



Australian Government
Australian Public Service Commission

JS

By email: foi+request-7175-65d5d0db@righttoknow.org.au

Our reference: SHC21-1962

Dear JS

Freedom of Information request

1. I am writing about your freedom of information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) for access to documents held by the Australian Public Service Commission (the Commission), received on 24 March 2021.
2. The FOI Act and other Commonwealth legislation is available at www.legislation.gov.au.

Documents relevant to your request

3. In your request you have asked for the following:

'I wish to know the commencement dates of the 3 most recent inquiries. Under FOI I seek access to documents that contain the date upon which each of the 3 most recent inquiries under section 41(41A) of the Public Service Act commenced. I limit the scope to one document is [sic] respect of each inquiry.'

4. I have identified three documents relevant to your request as outlined in **Attachment A** and I have attached copies of the documents I am releasing to you to this letter.

Decision on your FOI request

5. I am authorised under subsection 23(1) of the FOI Act to make decisions for the Commission.
6. I have decided that parts of the document you have requested are exempt from release under paragraph 47E(d) and section 47F of the FOI Act. My reasons are set out in **Attachment B**. The copies of the requested documents that I am releasing to you have been edited to remove the material that is exempt or that I otherwise consider is irrelevant to your request under section 22 of the FOI Act.

Contacts

7. If you have any question about this decision you can contact me on (02) 6202 3500 or by email at foi@apsc.gov.au.

Review rights

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Giorgia Strangio'. The signature is fluid and cursive, with the first name 'Giorgia' written in a larger, more prominent script than the last name 'Strangio'.

Giorgina Strangio
Authorised FOI decision maker
23 April 2021

ATTACHMENT A

Schedule of documents						
Document	Folio	Date	Author	Recipient	Description	Basis of redactions
1	1	2 October 2020	Commission	Redacted	Email	s. 22, s. 47E(d), s. 47F
2	2	16 August 2019	Commission	Redacted	Email	s. 22, s. 47E(d), s. 47F
3	4	30 May 2019	Commission	Redacted	Email	s. 22, s. 47E(d), s. 47F

Reasons for decision

1. I have decided to refuse access to parts of the document you have requested. The following outlines my findings and reasons for determining the specified exemptions apply to the documents identified as being relevant to your request.
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 identified;
 - c. the relevant provisions of the *Public Service Act 1999* (**PS Act**);
 - d. the relevant provisions of the *Freedom of Information Act 1982* (**FOI Act**); and
 - e. FOI guidelines issued by the Australian Information Commissioner and published on the Office of the Australian Information Commissioner (**OAIC**) website.

Paragraph 47E(d) of the FOI Act – Certain operations of agencies

3. 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.
4. The Commissioner has a range of functions relating to matters of conduct and integrity in the Australian Public Service (**APS**). Under the PS Act, the Commissioner has an important role in receiving complaints and investigating allegations made about the conduct and behaviour of APS employees and senior public officials, including Agency Heads. Specifically, the Commissioner's role under paragraph 41(1)(m) of the PS Act is:

“to inquire, in accordance with section 41A, into alleged breaches of the Code of Conduct by Agency Heads”.
5. The Commissioner's functions relating to conduct and integrity in the APS are important functions, conferred by the Australian Parliament, for the purpose of maintaining high ethical standards in the APS. Under section 14 of the PS Act, Agency Heads are bound by the APS Code of Conduct in the same way as APS employees.
6. When the Commissioner receives information about matters concerning his functions, he is under a statutory obligation to protect that information from disclosure (see section 72A of the PS Act). In particular, the Commissioner has a statutory obligation to protect the identity of an individual unless he is satisfied the disclosure is fair and reasonable (subsection 72A(6) PS Act). Unauthorised disclosure attracts criminal penalties (section 72A of the PS Act).

