



Australian Government
Australian Public Service Commission

Mr Willy Wonka

By email: foi+request-6976-232d6e29@righttoknow.org.au

Our reference: SHC20-6732

Dear Mr Wonka

Freedom of Information request

1. I am writing about your 13 December 2020 request under the *Freedom of Information Act 1982* (FOI Act) for access to documents held by the Australian Public Service Commission (the Commission).
2. The FOI Act is publicly available through www.legislation.gov.au.

Documents relevant to your request

3. You requested access to documents in the following terms:

"I request all documents including directions, advice, opinions, queries etc, between the APSC and ATO relating to working from home arrangements under the current pandemic including any specifically related to Clause 50 of the current ATO Enterprise Agreement."

4. I have identified 74 documents relevant to your request. I have attached a schedule at **Attachment A** to this letter setting out the documents relevant to your request.

Decision on your FOI request

5. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
6. I have decided to grant you access in part to the documents you have requested. My reasons are set out in **Attachment B**.

Deletion of exempt matter or irrelevant material

7. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.
8. Copies of the requested documents have been edited to remove material that is either exempt or irrelevant material to the scope of your request. The schedule at **Attachment A** sets out the grounds on which information has been redacted from the documents relevant to your request.

Contacts

9. If you require clarification on matters in this letter please contact the Commission's FOI Coordinator by telephone on (02) 6202 3500 or by email at foi@apsc.gov.au.

Review rights

10. You are entitled to seek review of this decision. Your review rights are set out at **Attachment C**.

Yours sincerely



Marco Spaccavento

Authorised FOI decision maker

// February 2021

ATTACHMENT A

Schedule of documents						
Document	Folio	Date	Author	Recipient	Description	Basis of redactions
1	1	07/12/2020	APSC	ATO	Email	s. 22, s. 47F
2	3	04/12/2020	ATO	APSC	Email	s. 22, s. 42, s. 47E
3	6	04/12/2020	APSC	Various	Email	s. 22, s. 42, s. 47E
4	9	02/06/2020	APSC	ATO	Email	s. 22, s. 47F
5	11	24/03/2020	APSC	ATO	Email	s. 22, s. 47F
6	12	24/03/2020	ATO	APSC	Email	s. 22, s. 47F
7	15	26/03/2020	APSC	ATO	Email	s. 22, s. 47F
8	21	24/03/2020	APSC	ATO	Email	s. 22, s. 47F
9	26	24/03/2020	APSC	ATO	Email	s. 22, s. 47F
10	29	24/03/2020	APSC	Various	Email	s. 22, s. 47F
11	31	08/04/2020	ATO	APSC	Email	s. 22, s. 47F
12	35	08/04/2020	APSC	ATO	Email	s. 22, s. 47F
13	37	27/03/2020	APSC	ATO	Email	s. 22, s. 47F
14	40	27/03/2020	ATO	APSC	Email	s. 22, s. 47F
15	42	27/03/2020	ATO	APSC	Email	s. 22, s. 47F
16	44	27/03/2020	ATO	Various	Email	s. 22, s. 47F
17	47	24/04/2020	APSC	ATO	Email	s. 22, s. 47F
18	49	14/04/2020	ATO	APSC	Email	s. 22, s. 47F
19	54	20/11/2020	APSC	ATO	Email with attachments	s. 22, s. 47F
20	57	Unknown	APSC	Various	Attachment to folio #54	Nil
21	61	Unknown	APSC	Various	Attachment to folio #54	Nil
22	64	07/04/2020	APSC	ATO	Email	s. 22, s. 47F
23	67	07/04/2020	APSC	ATO	Email	s. 22, s. 47F
24	69	08/04/2020	APSC	ATO	Email	s. 22, s. 47F

