



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2019/285IR

INTERNAL REVIEW DECISION AND REASONS UNDER SECTION 54 OF THE *FREEDOM OF INFORMATION ACT 1982*

REQUEST BY: Mr Jason Potts

DECISION BY: Ms Yael Cass
First Assistant Secretary
Social Impact Investing Taskforce

The request for internal review

On 1 January 2020, Mr Jason Potts (the applicant) requested internal review of a decision (the primary decision) dated 2 December 2019 made by Ms Megan Leahy, Assistant Secretary, Disability and Aged Care Branch, Department of the Prime Minister and Cabinet (the Department), under the *Freedom of Information Act 1982* (the FOI Act). The applicant limited the scope of the internal review to Document 6 in the primary decision.

Under section 54(2) of the FOI Act an applicant is entitled to apply for an internal review of a decision refusing to give access to a document in accordance with a request.

Authorised decision maker

Section 54C(2) of the FOI Act provides that an agency must arrange for a person (other than the person who made the original decision) to review the decision. I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Internal review decision

In relation to the one document in scope of the internal review (namely 'Document 6'), I have decided that:

- it is exempt in full under section 45(1) and section 47F(1) of the FOI Act; and
- it is not exempt under section 47E(c) of the FOI Act.

In making my decision I have had regard to:

- the applicant's FOI request of 1 October 2019;

- the primary decision;
- the applicant's request for internal review of 1 January 2020;
- the document within the scope of the internal review (Document 6);
- comments received from third parties consulted under section 27A of the FOI Act prior to the primary decision being made;
- comments received from third parties during the internal review;
- the FOI Act;
- the 'Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982*' (the FOI Guidelines);¹
- a recent Information Commissioner decision pertaining to section 45 of the FOI Act, namely '*RG*' and *Department of the Prime Minister and Cabinet (Freedom of information)* [2019] AICmr 69 (9 October 2019).

Background

The FOI request

On 1 October 2019, the Department received a request under the FOI Act from the applicant 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).

The primary decision

On 2 December 2019, the Department notified the applicant of the primary decision on his FOI request. In summary, the primary decision indicated that the decision-maker had identified seven documents relevant to the scope of the FOI request, granting access to five documents with irrelevant material deleted under section 22 of the FOI Act, granting access in part to one document with material exempt under section 47F of the FOI Act and irrelevant material deleted under section 22 of the FOI Act, and refusing access to one document exempt in full under sections 45, 47E(c) and 47F of the FOI Act.

The internal review request

On 1 January 2020, the applicant requested internal review in the following relevant terms:

Under Part VI of the FOI Act, I request review of the access refusal decision made by Ms Megan Leahy on 2 December 2019 in respect of document number 6 as set out here:
<https://www.righttoknow.org.au/request/5660/response/16163/attach/8/FOI%202019%20285%20Access%20decision.pdf>

...

I'm of the view that the primary decision maker, Ms Megan Leahy, has refused access to document 6 because it will tend to disclose further misconduct engaged in by Mr Lloyd and his close friend and political ally Ms Foster. That Ms Leahy refused to detail the date of the relevant document (presumably because it will show that Ms Foster and Mr Lloyd were engaging in taxpayer funded communications at a time Mr Lloyd's corruption (that was

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/>.

facilitated, in part, by Ms Foster's inaction) was under consideration by the Merit Protection Commissioner) and its page length demonstrates a particular lack of honesty, transparency and integrity on Ms Leahy's part, behaviour that has now become part and parcel of the systemic politically motivated corruption that drives PMC's FOI processing function:
<https://www.theguardian.com/australia-news/2019/jun/26/whistleblower-hits-out-at-pms-department-over-pervasive-and-toxic-disregard-for-law>.

...

Scope of the internal review

In accordance with the applicant's request for internal review, the scope of this internal review is limited to the decision by Ms Leahy to refuse access to Document 6 under sections 45, 47E(c) and 47F of the FOI Act. Document 6 comprises an email from Mr Lloyd PSM to then Secretary of the Department, Dr Martin Parkinson AC PSM, copying in Ms Stephanie Foster, Deputy Secretary (Governance) at the Department.

