

16 June 2021

Mr Phillip Sweeney

By email: [foi+request-7245-2b0e52ce@righttoknow.org.au](mailto:foi+request-7245-2b0e52ce@righttoknow.org.au)

Reference number: IA-1407

## Notice of Decision – Freedom of Information request

Dear Mr Sweeney

I refer to your request submitted to the Fair Work Ombudsman (**FWO**) on 15 April 2021 under the *Freedom of Information Act 1982 (FOI Act)*.

This letter sets out my decision in relation to the documents relevant to your request which I am authorised to make under section 23 of the FOI Act.

### Scope of Request

*“The National Australia Bank has admitted to underpaying some of its Australian staff. The documents I seek are copies of correspondence from the National Australia Bank to the Fair Work Ombudsman advising of such underpayments.”*

### Timeframe for processing the request

The statutory processing period for processing Freedom of Information requests under the FOI Act is 30 days. The original decision date for processing this request was 17 May 2021.

On 12 May 2021 the FWO notified you of a requirement to consult with third parties in accordance with section 27 of the FOI Act. This consultation requirement extended the processing timeframe by a further 30 days in accordance with s 15(6) of the FOI Act. The due date for a notice of decision on access is 16 June 2021.

### Third party consultation

The FWO consulted with one third-party organisation under section 27 of the FOI Act on the basis that they may reasonably wish to make a contention that relevant business information should be exempt.

### Matters taken into account in making this decision on access

In making my decision, I took the following matters into account:

- The scope of the request
- The documents

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- The FOI Act
- The Australian Information Commissioner's FOI Guidelines
- Internal consultation
- Consultation with relevant third parties

## **Searches**

I arranged for searches of FWO records to identify any documents falling within the scope of the FOI request. Records searched included those held by Compliance and Enforcement Teams. The search identified one relevant document with attachments (12 pages in total).

## **DECISION**

I have determined that some of the documents are conditionally exempt under section 47E of the FOI Act.

The relevant documents are outlined in the schedule at **Attachment A** to this letter. Attachment A contains my decision in relation to each document. The schedule lists references to exemptions relied upon under the FOI Act, and also indicates where irrelevant information has been redacted from the document under section 22 of the FOI Act. Detailed reasons for my decision follow.

## **Exemptions applied and reasons for decision**

### **Section 47E – Public interest conditional exemptions - certain operations of agencies**

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

I have decided that certain information and correspondence between the FWO and NAB which has not already been released by NAB to impacted employees is conditionally exempt information under s47E(d). The information and correspondence contain confidential communications between NAB and FWO relating to non-compliance under the *Fair Work Act 2009 (FW Act)*.

The material is exempt on the basis that it is important for the efficient and effective operations of the FWO to be able to conduct discussions and negotiations with employers about compliance with the FW Act in confidence. Disclosure under the FOI Act could reduce the level of trust and frankness between employers and the FWO if the FWO could not maintain reasonably held expectations of confidentiality. NAB communicated with FWO with the expectation that it would remain confidential and would be used for the sole purpose of the investigation. A reduction in the willingness of employers in the future to participate in an open and frank way could undermine less formal processes and result in less efficient and effective investigation and resolution of complaints.

### *“Substantial adverse effect”*

I consider that if employers cannot rely on the FWO to protect their communications from public disclosure, it would discourage them in the future from making self-disclosures and cooperating with the FWO. The FWO relies on employers feeling confident to make self-disclosures to the FWO of any potential or actual breaches of Australian workplace laws.

It is more efficient and less administratively burdensome not to have to engage more coercive regulatory powers and for information to be provided voluntarily by employers as part of a self-disclosure process. The power to require persons to produce records or documents is not a substitute for information

voluntarily provided because a notice to produce is necessarily confined to a written response providing existing documents. To change the way FWO operates in this way would not provide access to the same information and would substantially and adversely impact upon the functions of FWO.

Any reduction in cooperation could hinder or limit the ability of the FWO to investigate allegations of non-compliance and to take appropriate action to remedy breaches. I consider that the reduction in cooperation caused by disclosure of these types of documents would cause a substantial reduction in cooperation and, as a result, the proper and efficient conduct of the agency.

*“Would or could reasonably be expected to”*

Paragraph 5.15 of the FOI Guidelines provides that, there must, based on reasonable grounds, be at least a real, significant or material possibility in order to satisfy the test for ‘would or could reasonably be expected to’. I consider that the prejudice to the conduct of future investigations and achievement of regulatory outcomes which could arise from employers no longer voluntarily self-disclosing their handling of allegations of non-compliance with workplace laws could be substantial. I consider the risk of adverse effect to be not insignificant and more than a mere possibility.

For these reasons, I have decided that the relevant information is conditionally exempt under s 47E(d) of the FOI Act. Nonetheless, I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest (subsection 11A(5) of the FOI Act).

#### **Public interest test**

Section 11A(5) of the FOI Act requires the agency to give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. In working out whether access to the document would, on balance, be contrary to the public interest the FWO must have regard to the factors favouring release and factors which are irrelevant as listed at section 11B of the FOI Act, and the FOI Guidelines issued by the Information Commissioner.

