

Our ref: FOI-2021-10120

22 December 2021

Anonymous

By email to: foi+request-8120-9d7a4db4@righttoknow.org.au

Dear Anonymous

I refer to your email dated 22 November 2021, in which you sought access to certain documents under the *Freedom of Information Act 1982* (the FOI Act). Your sought access to:

‘...any document contained within Ms Penny McKay’s OCO email account, dated from 15 November 2020 onwards, containing the term “righttoknow” ...’

I am an officer authorised under section 23(1) of the FOI Act to make decisions on behalf of the Ombudsman in relation to FOI requests.

The purpose of this letter is to provide you with a decision in response to your FOI request.

Decision

Our office identified six documents relevant to your request. I have decided to grant you partial access to all six documents. My reasons for this decision are set out at Attachment A to this letter.

Attachment B contains a schedule describing the relevant documents.

Our office identified the documents by searching the Acting Ombudsman’s email account for any emails containing the expression ‘right to know’.

I enclose the released documents with this notice.

Review rights

Internal review

Under s 54 of the FOI Act, you may apply in writing to our Office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.

Where possible, please attach reasons for why you believe review of the decision is necessary. The internal review will be carried out by another Ombudsman officer within 30 days.

Review by the Australian Information Commissioner

Under s 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

- online at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>
- via email to foidr@oaic.gov.au
- by overland mail to GPO Box 5218 SYDNEY NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

Complaints to the Information Commissioner

You may complain to the Information Commissioner about action taken by the Ombudsman in relation to your FOI request.

While there is no particular form required to make a complaint, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way in which your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

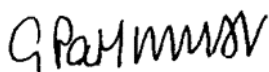
You may lodge your complaint in one of the following ways

- online at:
https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- by email to FOIDR@oaic.gov.au.

Contacts

If you require clarification of any of the matters discussed in this letter you should contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely



Gregory Parkhurst
Senior Legal Officer

ATTACHMENT A – Reasons for decision

Material taken into account

In making my decision I had regard to the following:

- The terms of your request,
- The content of the documents to which you sought access,
- Relevant provisions of the FOI Act, and
- The Australian Information Commissioner's' Guidelines on FOI, available at www.oaic.gov.au (the Guidelines).

Findings of fact and reasons for decision

Where the schedule of documents at Attachment B indicates that an exemption has been applied to a document, or part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document, or part of that document, are set out below.

Exemption – documents subject to legal professional privilege: section 42

A document is exempt from release under section 42 to the extent it would be exempt from production in legal proceedings on the ground of legal professional privilege (LPP).

A document is exempt from production on the ground of LPP if all of the following apply:

1. there exists a lawyer-client relationship;
2. there have been confidential communications which are recorded in the document;
3. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
4. the privilege has not been waived.

I find that disclosure of the material exempted under section 42(1) would involve disclosure of information that would be exempt from production in legal proceedings on the ground of LPP.

Lawyer-client relationship

The relevant material was prepared by a lawyer from the Australian Government Solicitor contracted to perform certain work for the Commonwealth Ombudsman. At the time of writing the relevant material, the relevant lawyer was working in her capacity as a legal adviser to the Commonwealth Ombudsman. For this reason, I am satisfied that a lawyer-client relationship exists.

Confidential communications

The relevant lawyer from the Australian Government Solicitor prepared the relevant material on a confidential basis, to advise the Ombudsman about aspects of managing certain matters under the *Freedom of Information Act 1982*, including certain sensitive matters. The relevant material is marked 'OFFICIAL: Sensitive' and sets out advice for consideration by the Ombudsman about a possible course of action relevant to certain Freedom of Information matters, including certain sensitive matters.

Dominant purpose

The relevant information was prepared for the dominant purpose of providing legal advice to the Ombudsman about a possible course of action to take in relation to certain matters under the *Freedom of Information Act 1982*.

No waiver

Legal Professional Privilege in the exempted material has not been waived. The exempted material has not been otherwise distributed or disclosed, and the Commonwealth Ombudsman has not publicly announced its reliance on the advice contained in the relevant material.

Conditional exemption - Public interest test – certain agency operations: s 47E

I have exempted from release the direct telephone and email contact information of Ombudsman Office staff where they appear in the requested documents. I have also exempted an email address for internal use by Ombudsman Office staff only. These exemptions are made on the basis that the s 47E conditional exemption applies to the information and release would be contrary to the public interest.

Section 47E relevantly provides that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.*

Ombudsman's Office staff contact details

I consider release of direct telephone and email contact details of individual Ombudsman Office staff could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of this Office.

I have concluded that release would significantly adversely affect the ability of the Ombudsman's Office to manage contact with members of the public in a manner that best supports the work of the Office as a whole and the efficient handling of the day to day responsibilities of individual officers. The Ombudsman's Office has established certain arrangements so as to efficiently and effectively manage communication with members of the public.

Members of the public can contact this office on our public contact number, 1300 362 072, at the general email address, ombudsman@ombudsman.gov.au and on facsimile number 02 6276 0123, unless individual contact arrangements have been made. The release of alternative contact options would undermine efficient and effective engagement with the public, records management, and the ability of staff with other responsibilities to undertake their assigned tasks in an efficient manner.

Email address for internal use by Ombudsman's Office staff only

I have decided to exempt from release an email address for internal use by Ombudsman's Office staff only. This exemption is made on the basis that the s 47E(d) conditional exemption applies to the information and release would be contrary to the public interest.

I consider release of the relevant email address could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Ombudsman's Office. The relevant email addresses is used by staff within the Ombudsman's Office to transfer messages to particular staff within the organisation.