Reasons

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.

As explained by the Australian Information Commissioner:

A breach of confidence is the failure of the 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.²

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.³

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:⁴

- 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.

² 'RG' and Department of the Prime Minister and Cabinet (*Freedom of information*) [2019] 69 (9 October 2019), [15] (footnotes omitted).

³ FOI Guidelines, [5.155].

⁴ FOI Guidelines, [5.159].

The information must be specifically identified

The FOI Guidelines provide that the alleged confidential information must be identified specifically.⁵ It is not sufficient for the information to be identified in global terms.⁶

I am satisfied that the confidential information has been specifically identified as the information in Document 6.

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.⁷ Information that is common knowledge or in the public domain will not have the quality of confidentiality.⁸ The quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain.⁹

The Australian Information Commissioner has elaborated as follows:

In *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Justice Megarry found that no matter how secret the information is, there can be no binding obligation of confidence if the information is disclosed in public or communicated in other circumstances which negate any duty to keep the information confidential:

... there can be no breach of confidence in revealing to others something which is already common knowledge.¹⁰

I am not aware of any evidence that the information in Document 6 is common knowledge or is in the public domain, and I am further satisfied that the information in Document 6 is known only to a limited number of people. I am therefore satisfied that the information in Document 6 has the necessary quality of confidentiality.

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

The FOI Guidelines relevantly provide as follows:

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. ...

...

It may be clear from an agency's actions whether the agency accepted an obligation of confidence and is maintaining that obligation. For example, an agency may mark a

⁵ FOI Guidelines, [5.161].

⁶ Ibid.

⁷ FOI Guidelines, [5.162].

⁸ Ibid.

⁹ FOI Guidelines, [5.163].

¹⁰ 'RG' and Department of the Prime Minister and Cabinet (*Freedom of information*) [2019] 69 (9 October 2019), [22] (footnotes omitted).

document as confidential, keep it separate from documents that are not confidential and ensure that the material is not disclosed to third parties without consent.

An obligation of confidentiality may be express or implied. An express mutual understanding may occur where the person providing the information asks the agency to keep the information confidential and the agency assures them that they will. Agency practices may illustrate how an implied mutual understanding may arise. For example, if an agency has policies and procedures in place for dealing with commercial-in-confidence information and those policies and procedures are known by the business community, it may be implied that when a business provides such information to that agency it will be on the basis of confidentiality.¹¹

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

The FOI Guidelines provide as follows:

The information must have been or been threatened to be disclosed without authority. The scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised.

For example, the agency may have told the person providing the information about the people to whom the agency would usually disclose such information. The law may require disclosure to third parties in the performance of an agency's functions, which will amount to authorised use and/or disclosure. Similarly, a person providing confidential information to an agency may specifically permit the agency to divulge the information to a limited group.

Compliance with a statutory requirement for disclosure of confidential information will not amount to an unauthorised use and will not breach confidentiality.¹²

Having regard to the content and context of Document 6, I am satisfied that disclosure to the applicant would be an unauthorised disclosure. Further, a third party (to whom the obligation of confidence was and is owed) objected in clear and unambiguous terms to disclosure of the information at both the primary and internal review decision-making stages. I am therefore satisfied that any disclosure of the information would be without authority.

The unauthorised disclosure of the information has or will cause detriment

The FOI Guidelines provide as follows:

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. Detriment takes many forms, such as threat to health or safety, financial loss, embarrassment, exposure to ridicule or public criticism. The last three are applicable only to private persons and entities, but not to government.

¹¹ FOI Guidelines, [5.164], and [5.166] – [5.167] (footnotes omitted).

¹² FOI Guidelines, [5.168] – [5.170] (footnotes omitted).

The AAT has applied this element in numerous cases, but whether it must be established is uncertain. The uncertainty arises because of an argument that an equitable breach of confidence operates upon the conscience (to respect the confidence) and not on the basis of damage caused. Despite the uncertainty, it would be prudent to assume that establishing detriment is necessary.¹³

I am satisfied that disclosure will cause detriment to the individual who provided the confidential information.

