in that role — told the Finance and Public Administration committee late on Monday. "I am not aware of sufficient facts to sustain such a claim."

He left it open to Lloyd to make a claim because he is a statutory officer. But Ryan had signalled he wasn't going to make the same mistake as Michaelia Cash had made with Lloyd's protege Nigel Hadgkiss when he broke the law while heading the ABCC — providing cover for someone whose position might later become untenable.

After lunch yesterday, the government then definitively hung Lloyd out to dry: Finance officials were allowed by the government to name Lloyd as being the subject of an allegation of a breach of the public service code of conduct, obliterating his refusal to answer questions. Later yesterday, Lloyd wrote to the committee redundantly declining to make a PII claim but insisting he wasn't the subject of an investigation.

Like Hadgkiss, Lloyd is an ideological appointment by the Liberals that in retrospect looks too cute by half. He is an ideological warrior on industrial relations inexplicably given the role of overseeing the public service by Tony Abbott. But he failed to understand that the rules apply to him like they do to any other public servant.

Public servants don't get to help out their mates in the private sector like [Lloyd helped out the IPA](#). And they don't get to complain about shadow ministers having a "swipe" at their mates. Nor, after that complaint has been publicly revealed, do they get to complain *again* about the shadow minister questioning them, which is what Lloyd did in an email to IPA head John Roskam in October.

How can we be so sure this is a poor fit with the APS code of conduct? Let's ask none other than... John Lloyd himself. In August, Lloyd released [a draconian interpretation of the public service code of conduct](#) in relation to social media that makes clear that his own behaviour doesn't pass muster. Lloyd's document explicitly warns against "criticising your shadow minister, the leader of the Opposition, or the relevant spokesperson from minor parties", because it is "likely to raise concerns about your impartiality and to undermine the integrity and reputation of your agency and the APS generally."

Lloyd goes on to note “senior APS employees, or employees with a particularly high-profile or specialist role, need to be especially careful in considering the impact of any comments they might make.”

Indeed, John.

“Can I breach the Code through material in a private email that I send to a friend?” Lloyd’s FAQ goes on to discuss. “Yes. There’s nothing to stop your friend taking a screenshot of that email, including your personal details, and sending it to other people or posting it all over the internet.”

Or, for that matter, someone FOIing it.

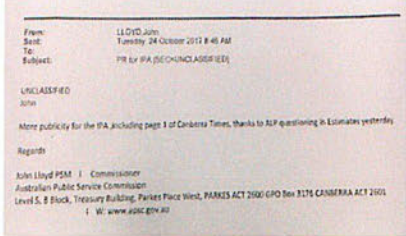
Still, there’s a bright spot for Lloyd. Should a decision be taken to investigate him, and should it find against him, he’s not subject to ordinary public service disciplinary proceedings and can only be removed from office by the Governor-General after a vote of both houses of parliament on the basis of misbehaviour or physical or mental incapacity.



Senator McAllister
@jennymcallister
Labor Senator for NSW. All tweets authorized by Senator Jenny McAllister, Australian Labor Party, Canberra.
Sydney
jennymcallister.com.au
Joined June 2009

Senator McAllister
@jennymcallister Follow

Your impartial Australian Public Service Commissioner at work - emailing the IPA about @AustralianLabor and our questions at #estimates. #auspol



3:13 AM - 21 May 2018
389 Retweets 343 Likes

- Daina Trethewey** @daina_trethewey · May 22
Replying to @jennymcallister @rapturebadia and 2 others
Sickening infiltration
- Jennifer Meyer-Smith** @smithmeyerjen · May 22
Replying to @jennymcallister @HkarterKarter and 2 others
Disgraceful abuse of power





Office of the Merit Protection Commissioner

Privacy notice about your personal information

Consideration of an Inquiry into an alleged breach of the Code of Conduct under section 50(1)(b) of the *Public Service Act 1999*

The Merit Protection Commissioner is collecting your personal information to consider whether to conduct an inquiry into allegations you have breached the Australian Public Service Code of Conduct.

This notice advises how your personal information will be handled while the Merit Protection Commissioner is considering whether to conduct an inquiry and, if he does decide to do so, in conducting the inquiry. This notice is issued in accordance with Australian Privacy Principle 5 in the *Privacy Act 1988*.

Further information is provided in the Merit Protection Commissioner’s privacy policy on the MPC website including advice on how you can access and correct personal information and make a privacy complaint. Further details are provided below.

Merit Protection Commissioner Consideration of an Inquiry into an alleged breach of the Code of Conduct — APP 5 Notice

Authority for collection of personal information The Merit Protection Commissioner has the function under subsection 50(1)(b) of the *Public Service Act 1999* to inquire into alleged breaches of the Code of Conduct by the Australian Public Service Commissioner and, where relevant, make recommendations for sanction(s).

If the Merit Protection Commissioner decides to conduct an inquiry he may appoint an independent investigator to inquire into the allegations.

Why is the Merit Protection Commissioner collecting your personal information and how will it be used? The Merit Protection Commissioner has received an allegation(s) that you have breached the APS Code of Conduct. The Merit Protection Commissioner may ask you to provide information about the complaint for the Merit Protection Commissioner to consider before deciding whether to conduct an inquiry. In order for this to occur, the Merit Protection Commissioner will collect information relevant to the allegation(s). If the Merit Protection Commissioner decides to conduct an Inquiry the Merit Protection Commissioner must collect information and evidence relevant to the allegation(s) to establish what you have or have not done and to determine whether or not you have breached the Code of Conduct and, where relevant, make recommendations for sanctions.

What sort of information will the Merit Protection Commissioner collect and how is it collected? This will depend on the nature of the allegations. The information may include but is not limited to:

- biographical information
- information about your employment history (including your role as the APS Commissioner)

- information about your conditions of employment including salary and related matters
- information about your conduct and behaviour at work, and outside work where this is in connection with or affects your role as APS Commissioner
- the opinions of colleagues about your behaviour, performance and other work related matters.

Some of this information may be 'sensitive information' as defined by section 6(1) of the *Privacy Act 1988*. This includes but is not limited to information about:

- racial or ethnic origin
- membership of a political association, trade union or professional/trade organisation
- sexual preferences or practices
- health information.

This information may be collected from your agency's records, and may be collected from witnesses, colleagues, other third parties and directly from you.

Who will the Merit Protection Commissioner disclose your personal information to?

Care is taken to treat the personal information you provide confidentially.

If the Merit Protection Commissioner decides to conduct an Inquiry the Merit Protection Commissioner must under section 50(1)(b) of the *Public Service Act* provide a report to the Presiding Officers of both Parliamentary Houses on the results of any enquiries, including where relevant, recommendations for sanctions. This will include your personal information.

The Merit Protection Commissioner may also disclose your personal information in the following circumstances:

- where the Merit Protection Commissioner considers it to be in the public interest and/or that of the individual or agency, in accordance with subsection 72B(5) of the *Public Service Act 1999*. Such circumstances may include a risk to health and safety or security and/or unlawful or improper practices.
- where required by law, including but not limited to, an application for access to information under the *Freedom of Information Act 1982* or as a result of a court/tribunal order
- where the Merit Protection Commissioner considers it necessary to disclose personal information to witnesses and other persons as part of the inquiry, for example to clarify inconsistencies in evidence.
- Where requested or required to do so by Parliament, including by a Committee of Parliament.

Overseas disclosure of your personal information.

It is unlikely that your personal information will be disclosed to any overseas recipients.

Please direct any inquiries, including questions about this notice, to the Merit Protection Commissioner.

READ,Amber

From: DAVIDSON,Mark
Sent: Friday, 1 June 2018 13:06
To: LLOYD,John
Cc: READ,Amber
Subject: Consultation on Freedom of Information Request [DLM=Sensitive:Personal]
Attachments: FOI request of 10 April 2018.pdf; Consultation document.pdf; 01062018 Letter to Mr Lloyd FOI Consultation.pdf

Sensitive: Personal

Dear Mr Lloyd,

I refer to my brief verbal advice to you of 18 May 2018 about [REDACTED].

Please find attached correspondence and attached documents seeking your view by way of consultation on an FOI request by [REDACTED].

Ms Read is the authorised FOI decision maker in respect of the FOI request.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)
Office of the Merit Protection Commissioner

Australian Public Service Commission
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<http://meritprotectioncommission.gov.au>



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Kind regards,
[REDACTED]

Sent: Tuesday, April 10, 2018 at 12:56 PM
From: "DAVIDSON, Mark"
To: [REDACTED]
Subject: RE: Commissioner Lloyd: referral/request pursuant to 50(1)(b)
[SEC=UNCLASSIFIED]

UNCLASSIFIED

Dear [REDACTED],

I refer to my e-mail to you of 28 March 2018 (below).

Ms Amanda MacDonald was engaged by me to carry out the consideration of your complaint.

Ms MacDonald has held various senior public service positions in the area of administrative law and review including as acting Merit Protection Commissioner on a number of occasions.

Ms MacDonald's consideration has recommended there is no prima facie case for inquiring into your allegations of breaches of the Australian Public Service Code of Conduct by the Australian Public Service Commissioner because:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I have accepted Ms MacDonald's recommendation. There will be no inquiry under section 50(1)(b) of the *Public Service Act 1999*. No further action will be taken by me in respect of this matter.

If you are not satisfied with my decision, you may apply to a court for judicial review, generally on a question of law, rather than the merits of the decision. For example, under the Administrative Decisions (Judicial Review) Act 1977, the Federal Circuit Court of Australia and the Federal Court of Australia have the power to review certain decisions. Generally, the courts' role is to ensure that decision makers acted fairly and within the law and followed proper procedures in coming to a decision. The time limit for such applications is usually 28 days from being notified of the relevant decision. The websites for the courts are at www.federalcircuitcourt.gov.au and www.federalcourt.gov.au. Before making an application, you may wish to consider obtaining independent legal advice.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

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Australian Public Service Commission

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cid:image001.jpg@01D2B20C.4730D520



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From: DAVIDSON, Mark
Sent: Wednesday, 28 March 2018 12:15 PM
To: [REDACTED]
Subject: RE: Commissioner Lloyd: referral/request pursuant to 50(1)(b)
[SEC=UNCLASSIFIED]

UNCLASSIFIED

Dear [REDACTED]

I have considered your e-mails to me of 15 March 2018 in terms of the progressing the above matter. In doing so I have taken into account the content of my e-mail to you of 19 February 2018.

I have decided to refer the above matter to an independent person for consideration.

I thought it helpful for you to be informed in broad terms how complaints of this nature are usually handled. Once a complaint is made to the Merit Protection Commissioner, there is a two-stage decision making process. The first is a consideration of whether there is a prima facie case for inquiring into the alleged conduct and the second stage is any investigation that results from that consideration.

As the complainant, please be aware that you should have no expectation of being provided with progress reports or the details of the consideration of your complaint or of any investigation that may result from it. This is for a number of reasons including privacy and in order not to prejudice any investigation.

In the interests of transparency, I undertake to let you know when actions arising from your complaint have been finalised.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

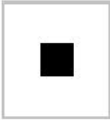
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cid:image001.jpg@01D2B20C.4730D520





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From: DAVIDSON,Mark
Sent: Friday, 16 March 2018 3:02 PM
To: [REDACTED]
Subject: RE: Commissioner Lloyd: referral/request pursuant to 50(1)(b)
[SEC=UNCLASSIFIED]

UNCLASSIFIED

Dear [REDACTED],

I refer to your email of 15 March 2018 below.

