



Australian Government
Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2019/150

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: HW

DECISION BY: Stephen Heskett
Assistant Secretary
Shared Services Branch

HW

By email: foi+request-5491-70ca1aa@righttoknow.org.au

Dear HW

I refer to your email, dated 28 June 2019, in which you made a request to the Department of the Prime Minister and Cabinet (the **Department**) under the *Freedom of Information Act 1982* (the **FOI Act**) in the following terms:

I refer to this article: <https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law> which concerns systemic corruption engaged in by the PM/PM's Department.

I note that the article states that the investigators into that systemic corruption "recruited two solicitors from the Australian Government Solicitor (AGS)" to help with the investigation.

It's in the public interest to know how much taxpayer money the PM/his Department spent on lawyers to paper over the PM's/Department's corruption.

Under the FOI Act, I seek copies of invoices given to the Department by AGS in respect of services rendered by AGS related to the public interest disclosure the subject of the above article.

On 27 July 2019, the Department wrote to you to advise that in accordance with s15(6) of the FOI Act, the processing period for your request had been extended to allow for third party consultation.

On 22 August 2019, the Office of the Australian Information Commissioner (the **OAIC**) approved an extension of the processing period by a further 30 days under section 15AB(2) of the FOI Act.

On 23 August 2019, you wrote to the Department to advise that:

... I'm happy for the Department to black out the names/personalinfo [sic] of anyone contained in the invoices. There's no public interest in that info, but there's obviously a massive public interest in knowing how much taxpayer money the PM/PM's Dept spent on investigating his own corrupt staff.

On 25 August 2019, the Department issued you with a notice of the preliminary charge to process your request. In that notice, the Department also advised that on the basis of your 23 August 2019 correspondence, the Department has interpreted your request, as revised, to be for:

... copies of invoices given to the Department by AGS in respect of services rendered by AGS related to the public interest disclosure the subject of the article in the Guardian dated 26 June 2019 (available here: <https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law>). The names and personal information of anyone contained in the invoices are to be excluded.

On 25 September 2019, you wrote to the Department to advise that:

Further to my FOI request of 28 June 2019 and my follow up email of 23 August 2019, I note that the Australian Government Solicitors' hourly rates (ex gst) that it currently charges DPMC are publicly available as follows:

*Chief Counsel - \$500
Senior Partner - \$445
Partner - \$395
Senior Associate (EL2) - \$320
Senior Associate (EL1) - \$280*

And the hourly rates (ex GST) that AGS would have charged DPMC during the period to which it provided assistance to DPMC in its investigation of the systemic corruption engaged in by DPMC staff referred to in this article:

<https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law> are publicly available as follows:

*Special Counsel - \$515-\$595
Partner - \$460-\$510
Senior Associate Lawyer - \$355-\$375
Lawyer 2-5 years PAE - \$295-\$320*

Those rates being publicly available means that the DPMC cannot lawfully and/or in good faith claim that information contained in the documents the subject of my request are sensitive commercial or professional information that is conditionally or otherwise exempt under s.47G of the FOI Act. But if the DPMC so wishes, I consent to the DPMC redacting the hourly rates charged (and the corresponding time spent by AGS lawyers) as mentioned

in relevant documents to be redacted but only on the basis that the total amount listed on each relevant invoice remains unredacted...

Accordingly, the Department has interpreted your request to have been further revised to be for:

Copies of invoices given to the Department by AGS in respect of services rendered by AGS related to the public interest disclosure the subject of the article in the Guardian dated 26 June 2019 (available here: <https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law>). The names and personal information of anyone contained in the invoices are to be excluded.

The hourly rates charged (and the corresponding time spent by AGS lawyers) as mentioned in relevant documents are to be redacted but only on the basis that the total amount listed on each relevant invoice remains unredacted.

Processing and access charges

As mentioned above, on 25 September 2019, the Department issued you with a notice of the preliminary charge (in the amount of \$109.95) to process your request.

