

Megan McKenna

From: Stephanie Otorepec
Sent: Wednesday, 24 May 2017 3:32 PM
To: Melanie Drayton
Cc: Sarah Ghali
Subject: FW: FOR CLEARANCE BY COB TODAY: response to APSC re reporting of terminations for misconduct [SEC=UNCLASSIFIED]

Hi Mel,

s 22

Here is the text:

*** **

Dear Kerren

Thank you for your email seeking comments on a potential change to the APSC's process for recording terminations for misconduct. Thank you also for allowing a short extension for the OAIC's response.

I recognise the importance of maintaining the integrity of the APS and dealing with serious misconduct appropriately, including the importance of maintaining appropriate records of relevant incidents. In this regard I understand that the APSC's current *Directions* require the publication (in the APS Gazette) of the names of ongoing APS employees who have had their employment terminated for a breach of the APS Code of Conduct.

I note the context of your review, and would broadly support the change you propose - which would be to instead record such information in a centralised database which would be accessible only to relevant APS staff on an as-needed basis. Provided appropriate safeguards are in place, this would seem to be less privacy-invasive than the current arrangements.

In this regard, as part of the APSC's development of any new process I would encourage you to ensure that an appropriate balance is struck between any impacts on individual privacy, and efforts to realise the record-keeping and integrity objectives you have outlined below. The challenge lies in ensuring that adequate privacy safeguards are built-in to any new information gathering and sharing processes. To facilitate this, I would strongly recommend that the APSC undertake a Privacy Impact Assessment (PIA) in relation to any new proposals, to ensure that any relevant privacy risks or impacts are identified and managed appropriately.

More information on how to conduct a PIA can be found on my Office's website and in the [Guide to Conducting Privacy Impact Assessments](#). Feel free to call me on (02) 9284 9812 if you would like to discuss further.

Kind regards

Melanie

From: Melanie Drayton
Sent: Wednesday, 24 May 2017 3:27 PM
To: Stephanie Otorepec
Cc: Sarah Ghali

Subject: Re: FOR CLEARANCE BY COB TODAY: response to APSC re reporting of terminations for misconduct
[SEC=UNCLASSIFIED]

Thanks Steph, can you please alter so it's coming from me and going to Kerren. Invite her to call me directly if she'd like to discuss. I've also changed the last sentence slightly.

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Thanks

M

Sent from my iPhone

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[REDACTED]

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[REDACTED]

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[REDACTED]

On 24 May 2017, at 2:53 PM, Stephanie Otorepec <xxxxxxxxx.xxxxxxxx@xxxx.xxx.xx> wrote:

Hi Mel and Sarah

Sorry just got to this - please see here a draft response for TP about the APSC question - due today. What do you think?

s 22

Thanks
Steph

Dear [John/Kerren]

Thank you for your email seeking comments on a potential change to the APSC's process for recording terminations for misconduct. Thank you also for allowing a short extension for the OAIc's response.

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Kind regards

[Timothy]

From: Melanie Drayton

Sent: Monday, 22 May 2017 10:47 AM

To: Sarah Ghali <xxxxx.xxxxx@xxxx.xxx.xx>; Stephanie Otorepec <stephanie.otorepec@oaic.gov.au>

Subject: FW: Reporting of terminations for misconduct [SEC=UNCLASSIFIED]

Importance: High

Hi guys

s 22 [REDACTED]

Can you please have a look and draft a very brief response for TP to send back.

It's fairly straight forward and we'd support the move to a database accessible by HR, given it has the appropriate protections etc.

s 22 [REDACTED]

Thanks
Mel

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Megan McKenna

From: Melanie Drayton
Sent: Wednesday, 24 May 2017 4:29 PM
To: x@xx
Subject: APSC's process for recording terminations for misconduct [SEC=UNCLASSIFIED]

Dear Kerren

Thank you for your email seeking comments on a potential change to the APSC's process for recording terminations for misconduct. Thank you also for allowing a short extension for the OAIC's response.

We recognise the importance of maintaining the integrity of the APS and dealing with serious misconduct appropriately, including the importance of maintaining appropriate records of relevant incidents. In this regard I understand that the APSC's current *Directions* require the publication (in the APS Gazette) of the names of ongoing APS employees who have had their employment terminated for a breach of the APS Code of Conduct.