I will consider the content of the email and attachments with a view to communicating further with you as soon as I can. In this regard I note your other email of 15 March 2018 referencing the content of my email to you of 19 February 2018.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

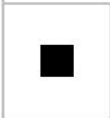
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P: +612 82395330 F: +612 6267 4944 | **W:** <http://meritprotectioncommission.gov.au>

cid:image001.jpg@01D2B20C.4730D520



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From: [REDACTED]
Sent: Thursday, 15 March 2018 3:29 PM
To: DAVIDSON,Mark
Subject: Commissioner Lloyd: referral/request pursuant to 50(1)(b)

Dear Mr Davidson,

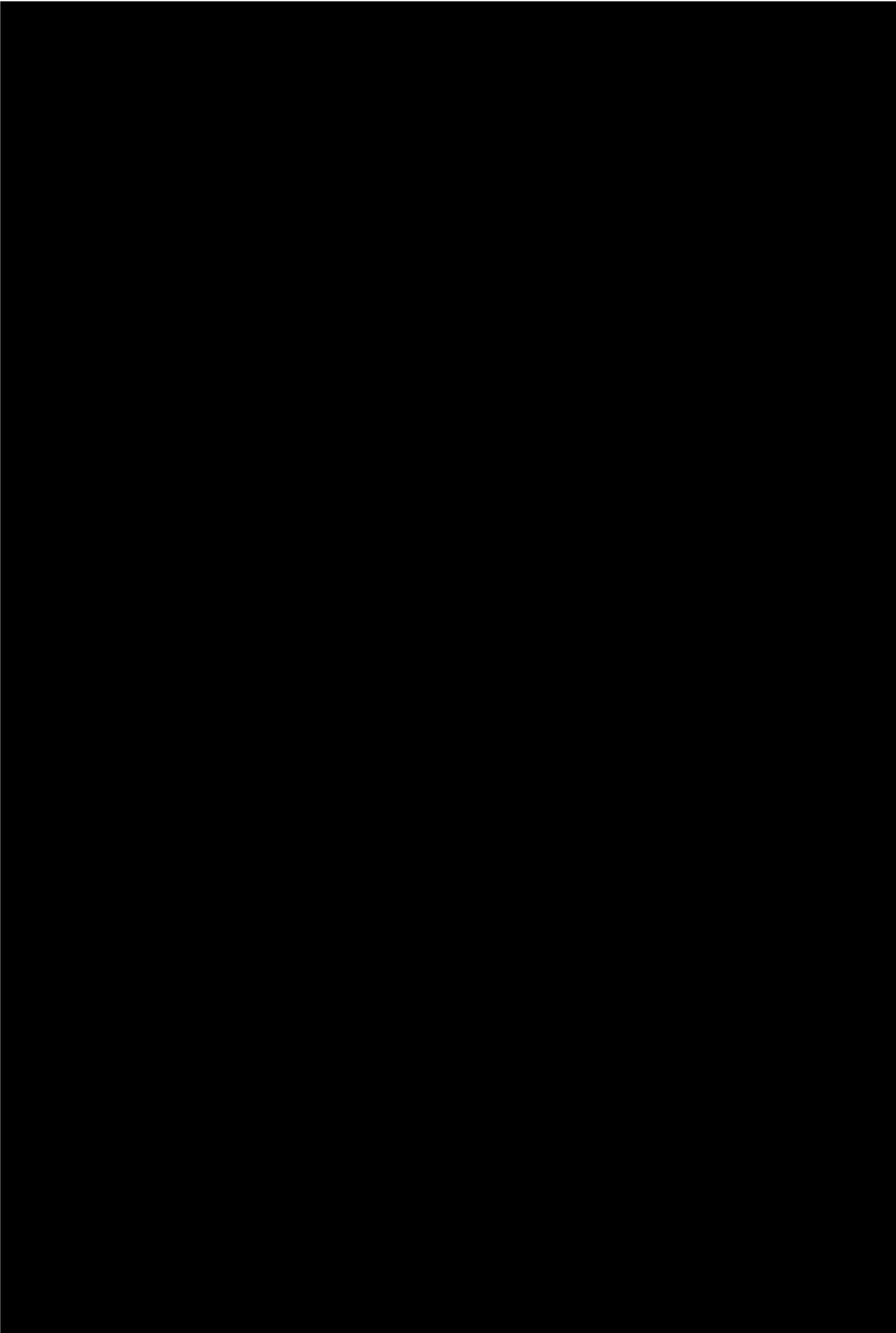
The attached Word document ("Merit Protection...") requests a "50(1)(b)" with respect to PS Commissioner Lloyd.

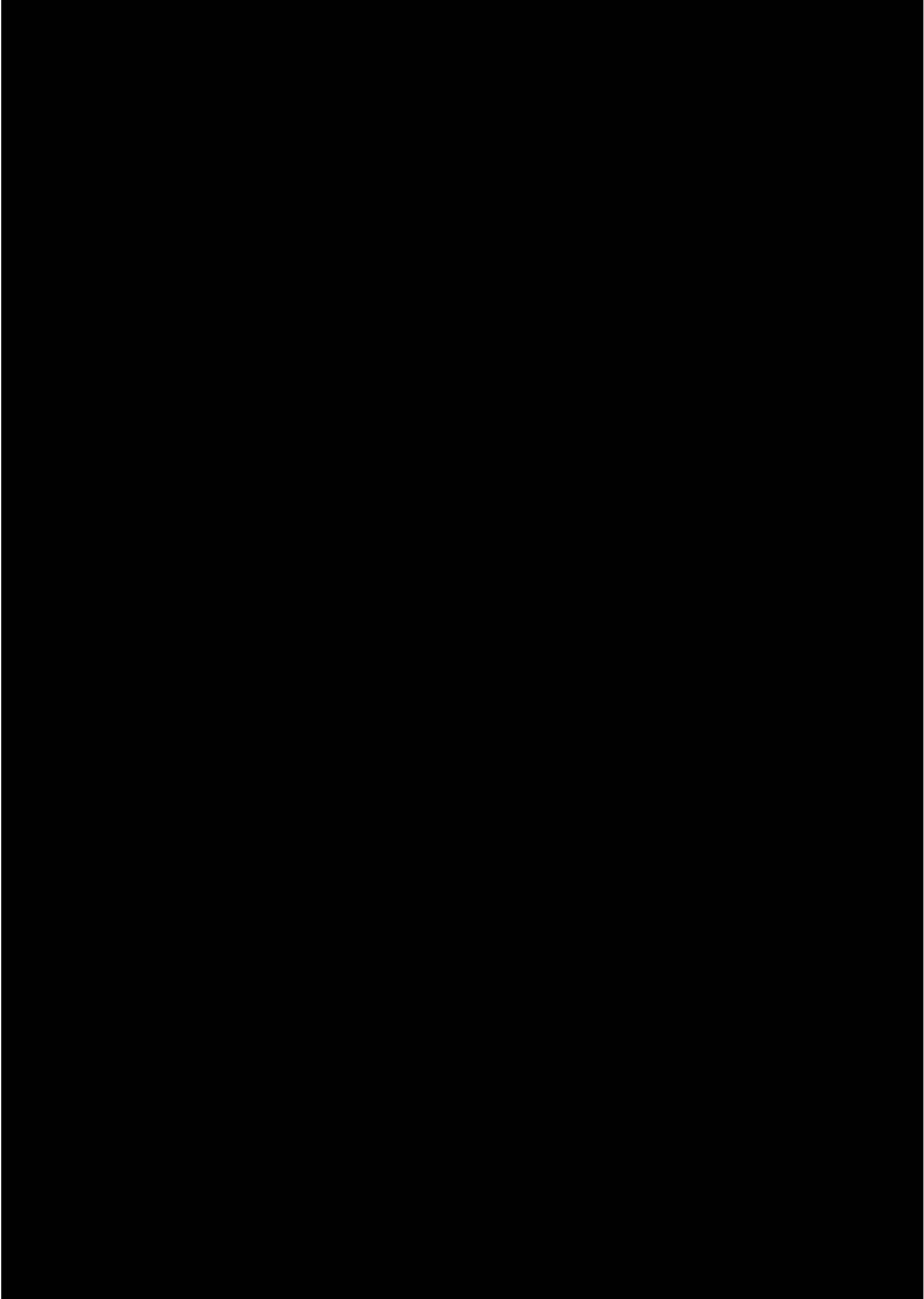
Please let me know if there's anything additional I can provide you.

