



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2018/285

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Mr Jason Potts

**DECISION BY: Ms Megan Leahy
Assistant Secretary
Disability and Aged Care Branch**

The FOI Request

On 1 October 2019 Mr Jason Potts (the applicant) made a request under the *Freedom of Information Act 1982* (the FOI Act) to the Department of the Prime Minister and Cabinet (the Department) in the following terms:

Under the FOI Act, I seek access to email correspondence, falling between the period of 2 July 2018 to the date of this application, between Mr John Lloyd and his loyal friend and colleague, Stephanie Foster (including email documents sent by Mr Lloyd to Ms Foster and email documents sent by Ms Foster to Mr Lloyd).

Processing and access charges

On 30 October 2019, the Department notified the applicant that the preliminary assessment of the charge for processing the request was \$96.30.

On 31 October 2019, the applicant paid the required deposit of \$20.

In accordance with the procedures specified in the Charges Regulations for imposing charges on an applicant, I find that the estimated charge for processing the request is equal to the actual charge for processing the request. The outstanding balance of the charge is therefore \$76.30.

Under section 11A of the FOI Act and regulation 11 of the *Freedom of Information (Charges) Regulations 2019* (the Charges Regulations), an applicant is required to pay the charge before access is granted to a document. The applicant will be entitled to receive copies of the documents that can be released in accordance with this decision on payment of the outstanding balance of the charge.

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.

Steps taken to identify relevant documents

The email account of Ms Stephanie Foster was searched. As a result of this search, seven documents relevant to the FOI request were found and are described in the schedule at Attachment A.

Decision

My decision on access in relation to each document is set out in the schedule at Attachment A.

The applicant will be entitled to receive redacted copies of the documents on payment to the Department of the outstanding balance of the charge of \$76.30.

Material taken into account

I have taken the following material into account in making my decision:

- the terms of the FOI request and the revisions to the FOI request;
- the document 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*'¹ (the FOI Guidelines);
- responses received from third parties consulted under section 27A of the FOI Act; and
- comments received from an agency in response to a courtesy consultation.

Reasons

Document 6

Section 45 Documents containing material obtained in confidence

Section 45(1) provides that a document is an exempt document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence.

The FOI Guidelines state that the exemption is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.²

The FOI Guidelines state that to found an action for breach of confidence (which means section 45 would apply), the following five criteria must be satisfied in relation to the information:³

- 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

¹ FOI Guidelines combined June 2019 published on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

² FOI Guidelines, [5.155].

³ FOI Guidelines, [5.159].

- it must have been disclosed or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.

The information must be specifically identified

The FOI Guidelines provide that the alleged confidential information must be identified specifically.⁴ It is not sufficient for the information to be identified in global terms.⁵

The confidential information comprises the information in the document.

The information must have the necessary quality of confidentiality

The FOI Guidelines provide that for the information to have the necessary quality of confidentiality it must be secret or only known to a limited group.⁶ Information that is common knowledge or in the public domain will not have the quality of confidentiality.⁷ The quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain.⁸

The information in the document is known only to a limited group.

The information must have been communicated and received on the basis of a mutual understanding of confidence

The FOI Guidelines state that:

The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency needs to have understood and accepted an obligation of confidence. The mutual understanding must have existed at the time of the communication.⁹

Accordingly, I am satisfied that the information in the document was communicated and received on the basis of a mutual understanding of confidence.

The information must have been disclosed or threatened to be disclosed, without authority

A third party has not consented to disclosure of the information to the FOI applicant.

The unauthorised disclosure of the information has or will cause detriment

The FOI Guidelines provide that the fifth element for a breach of confidence action is that unauthorised disclosure of the information has or will cause detriment to the person who provided the confidential information.¹⁰

I am satisfied that disclosure will cause detriment to the individual concerned.

⁴ FOI Guidelines, [5.161].

⁵ Ibid.

⁶ FOI Guidelines, [5.162].

⁷ Ibid.

⁸ FOI Guidelines, [5.163].

⁹ FOI Guidelines, [5.164].

¹⁰ FOI Guidelines, [5.171].

Finding on application of section 45

I find that Document 6 is exempt in full under section 45(1) of the FOI Act.

Section 47E Public interest conditional exemptions—certain operations of agencies

Section 47E(c) 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 management or assessment of personnel by the Commonwealth or by an agency.

The FOI Guidelines provide 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.¹¹

In relation to the test ‘would or could reasonably be expected to’, the FOI Guidelines provide as follows:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.¹²

The FOI Guidelines provide that the term ‘substantial adverse effect’ broadly means

... ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’. The word ‘substantial’, taken in the context of substantial loss or damage, has been interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.¹³

I am satisfied that the document relates to the management of personnel and that disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

I am therefore satisfied that the document is conditionally exempt under section 47E(c) of the FOI Act.

¹¹ FOI Guidelines, [6.114].

¹² FOI Guidelines, [5.16] – [5.18].

¹³ FOI Guidelines, [5.20].

Would disclosure be contrary to the public interest?

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:¹⁴

- promote the objects of the FOI Act (including all the matters set out in sections 3 and 3A of the FOI Act);
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; and
- allow a person to access his or her personal information.

I consider that a relevant factor from this list is that disclosure could reasonably be expected to promote the objects of the FOI Act.

The FOI Guidelines contain a non-exhaustive list of public interest factors favouring disclosure that may also be relevant in particular circumstances,¹⁵ however there are no additional factors in that list that I consider relevant or that I have not already had regard to above.