On 26 September 2019, the Department received your payment of a deposit (in the amount of \$27.50) towards the charge. In accordance with the procedures specified in the *Freedom of Information (Charges) Regulations 2019* for imposing charges on an applicant, I have fixed the charge at \$27.50 and no further charge is payable in respect of the request.

As you have paid the full amount of \$27.50, I find that the charge to process this request has been paid in full. This means that I am now required to provide you with a decision in relation to your request.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Searches for relevant documents

The Department has undertaken searches of its relevant electronic and paper records and identified nine documents within the scope of your request (the **requested documents**).

Decision

I have decided to refuse access, in full, to the requested documents, on the basis that they contain information that is exempt under:

- section 42 of the FOI Act (legal professional privilege);
- section 45(1) of the FOI Act (material obtained in confidence);
- section 37(2) of the FOI Act (documents affecting enforcement of law);

- section 47E(c) of the FOI Act (certain operations of agencies - management of personnel); and
- section 47E(d) of the FOI Act (certain operations of agencies – proper and efficient conduct).

In making this decision, I have had regard to the following material:

- the FOI request;
- the documents relevant to the FOI request;
- the FOI Act;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982* (**FOI Guidelines**); and
- the *Public Interest Disclosure Act 2013* (Cth) (the '**PID Act**').

Reasons

Legal Professional Privilege (section 42 of the FOI Act)

Section 42(1) of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The FOI Guidelines at paragraph 5.127 provide that to determine the application of the exemption, the decision maker needs to turn to the common law concepts of legal professional privilege. The FOI Guidelines at paragraph 5.129 provide that at common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.

I am satisfied that parts of the documents meet the common law requirements for establishing a claim of legal professional privilege.

I am therefore satisfied that those parts of the documents are exempt under section 42 of the FOI Act.

Documents containing material obtained in confidence (section 45 of the FOI Act)

Section 45 of the FOI Act provides that:

- (1) *A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.*
- (2) *Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared*

by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:

- (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or*
- (b) an agency or the Commonwealth.*

Paragraphs 5.158 - 5.159 of the FOI Guidelines provide that:

A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified*
- it must have the necessary quality of confidentiality*
- it must have been communicated and received on the basis of a mutual understanding of confidence*
- it must have been disclosed or threatened to be disclosed, without authority*
- unauthorised disclosure of the information has or will cause detriment*

The documents relate to disclosure/s made under the PID Act, and the subject of investigation under that Act. The PID Act makes a number of provisions directed to maintaining a level of confidentiality about aspects of disclosures and their handling. These include provision to protect the identity of disclosers (refer section 20 of the PID Act which includes an offence), provision to protect information obtained in the course of conducting an investigation or in connection with the performance of a function under the PID Act (refer section 67 of the PID Act which includes an offence), and provision requiring a principal officer of an agency to establish procedures providing for confidentiality of investigative processes (refer section 59(1)(b) of the PID Act).

In *'FT' and Civil Aviation Safety Authority [2015] AICmr 37 (FT)*, the Australian Information Commissioner held that documents in relation to an investigation involving employees were exempt under section 45 of the FOI Act. In relation to whether disclosure would cause a detriment of some kind, the Australian Information Commissioner held that:

[22] The concept of 'detriment' must take colour from the nature of the information and the circumstances in which it has been communicated to a government agency. In this case, the suggestion is that disclosure could cause a detriment in a number of ways – exposing employees who are identifiable and who reported this information to criticism; discouraging employees from reporting relevant information about other employees; discouraging bodies from reporting information to CASA, as a regulator; and exposing a company to adverse reputational reporting.

[23] Without separately analysing each of those claims, I think there is a sound basis in this case for concluding that release of the document could reasonably be expected to impair the communication chain that is revealed in the document. This conclusion is based on the fact that the information was communicated voluntarily at the time on an implicit understanding of confidence. Disclosure could cause those involved in this process to be less willing to do so in future. I am therefore satisfied of this element.