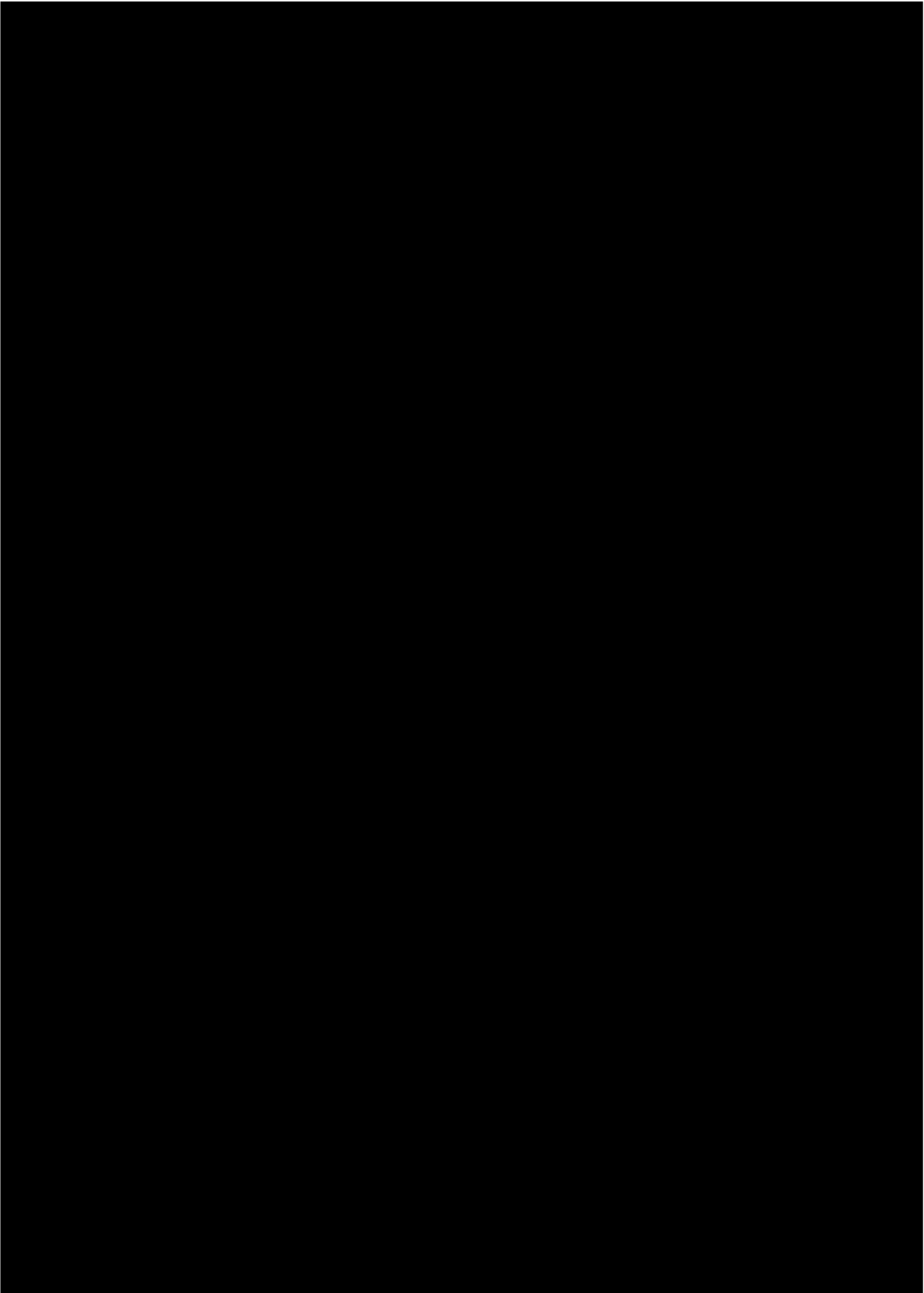
Many thanks; kind regards,

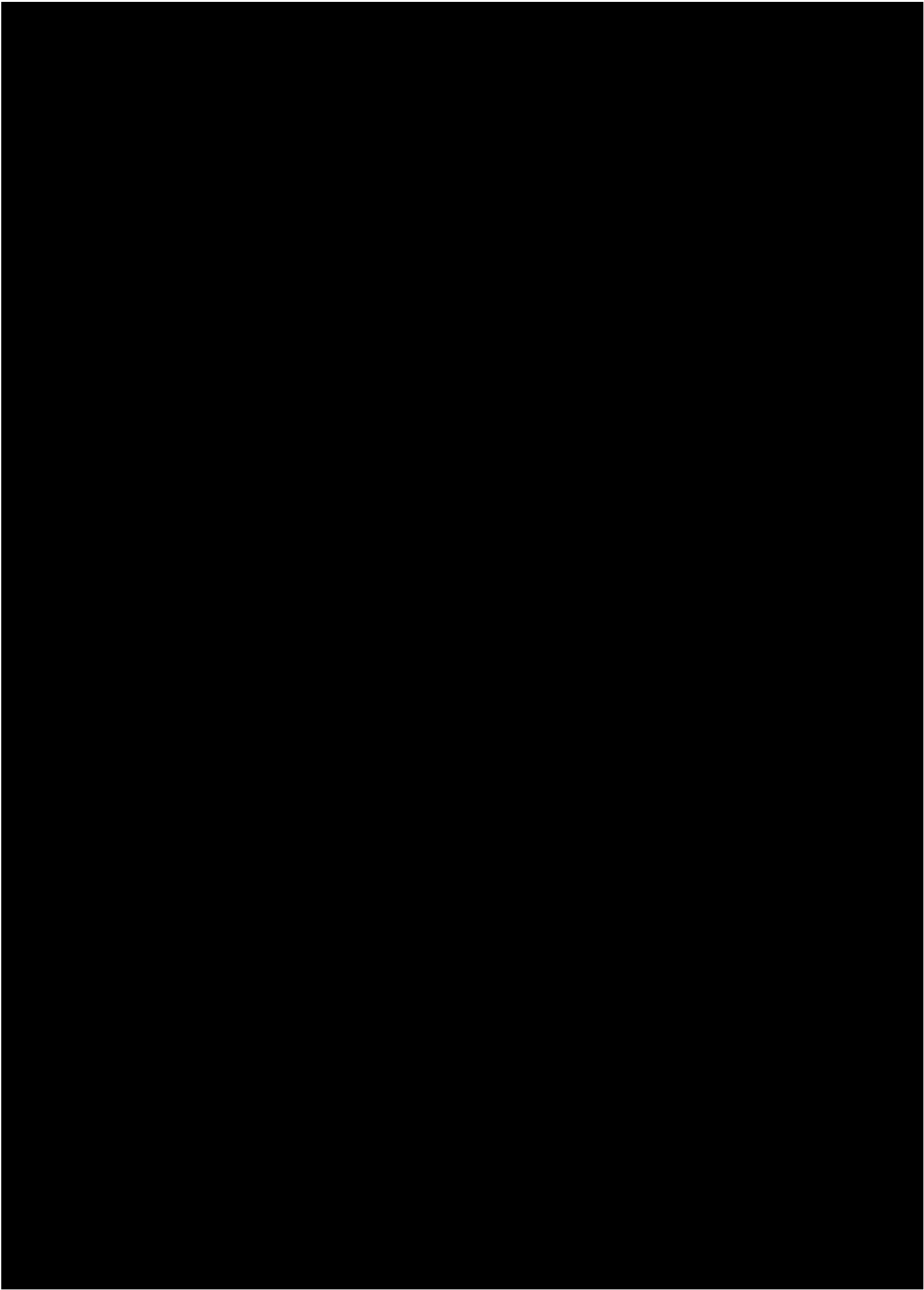
[REDACTED] (15/3)

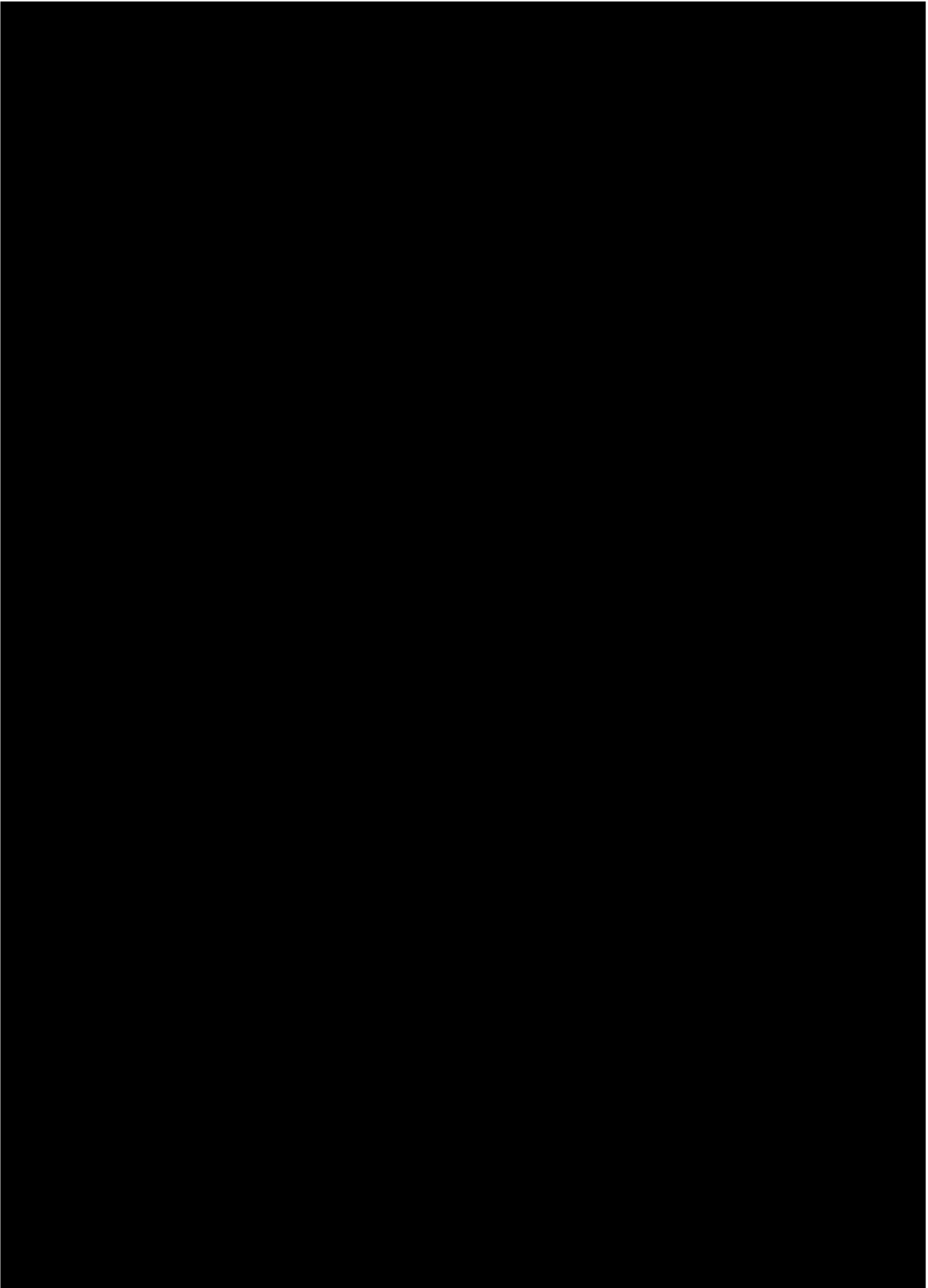
Sent: Wednesday, February 21, 2018 at 7:35 PM
From: [REDACTED]
To: "PS Comm"
Cc: "PMO Canberra"
Subject: Commissioner Lloyd

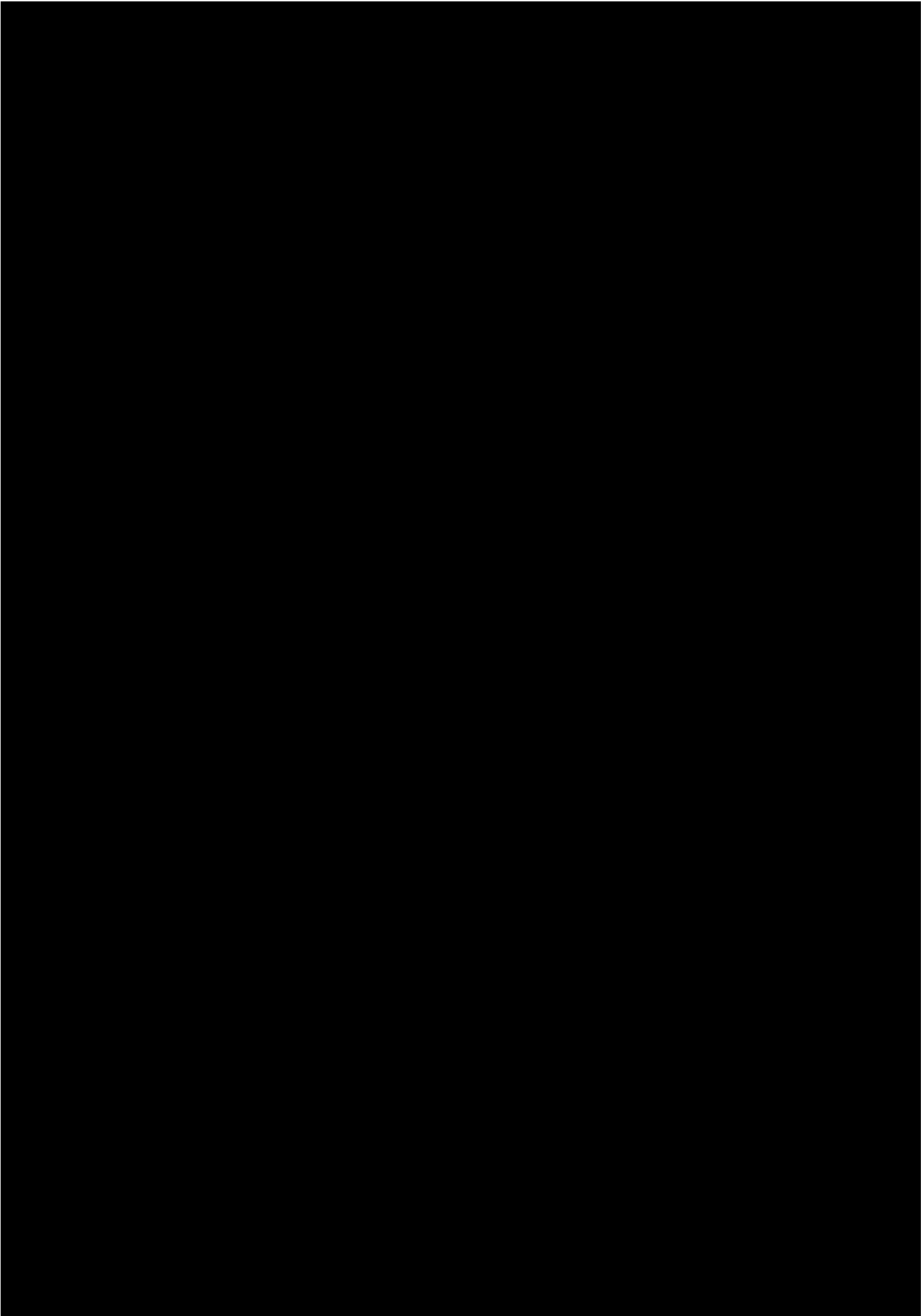














Sensitive: Personal

The Hon John Lloyd PSM
 Public Service Commissioner
 Australian Public Service Commission
 Treasury Building
 B Block Level 4
 Parkes Place West
 Parkes ACT 2600