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Kind regards

Melanie

Melanie Drayton

Assistant Commissioner | Regulation and Strategy

Office of the Australian Information Commissioner

Level 3, 175 Pitt Street, SYDNEY NSW 2000 | www.oaic.gov.au

Phone: +61 2 9284 9812 | 1300 363 992

Email: xxxxxxx.xxxxxxx@xxxx.xxx.au



From: [John McMillan](#)
To: [Alison Leonard](#); [Timothy Pilgrim](#); [Angelene Falk](#); [Natasha Roberts](#)
Cc: [Judy Woutersz](#)
Subject: FW: Advice to Agency Heads [SEC=UNCLASSIFIED]
Date: Tuesday, 1 July 2014 7:52:10 PM
Attachments: [HODA June 2014.pdf](#)

Alison – FYI

Timothy/Angelene/Natasha - you will see that the PS Regs will be amended to remove names of people terminated, which is what our subm recommended.

John

s 22





Australian Government

Office of the Australian Information Commissioner

Our reference: 14/000026-02

Karin Fisher
Group Manager Ethics
Australian Public Service Commission
by email: ethics@apsc.gov.au

Dear Ms Fisher

Notification of employment decisions in the Gazette – a discussion paper

Thank you for the opportunity to provide feedback on *Notification of employment decisions in the Gazette – a discussion paper* (the discussion paper).

The Office of the Australian Information Commissioner (OAIC) supports the proposal presented in the discussion paper that the *Australian Public Service Commissioner's Directions 2013* be amended to remove the requirement to notify the Gazette when an ongoing APS employee is terminated or an SES employee is retired.

We provide the following comments in relation to the specific questions in the discussion paper:

1. Is there any justification for publishing in the APS Gazette termination decisions that show the name of the employee and the reason for termination?

In our view, no. The discussion paper points out that no other Australian jurisdiction requires publication of both the name of the employee and the reason for their termination;¹ a fact indicating that publication is not necessary and that other jurisdictions have found alternatives to publication that achieve the same transparency and oversight objectives.

We believe the justifications for publishing termination decisions are outweighed by the significance of the privacy impact on individuals and the existence of alternatives to publication. The discussion paper states that the purpose of publishing termination decisions is to provide 'an accessible and reasonably up to date public record of termination decisions which can be used to monitor these matters Service-wide and inform management decisions.' Publication also plays a role in assuring the public that appropriate action is being taken in Code of Conduct cases and other matters. In our view, these objectives can be achieved in other ways (see response to question 3 below).

Nothing in the discussion paper suggests that another purpose of publication is to punish terminated employees through a 'name and shame' mechanism. Certainly this would be inappropriate for employees terminated on grounds of physical or mental incapacity or where

¹ As noted in the discussion paper, only Tasmania and the ACT publish the names of employees whose employment has been terminated. Neither jurisdiction publishes the reason for the termination.

the employee was excess to requirements. Yet, 'shaming' may be a current unintended consequence of publication. Even for Code of Conduct terminations, the discussion paper notes that 'employees may consider that the penalty of termination of employment is sufficient punishment and that public release of such information is an additional and unwarranted punishment.'

Termination information is likely to be sensitive to individuals. The long term availability of termination decisions in the Gazette online may restrict a person's ability to move on and adversely affect their reputation long after they have addressed the issue that led to their termination (for example, by obtaining necessary qualifications or recovering from a physical incapacity). In light of the significant privacy impacts, we support removing the requirement to publish termination decisions in the Gazette.

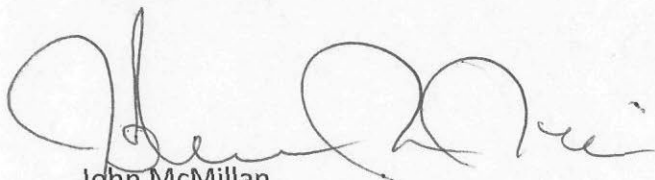
2. Is there any justification for treating particular termination decisions differently than others?

No. As discussed above, we believe that the significance of the privacy impact outweighs the justifications for publishing termination decisions. Our understanding is that publication is not aimed at punishing individuals who have been terminated, but at fostering transparency of process and enabling oversight. These are objectives that can be achieved in other ways (see below).

3. Could the intention of the gazettal requirement be achieved in some other way?

Yes. The discussion paper lists alternatives that would enable oversight without the impact on individual privacy, such as publication of the information in aggregate form or reporting of the information in the State of the Service Report or the APS Statistical Bulletin. In our view, publishing of termination information in a way that does not identify the individuals involved would achieve the desired outcomes.² Other Australian jurisdictions may also offer models for the monitoring of employment decisions. In essence, transparency of process can be achieved in a range of ways aside from broad-scale publication.