25	71	07/04/2020	ATO	APSC	Email	s. 22, s. 47F
26	73	31/03/2020	ATO	APSC	Email	s. 22, s. 47F
27	75	18/03/2020	APSC	ATO	Email	s. 22, s. 47F
28	77	18/03/2020	APSC	ATO	Email	s. 22, s. 47F
29	79	06/07/2020	ATO	APSC	Email	s. 22, s. 47F
30	83	10/07/2020	ATO	APSC	Email	s. 47F
31	84	23/03/2020	ATO	APSC	Email	s. 22, s. 47F
32	88	23/03/2020	APSC	Various	Email	s. 22, s. 47F
33	91	10/12/2020	ATO	APSC	Email	s. 22, s. 47F
34	95	23/03/2020	ATO	APSC	Email	s. 22, s. 47F
35	97	23/03/2020	ATO	APSC	Email	s. 22, s. 47F
36	99	18/03/2020	ATO	Various	Email	s. 22, s. 47F
37	102	29/03/2020	ATO	APSC	Email	s. 22, s. 47F
38	108	29/03/2020	ATO	APSC	Email	s. 22, s. 47F
39	111	29/03/2020	APSC	ATO	Email	s. 22, s. 47F
40	114	03/04/2020	ATO	APSC	Email	s. 22, s. 47F
41	117	29/03/2020	ATO	Various	Email	s. 22, s. 47F
42	124	29/03/2020	ATO	Various	Email	s. 22, s. 47F
43	126	29/03/2020	Journalist	ATO	Attachment to folio #124	s. 22
44	127	03/12/2020	ATO	APSC	Email	s. 22, s. 42, s. 47E, s. 47F
45	131	16/06/2020	APSC	Various	Email	s. 22, s. 47E, s. 47F
46	134	11/05/2020	ATO	APSC	Email	s. 47E, s. 47F
47	137	09/12/2020	ATO	APSC	Email	s. 22, s. 47F
48	141	16/12/2020	APSC	ATO	Email	s. 22, s. 47F
49	144	07/12/2020	ATO	APSC	Email	s. 22, s. 42, s. 47F
50	152	09/07/2020	ATO	APSC	Email	s. 47F
51	154	02/04/2020	APSC	ATO	Email	s. 22, s. 47F
52	157	08/05/2020	ATO	APSC	Email	s. 47E, s. 47F

53	159	09/07/2020	ATO	APSC	Email	s. 47F
54	160	18/11/2020	APSC	Various	Email with attachments	s. 22, s. 47E, s. 47F
55	161	Unknown	APSC	Unknown	Attachment to folio #160	Nil
56	165	Unknown	APSC	Unknown	Attachment to folio #160	Nil
57	168	Unknown	APSC	Unknown	Attachment to folio #160	Nil
58	171	27/10/2020	APSC	ATO	Email	s. 47E, s. 47F
59	172	Unknown	APSC	Unknown	Attachment to folio #171	Nil
60	173	23/03/2020	ATO	Various	Email	s. 22, s. 47E
61	175	23/03/2020	ATO	Various	Email	s. 22
62	177	04/12/2020	ATO	APSC	Email	s. 22, s. 42, s. 47E, s. 47F
63	180	31/03/2020	APSC	ATO	Email	s. 22, s. 47E, s. 47F
64	182	23/03/2020	ATO	APSC	Email	s. 22, s. 47F
65	186	07/12/2020	APSC	ATO	Email	s. 22, s. 42, s. 47E, s. 47F
66	189	07/12/2020	APSC	ATO	Email	s. 22, s. 42, s. 47E, s. 47F
67	192	31/03/2020	ATO	APSC	Email	s. 22, s. 47E, s. 47F
68	195	23/03/2020	APSC	ATO	Email	s. 22, s. 47F
69	200	23/03/2020	ATO	APSC	Email	s. 22, s. 47F
70	205	26/03/2020	APSC	ATO	Email	s. 22, s. 47F
71	207	05/08/2020	APSC	ATO	Email	s. 22
72	208	29/05/2020	APSC	Various	email	s. 22, s. 47F
73	209	30/03/2020	ATO	APSC	Email	s. 22, s. 47E, s. 47F
74	211	26/03/2020	ATO	APSC	Email	s. 22, s. 47F

Reasons for decision

1. I have decided to refuse access to parts of the documents you have requested. The following paragraphs outline my findings and reasons for determining the specified exemptions.
2. In making my decision on your request I have had regard to the following:
 - a. the terms of your request;
 - b. the content of the relevant documents you have requested;
 - c. the relevant provisions of the *Freedom of Information Act 1982* (FOI Act);
 - d. FOI guidelines issued by the Australian Information Commissioner and published on the Office of the Australian Information Commissioner (OAIC) website.

