



Our ref: FOI22/019; CM22/1874

8 March 2022

By email: [foi+request-8377-e93f6b18@righttoknow.org.au](mailto:foi+request-8377-e93f6b18@righttoknow.org.au)

Dear Stoyan

### Freedom of Information Request FOI22/019 – Decision letter

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

#### Your request

On 6 February 2022, you requested access to:

- a) the APS role evaluation summary record (i.e. the completed record of the template set out on pages 3 – 5 of the “Australian Public Service Role evaluation tool” – see <https://www.apsc.gov.au/working-aps/aps-employees-and-managers/classifications/aps-role-evaluation-guidance-and-tool>) for the EL1 position that the AGD employee making \$145,000 was engaged to fill; and*
- b) the APS role evaluation summary record (i.e. the completed record of the template set out on pages 3 – 5 of the “Australian Public Service Role evaluation tool” – see <https://www.apsc.gov.au/working-aps/aps-employees-and-managers/classifications/aps-role-evaluation-guidance-and-tool>) for the EL2 position that the AGD employee making \$203,408 was engaged to fill; and*
- c) other pertinent documents, such as position descriptions, setting out the scope of the EL1 and EL2 roles for which the relevant AGD employees are paid \$145,000 and \$203,408 respectively; and*
- d) vacancy notices published in the Public Service Gazette for the EL1 and EL2 positions for which the relevant AGD employees are paid \$145,000 and \$203,408 respectively; and*
- e) if, and only if, the role evaluation summary records referred to in a) and b) have not been maintained, any and all documents setting out the research (e.g. interviews with other staff, analysis of similar roles in other agencies, analysis of going market rates in relation to the work to be performed etc.) undertaken by appropriate staff members in the AGD to determine the proper scope of the relevant EL1 and EL2 positions; and*
- f) a written record of any individual flexibility arrangement entered into between the EL1 non-AGS AGD employee and the Secretary of the AGD (or an approved delegate); and*
- g) a written record of any individual flexibility arrangement entered into between the EL2 non-AGS AGD employee and the Secretary of the AGD (or an approved delegate); and h) in respect of f) and g) above, any documents recording how the arrangements meet the genuine needs of the AGD and the relevant employees in relation to i) arrangements about when the work is performed, ii) overtime rates, iii) penalty rates, iv) allowances, v) employer superannuation contributions, vi) remuneration and/or vii) leave entitlements.*

*In relation to f) and g), you are welcome to redact the names, residential addresses, and email addresses of the relevant employees. Otherwise, I do not, at least pre-emptively, agree to redactions other than what is permitted by, and necessary according to, the law.*

On 10 February 2022, the department acknowledged your request.

On 21 February 2022, the department wrote to you to clarify the scope of your request. The department sought to confine parts (e), (f) and (g) of your request to the salaries of \$145,000 and \$203,408 respectively.

On 22 February 2022, you advised the following:

*I confirm that my intention was that the scope of the request for parts (e), (f) and (g) are limited to the \$145,000 EL1 position and the \$203,408 EL2 position.*

A decision in relation to your request is due on 8 March 2022.

### **My decision**

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have identified three documents that fall within the scope of your request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request,
- the content of the documents identified as within scope of your request,
- the provisions of the FOI Act, and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

I have decided to refuse access in full to three documents on the basis that the material they contain is exempt pursuant to sections 47E(c) and 47F.

### **Additional information**

Parts (a), (b) and (c) of your request, seeking the APS role evaluation summary records and other pertinent documents do not exist within the department's record holdings. With regard to Part (d) the Executive Level 1 and Executive Level 2 positions were not advertised, therefore no vacancy notices were published in the Public Service Gazette.

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The schedule of documents at **Attachment B** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The statement of reasons at **Attachment C** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

Additional information regarding the department's Executive Level 2 and Executive Level 1 employee positions and salaries are at **Attachment D**.

**Questions about this decision**

If you wish to discuss this decision, the FOI case officer for this matter is Claire, who can be reached on (02) 6141 6666 or by email to [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bridie Dawson', with a wavy tail extending to the right.

Bridie Dawson  
Assistant Secretary  
Human Resources Branch

**Attachments**

Attachment A: Review rights  
Attachment B: Schedule of documents  
Attachment C: Statement of reasons  
Attachment D: Additional information



## **Attachment A - FOI Review rights**

If you are dissatisfied with the decision of the Attorney-General's Department (the department), you may apply for internal review or Information Commissioner review of the decision.

The department encourages applicants to consider seeking internal review as a first step as it may provide a more rapid resolution of your concerns.