Yours sincerely



John McMillan
Australian Information Commissioner

Timothy Pilgrim
Australian Privacy Commissioner

April 2014

² The OAIC has developed advice on de-identification of data sets which may be relevant to the activities of the APSC in this regard. See www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/information-policy-agency-resource-1-de-identification-of-data-and-information.

From: [John McMillan](#)
To: [FISHER.Karin](#)
Cc: [James Popple](#); [Timothy Pilgrim](#); [Angelene Falk](#); [HOOPER.Louise](#); [Judy Woutersz](#)
Subject: RE: APS employee information - public consultation paper and other matters [SEC=UNCLASSIFIED]
Date: Wednesday, 19 March 2014 2:00:12 PM
Attachments: [image001.jpg](#)

Dear Karin

Notification of employment decisions in the Gazette – draft discussion paper

Thanks for your email and for giving the OAIC an opportunity to comment on these drafts. I have some comments to offer on the draft issues paper which I've outlined below. Regarding the second matter (the guidelines), given the longer lead-time, I will respond to you about that in a separate email, rather than hold up this one.

The discussion paper reads very well. It explains the key issues clearly and gives a good overview of past and present practice and the legal basis for present practice. The discussion questions at the end are pertinent and should elicit useful feedback.

The OAIC has three comments to make.

Preferred view

The paper does what a discussion paper is meant to do, by placing all issues on the table and inviting comment. But would it make better sense on this occasion to flag the Public Service Commissioner's preferred view (this is done obliquely at p 6, viz, 'On this basis, it is reasonable to consider removing the requirement to gazette termination decisions. The interests of transparency may be served in a different way...')?

From the discussion in the paper it would appear that a change to the Public Service Commissioner Directions is desirable, and almost certainly this lies behind the Parliamentary Joint Committee's referral of the issue. The OAIC believes that the case for protecting the privacy of terminated employees is a strong one and countervailing arguments for transparency and oversight of APS recruitment activities are outweighed by the significance of the privacy impact and the existence of alternatives (such as publication of the information in de-identified form or provision of the information to the APSC without the further step of gazetting). In our view, many of the objectives of publication can be achieved without naming individuals.

Presenting the Commissioner's preferred view would provide a proposal for stakeholders to argue for or against. It might also help stakeholders in focussing their response, for example, to propose that clause 2.29(1)(i) be removed entirely or be altered only in part (for example, removal of just the requirement to publish the grounds for termination). It is for you to consider, but our view is that a preferred approach could sit alongside the consultation questions at the end of the paper.

Technological change and its impact on publication of employment decisions

Something that you might like to consider including in the paper is the affect the internet (and publication of Gazettes online) has on privacy. The discussion paper provides a very useful history of the gazettal of employment decisions. You may wish to draw out what has changed between 1902 (and the first Public Service Act) and 2014 which might justify a change in approach. A key change with implications for privacy is that gazettes are now published online and are therefore available for much longer and in a more searchable form.

In the past, publication in hard copy may have had a less significant privacy impact given that any

personal information became protected by its 'practical obscurity' once archived, meaning that thereafter it could only be tracked down in a library or archive by a motivated researcher. Having termination information available online years after the fact and discoverable via a search engine raises a new set of privacy challenges that may call for a different procedure. This point ties in with the point made in the paper that some would view the penalty of the termination of employment as sufficient punishment and that public release of such information is an additional and unwarranted punishment. Clearly, the 'punishment' of publication is made more serious if the information is available and discoverable long after the event.

The Australian Privacy Principles

It may also sharpen the discussion to refer to the recent commencement of the Australian Privacy Principles (APPs) and their relevance to this issue.

The publication of employment decisions would be possible under APP exceptions that allow for disclosure where it is required or authorised by or under an Australian law. That said, the APPs offer a good model for privacy best practice that may be useful to identify. An underlying theme of the APPs is that personal information should only be used or disclosed for the purpose it was collected (or created) or a related secondary purpose that is within the individual's reasonable expectations. Good privacy practice therefore involves being clear on the purpose of collecting termination information from agencies and ensuring that disclosure of the information via the Gazette fits in with that purpose. In effect, the APPs provide another framework through which to assess whether a practice (in this case, the gazetting termination decisions) meets with privacy standards. They may offer another tool to develop or test your policy position on this matter.

I hope this information is useful. Needless to say, I would be happy to discuss any of the issues raised above.

Regards

John

John McMillan | Australian Information Commissioner

Office of the Australian Information Commissioner

Level 3, 4 National Circuit, CANBERRA

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Phone: +61 2 6239 9124 | Fax: 6239 9190

Email: john.mcmillan@oaic.gov.au

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Protecting information rights – advancing information policy



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