Public interest factors favouring non-disclosure

I have had regard to the list of non-exhaustive public interest factors against release in the FOI Guidelines, and consider that disclosure:¹⁶

- could reasonably be expected to prejudice the protection of an individual's right to privacy;
- could reasonably be expected to prejudice an agency's ability to obtain similar confidential information;
- could reasonably be expected to prejudice an agency's ability to obtain similar information in the future;
- could reasonably be expected to harm the interests of an individual; and
- could reasonably be expected to prejudice the management function of an agency.

Balancing the public interest

In weighing the public interest factors for and against disclosure, I note the FOI Guidelines provide that the pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure.¹⁷

Notwithstanding the weighting towards disclosure, in this case I attach more weight to the public interest factors against disclosure. In weighing the factors, I therefore consider the public interest against disclosure outweighs the public interest for disclosure.

¹⁴ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

¹⁵ FOI Guidelines, [6.19].

¹⁶ FOI Guidelines, [6.22].

¹⁷ FOI Guidelines, [6.12].

In addition to section 45(1) mentioned above, I am also satisfied that disclosure of Document 6 would, on balance, be contrary to the public interest and is exempt under section 47E(c).

Documents 4 and 6

Section 47F Public interest conditional exemptions—personal privacy

A document is conditionally exempt under section 47F of the FOI Act if its disclosure would involve the unreasonable disclosure of personal information about any person.

Does the document contain personal information?

Under the FOI Act, ‘personal information’ has the same meaning as in the *Privacy Act 1988* (the Privacy Act) and is defined as

... information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.¹⁸

The documents contain the personal information of an identified individual.

Would disclosure of the personal information be unreasonable?

Section 47F(2) of the FOI Act states that in determining whether disclosure of the document would involve the unreasonable disclosure of personal information, an agency must have regard to the following matters:

- the extent to which the information is well known;
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- the availability of the information from publicly accessible sources;
- any other matters that the agency or Minister considers relevant.

The FOI Guidelines state that key factors for determining whether disclosure is unreasonable include:¹⁹

- the author of the document is identifiable;
- the documents contain third party personal information;
- release of the documents would cause stress on the third party; and
- no public purpose would be achieved through release.

The FOI Guidelines provide that other factors that may be relevant to whether disclosure of personal information would be unreasonable under section 47F of the FOI Act include:²⁰

- the nature, age and current relevance of the information;
- any detriment that disclosure may cause to the person to whom the information relates;
- any opposition to disclosure expressed or likely to be held by that person;

¹⁸ See definition of ‘personal information’ in section 4(1) of the FOI Act and section 6(1) of the Privacy Act.

¹⁹ FOI Guidelines, [6.142].

²⁰ FOI Guidelines, [6.143].

- the circumstances of an agency's collection and use of the information;
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information; and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

The FOI Guidelines further provide that the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of section 47F to protect personal information.²¹ The FOI Guidelines explain as follows (footnotes omitted):

Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future. On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.²²

Having regard to the above factors, I find that the following factors weigh in favour of a finding that disclosure of the personal information would be unreasonable:

- the personal information is not, to my knowledge, well known;
- the personal information is not, to my knowledge, available from publicly accessible sources;
- the personal information is third party information;
- an individual has opposed disclosure of their personal information.

It is not apparent to me that that there are any factors favouring disclosure.

I am therefore satisfied that Documents 4 and 6 are conditionally exempt under section 47F of the FOI Act.

Would disclosure be contrary to the public interest?

I refer to my findings and reasons regarding the public interest in relation to section 47E(c) of the FOI Act, which I consider also apply in relation to section 47F of the FOI Act and, on that basis, I am satisfied that disclosure of the conditionally exempt information would, on balance, be contrary to the public interest.

Deletion of exempt or irrelevant matter

Section 22 of the FOI Act provides that exempt or irrelevant information may be deleted from a copy of a document, and access granted to such an amended copy where it is reasonably practicable to do so, unless it is apparent that the applicant would not wish to have access to such a copy.

²¹ FOI Guidelines, [6.144].

²² FOI Guidelines, [6.145].

In accordance with the Department's policy as advised to the applicant in the Department's email on 9 October 2019, I find that the following information in the documents where ever it occurs is irrelevant to the FOI request:

- the names and contact details of Australian Public Service officers not in the Senior Executive Service (SES);
- the mobile or direct numbers of SES officers.

I consider that it is reasonably practicable to copy the documents with the exempt and irrelevant information deleted, and that the applicant would wish to be granted access to the document with the deletions.

Publication of the documents

Under section 11C of the FOI Act, the Department will make arrangements to publish the documents released to the applicant on the Department's web site in its FOI Disclosure Log.

Review rights

Information about the applicant's rights of review can be found on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Complaint rights

Information about the applicant's complaint rights can be found on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.



Megan Leahy
Assistant Secretary
Disability and Aged Care Branch

2 December 2019

FOI REQUEST: FOI/2019/285

SCHEDULE OF DOCUMENTS

FOI

Document	Date	Description	Number of pages	Decision
1	13/07/2018	Email	1	Release with irrelevant material deleted under section 22 of the FOI Act.
2	03/08/2018	Email	1	Release with irrelevant material deleted under section 22 of the FOI Act.
3	10/08/2018	Email	1	Release with irrelevant material deleted under section 22 of the FOI Act.
4	22/10/2018	Email	1	Release in part with material exempt under section 47F of the FOI Act. Irrelevant material deleted under section 22 of the FOI Act.
5	07/08/2018	Email	1	Release with irrelevant material deleted under section 22 of the FOI Act.
6	-	Email	-	Exempt in full under section 45, section 47E(c) and section 47F of the FOI Act.
7	06/07/2018	Email	3	Release with irrelevant material deleted under section 22 of the FOI Act.