Section 42 – legal professional privilege material

3. Subsection 42(1) of the FOI Act exempts a document if it would be exempt from production in legal proceedings on the grounds of legal professional privilege. A document is exempt from production on the grounds of legal professional privilege if all of the following apply:
 - a. there exists a lawyer-client relationship;
 - b. there have been confidential communications which are recorded in the document;
 - c. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings, and
 - d. the privilege has not been waived.
4. Legal professional privilege applies in respect of confidential communications between a solicitor and a client made for the dominant purpose of giving or receiving legal advice and to documents produced for the dominant purpose of being used in actual litigation or litigation that is reasonably anticipated. It also extends to any documents which either directly reveal, or would allow a reader to infer, the nature, content or substance of a confidential communication.
5. A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. This will depend on the circumstances, including whether the disclosure was for any advantage.
6. Subsection 42(2) of the FOI Act provides that a document is not exempt because of subsection 42(1) if the person entitled to claim legal professional privilege for production of the document in legal proceedings waives that claim.

7. The Australian Taxation Office (ATO) has confirmed that certain material contained in some of the documents you have requested relates to independent legal advice between internal ATO lawyers and their clients, that was created for the dominant purpose of providing legal advice and/or in relation to certain matters concerning actual or anticipated legal proceedings, and that privilege over that advice has not been waived.
8. On this basis, in my view the relevant material refers to documents were brought into existence for the dominate purpose of giving or receiving legal advice, or that could reveal the nature, content or substance of that legal advice. I further consider that release of the information under the FOI Act would be inconsistent with the maintenance of the legal professional privilege over that advice.
9. Accordingly, I consider that disclosure of parts of some of the documents you have requested would involve disclosure of material that would be exempt on the grounds of legal professional privilege. Please note that the exemption of material under section 42 of the FOI Act is not subject to a separate public interest test under the FOI Act. Those parts of the relevant documents are therefore exempt under section 42 of the FOI Act and I refuse access to those parts of the relevant documents sought in your FOI request on that basis.

Paragraph 47E(d) – proper and efficient conduct of operations

10. Paragraph 47E(d) of the FOI Act provides that a document is conditionally exempt from disclosure 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.
11. The Australian Public Service Commissioner (Commissioner) and his delegates have a number of statutory functions under the *Public Service Act 1999* (PS Act), including in particular including the facilitation of workforce management of the Australian Public Service (APS). These are important statutory functions conferred by the Australian Parliament for the purposes of providing for the effective a fair employment, management and leadership of APS employees.
12. As part of fulfilling this function the Commission acts as a central coordinator across and between APS agencies, including in relation to the COVID-19 pandemic and working from home arrangements. In the context of rapid and widespread APS workforce movement in response to the unfolding COVID-19 pandemic, the Commission's role in facilitating workforce management arrangements, human resources and employer functions and to assist and coordinate between agencies was heightened further.
13. A number of the documents you have requested relate to sensitive documents and communications between Commissioner and other agencies, including the ATO, concerning their workforce management arrangements during the COVID-19 pandemic and related matters, including litigation proceedings relating to those arrangements. It

was in this context of the COVID-19 pandemic that the material you have requested was communicated between the ATO and the Commission.

14. The disclosure of such information would likely have a substantial adverse effect on the working relationship and trust between the Commission and agencies, including the ATO. This would invariably hinder the Commission's ability to provide these central coordination and support services and fulfil its statutory functions in the future.
15. Release of such material could reasonably be expected to inhibit the future flow of such information to the Commissioner and have the effect of diminishing trust and confidence of agencies in the Commission to manage their sensitive enquiries appropriately. As a result, agencies including the ATO would likely be less willing to provide critical information or seek advice from the Commission in the future, undermining the role of the Commission's statutory functions under the PS Act to effectively manage the APS workforce into the future.
16. For the reasons outlined above I am of the view that the release of relevant parts of the requested documents would have a substantial and adverse effect on the proper and efficient conduct of the operations of the Commission. I have therefore decided that such material contained in the documents falling within the scope of your request is conditionally exempt from disclosure under paragraph 47E(d) of the FOI Act. My consideration of the public interest is provided separately below.