In the present case, the documents contain information, obtained by the Department, in confidence, from a person/s or body/bodies other than a person in the capacity of Minister, a member of the staff of a Minister, or officer of an agency.

Such persons have a legitimate expectation, given the circumstances of a PID investigation and reinforced by the objects and the secrecy provisions of the PID Act, that their confidential information would be protected by the Department. In particular, given the nature of a PID investigation, there is a real risk that the person or body would suffer loss or damage if the information contained in the documents were disclosed.

I also consider that the findings in *FT* as cited above are equally applicable to the current matter, in that disclosure of the requested documents would result in a significant detriment to individuals who communicated information voluntarily to the Department in circumstances that were expressly or implicitly understood to be in confidence.

Therefore, I am satisfied that the criteria to found an action for breach of confidence have been satisfied by the facts of the current matter.

Accordingly, I find that the requested documents are exempt, in full, under section 45(1) of the FOI Act.

Documents affecting enforcement of law (section 37(2)(b) of the FOI Act)

Section 37(2)(b) of the FOI Act provides that a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

Paragraph 5.81 of the FOI Guidelines provides that:

Section 37 concerns the investigative or compliance activities of an agency and the enforcement or administration of the law, including the protection of public safety. It is not concerned with an agency's own obligations to comply with the law. The exemption applies, therefore, where an agency has a function connected with investigating breaches of the law, its enforcement or administration.

Paragraph 5.101 of the FOI Guidelines indicates that:

The phrase 'the enforcement or the proper administration of the law' is not confined to the enforcement or administration of statutory provisions or of the criminal law. It requires only that a document should have a connection with the criminal law or with the processes of upholding or enforcing civil law.

Paragraph 5.109 of the FOI Guidelines further provides that:

'Lawful methods and procedures' are not confined to criminal investigations and can, for example, extend to taxation investigations. The exemption focuses on an agency's methods and procedures for dealing with breaches of the law, where disclosure would, or could reasonably be expected to, adversely affect the effectiveness of those methods and procedures.

The requested documents relate to an investigation or investigations under the PID Act. Disclosure of the requested documents would disclose the Department's lawful methods and procedures, consistent with the provisions of the PID Act, for investigating, or dealing with matters arising out of, reported breaches of the law.

Section 6 of the PID Act provides that:

The objects of this Act are:

- (a) to promote the integrity and accountability of the Commonwealth public sector; and*
- (b) to encourage and facilitate the making of public interest disclosures by public officials; and*
- (c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and*
- (d) to ensure that disclosures by public officials are properly investigated and dealt with.*

Section 65 of the PID Act sets out the general secrecy provisions under the PID Act. The purpose of secrecy provisions in legislation is generally to protect information through the prohibition of any unauthorised disclosure of the specified information that is collected, obtained or held by an agency, primarily in connection with the performance of a function or exercise of powers.

In the circumstance of a PID Act investigation, the secrecy provisions give rise to a legitimate expectation by the discloser, witnesses, investigating officer and other relevant persons involved in a PID investigation that their information, and documents relating to the investigation, would be protected from disclosure.

I consider that disclosure of the information contained in the requested documents would be reasonably likely to, prejudice the effectiveness of the methods or procedures used by the Department to investigate disclosures made by public officials. Further, such disclosure would also be contrary to the objects and purpose of, and inconsistent with the secrecy provisions in, the PID Act. Accordingly, I find that the requested documents are exempt, in full, under section 37(2)(b) of the FOI Act.

Certain operations of agencies - management of personnel (section 47E(c) of the FOI Act)

Section 47E(c) of the FOI Act provides that a document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency.