Dear Mr Lloyd

Consultation on Freedom of Information Request

I am writing to you in regards to a request under the *Freedom of Information Act 1982* (the FOI Act) my Office has received from [REDACTED]. I attach a copy of the request from [REDACTED], which was received by the Australian Public Service Commission (APSC)'s FOI officer on 10 April 2018 and transferred to my Office the same day.

[REDACTED] made a complaint to me on 15 March 2018 alleging breaches of the Code of Conduct by the Australian Public Service Commissioner and requested that the Merit Protection Commissioner inquire into the alleged breaches under section 50(1)(b) of the *Public Service Act 1999*.

I understand that [REDACTED] wrote to you directly about his allegations on a number of occasions including 6 February 2018 and 21 February 2018. [REDACTED]

This matter was independently assessed by Ms Amanda MacDonald, who advised me on 10 April 2018 that there was no behaviour on the part of the Australian Public Service Commissioner that would warrant an enquiry under section 50(1)(b) of the *Public Service Act 1999*. I accepted Ms MacDonald's recommendation and advised [REDACTED] of this outcome on 10 April 2018.

Following this matter, [REDACTED] lodged the attached FOI request. I have identified the following documents contained in my records which fall within the scope of [REDACTED] FOI request:

- *Consideration of a Complaint made to the Merit Protection Commissioner by [REDACTED] by Ms Amanda MacDonald, dated 10 April 2018*

As the document contains your personal information, I am writing to you to consult you in accordance with section 27A of the FOI Act. I would be grateful if you could examine the document and comment on its possible release under the FOI Act. If you consider that the consultation document should be fully or partially exempted from release, I would be grateful if you could advise the section or sections of the FOI Act that you consider would apply. I would also be grateful if you could provide reasons for seeking



Sensitive: Personal

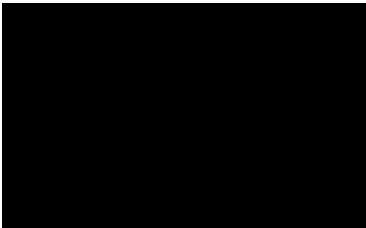
an exemption. While your comments will be taken into account in the decision making process, Ms Read, the decision-maker within my Office is obliged to form their own view, regarding the appropriateness of release.

Under the FOI Act, I am required to provide a decision to [REDACTED] by 12 June 2018. Accordingly, I would be grateful if you could respond to authorised FOI decision maker Ms Amber Read by **Friday 8 June 2018**. Ms Read can be contacted by email to amber.read@apsc.gov.au or by telephone to (02) 8239 5398.

I apologise for the short timeframe in this matter. Please contact Ms Read directly if you will have difficulty meeting this timeframe.

Thank you in advance for your assistance with this matter.

Yours sincerely

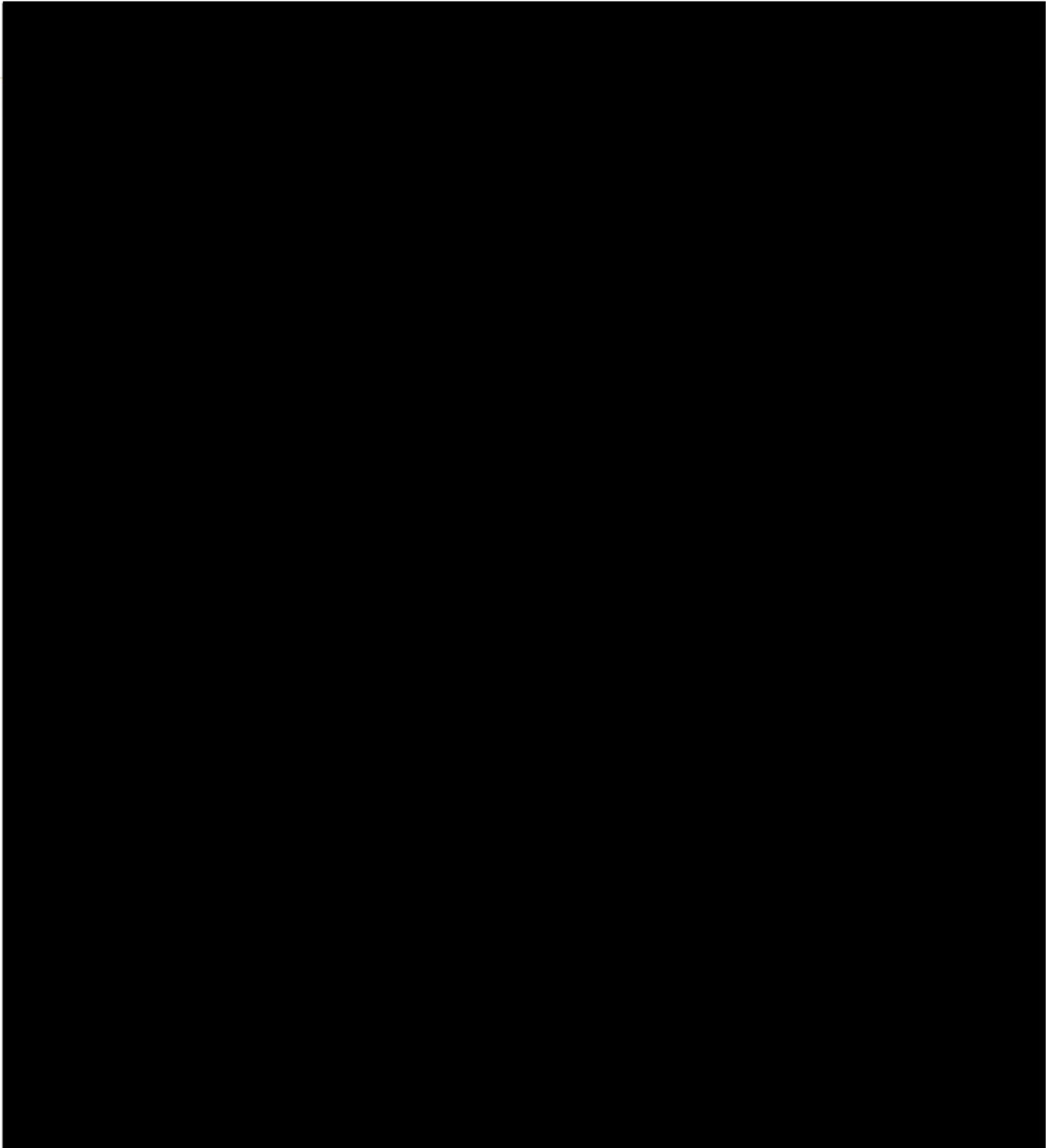


Mark Davidson
Merit Protection Commissioner (A/g)
1 June 2018

Consideration of a Complaint made to the Merit Protection Commissioner by [REDACTED]

What is the issue under consideration?

The issue is whether there is a prima facie case for inquiring into alleged breaches of the Code of Conduct by the Public Service Commissioner.



Recommendation

There is not a prima facie case for inquiring into alleged breaches of the Code of Conduct by the Public Service Commissioner.



Amanda MacDonald

10 April 2018

READ,Amber

From: DAVIDSON,Mark
Sent: Friday, 25 May 2018 11:33
To: LLOYD,John
Subject: HPE CM: RE: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]
Attachments: 25052018 Letter to Mr Lloyd.pdf

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)
Office of the Merit Protection Commissioner

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 P: +612 82395326 W: <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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From: LLOYD,John
Sent: Friday, 25 May 2018 8:52 AM
To: DAVIDSON,Mark <Mark.Davidson@apsc.gov.au>
Subject: HPE CM: Re: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Dear Mr Davidson

I refer to the letter attached to your email dated 24 May 2018.

I thank you for the opportunity to present my views on the threshold question of whether an inquiry should be conducted.

However, I assert that I will be unable to meet the timeline you have given me to respond by.

I am currently in Darwin attending the Australia - New Zealand Public Service Commissioners conference. The conference concludes today, Friday.

Monday, 28 May 2018 is a public holiday in Canberra.

I am to

to work on Friday 1 June 2018.

I suggest that in these circumstances it is unreasonable to require me to respond by Friday 1 June 2018.

Also, I submit that this response, although dealing with a preliminary question is nevertheless a significant matter. This is particularly so given your stated disposition to undertake an inquiry.

I intend to challenge this stated preliminary view. This is a especially challenging predicament, the need to change your mind and preliminary conclusion. I will need to obtain legal advice. In addition, I will continue to discharge the responsibilities of my Commissioner position.

Accordingly, I request that the date for making a submission be extended to Friday 15 June 2018. I submit that in all the circumstances this would be a fair arrangement.

Regards

John Lloyd

8

From: DAVIDSON,Mark <Mark.Davidson@apsc.gov.au>

Date: 24 May 2018 at 2:50:41 pm ACST

To: LLOYD,John <John.Lloyd@apsc.gov.au>

Subject: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

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The Hon John Lloyd PSM
Public Service Commissioner
Australian Public Service Commission
Treasury Building
B Block Level 4
Parkes Place West
Parkes ACT 2600

Dear Mr Lloyd

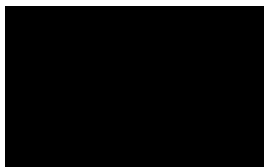
I refer to your e-mail to me of 8.52am today.

On the basis of the information you have given me I am extending the time for submission by you of any materials or other information to me to close of business, Friday 8 June 2018.

If you have further [REDACTED] to put to me, I would consider that at the time.

Please also find **enclosed** a privacy notice.