### ***Internal review***

Under section 54 of the *Freedom of Information Act 1982* (FOI Act), applications for internal review must be made in writing within 30 days of the date of the decision letter, and be lodged in one of the following ways:

email: [foi@ag.gov.au](mailto:foi@ag.gov.au)

post: Freedom of Information and Privacy Section  
Strategy and Governance Branch  
Attorney-General's Department  
3-5 National Circuit BARTON ACT 2600

An officer of the department other than the officer who made the original decision will complete the internal review within 30 days of receipt of your request.

Providing reasons you believe internal review of the decision is necessary will facilitate the completion of the internal review.

### ***Information Commissioner review***

Under section 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 the decision letter, and be lodged in one of the following ways:

online: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post: 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/>

Attachment B - Schedule of documents - Freedom of Information Request FOI22/019



Australian Government  
 Attorney-General's Department

Document no.	Date	No. pages	Description	Access decision	Exemption/s applied
1	18 January 2021	5	Internal departmental email regarding an Individual Flexibility Arrangement	Refuse access	Section 47E(c): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
2	9 February 2021	2	Individual Flexibility Arrangement	Refuse access	Section 47E(c): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
3	12 January 2021	2	Individual Flexibility Arrangement	Refuse access	Section 47E(c): Public interest conditional exemption - Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy



## **Attachment C – Statement of reasons – FOI22/019**

This document, when read in conjunction with the schedule of documents at **Attachment B**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

### **Public interest conditional exemptions**

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents for your request which are conditionally exempt under Division 3 relate to certain operations of agencies (section 47E) and personal privacy (section 47F).

Brief information about each of the conditional exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these conditional exemptions can be obtained from the OAIC *FOI Guidelines* available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest are set out below.

#### ***Section 47E: Public interest conditional exemption—certain operations of agencies***

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure 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 or by an agency;*
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I have decided to apply section 47E(c) to document 1, 2 and 3. My reasons for applying this exemption has been set out below.

### Section 47E(c)

Section 47E(c) of the FOI Act relevantly 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.

Paragraph 6.114 of the 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*

I am satisfied that documents captured by your request predominantly relate to the management of personnel by the department. In particular, the information concerned discusses in detail the department's human resources activities and the management of recruitment and promotion of certain individuals.

Accordingly, I am satisfied that the relevant material is conditionally exempt under section 47E(c) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the header '*Section 11A(5): Public interest test*'.

### **Section 47F: Public interest conditional exemption—personal privacy**

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person). For the purposes of the FOI Act, personal information is defined as: information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

I have identified the following personal information relating to private individuals in the relevant documents for your request: names; signatures; home addresses; classification levels and salaries.

In deciding whether to conditionally exempt the personal information described above, I have had regard to the following factors set out in section 47F(2) of the FOI Act:

- (a) *the extent to which the information is well known;*
- (b) *whether the people to whom the information relates are 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 considers relevant.*

My reasons for applying the section 47F(1) exemption to each of the categories of personal information listed above are set out below.

In my view the relevant personal information is not well known, nor are the persons concerned generally known to be (or to have been) associated with the particular matters dealt with in the documents. The information is known only to the persons whose information appears in the

documents and departmental officers with responsibility for the matters concerned. I consider it likely that the persons concerned would object to disclosure of their personal information and, noting that the FOI Act does not control or restrict any subsequent use or dissemination of information disclosed, I consider that disclosure could reasonably be expected to cause distress to the persons concerned.

For the reasons set out above, I have decided to exempt the personal information of individuals pursuant to section 47F(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in this regard under the header '*Section 11A(5): Public interest test*'.

### ***Section 11A(5): Public interest test***

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.5 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in section 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under section 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, by informing the community of the Government's operations.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could, as the case may be, reasonably be expected to prejudice the protection of an individual's right to privacy, including where the personal information is that of a government employee in relation to personnel management and the disclosure of the information could be reasonably considered to reveal information about their private disposition or personal life.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.





**Attachment D – Additional information – FOI22/019**

**Executive Level 2 Employee**

The [Office of the Special Investigator](#) (OSI), was established as an Executive Agency within the Home Affairs portfolio on 4 January 2021 by [order](#) made by the Governor-General on 10 December 2020. At the same time Mr Christopher Moraitis PSM, then Secretary of the Attorney-General's Department (AGD), was appointed as Director-General (D-G), OSI with effect from 4 January 2021.

Mr Moraitis, as D-G designate, identified an Australian Public Service (APS) employee role to be filled immediately upon the creation of the office of the OSI. Mr Moraitis indicated that he considered the role was at the SES Band 1 classification.

An existing AGD Executive Level 2 employee was identified as suitable for the role.