The relevant email address is used for internal correspondence only. It is one of a number of email accounts monitored by particular staff for certain work performed within the Office. I consider it would substantially reduce the efficiency of these arrangements if correspondence other than from the Ombudsman's Office were to be received through the relevant email address.

Should the relevant email address be released to the world-at-large, there would likely be a potential increase the workload for the staff managing those email address, which would divert relevant staff from effectively and efficiently performing their duties.

Accordingly, I am satisfied that release of the relevant email address could reasonably be expected to have a significant adverse impact on the efficient operations of the Ombudsman's Office.

Public interest test

In considering whether disclosure of direct telephone and email contact details of Ombudsman Office and the email address for internal use by Ombudsman's Office staff only would be contrary to the public interest, I have considered whether there are any factors favouring disclosure, including the factors identified in s 11B(3) of the FOI Act.

While there is a public interest in promoting the objects of the FOI Act which include increased scrutiny and review of the Government's activities, I do not believe release of the relevant email addresses and telephone contact information would enhance or promote such scrutiny. Release of this information would not inform debate on any matter or promote oversight of public expenditure, and the deleted material is not your own personal information. In my view, disclosure of this information would be contrary to the public interest given the significant adverse impact I consider it could reasonably be expected to have on the proper and efficient operations of this Office.

For these reasons, I have concluded that this information is conditionally exempt under s 47E(d) of the FOI Act.

Public interest conditional exemption – personal privacy: section 47F

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

Section 11A of the FOI Act provides that while an agency must give a person access to a document if it is conditionally exempt, access may be refused if the document's disclosure would, on balance, be contrary to the public interest.

Personal information

'Personal information' is defined in section 4 of the FOI Act as:

Information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The elements of personal information are:

1. It relates only to a natural person (e.g. not a company),
2. It says something about the individual,
3. It may be in the form of an opinion, it may be true or untrue, and it may form part of a database, and
4. The individual's identity is known or is reasonably ascertainable using the information in the document.

I am satisfied that the relevant information constitutes personal information under the definition set out in s 4 of the FOI Act. The documents contain personal information in the form of the surnames of certain members of staff in this Office. The identity of the relevant individuals is reasonably ascertainable from the relevant information.

Disclosure unreasonable

If information is personal information, it will be conditionally exempt if its disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act requires me to take into account:

1. The extent to which the information is well known,
2. 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,
3. The availability of the information from publicly accessible sources, and
4. Any other matter I consider relevant.

The relevant information is not well known. The individuals to whom the information relates are not generally known to be associated with the information contained in the relevant documents. The relevant information is not available from public sources. I am satisfied that the relevant names are specific to the relevant individuals. I have not consulted the relevant individuals about the possible disclosure of their personal information. In my view it is reasonable to conclude that the relevant individuals would have an interest in the decision whether to disclose their personal information in response to a request under the FOI Act.

In my view, it is reasonable to expect that disclosure of staff members' names could subject the relevant staff to the possibility of inappropriate contact from complainants or other individuals dissatisfied by their dealings with this Office. This, in turn, could reasonably be expected to have a substantial adverse effect on the relevant personnel and to the management of those personnel within this Office.

For the reasons set out in this decision, I have formed the view that the name of the relevant individual is conditionally exempt under s 47F(1) of the FOI Act. In my view, release of such information would involve the unreasonable disclosure of personal information.

Disclosure not in the public interest

In deciding whether or not access should be given to this information on the basis of public interest I have taken a number of matters into account. These matters include the public interest factors for and against disclosure as outlined in the Guidelines, as well as matters specific to this agency's functions and operating environment.

In my opinion, the public interest is best served by withholding this information on the ground that:

- Release of this information could reasonably be expected to prejudice the protection of a person's right to privacy.
- Disclosure of the relevant material could reasonably be expected to result in certain inefficiencies in this Office.

Pursuant to subsection 11A(5) of the FOI Act, I have concluded that the relevant material is not required to be disclosed because disclosure at this time would be, on balance, contrary to the public interest.

Further, I am of the view that disclosure of the relevant information would not achieve any of the following outcomes provided for by the FOI Act:

- Promote the objects of the FOI Act,
- Inform debate on a matter of public importance,
- Promote effective oversight of public expenditure, or
- Allow you access to your own personal information.

Deletion of exempt or irrelevant matter: section 22

Section 22 of the FOI Act allows an agency to delete exempt or irrelevant matter from a document which is otherwise relevant to an applicant's FOI request, and to provide an applicant with access to an edited copy.

As I have found that parts of the documents falling within the scope of your request contain information which is conditionally exempt, I have deleted that information accordingly. I have provided you with access to an appropriately edited version of the relevant documents.

ATTACHMENT B – Schedule of relevant documents

SCHEDULE OF DOCUMENTS FOR: Right to know					
Ombudsman's reference: FOI-2021-10120					
Item no.	File	Folio Nos	Description	Date	Decision
1			Ombudsman's internal email	04-May-21	Deletions s 47E, s 47F
2			Ombudsman's internal email	04-May-21	Deletions s 47E, s 47F
3			Ombudsman's internal email	19-Apr-21	Deletions s 47F
4			Ombudsman's internal email	5-May-21	Deletions s 47E, s 47F
5			Ombudsman's internal email	28-Apr-21	Deletions s 42, s 47E, s 47F
6			Ombudsman's internal email	28-Apr-21	Deletions s 42, s 47E, s 47F

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must 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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
 - (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:

- (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
- (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.
document unless it would be contrary to the public interest (see section 11A).

42 Documents subject to legal professional privilege

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

Note: For ***operational information***, see section 8A.

47E Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;

- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47F Public interest conditional exemptions—personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) 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;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.