Section 47F – personal information

17. Section 47F of the FOI Act provides that a document is conditionally exempt if it would involve the unreasonable disclosure of the personal information about any person.
18. Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether:
 - a. the information or opinion is true or not; and
 - b. the information or opinion is recorded in a material form or not.
19. A number of your requested documents capture the personal information of public servants and other individuals.
20. Under the FOI Act there is no presumption that agencies and ministers should start from the position that the inclusion of the full names of staff in documents increases transparency and the objects of the FOI Act: *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83].
21. With the substantial increase in electronic requests and related correspondence, a rise in anonymous applications as well as requests affecting the safety and wellbeing of

employees, the Commission now assesses whether a disclosure of public servants' personal information in requests is unreasonable under section 47F of the FOI Act.

22. Having regard to the matters I must consider under subsection 47F(2) of the FOI Act, I have identified the following factors that, in my view, do not support release of certain public servants' personal information under section 47F of the FOI Act:
- a. the individual's personal information, in particular their full names, will identify them;
 - b. the names and contact details of a number of the individuals is generally not well known or publicly available and the disclosure of this information will not advance scrutiny of any decisions falling within the scope of your FOI request, particularly with regard to staff who are not relevant decision-makers and non-SES staff members who are acting under the direction of senior staff within relevant agencies in the course of their ordinary duties;
 - c. the release of some of the individual's personal information in connection with the subject matter of the documents would likely cause stress for them or other detriment, including in particular:
 - i. where the documents sought relates to matters the subject of a legal dispute and ongoing legal proceedings, the likelihood that individuals may suffer harassment or threats is increased;
 - ii. the relevant personal private information includes medical information or other identifying information about certain individuals and their family members;
 - iii. relevant personal information, including emails and mobile phone numbers could result in those individuals being contacted outside of appropriate official channels, including outside of business hours;
 - d. some of the personal information relates to staff member's personal private or family and medical affairs and do not relate to their ordinary duties; and
 - e. no public purpose or interest in increasing transparency of government would be achieved through the release of the information.
23. Considering the above factors, I consider that the disclosure of personal information of certain public servants and of other individuals about would be unreasonable in the circumstances and could result in specific harm.
24. I have therefore decided that to the extent the documents include personal information about non-SES staff members and mobile phone contact details of SES staff members, those parts of the documents are conditionally exempt from disclosure under section 47F of the FOI Act. My consideration of the public interest test is provided separately below.

Section 11A – the public interest

25. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless (in the circumstances) access to the document would, on balance, be contrary to the public interest. I have found that certain material is conditionally exempt on the grounds of paragraph 47E(d) and section 47F of the FOI Act.

Factors in favour of disclosure

26. Subsection 11B(3) lists certain factors as favouring access to a document in the public interest. Relevantly, these factors include whether access to the document would:
- a. promote the objects of the FOI Act (including all the matters set out in sections 3 and 3A); and
 - b. allow a person to access his or her own personal information.
27. In considering whether access to the documents you have requested would, on balance, be contrary to the public interest, I have not identified any other relevant factors in addition to the subsection 11B(3) factors above, as being in favour of providing access.
28. Subsection 11B(4) of the FOI Act lists factors that are irrelevant to determining whether access would be in the public interest. I have not had regard to these factors.

Factors against disclosure

29. I have identified the following factors as weighing against disclosure of the documents you have requested:
- a. the disclosure of certain personal information (including contact details) of a number of the identifiable individuals will not advance any scrutiny of any decisions falling within the scope of your FOI request;
 - b. the disclosure of personal information could reasonably be expected to prejudice the protection of certain individual's right to privacy;
 - c. there is a public interest in APS employers fulfilling their obligations under the *Work Health and Safety Act 2011*, in particular by preventing the exposure of staff members from potential harassment or threats in a public forum;
 - d. the disclosure of sensitive material and the contents of certain communications would significantly undermine the Commission's working relationship with agencies and would do little to enhance scrutiny of government decisions; and
 - e. disclosure would have a substantial adverse effect on the proper and efficient operations of the Commission, the ATO and other agencies.
30. Taking into account the matters above, I find overall that disclosure of some parts of the requested documents would be contrary to the public interest. I therefore find that to the extent that the material contained in the documents is conditionally exempt under sections 47E and 47F of the FOI Act, those parts of the requested documents are exempt from disclosure under the FOI Act.

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of an FOI decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission, and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au

Post: The FOI Coordinator
Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au