The FWO accepts there is a general public interest in disclosure of information held by government and the disclosure of the documents would broadly promote the objects of the FOI Act by informing the community about the actions taken by FWO when managing large corporate disclosures of non-compliance with the FW Act.

I have determined that the likelihood of damage that would arise to the FWO’s ability to effectively and efficiently carry out its legislative mandate as described in the FW Act outweighs any benefit that would attach to the release of these documents. The expectation of confidentiality that attaches to the voluntary self-disclosure of information by employers to FWO is central to the proper and efficient conduct of the operations of FWO. Accordingly, I have decided that the release of documents is conditionally exempt in part under s 47E(d) of the FOI Act and would be contrary to the public interest.

#### **Section 22 – Irrelevant information**

On 16 April 2021 you agreed to the removal from the documents of information which might be described as irrelevant. This information has been redacted from the documents under section 22 of the FOI Act.

I can confirm that the material that has been redacted as irrelevant is limited to the following

- information that is publicly available,
- duplicate documents, including duplicate emails,
- names of FWO staff members, direct telephone numbers, email addresses and signatures of FWO staff (other than Senior Executives), and
- personal information relating to third parties.

### **Access to the documents**

An affected third party is entitled to seek review of my decision to release the edited documents to you. As a result, I am unable to give you access to the edited documents for at least 30 days from the day I notify them of my decision.

In accordance with section 27(7) of the FOI Act, the documents will be released to you after the opportunities the third party has to seek review of the decision have run out, and the decision still stands or is confirmed.

### **Website Publication**

Subject to certain exceptions, section 11C of the FOI Act requires agencies to publish any information released in response to freedom of information requests on the online Disclosure Log. Section 11C contains some exceptions to this general requirement.

As the documents are exempt in part, I do not propose to release any material via the Fair Work Ombudsman's Disclosure Log.

### **Review rights**

I have attached a document setting out your rights of review of this decision at **Attachment B**.

### **Contact details**

For further information, please email [foi@fwo.gov.au](mailto:foi@fwo.gov.au).

Yours sincerely



Nicola Forbes

Director Information Governance

Fair Work Ombudsman

Attachment A – Schedule of Documents

<b>Document Number</b>	<b>Pages</b>	<b>Date</b>	<b>Description</b>	<b>Decision</b>	<b>Applicable Provision (s)</b>
1	001-012	20.12.2019	Email thread and attachments: Correspondence National Australia Bank and the Fair Work Ombudsman	Release in part	s.22, s.47E(d)

## Attachment B

### INFORMATION ON RIGHTS OF REVIEW & COMPLAINTS

#### Rights of review

If you are dissatisfied with this decision, you can apply for internal review by this agency (Option 1 below) or external review by the Australian Information Commissioner (IC Review) (Option 2 below).

You do not have to apply for internal review before seeking IC review. However, the Information Commissioner has expressed the view that it is preferable for a person to seek internal review by the agency before applying for IC Review. If you choose Option 1 (internal review), you can also apply for IC review of the internal review decision within 60 days after receiving notice of our review decision.

#### Option 1 – Internal review

You can seek internal review of the decision. An application for internal review must be made in writing within 30 days after the date you were notified of the decision, or within such further period as the Fair Work Ombudsman allows. The internal review will be conducted by a senior officer who had no involvement in the initial decision.

There is no particular form required to make a request for internal review. However, it would help the reviewer if you said, in writing, why you think the decision should be reviewed. An application for an internal review of the decision should be sent to:

Email: [foi@fwo.gov.au](mailto:foi@fwo.gov.au)

FOI Manager

GPO Box 9887

MELBOURNE VIC 3001

#### Option 2 – Review by the Australian Information Commissioner

Alternatively, you can apply in writing to the Australian Information Commissioner for IC review of the decision.

An application for IC Review must be made within 30 days after the day you were given notice of this decision and the decision relates to an access grant decision (s 54M(2)(a))<sup>1</sup> or 60 days where the decision relates to an ‘access refusal decision’ (s 54L(s)(a)):<sup>2</sup>

In making your application, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. It would also help the Australian Information Commissioner if you set out the reasons for seeking IC review in your application.

To apply for IC review, please refer to the relevant information issued by the Office of the Australian Information Commissioner. You can file your application online or download a review form from the OAIC’s website via [www.oaic.gov.au](http://www.oaic.gov.au).

#### Complaints

You can complain to the Australian Information Commissioner about action taken by the Fair Work Ombudsman in relation to your freedom of information request. Your complaint must be in writing and it is the Information Commissioner’s preference that an online complaint form is completed. Alternatively, you can send a letter to the Office of the Australian Information Commissioner, GPO Box 5218, Sydney NSW 2001 or send an email to [enquiries@oaic.gov](mailto:enquiries@oaic.gov).

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<sup>1</sup> An “access grant decision” is defined in s 53B of the FOI Act to mean a decision to grant access to a document where there is a requirement to consult with a third party under ss 26A, 27 or 27A.

<sup>2</sup> An “access refusal decision” is defined in s 53A of the FOI Act and Part 10 of the FOI Guidelines at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/>