The person was not 'engaged' for the role as described in the FOI application. Because the person was already an APS employee and was placed on secondment to OSI (as discussed below), the person's movement to the role occurred by way of an assignment within AGD to a new Executive Level 2 position under s25 of the *Public Service Act 1999* (the Act). As the [APSC's Guidance](#) makes clear, it is not a requirement to conduct an open competitive selection process, nor notify the job in the Public Service Gazette, where a role is filled in these circumstances. Notably, had the role been created at the SES level as considered appropriate by the D-G-designate, a competitive process would also not have been required in those circumstances for the employee's temporary assignment to a role at that level.

Principally because there was no existing industrial instrument to provide for the pay and conditions of employees directly employed by the newly established OSI agency it was decided the employee should initially perform the OSI role on a secondment basis, rather than a temporary movement under s26 of the Act.

Under secondment arrangements the seconded employee remains subject to the pay and conditions applying in the 'home agency' (in this case AGD) while performing work in the 'host agency' (in this case OSI). If the role was created at the SES level, the SES role would count against the AGD SES Cap, rather than OSI's cap.

Because of existing pressures on the AGD SES Cap, the department was not prepared to have the employee go on secondment to the OSI as an SES employee. The department agreed that a secondment could occur at the Executive Level 2 level and that an Individual Flexibility Arrangement (IFA) could apply to pay additional remuneration at the same rate as would apply to an AGD Executive Level 2 employee temporarily assigned to perform an SES role (an allowance at the rate of \$55,000pa). Structured this way the secondment would not utilise an AGD SES Cap space.

The employee's salary level for their Executive Level 2 classification was \$148,408pa. This rate is higher than the maximum rate for an EL2 prescribed in Schedule 1 of the AGD Enterprise Agreement. This is because it was a maintained salary rate from the employee's former Executive Level 2 role the employee had previously held at the Department of Home Affairs (clause 3.14 of the AGD Enterprise Agreement refers). This salary rate plus the \$55,000pa additional IFA remuneration amount brought the total remuneration figure to \$203,408pa.

The employee's secondment to OSI has now ceased.

## Executive Level 1 Employee

With respect to the Executive Level 1 employee with a remuneration level of \$145,000pa the circumstances were that the employee was an Executive Level 1 employee from another APS agency who was selected for a 12-month temporary movement to AGD for a role at the Executive Level 2 classification.

At the time of the employee's selection for the AGD role the employee was performing an Executive Level 2 role on a long-term higher duties basis in their current agency and received a rate of remuneration (salary plus higher duties allowance) of \$145,000pa for the performance of that role.

The manager of the AGD EL2 role for which the employee had been selected requested approval to maintain the employee's acting Executive Level 2 remuneration level at the level applying in the employee's current agency for their performance in the AGD EL2 role. This was agreed.

The employee's movement to AGD occurred as a temporary movement under s26 of the Act. The *Classification Rules 2000* relevantly provide:

### 7 Classification of APS employees: section 26 agreement

- (1) This rule applies to an Agency Head if:
  - (a) an ongoing APS employee moves to the Agency Head's Agency in accordance with an agreement entered into under section 26 of the Act; and
  - (b) the agreement applies for:
    - (i) a specified period, in accordance with the agreement and the *Public Service Regulations 1999*; or
    - (ii) the duration of a specified task, in accordance with the agreement and those Regulations.
- (2) The Agency Head must not comply with rule 6.
- (3) The Agency Head must allocate to the employee:
  - (a) the approved classification that was allocated to the employee immediately before moving to the Agency; or
  - (b) another approved classification that is in the same group as the classification mentioned in paragraph (a).
- (4) The allocation of a classification in accordance with subrule (3) does not prevent the employee from:
  - (a) performing the duties that are to be performed by the employee following the move to the Agency; and
  - (b) receiving the pay and other entitlements that are to be paid to the employee following the move to the Agency.

Rule 7 of the Classification Rules required that the employee be allocated the approved classification that applied to them at Home Affairs (refer Rule 7(3)(a)). This was the Executive Level 1 classification (refer Rule 6 of the Classification Rules). This is despite the employee performing a role

at the Executive 2 classification for the duration of their temporary movement to AGD (as contemplated in Rule 7(4)(a) and (b)).

Because the employee was recorded in the AGD Human Resource Management System as having the approved classification of Executive Level 1, the remuneration the employee received for the duties the employee received for the Executive Level 2 role the employee solely performed at AGD was recorded against the Executive Level 1 classification in the Annual Report. The Department is considering whether this is the appropriate way such circumstances should be reflected for future annual reports.

The employee's remuneration level for the acting Executive Level 2 role they were performing in their former agency was \$145,000pa. This amount was above the top AGD Executive Level 2 pay point provided for at Schedule 1 of the AGD Enterprise Agreement (\$142,728pa). This necessitated an IFA to pay additional remuneration to the employee at the rate of \$2,272 pa in addition to the top AGD Executive Level 2 salary rate to match the rate of remuneration applying at the employee's former agency. A copy of the IFA has been provided.