Yours sincerely



Mark Davidson
Merit Protection Commissioner (A/g)
25 May 2018





Office of the Merit Protection Commissioner

Privacy notice about your personal information

Consideration of an Inquiry into an alleged breach of the Code of Conduct under section 50(1)(b) of the *Public Service Act 1999*

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Merit Protection Commissioner Consideration of an Inquiry into an alleged breach of the Code of Conduct — APP 5 Notice

Authority for collection of personal information The Merit Protection Commissioner has the function under subsection 50(1)(b) of the *Public Service Act 1999* to inquire into alleged breaches of the Code of Conduct by the Australian Public Service Commissioner and, where relevant, make recommendations for sanction(s).

If the Merit Protection Commissioner decides to conduct an inquiry he may appoint an independent investigator to inquire into the allegations.

Why is the Merit Protection Commissioner collecting your personal information and how will it be used? The Merit Protection Commissioner has received an allegation(s) that you have breached the APS Code of Conduct. You have asked the Merit Protection Commissioner to allow you to provide information about the complaint for the Merit Protection Commissioner to consider before deciding whether to conduct an inquiry, and the Merit Protection Commissioner has agreed to your request. In order for this to occur, the Merit Protection Commissioner will collect information relevant to the allegation(s). If the Merit Protection Commissioner decides to conduct an Inquiry the Merit Protection Commissioner must collect information and evidence relevant to the allegation(s) to establish what you have or have not done and to determine whether or not you have breached the Code of Conduct and, where relevant, make recommendations for sanctions.

What sort of information will the Merit Protection Commissioner collect and how is it collected? This will depend on the nature of the allegations. The information may include but is not limited to:

- biographical information
- information about your employment history (including your role as the APS Commissioner)

- information about your conditions of employment including salary and related matters
- information about your conduct and behaviour at work, and outside work where this is in connection with or affects your role as APS Commissioner
- the opinions of colleagues about your behaviour, performance and other work related matters.

Some of this information may be ‘sensitive information’ as defined by section 6(1) of the *Privacy Act 1988*. This includes but is not limited to information about:

- racial or ethnic origin
- membership of a political association, trade union or professional/trade organisation
- sexual preferences or practices
- health information.

This information may be collected from your agency’s records, and may be collected from witnesses, colleagues, other third parties and directly from you.

Who will the Merit Protection Commissioner disclose your personal information to?

Care is taken to treat the personal information you provide confidentially.

If the Merit Protection Commissioner decides to conduct an Inquiry the Merit Protection Commissioner must under section 50(1)(b) of the *Public Service Act* provide a report to the Presiding Officers of both Parliamentary Houses on the results of any enquiries, including where relevant, recommendations for sanctions. This will include your personal information.

The Merit Protection Commissioner may also disclose your personal information in the following circumstances:

- where the Merit Protection Commissioner considers it to be in the public interest and/or that of the individual or agency, in accordance with subsection 72B(5) of the *Public Service Act 1999*. Such circumstances may include a risk to health and safety or security and/or unlawful or improper practices.
- where required by law, including but not limited to, an application for access to information under the *Freedom of Information Act 1982* or as a result of a court/tribunal order
- where the Merit Protection Commissioner considers it necessary to disclose personal information to witnesses and other persons as part of the inquiry, for example to clarify inconsistencies in evidence.
- Where requested or required to do so by Parliament, including by a Committee of Parliament.

Overseas disclosure of your personal information.

It is unlikely that your personal information will be disclosed to any overseas recipients.

Please direct any inquiries, including questions about this notice, to the Merit Protection Commissioner.

READ,Amber

From: DAVIDSON,Mark
Sent: Thursday, 24 May 2018 15:21
To: LLOYD,John
Subject: HPE CM: Complaint under s50(1)(b) of the Public Service Act 1999
[DLM=Sensitive:Personal]
Attachments: 24052018 Letter to Mr Lloyd.pdf

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)
Office of the Merit Protection Commissioner

Australian Public Service Commission
PO Box 20636, World Square Post Office, SYDNEY NSW 2002
P: +612 82395326 | W: <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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Sensitive: Personal

The Hon John Lloyd PSM
Public Service Commissioner
Australian Public Service Commission
Treasury Building
B Block Level 4
Parkes Place West
Parkes ACT 2600

Dear Mr Lloyd

I have considered the contents of your letter to me of 21 May 2018. I note you have asked for the opportunity to convey to me your view of the context of the complaint made against you before I make a decision about whether there should be an inquiry into that complaint.

In all the circumstances, I have decided that it is appropriate that I do give you this opportunity. Accordingly, I will not make a decision about whether there should be an inquiry into the complaint any earlier than 4 June 2018, and before doing so I will consider any submissions or other material you provide to me by 1 June 2018.

To assist you in formulating any submission you might want to make to me it is appropriate that I provide you with the following information.

Statutory context

The power which I am considering exercising is conferred on me by s 50(1)(b) of the *Public Service Act 1999* (PS Act), which provides that one of my functions as the Merit Protection Commissioner is to inquire into alleged breaches of the Code of Conduct by the (APS) Commissioner and to report to the Presiding Officers on the results of such enquiries (including, where relevant, recommendations for sanctions).

If I do decide that such an inquiry should occur I would inform you of my decision in writing. I would also inform the President of the Senate and the Speaker of the House of Representatives of this decision, and that they will be informed of the result of such enquiries in accordance with s 50(1)(b) of the PS Act in due course.

Report from Mr Cornall

I have decided that it is appropriate that I provide you with a copy of the preliminary report I have received from Mr Cornall. A copy of Mr Cornall's report to me is **enclosed** with this letter.

At page 3 of his report Mr Cornall states that s 50A(2) of the PS Act requires that I have due regard to procedural fairness when inquiring into and determining whether you have breached the Code of Conduct, and that in undertaking such inquiries I have the same powers as the Agency Head. I agree that if I do decide that there should be an inquiry into the complaint I (or any person to whom I delegate that power) will be required to have due regard to procedural fairness. However I note that any inquiry



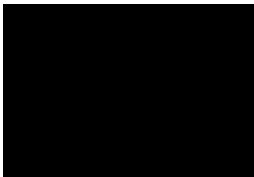
would be conducted pursuant to s 50(1)(b) of the PS Act and not pursuant to s 50A. Mr Cornall's observations about sections 41 and 50A of the PS Act and regulation 6.1A of the Public Service Regulations 1999 are therefore not strictly relevant.

The (alleged) factual matters raised by the complaint are summarised at pages 5-6 of Mr Cornall's report.

Mr Cornall states at page 7 of his report that the complaint is specific, detailed and supported by reference to documents and other information, and that thorough investigation of the allegations and careful consideration of any response from you will be necessary to determine the complaint. My present view is that this appears to be correct but I will consider and have regard to any submission you make about this before making my decision.

Mr Cornall also states at page 7 of his report that he is of the opinion that there is no basis on which I could decline to conduct an inquiry into the complaint. That statement appears to be based on a premise that I do not necessarily accept – that I should conduct an inquiry into the complaint unless there is a basis on which I could decline to do so. I do not think that s 50(1)(b) of the PS Act confers a power on me which I am required to exercise, merely because it is available to be exercised, unless there is a basis on which I decide not to do so. Having said that my preliminary view is that I should decide that an inquiry should be conducted.

Yours sincerely



Mark Davidson
Merit Protection Commissioner (A/g)
24 May 2018

Robert Cornall AO



20 April 2018

Mr Mark Davidson
Acting Merit Protection Commissioner
Office of the Merit Protection Commissioner
PO Box 20636
World Square Post Office
SYDNEY NSW 2002



Dear Mr Davidson

Preliminary consideration of complaint

I acknowledge receipt of your letter dated 5 April 2018 together with a copy of the complaint made against the Public Service Commissioner by [REDACTED] in an email sent on 13 December 2017 and your comprehensive brief of related material.

You have asked me to undertake a preliminary investigation into the complaint based on that information and my consideration of the applicable legislation, regulations and directions.

I understand you have provided a copy of the complaint to the Commissioner but taken no further action pending the outcome of this investigation. The Commissioner has not responded to the complaint and I have not contacted him.

The Public Service Commissioner

Section 40 (1) of the *Public Service Act 1999* provides that there is to be an Australian Public Service Commissioner. Under subsections 40(3)(a) and (b), *the Commissioner and the APS staff assisting the Commissioner constitute a Statutory Agency and the Commissioner is the Head of that Agency.*

Under section 41 of the Act, the Commissioner's functions include:

- *to strengthen the professionalism of the APS and facilitate continuous improvement in workforce management in the APS*
- *to uphold high standards of integrity and conduct in the APS, and*

SENSITIVE: PERSONAL

- *to lead thinking about, provide advice on and drive reforms to workforce management policies so that the APS is ready for future demands.*

The Hon John Lloyd PSM

The Hon John Lloyd PSM was appointed Commissioner in December 2014. He had previously held a number of significant senior positions:

- Deputy Secretary of the Commonwealth Department of Employment and Workplace Relations
- Australian Building and Construction Commissioner
- Senior Deputy President of the Australian Industrial Relations Commission, and
- Red Tape Commissioner Victoria.

Mr Lloyd was also Director, Workplace Relations and Productivity at the Institute of Public Affairs.

The Merit Protection Commissioner's functions

The Merit Protection Commissioner's functions, which are set out in section 50(1) of the Public Service Act, include:

(b) to inquire into alleged breaches of the Code of Conduct by the Commissioner¹ and report to the Presiding Officers on the results of such enquiries (including, where relevant, recommendations for sanctions).

The term *Presiding Officer* is defined in section 7 of the Act to mean the President of the Senate or the Speaker of the House of Representatives.

The alleged breaches of the Code of Conduct

Although Agency Heads are not APS employees, they *are bound by the Code of Conduct in the same way as APS employees².*

The complainant alleges that the Commissioner has, as a result of the conduct discussed below, committed breaches of the Code as set out in subsections 13(1), (7), (8), (10) and (11) of the Act. In short, for the purposes of this investigation, those parts of the Code require an APS employee to:

- behave honestly and with integrity in connection with APS employment

¹ That is, the Public Service Commissioner – see section 7 of the Act

² Section 14(1) of the Act

SENSITIVE: PERSONAL

- take reasonable steps to avoid any conflict of interest (real or apparent)
- use Commonwealth resources in a proper manner and for a proper purpose
- not improperly use inside information or the employee's duties, status, power or authority to gain a benefit or advantage for any other person, and
- at all times behave in a way that upholds the APS Values.

The APS Values are set out in section 10 of the Act and include impartiality:

The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

The complainant further alleges that the Commissioner has committed breaches of sections 26, 27, 28 and 29 of the *Public Governance Performance and Accountability Act 2013*. In short, those sections are similar to the Code of Conduct provisions and impose on officials of a Commonwealth entity a duty:

- to act in good faith and for a proper purpose (section 26)
- to not improperly use his or her position to gain an advantage for another person (section 27)
- to not improperly use information obtained as an official to gain an advantage for another person (section 28), and
- to disclose details of a material personal interest that relates to the affairs of the entity (section 29).

These provisions could be relevant because the Code of Conduct³ requires that an APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. Section 32 of the PGPA Act states that the finance law is an Australian law for the purposes of section 13(4) of the Public Service Act and the Public Service Commission is prescribed as a listed entity in Schedule 1 to the *Public Governance Performance and Accountability Rule 2014*.

Finally, the complainant alleges that the Commissioner has committed an offence of abuse of public office under section 142.2 of the *Criminal Code Act 1995*. That offence includes a public official using information obtained in that capacity with the intention of dishonestly obtaining a benefit for another person.