Paragraph 6.114 of the FOI Guidelines provides that:

For this exemption to apply, the documents must relate to either:

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

In *Carver and Fair Work Ombudsman [2011] AICmr 5 (Carver)*, the Australian Information Commissioner held that:

[22] An assertion that an APS employee has breached the APS Code of Conduct is a serious allegation. When undertaking a Code of Conduct investigation of one of its employees, an agency can be expected to create documents that include evidence about that employee's conduct taken from that employee, from other employees and (possibly) from people outside the agency. It is obviously beneficial for an agency's management and assessment of its personnel that the evidence that it collects in such investigations is as frank as possible. Anyone providing such evidence would expect that, subject to applicable natural justice principles, details of that evidence will not be widely disclosed. Disclosure of such evidence could reasonably be expected to affect the willingness of people to provide evidence for future Code of Conduct investigations which, in turn, would have a substantial adverse effect on the management or assessment of the agency's personnel.

I consider that *Carver* is analogous to the current matter, in that the integrity of the PID scheme is reliant on an agency's ability to obtain frank and accurate information from disclosers to inform its investigation. Disclosure of the information contained in the requested documents would result in persons either being reluctant to make disclosures to the Department, or to participate in future PID investigations.

Having regard to the above matters, I am satisfied that disclosure of the information contained in the requested documents would have a substantial adverse effect on the Department's management or assessment of its personnel and therefore, that information is conditionally exempt under section 47E(c) of the FOI Act.

Certain operations of agencies – proper and efficient conduct (section 47E(d) of the FOI Act)

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Paragraph 6.122 of the FOI Guidelines provides that:

The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.

In *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11 (*ABC*), the Freedom of Information Commissioner held that:

[29] In this case, the third party provided information to the Ombudsman on the understanding that it would be used in an investigation, but not disclosed. Disclosure, under the FOI Act, of information provided to the Ombudsman by complainants in such circumstances would affect the willingness of people to make complaints to the Ombudsman in the future. That would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations. Accordingly, the documents sought by the ABC are conditionally exempt under s 47E(d).

I consider that *ABC* is analogous to the current matter, in that the integrity of the PID scheme is reliant on an agency's ability to obtain frank and accurate information from disclosers to inform its investigation. Disclosure of the information contained in the requested documents would result in persons either being reluctant to make disclosures to the Department, or to participate in future PID investigations.

Further, the documents also relate to the Department's ability to obtain external professional advice to enable it to discharge a very important function, namely to conduct PID investigations. Disclosure of the information contained in the requested documents would adversely affect the Department's ability to obtain comprehensive advice from external organisations, who may be reluctant in providing detailed advice to the Department for further PID investigations.

Having regard to the above matters, I am satisfied that disclosure of the information contained in the requested documents would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department and therefore, that information is conditionally exempt under section 47E(d) of the FOI Act.

Public interest test

Section 11A(5) of the FOI Act provides that access must generally be given to a conditionally exempt document unless it would, on balance, be contrary to the public interest.

Public interest factors favouring disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her personal information.

Having regard to the nature of the conditionally exempt information, I am satisfied that disclosure may promote the objects of the FOI Act and the effective oversight of public expenditure.

Public interest factors favouring non-disclosure

The FOI Guidelines contain a non-exhaustive list of public interest factors against disclosure that may be relevant in particular circumstances. I consider the following factors from that list are relevant:

- disclosure could reasonably be expected to prejudice the management function of an agency;
- disclosure could reasonably be expected to prejudice the proper and efficient conduct of the operations of the department.

Further, I consider that disclosure would be contrary to the objects and purpose of, and inconsistent with the secrecy provisions in, the PID Act.

Balancing the public interest

In balancing the public interest factors for and against disclosure, I attach greater weight to the factors against disclosure. I am satisfied that, on balance, release of the conditionally exempt information in the requested documents would be contrary to the public interest.

I have not taken the irrelevant factors set out in section 11B of the FOI Act in making this finding.

Review rights

Information about your rights of review is attached to this decision.

Complaint rights

You may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/foi-complaints>.



Stephen Heskett
Assistant Secretary
Shared Services Branch
30th September 2019