7. An assertion that a person may have breached the APS Code of Conduct is a serious allegation, particularly if that person is a senior public official. Public disclosure could have serious reputational consequences for a person, including damaging future employment prospects. The strict secrecy provisions contained in section 72A of the PS Act mandate that such information is protected from disclosure unless particular exceptions apply. Publicly salaried officers understand that the Commissioner is under a statutory obligation not to disclose their personal information and expect that their confidentiality will be protected.
8. In my view, disclosure of a range of information about allegations or inquiries and outcomes of alleged breaches of the APS Code of Conduct would, or could reasonably be expected to, have a substantial adverse effect on the Commissioner's statutory functions.
9. The main consequence of disclosure would be the substantial adverse impact on future complainants and witnesses communicating freely with the Commissioner in support of the exercise of the Commissioner's statutory functions under the PS Act.
10. The maintenance of confidentiality is essential to upholding trust between the Commissioner and relevant agencies, complainants, witnesses, and employees. In this context, any information about alleged APS Code of Conduct inquiries should be protected from public release, including under the FOI Act.
11. In circumstances where a person suspects that an official or Agency Head may have breached the APS Code of Conduct, it is important that the person is able to raise their concerns with the Commissioner and delegates, confidentially and without concern that information provided to the Commission will be made public. It is not unusual for complainants to raise concerns about the protection of their identity for fear of potential adverse consequences for them as individuals.
12. For the same reasons, it is important that the Commissioner (or delegate), is able to communicate with the following parties in a confidential manner:
 - a. complainants;
 - b. the person the complaint is about;
 - c. any witnesses who may provide information to the Commissioner.
13. Public examination of the issues raised with the Commissioner could reasonably be expected to dissuade complainants from coming forward and prevent witnesses from participating fully with the Commissioner's processes in future. Confidential sources provide information under the reasonable expectation that their identity and the information they provide will remain confidential, including when relevant documents are the subject of requests under the FOI Act.
14. For these reasons, confidentiality is a critical important feature of the statutory inquiry function of the Commissioner.

15. Release of the requested documents could reasonably inhibit the future flow of confidential information to the Commissioner. Release of this document would have the effect of diminishing the confidence that future complainants would have in the Commissioner as a reliable recipient of confidential information. Sources such as these would be less willing to provide information to the Commissioner in future.
16. If the Commissioner is unable to assure persons or agencies that it can protect sensitive, confidential information relating to alleged breaches of the APS Code of Conduct or inquiry functions from release, persons or agencies would be less willing to provide the information about employees and senior public officials in the future. If the Commissioner is unable to maintain good working relationships with other agencies, it will undermine and prejudice the ability of the Commissioner to continue to undertake his statutory function to review and assess allegations of breach of the APS Code of Conduct efficiently and effectively.
17. Furthermore, release of information gathered or provided in these contexts would also likely hinder the ability of Commission staff assisting the Commissioner to freely and effectively communicate with each other and with the Commissioner, for the purpose of considering and assessing material before decisions are made. The routine release of documents relating to relevant complaints and inquiries and any resulting outcomes would inhibit this freedom and result in less reliance on written deliberations. This would result in less information being collected and recorded and impact on the efficiency of the Commissioner's processes.
18. In my view, there is a real risk that release of certain information in the documents you have requested will inhibit the ability of the Commissioner and Commission staff to discharge their functions properly and effectively in future. Public exposure of allegations made to the Commissioner, consideration of those allegations and any outcomes or responses from that process could diminish trust in the role of the Commissioner across the APS. Public officials should be entitled to assume that information, comprising of allegations made against them will be treated confidentially. Release of the details of every allegation could reasonably be expected to diminish the trust and confidence that public officials have in the Commission and the Commissioner, to the detriment of the full range of the Commissioner's functions.
19. The documents you have requested include content concerning allegations about misconduct, the consideration of those allegations and relevant evidence and the conduct the relevant inquiries. For the reasons above, I find that release of relevant parts of the requested documents would have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission. Parts of the requested documents are therefore conditionally exempt from release under paragraph 47E(d) of the FOI Act. My consideration of the public interest is provided separately below.