Misconduct inquiries and preliminary investigations

In undertaking this preliminary investigation, I have regard to relevant legislation, regulations and APSC guidance.

³ Section 13(4) of the Public Service Act

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Pursuant to section 50A(2) of the Public Service Act, the Merit Protection Commissioner (among other things) *must have due regard to procedural fairness* when inquiring into and determining whether an APS employee (that is, the Commissioner) has breached the Code of Conduct.

In undertaking such inquiries, *the Merit Protection Commissioner may exercise the same powers as the Agency Head*⁴.

Section 41(2) of the Public Service Act sets out the Public Service Commissioner's functions, including:

*(m) to inquire, in accordance with section 41A, into alleged breaches of the Code of Conduct by Agency Heads*⁵, and

(p) such other functions as are conferred on the Commissioner by this Act, the regulations or any other law.

The regulations may prescribe circumstances in which the Commissioner may decline to conduct an inquiry into an alleged breach of the Code of Conduct by an Agency Head.⁶

Regulation 6.1A of the Public Service Regulations 1999 deals with the Commissioner's Inquiries into alleged breaches of the Code of Conduct by statutory officer holders (Act s 41(2)(p)). The Commissioner may decline to conduct an inquiry and, in deciding whether to do so, must have regard to the matters in Regulation 6.1(A)(3), including:

(d) whether sufficient detail about the complaint has been provided

(e) whether the allegation refers to specific decisions or actions by the statutory office holder, and

(f) whether the allegation is vexatious, frivolous, misconceived or lacking in substance.

The Australian Public Service Commission's publication, *Handling Misconduct: a human resource management guide*, sets out the following instructions in relation to preliminary investigations:

5.6.1 A preliminary investigation may indicate that, although there may be some substance to an allegation, it is not a matter best dealt with under an agency's s15(3)⁷ procedures. This could occur if the alleged behavior is better addressed through the performance management framework.

⁴ Section 50(A)(6) of the Public Service Act

⁵ The definition of Agency Heads in section 7 of the Act includes the head of a statutory agency. The Commissioner and the APS employees assisting the Commissioner constitute a statutory agency and the Commissioner is its head: see section 40(3) of the Act.

⁶ Section 41A(3) of the Act

⁷ Section 15(3) of the Act

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5.6.2 Preliminary investigations may also indicate there would be little utility in proceeding to a s15(3) investigation. This can occur for a range of reasons including insufficient evidence to be able to reach a concluded view that misconduct had occurred.

5.6.3 While as a matter of good practice, agencies should keep the preliminary investigative phase short, this is not always possible. ...

A preliminary investigation will recommend the decision-maker conduct a full investigation into the complaint or, alternatively, that he or she should decline to do so and, if appropriate, consider the other options for addressing behavioural concerns listed in section 5.7.1.

An examination of the material available for this preliminary investigation

The complaint supported his allegations against the Commissioner by reference to electronic documents and reports, some of which are no longer accessible. You supplied hard copies of available references in your comprehensive brief.

The actions which gave rise to the complaint took place at a time when the Australian Government, its departments and agencies and the Community and Public Sector Union were engaged in lengthy, sometimes acrimonious and largely unsuccessful negotiations to renew expired Commonwealth Public Sector Enterprise Agreements.

The Commissioner and the Public Service Commission were in the forefront of those disputes.

For the purposes of this preliminary investigation, the essential facts or assertions alleged in the complaint are as follows.

Immediately prior to his appointment, the Commissioner was a member of the Liberal Party and a director and member of the Institute of Public Affairs. The Commissioner confirmed he was previously a member of the Liberal Party and is currently a member of the H R Nicholls Society in answer to questions by Senator Lundy at a hearing of the Finance and Public Administration Legislation Committee on 23 February 2015. His engagement with the Institute of Public Affairs is on his public record

The industrial disputes centred on the Government's 1% cap on proposed salary increases, terms and conditions and productivity offsets.

The APSC Commission prepared a paper headed *Examples of 'Soft' arrangements in Commonwealth Enterprise Agreements*. The paper argued that APS employees had enjoyed wage increases substantially above CPI over the past decade and significantly more than remuneration increases in most other industries. The paper asserted that Commonwealth public sector agreements had accumulated generous terms and conditions beyond those provided by minimum safety nets and often well above community standards. Attachments A and B to the paper contained specific details of some of those terms and conditions.

The APSC paper was provided by the Commission to I Whittaker on 6 July 2017 as part of the material supplied in response to his Freedom of Information request. That request sought documents sent by the

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Commissioner or any APSC SES officer to the Institute of Public Affairs or the H R Nicholls Society (or a member, staffer or affiliate of them).

The FOI response also disclosed two emails headed *Examples of generous agreements in Commonwealth enterprise agreements* sent by the Commissioner on 13 April 2015 to unidentified recipients. At 9.20 pm on the same day, the Commissioner received an email response from one of the unidentified recipients which said: *Hi John, Thank you for this – that is very handy.*

The Institute of Public Affairs subsequently published a paper in December 2015 entitled *Australian Taxation Office: Driving a soft bargain – Examining the Commonwealth Public Sector Enterprise Agreements 2011 – 2014*. The paper was authored by Aaron Lane and James Paterson (now Senator Paterson).

That paper argued that public sector wages are higher than those in the private sector on average. It also criticised generous allowances in public sector enterprise agreements, generous superannuation and leave entitlements, prescriptive clauses in the performance management system and union privilege clauses. The Executive Summary concluded: *This report provides a weight of evidence supporting arguments that the public sector union's ambit-claims in the current negotiations are unjustified.*

The complaint alleges that the IPA paper was substantially based on the APSC document provided to it by the Commissioner and that some sections of the IPA paper were directly copied from sections of the APSC document but without attribution. Copied sections can be verified by a comparison of the two documents.

In addition, the Institute of Public Affairs submitted its paper by letter dated 26 October 2016 to the Senate Education and Employment Committee inquiry into the impact of the Government's Workplace Bargaining Policy and approach to Commonwealth public sector bargaining. In his covering letter to the Committee Secretary, Aaron Lane refers to *IPA's research paper* authored by himself and James Paterson and that *IPA's research* supported the conclusion set out above. No mention was made of the Commissioner's contribution.

Mr Lane relied on the IPA paper and its research in his evidence to the Committee at a hearing on 11 November 2016 where his co-author was in attendance as a Senator.

The report of that Committee Inquiry includes a Coalition Senators' Dissenting Report which is based in part on the *wealth of research evidence* provided by IPA and Mr Lane's testimony.

At various times, the Commissioner's role has been the subject of parliamentary committee comment and media commentary including an article by Richard Mulgan entitled *John Lloyd: pin-up boy of impartiality?* published by *The Canberra Times* on 7 November 2017. Mr Mulgan noted:

... the Public Service Commissioner's advice on the values and code in practice counsels that public servants 'should consider the use an enquirer may make of information sought'. The ethical public servant would surely take care not to overstep the bounds of impartiality when dealing with a partisan organization.

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Assessment

The purpose of a preliminary investigation is to deal quickly and efficiently with complaints that clearly lack substance or for some other obvious reason do not justify the time, cost and inconvenience involved for all parties in an inquiry under section 15(3) of the Public Service Act.

This complaint is specific, detailed and supported by reference to documents and other information. Thorough investigation of the allegations and careful consideration of any response from the Commissioner will be necessary to determine the complaint.

In these circumstances, I am of the opinion that there is no basis on which the Merit Protection Commissioner could decline to conduct an inquiry into the complaint by [REDACTED]

Recommendation

I recommend that the Merit Protection Commissioner inquire into the alleged breaches of the Code of Conduct by the Public Service Commissioner and report to the Presiding Officers on the results of such enquiries (including, where relevant, recommendations for sanctions) in accordance with section 50(1) of the Public Service Act.

Yours sincerely

[REDACTED]

Robert Cornall AO

READ,Amber

From: DAVIDSON,Mark
Sent: Monday, 21 May 2018 11:04
To: LLOYD,John
Subject: HPE CM: RE: Complaint under s50(1)(b) of the Public Service Act [DLM=Sensitive:Personal]

Dear Mr Lloyd,

I acknowledge receipt of your letter.

I will be seeking advice on the issue you have raised.

Consequently, the matter remains under consideration.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)
Office of the Merit Protection Commissioner

Australian Public Service Commission

PO Box 20636, World Square Post Office, SYDNEY NSW 2002

P: +612 82395326 F: +612 6267 4944 | W: <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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From: LLOYD,John
Sent: Monday, 21 May 2018 10:03 AM
To: DAVIDSON,Mark <Mark.Davidson@apsc.gov.au>
Subject: Complaint under s50(1)(b) of the Public Service Act [DLM=Sensitive:Personal]

Sensitive: Personal

Mark

I forward the attached letter to you, for your consideration.

Regards

John Lloyd PSM | Commissioner

Australian Public Service Commission

Level 5, B Block, Treasury Building, Parkes Place West, PARKES ACT 2600

GPO Box 3176 CANBERRA ACT 2601

P: +612 6202 3501 | W: www.apsc.gov.au

READ,Amber

From: DAVIDSON,Mark
Sent: Friday, 18 May 2018 9:12
To: LLOYD,John
Subject: HPE CM: Complaint under section 50(1)(b) of the Public Service Act [DLM=Sensitive:Personal]
Attachments: 18052018 Letter to Mr Lloyd.pdf

Sensitive: Personal

Dear Mr Lloyd,

I refer to my correspondence to you of 5 April 2018.

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)
Office of the Merit Protection Commissioner

Australian Public Service Commission

PO Box 20636, World Square Post Office, SYDNEY NSW 2002

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Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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Sensitive: Personal

The Hon John Lloyd PSM
Public Service Commissioner
Australian Public Service Commission
Treasury Building
B Block Level 4
Parkes Place West
Parkes ACT 2600

Dear Mr Lloyd

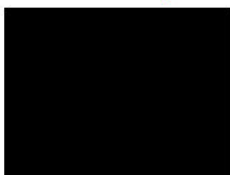
Referral of complaint under section 50(1)(b) of the *Public Service Act*

I refer to my letter to you of 5 April 2018 about a complaint that was referred to me as Acting Merit Protection Commissioner by the Department of the Prime Minister and Cabinet under section 50(1)(b) of the *Public Service Act* (the Act).

Mr Robert Cornall AO has independently considered the complaint and has recommended that an inquiry be conducted.

I am in the process of identifying and engaging an independent person to undertake the inquiry on an independent basis, which I hope to settle in the near future. When that person is engaged, I will advise you of their engagement and the commencement of the inquiry

Yours sincerely



Mark Davidson
Merit Protection Commissioner (A/g)
18 May 2018



READ,Amber

From: LLOYD,John
Sent: Friday, 25 May 2018 13:22
To: DAVIDSON,Mark
Subject: HPE CM: RE: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Dear Mr Davidson

I refer to your email of 25 May 2018 rejecting my request for an extension until 15 June 2018.

I consider the rejection has the capacity to compromise the fairness of the process.

I will do my best to satisfy the timeline you have imposed.

Regards

John Lloyd

From: DAVIDSON,Mark <Mark.Davidson@apsc.gov.au>
Date: 25 May 2018 at 11:02:55 am ACST
To: LLOYD,John <John.Lloyd@apsc.gov.au>
Subject: RE: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

Office of the Merit Protection Commissioner

Australian Public Service Commission

PO Box 20636, World Square Post Office, SYDNEY NSW 2002
P: +612 82395326 **W:** <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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From: LLOYD,John
Sent: Friday, 25 May 2018 8:52 AM
To: DAVIDSON,Mark <Mark.Davidson@apsc.gov.au>
Subject: HPE CM: Re: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Dear Mr Davidson

I refer to the letter attached to your email dated 24 May 2018.