Finding on the application of section 45

Having found that each of the elements of the test for breach of confidence are satisfied, I accordingly 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.¹⁴

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.¹⁵

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

¹³ FOI Guidelines, [5.171] – [5.172] (footnotes omitted).

¹⁴ FOI Guidelines, [6.114].

¹⁵ FOI Guidelines, [5.16] – [5.18] (footnotes omitted).

... ‘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’.¹⁶

As noted above, the primary decision found that Document 6 was also exempt under section 47E(c) of the FOI Act. However, having considered the content and context of Document 6, and the effect that could reasonably be expected to occur if Document 6 were to be disclosed, I am not satisfied 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 an agency.

Accordingly, I am not satisfied that Document 6 is conditionally exempt under section 47E(c) of the FOI Act. This finding means that it is unnecessary for me to consider the application of the public interest test under section 11A(5) of the FOI Act in the context of section 47E(c) of the FOI Act.

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.¹⁷

I am satisfied that Document 6 contains 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:¹⁸

- the author of the document is identifiable;

¹⁶ FOI Guidelines, [5.20] (footnotes omitted).

¹⁷ See definition of ‘personal information’ in section 4(1) of the FOI Act and section 6(1) of the Privacy Act.

¹⁸ FOI Guidelines, [6.142].

- 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:¹⁹

- 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;
- 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.²⁰ The FOI Guidelines explain as follows:

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.²¹

I agree with the primary decision 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 (that is, it is not personal information about the applicant to the primary and internal review requests);
- an individual has opposed disclosure of their personal information.

In addition, I consider the following additional factors weigh in favour of a finding that disclosure of the personal information would be unreasonable:

- disclosure would be likely to 'no more than excite the curiosity of people about the person whose personal affairs were disclosed';²²

¹⁹ FOI Guidelines, [6.143].

²⁰ FOI Guidelines, [6.144].

²¹ FOI Guidelines, [6.145] (footnotes omitted).

²² Per Heerey J in *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 quoted in FOI Guidelines, [6.144].

- the person concerned provided the information on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require disclosure of the information.²³

In terms of factors favouring a finding that disclosure of the personal information would not be unreasonable, I consider that disclosure might advance the public interest in government transparency and integrity. However, given the context and content of Document 6, I would not see the advancement of government transparency and integrity as extending very far from disclosure of the personal information.

On balance, I am satisfied that disclosure of the personal information would be unreasonable.

I therefore find that Document 6 is conditionally exempt under section 47F(1) of the FOI Act.

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.

Section 11B(4) of the FOI Act sets out the following factors that the decision-maker must *not* take into account when deciding whether access to the document would be contrary to the public interest:

- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- the author of the documents was (or is) of high seniority in the agency to which the request for access to the document was made; or
- access to the document could result in confusion or unnecessary debate.

I have not taken any of the above factors into account in making my decision.

Public interest factors favouring disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:²⁴

- 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 agree with the primary decision 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,²⁵ however there are no

²³ FOI Guidelines, [6.145].

²⁴ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

²⁵ FOI Guidelines, [6.19].

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. I agree with the primary decision that the following public interest factors weigh against disclosure:²⁶

- 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.

The primary decision also found that disclosure 'could reasonably be expected to prejudice the management function of an agency'. However, in my view, including having regard to my finding that Document 6 is not exempt under section 47E(c) of the FOI Act, I am not satisfied that disclosure 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.²⁷

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.

I am therefore satisfied that disclosure of Document 6 would, on balance, be contrary to the public interest and is exempt in full under section 47F(1) of the FOI Act.

Review rights

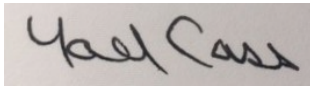
Information about the applicant's rights of review can be found on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

²⁶ FOI Guidelines, [6.22].

²⁷ FOI Guidelines, [6.12].

Complaint rights

The applicant may make a complaint to the Information Commissioner about the Department's actions in relation to this request. 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/reviews-and-complaints/make-an-foi-complaint/>.

A rectangular box containing a handwritten signature in dark ink. The signature appears to read "Yael Cass".

(signed electronically)

Yael Cass
First Assistant Secretary
Social Impact Investing Taskforce

31 January 2020