Section 47F of the FOI Act – Personal Privacy

20. 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.
21. 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.
22. The documents requested capture the personal information of public servants and individuals. 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].
23. The documents requested include personal information of a number of individuals about whom allegations of misconduct have been made, witnesses to such allegations, or about whom the alleged conduct had some connection with their confidential employment matters. 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 those individual's personal information:
 - a. the names and contact details of these individuals are generally not well known or publicly available and the disclosure of this information will not advance any scrutiny of the decisions falling within the scope of your FOI request;
 - b. the individual's personal information, in particular their full names, will identify them;
 - c. the disclosure of information about persons who may be the subject of such allegations, including unsubstantiated allegations are not matters that concern normal duties or responsibilities (see '*BA*' and *Merit Protection Commissioner* [2014] AICmr 9);
 - d. release of the individual's information in connection with the subject matter of the documents would likely cause stress for them or other detriment by way of association with the subject matter of the material, including potential adverse consequences;
 - e. the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;
 - f. the disclosure of the personal information could prejudice the protection of relevant individual's right to privacy in relation to confidential employment matters; and
 - g. no public purpose or public interest in increasing the transparency of government would be achieved through release of the information.

24. Having regard to the matters set out above, I consider that the disclosure of personal information of public servants and of other individuals about whom allegations have been made, witnesses to such allegations, or about whom the alleged conduct had some connection with their confidential employment matters would be unreasonable.
25. I have therefore decided that to the extent that the document includes personal information, I consider that those parts of the document are conditionally exempt from disclosure under section 47F of the FOI Act. My consideration of the public interest is provided separately below.

Section 11A – the public interest

26. 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. 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. 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.
28. Subsection 11B(5) of the FOI Act also requires me to consider the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act. I have had regard to the relevant FOI guidelines.

Factors in favour of disclosure

29. In considering whether access to the documents you have requested would, on balance, be contrary to the public interest, I have identified the following factors, in addition to the subsection 11B(3) factors above, as being in favour of providing access:
- a. disclosure would promote transparency in the way the Commissioner decides whether to undertake inquiries and consider allegations under the PS Act;
 - b. release would inform the community of the Commission's operations, including the policies, rules, guidelines and practices followed by the Commissioner in dealings with members of the community; and
 - c. release would enhance the scrutiny of the Commissioner's decision making.

Factors against disclosure

30. I have identified the following factors as weighing against release of the document you have requested:

- a. the public interest in preserving the effective, confidential operation of the Commissioner's function concerning the conduct of inquiries and considering allegations under the PS Act;
- b. release could have the effect of diminishing the future flow of information to the Commissioner from complainants, witnesses, staff and other third parties;
- c. disclosure would undermine the Commissioner's capacity to freely deliberate with staff about potential inquiries and consider allegations under the PS Act;
- d. disclosure of the identities of, complainants, witnesses, staff and public officials against whom allegations have been made would undermine confidence in the confidentiality of inquiries;
- e. disclosure of identities of those persons could lead to a range of negative outcomes including potential reprisal action, harassment and threats to an individual's safety and wellbeing; and
- f. disclosure would have a substantial adverse effect on the proper and efficient operations of the Commissioner and the Commission in performing relevant statutory functions and powers.

31. In weighing the public interest considerations set out above, I have formed the view that in this case, the public interest factors weigh strongly against disclosure of the conditionally exempt material. I consider that in the context of allegations made under the PS Act, the considerations of transparency and scrutiny objects of the FOI Act is appropriately balanced with the paramount importance of ensuring the confidentiality of material disclosed, gathered and considered in the context of the proper and effective discharge of relevant statutory inquiry function.

32. In conclusion, I find that it would not be in the public interest to release the relevant exempt material under sections 47E(d) and 47F of the FOI Act. I therefore find that those relevant parts of the requested document 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