I thank you for the opportunity to present my views on the threshold question of whether an inquiry should be conducted.

However, I assert that I will be unable to meet the timeline you have given me to respond by.

I am currently in Darwin attending the Australia - New Zealand Public Service Commissioners conference. The conference concludes today, Friday.

Monday, 28 May 2018 is a public holiday in Canberra.

I am to [REDACTED]
[REDACTED] to work on Friday 1 June 2018.

I suggest that in these circumstances it is unreasonable to require me to respond by Friday 1 June 2018.

Also, I submit that this response, although dealing with a preliminary question is nevertheless a significant matter. This is particularly so given your stated disposition to undertake an inquiry.

I intend to challenge this stated preliminary view. This is a especially challenging predicament, the need to change your mind and preliminary conclusion. I will need to obtain legal advice. In addition, I will continue to discharge the responsibilities of my Commissioner position.

Accordingly, I request that the date for making a submission be extended to Friday 15 June 2018. I submit that in all the circumstances this would be a fair arrangement.

Regards

John Lloyd

8

From: DAVIDSON, Mark <Mark.Davidson@apsc.gov.au>

Date: 24 May 2018 at 2:50:41 pm ACST

To: LLOYD, John <John.Lloyd@apsc.gov.au>

Subject: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

Office of the Merit Protection Commissioner

Australian Public Service Commission

PO Box 20636, World Square Post Office, SYDNEY NSW 2002

P: +612 82395326 | **W:** <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



Join us on Facebook

READ,Amber

From: LLOYD,John
Sent: Friday, 25 May 2018 8:52
To: DAVIDSON,Mark
Subject: HPE CM: Re: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

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However, I assert that I will be unable to meet the timeline you have given me to respond by.

I am currently in Darwin attending the Australia - New Zealand Public Service Commissioners conference. The conference concludes today, Friday.

Monday, 28 May 2018 is a public holiday in Canberra.

I am to [REDACTED] [REDACTED]
[REDACTED] to work on Friday 1 June 2018.

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Also, I submit that this response, although dealing with a preliminary question is nevertheless a significant matter. This is particularly so given your stated disposition to undertake an inquiry.

I intend to challenge this stated preliminary view. This is a especially challenging predicament, the need to change your mind and preliminary conclusion. I will need to obtain legal advice. In addition, I will continue to discharge the responsibilities of my Commissioner position.

Accordingly, I request that the date for making a submission be extended to Friday 15 June 2018. I submit that in all the circumstances this would be a fair arrangement.

Regards

John Lloyd

8

From: DAVIDSON,Mark <Mark.Davidson@apsc.gov.au>
Date: 24 May 2018 at 2:50:41 pm ACST
To: LLOYD,John <John.Lloyd@apsc.gov.au>
Subject: Complaint under s50(1)(b) of the Public Service Act 1999 [DLM=Sensitive:Personal]

Sensitive: Personal

Dear Mr Lloyd,

Please find attached correspondence.

Yours sincerely

Mark Davidson | Merit Protection Commissioner (A/g)

Office of the Merit Protection Commissioner

Australian Public Service Commission

PO Box 20636, World Square Post Office, SYDNEY NSW 2002

P: +612 82395326 | W: <http://meritprotectioncommission.gov.au>



Office of the Merit Protection Commissioner
<http://meritprotectioncommission.gov.au>



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READ,Amber

From: LLOYD,John
Sent: Thursday, 24 May 2018 14:08
To: DAVIDSON,Mark
Subject: HPE CM: Referral pursuant to S(50)(1)(b) of the Public Service Act 1999
[SEC=UNCLASSIFIED]

Dear Mr Davidson

I refer to my email to you on this matter today.

I want to reassure you that I am not critical of the manner you are discharging your role. Nor do I seek to influence that. In fact I consider you are discharging your role in a very appropriate manner.

My purpose in writing to you was to draw to your attention the personal and inflammatory social media commentary. It is not only offensive to me but is causing considerable anxiety amongst family members.

Regards

John Lloyd

READ,Amber

From: LLOYD,John
Sent: Thursday, 24 May 2018 12:26
To: DAVIDSON,Mark
Subject: HPE CM: Complaint under s50(1)(b) of the Public Service Act 1999
[DLM=Sensitive:Personal]

Dear Mr Davidson

I note a report in today's Canberra Times of a letter your have written to the President of the Senate.

In the letter it is reported that you will advise the President of any future decision to undertake an inquiry into the complaint against me.

S50(1)(b) of the Public Service Act 1999 requires the Merit Protection Commissioner to "report to the Presiding Officers on the results of such enquiries".

I am concerned as the subject of the complaint about the public commentary surrounding this matter. Much of the social media commentary is personally targeted and offensive. I am concerned that the intent of the Act, that the handling of a complaint be undertaken in a confidential manner, is not unduly jeopardised. The continuation of public commentary about the matter would have the potential to prejudice the conduct of an inquiry.

Regards

John Lloyd

READ,Amber

From: LLOYD,John
Sent: Monday, 21 May 2018 10:03
To: DAVIDSON,Mark
Subject: HPE CM: Complaint under s50(1)(b) of the Public Service Act [DLM=Sensitive:Personal]
Attachments: Letter to Acting Merit Protection Commissioner - 21 May 2018.pdf

Sensitive: Personal

Mark

I forward the attached letter to you, for your consideration.

Regards

John Lloyd PSM | Commissioner

Australian Public Service Commission
Level 5, B Block, Treasury Building, Parkes Place West, PARKES ACT 2600
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Australian Government
Australian Public Service Commission

Australian Public Service Commissioner

Mr Mark Davidson
Acting Merit Protection Commissioner
PO Box 20636 World Square Post Office
NSW 2002

Dear Mr Davidson

I refer to your letter of 18 May 2018. You advised me that Mr Cornall had considered the complaint against me and recommended that an inquiry be conducted.

I advise that I consider the process followed by Mr Cornall to be deficient and that I was denied a fair procedure. I request that the consideration by Mr Cornall be reopened or reviewed to guarantee a fair consideration of whether an inquiry be conducted.

In reaching this position, I have had regard to the approach I follow as Australian Public Service Commissioner when considering an alleged breach of conduct against an agency head pursuant to s41A of the *Public Service Act 1999*.

I typically consider several complaints against agency heads each year. A number are found to lack substance or are considered vexatious. A decision is made on the papers that an inquiry will not be conducted.

In other cases, where the content of the complaint suggests an inquiry may be in prospect, I invite the respondent agency head to submit a preliminary view about the complaint.

This procedure has some similarities to a committal hearing approach. A decision to conduct an inquiry is a serious matter entailing a report to the relevant Minister. It is fair that the respondent agency head be afforded an opportunity to offer a preliminary response to the complaint to properly inform the important decision on whether to initiate an inquiry.

In this case your letter of 5 April 2018 advising me that the intention was to conduct the consideration of the complaint on the papers. You indicated I could provide information to Mr Cornall if I wished.

I presumed that an approach consistent with the process I adopt to complaints against agency heads would be followed. This presumption was obviously mistaken.

Mr Cornall I assume read the complainants three page document with several links to other material. I respectfully suggest that I should have the opportunity to convey my view of the context of the complaint. In particular my experience with numerous personal attacks against me over more than 20 years of senior public service.

As indicated above, I consider that in the interests of fairness the consideration should be reopened or reviewed before a decision is made on whether or not to conduct an inquiry into the complaint.

Yours sincerely



John Lloyd PSM
21 May 2018

READ,Amber

From: LLOYD,John
Sent: Friday, 8 June 2018 16:52
To: DAVIDSON,Mark
Subject: HPE CM: Letter to acting Merit Protection Commissioner - compliant under s50(1)(b) of the PS Act [DLM=Sensitive:Personal]
Attachments: Letter to Acting Merit Protection Commissioner - 8 June 2018.pdf

Sensitive: Personal

Dear Mr Davidson

I refer to your email and letter of 25 May 2018.

Please find attached a letter and associated papers addressing the question of whether an inquiry should or should not be conducted.

Regards

John Lloyd PSM | Commissioner

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Australian Government
Australian Public Service Commission

Australian Public Service Commissioner

Private and Confidential

Mr Mark Davidson
Acting Merit Protection Commissioner
By email: Mark.Davidson@apsc.gov.au

Dear Mr Davidson

I refer to your letter of 24 May 2018.

You invited me to present my views on why an inquiry should not be conducted into the complaint against me. You indicated that your preliminary view was that you would conduct an inquiry.

I agree with your view that, just because you have a function under s. 50(1)(b) of the *Public Service Act 1999*, does not mean that you have to exercise that function in every case. You have a discretion as to whether or not you will exercise that function.

A paper setting out some observations relevant to your preliminary question is attached, together with a paper setting out some possible legal errors in Mr Cornall AO's letter dated 20 April 2018.

Your letter also indicated that you intend to advise the Presiding Officers of your decision as to whether or not to conduct an inquiry.

Such action is not contemplated by s. 50(1)(b) of the *Public Service Act 1999*. The Act confers on the Merit Protection Commissioner a function of reporting to the Presiding Officers on the results of an inquiry, if one is undertaken. The Act does not confer on you a function of advising the Presiding Officers of a decision as to whether or not to conduct an inquiry. In fact the President, when transmitting your letter of 23 May 2018 to the Chairman of the Senate Finance and Public Administration Committee, stated that on his reading "the Act does not require the Merit Protection Commissioner to alert the Presiding Officers that an inquiry under s. 50(1) (b) is underway."

I submit that if you do as you propose, it would be outside your statutory functions and will undermine the intent of the Act that an inquiry should be conducted in private. If you adopt your proposed procedure, this will inevitably generate more adverse public comment about me and my position. This in turn has the potential to prejudice any inquiry.

I submit that in the interests of procedural fairness you should reconsider this position.

Yours sincerely



John Lloyd PSM
8 June 2018

Why An Inquiry Should Not Be Undertaken

The Allegation

1. The allegation in summary is that I engaged in serious misconduct and contravened the *Public Service Act 1999*, the *Public Governance, Performance and Accountability Act 2013* and the *Criminal Code Act 1995*.
2. The latter allegation is an allegation of criminal conduct which, if it is to be pursued, is best left to the courts.
3. There is no prima facie case of a breach of the Code of Conduct that would justify an inquiry.
4. The allegation centres on a document that I sent to the Institute of Public Affairs (IPA). The document of 13 pages consisted mostly of downloaded extracts from Commonwealth agency enterprise agreements. It also contained less than a page of analysis of wage movements and employer superannuation entitlements.

The Document

5. All information contained in the document is publicly available.
6. The provision of the document to the IPA gave it no advantage over other persons. The document did not contain privileged or confidential information. The document contained information that any interested party could have obtained by their own research.
7. The provision of the document to the IPA was consistent with the public interest and within the scope of the functions of the Commissioner. Under s. 41(2) of the PSA, those functions include:
 - (b) *to lead the thinking about, provide advice on and drive reforms to workforce management policies so that the APS is ready for future demands;*
 - (c) *to develop, review and evaluate APS workforce management policies and practices and maintain appropriate databases;*
8. It has been my practice, when I have been responsible for government employment workplace relations, to have at my disposal a document like that given to the IPA. This is a practice I have adopted on various occasions throughout my senior executive and Chief Executive Officer experience since the 1980s. I have used such documents during my service with the Commonwealth, Victorian and Western Australian governments.
9. The purpose of the documents is to highlight the more generous elements of public service conditions of service. Bargaining for new agreements is an almost continuous exercise. It is important that the bargaining be conducted in an accurate and well-grounded context. While the headline claims on pay increases attract most attention the conditions of service that employees enjoy are integral to the negotiations. In most bargaining exercises, claims seek improvements in conditions of service. But irrespective of this, it is important that the overall package of pay and conditions is encompassed by the bargaining exercise.

Private and Confidential

10. I have found government ministers and some commentators acutely aware of the terms and conditions of public servants. They are often concerned when public service conditions are materially more generous than the entitlements that most employees in the private sector enjoy.
11. I have used the documents to brief Ministers, to include in speeches and to share with the media, industry associations and other interested bodies. Media coverage of this issue occurs periodically. The material is used in negotiations and in justifying the relevant government's workplace relations strategy.
12. I decided soon after my appointment as APS Commissioner that I would have this type of document drawn up. This was before the request for information was received from the IPA. I planned to write an article on this subject and also include the material in speeches I was committed to make.
13. In the circumstances, and mindful of the role of the APSC, I considered it appropriate to accede to the IPA request for information. A request for such information from any other organisation such as a think tank, a union or an industry association would also have been acceded to. The document was prepared for APSC purposes, not for the purpose of passing information to the IPA. The provision by the APSC of the document in answer to a request for information by an interested party was appropriate.
14. I have regularly throughout my career passed information about workplace relations to other governments, industry associations, academic researchers and organisations like think tanks. The objective information from time to time conflicts with the assertions and conjecture of interested parties. It is highly relevant to workplace negotiations.
15. The IPA is a 'think tank' organisation. The IPA requests and receives information from various government bodies every week. It both supports and opposes Government policy. It is not a registered political party. Many prominent Australians engaged in public life have both worked for and been members of the IPA. My contact with the IPA while in this position has been extremely infrequent.
16. Senior public servants engage with similar organisations on a regular basis. Some retain membership. Some senior officials retain membership of trade unions that they were associated with in the past.
17. The APSC is constantly passing data and information to outside entities. This is a regular and inherent aspect of our role and duties. The entities come from many fields and many policy and political persuasions with a variety of philosophies. Accordingly, the request from the IPA for information about terms and conditions was not seen as unusual.
18. Many government departments and agencies prepare and distribute material and papers that inform particular policy questions. Many government departments and agencies engage with a wide range of interest groups of all political persuasions. The public sector does not operate in a vacuum.

The Bargaining Environment

19. I have responsibility for administering the Government's workplace bargaining policy. The Government's policy was to achieve average salary increases of 1.5% and then 2% a year. Mr Cornall is in error by stating that the policy provided for a 1% increase.
20. The bargaining was controversial and contested. The unions took an entrenched position of opposition to any agreement that was not on their terms. This ultimately proved unsuccessful as most agencies reached agreement with their employees. Mr Cornall is in serious error to state that the bargaining involved "largely unsuccessful negotiations."
21. It is one of my statutory functions to "*facilitate continuous improvement in workforce management in the APS*": s. 41(1)(a) of the PSA.
22. Section 20 of the PSA provides that Agency Heads, as agents for the Commonwealth, have all the rights, duties and powers of an employer.
23. It is entirely consistent with my responsibilities as Commissioner that I engage with and on occasions criticise trade union statements, policies and industrial tactics. Not to do so would amount to a failure to properly discharge my responsibilities. Ministers and senior colleagues have been very supportive of my handling of the bargaining. Also, it is inevitable that the unions will be critical of my conduct and resort to highly personal attacks.

Use of the Material

24. The allegation refers to documents that emanated from the IPA following the provision of the APSC document to them. The first IPA paper was a 25-page issues paper. It was a detailed analysis of the terms and conditions of public service employees. It contained much more material than that contained in the paper supplied by the APSC. Much of the APSC paper was not reproduced by the IPA. What use the IPA made of the data provided was entirely a matter for IPA.

Pattern of Personal Attacks

25. I have been the target of numerous personal attacks and criticism over many years of public service. Almost all of this criticism has been directed at me while discharging official duties in senior roles for governments, both Coalition and ALP.
26. I refer to these facts to highlight the unusually personal dimension to debate and discourse in workplace relations. It is emblematic of the contentious nature of workplace relations.
27. The attacks have continued in my role as APS Commissioner. Personal smears and commentary by union officials and supporters have continued unabated. The responses to my resignation announcement this week are further evidence of this appalling standard of conduct. It is important to remember that the grievance of my critics is that I am faithfully carrying out my roles as a senior public servant.
28. The allegation is consistent with this line of attack. One can only question the utility of providing a forum for such ongoing vexatious complaints, particularly in circumstances where I am soon to be replaced as Commissioner.

The Complainant

29. The fact the complainant has apparently chosen to remain anonymous should be a factor militating against the conduct of an inquiry. It is difficult to argue that a complaint is vexatious if the complainant is not identified.
30. Natural justice and procedural fairness require that a respondent be able to test the credibility of a complainant. For example, the complainant could be a person I have prosecuted in a previous role, associated with a person I have prosecuted, an agitator who regularly makes complaints, a person who has threatened me on social media etc.
31. Where the complainant hides behind anonymity, I am denied the opportunity to test source of the allegation and investigate the extent to which it should be dismissed as vexatious.

Political Affiliations

32. My political affiliations before my appointment are immaterial. I resigned from the Liberal Party some time before being appointed to the APSC position. I did not resign immediately before taking up my appointment, as Mr Cornall states in error. Many senior public servants have belonged to political parties, employer associations, trade unions and political lobby groups earlier in their careers. Many of my senior colleagues also have worked as political staffers to Ministers and members of parliament from all political persuasions. This in no way precludes them from being appointed to and discharging the responsibilities of senior roles, including CEO positions. The same applies to me. It would be a serious error to rely on this consideration when assessing the suitability of an inquiry.

Summary

33. The document that is the focus of the allegation was not prepared for the IPA.
34. It was entirely appropriate to supply the document to the IPA in response to its request for information.
35. The IPA gained no material advantage from the document that was not available to anyone who requested information of that kind.
36. The allegation is symptomatic of a long standing pattern of personal abuse against me for carrying out my government responsibilities.
37. Government resources were not used for an improper purpose. Many government departments and agencies prepare and distribute material of a similar nature to a wide range of interest groups and organisations.
38. Mr Cornall misunderstood important aspects of the conduct of Commonwealth enterprise bargaining and my political affiliations.
39. The complainant has chosen to remain anonymous and this should militate against an inquiry.
40. An inquiry should not be undertaken. The allegation is misconceived and lacking in substance.

41. The proposed informing of the Presiding Officers of your decision as to whether or not to conduct an inquiry is outside your statutory functions and will attract adverse publicity which in turn will prejudice any inquiry.

8 June 2018

Possible Legal Errors

Mr Cornall AO letter dated 20 April 2018

1. As Mr Cornall acknowledges, I am not an “APS employee”. I was appointed as Commissioner under s. 40 of the Public Service Act 1999 (“PSA”), not engaged under s. 22 PSA. This is confirmed by the wording of s. 14(1) PSA.
2. The MPC has a function under s. 50(1)(b) that applies to me as Commissioner. The provisions of s. 50(1)(ca) and s. 50A do not apply to the Commissioner, as they apply only to APS employees.
3. The obligations to observe the principles of natural justice and procedural fairness arise under the common law.
4. The Merit Protection Commissioner (MPC) does not have either the power or the function to determine whether or not there has been a Code of Conduct breach by the Commissioner, only the function to inquire and report to the Presiding Officers under s. 50 (1) (b) on the results of his inquiry (including, where relevant, recommendations for sanctions).
5. In particular, the MPC does not have any power under s. 50A (6) PSA. Those powers do not apply to a s. 50(1)(b) inquiry. The MPC has the function under s. 50(1)(b) without any associated statutory powers.
6. The provisions of s. 50A do not apply, as a matter of law, to an inquiry in respect of the conduct of the Commissioner.
7. The reliance by Mr Cornall AO on regulation 6.1A(3) of the Public Service Regulations 1999 has no legal basis. Regulation 6.1A applies to a potential inquiry by the Commissioner into alleged breach of the Code of Conduct by a statutory office holder. It does not apply to any inquiry by the MPC.

8. The Commissioner is Head of his own Statutory Agency: s. 40(3) PSA. If the MPC is to be guided in his procedures by analogy, then the closer analogy is the “public interest” test in reg 6.3, as this applies to Agency Heads:

6.3 Circumstances in which Australian Public Service Commissioner may decline to conduct, or may discontinue, inquiry into alleged breach of Code of Conduct by Agency Head

(1) For paragraphs 41A(3)(a) and (b) of the Act, a circumstance in which the Australian Public Service Commissioner may decide to decline to conduct, or to discontinue, an inquiry is that the Australian Public Service Commissioner concludes that conducting or continuing the inquiry is not in the public interest.

(2) In deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct, the Australian Public Service Commissioner may have regard to the following:

(a) whether the allegation is vexatious, frivolous, misconceived, or lacking in substance;

(b) whether sufficient detail about the allegation has been provided;

(c) whether the allegation refers to specific decisions or actions by the Agency Head;

(d) whether the allegation identifies conduct which, if proven, would constitute a breach of the Code of Conduct;

(e) whether the allegation relates to a decision properly taken, or to policy properly adopted, by the Agency Head, with which the person making the allegation disagrees;

(f) whether the cost of conducting an inquiry is justified in the circumstances.

9. The proposed inquiry is not under s. 15(3) of the PSA. It is not the function of a MPC inquiry under s. 50(1)(b) of the PSA to determine whether or not there has been a breach by the Commissioner. Section 15 is concerned with sanctions that can be imposed on an APS employee. It does not apply to a recommendation for sanctions to be imposed on the Commissioner.

READ,Amber

From: KELLY,Clare on behalf of LLOYD,John
Sent: Friday, 8 June 2018 16:34
To: APSC - Australian Public Service Commission
Subject: Merit Protection Commissioner [SEC=UNCLASSIFIED]

UNCLASSIFIED

Colleagues

The Minister has just announced the appointment of Ms Linda Waugh as the new Merit Protection Commissioner. Ms Waugh's appointment is for a five year term commencing 25 June 2018.

Linda has extensive experience in complaint handling and oversight, investigations, prevention and education.

She has held senior roles in state governments, most recently working as an Assistant Ombudsman with the Victorian Ombudsman. She spent her early career as a psychologist before moving to the Queensland Crime and Corruption Commission in 1996. From 2003 to 2008, she was the Executive Director, Corruption Prevention for the Queensland Commission. In 2011, she moved to the position of Deputy NSW Ombudsman, a position she held until 2017.

Linda will be based in Sydney. There will continue to be an office for her and MPC staff in Canberra.

I would like to thank Mark Davidson for acting in the role of Merit Protection Commissioner since December. Mark has made a valuable contribution in this role and as a member of the Executive Committee.

Regards

John Lloyd PSM | Commissioner

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