



Australian Government

Australian Public Service Commission

Ashok

By email: foi+request-8490-1e8b9719@righttoknow.org.au

Our reference: <SHC22-1618>

Dear Ashok

Freedom of Information request

1. I am writing about your Freedom of Information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) made on 20 February 2022 for access to documents held by the Australian Public Service Commission (Commission).
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au.

Documents relevant to your request

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

"I want to know how it is that a person who does not meet essential requirements for a vacancy may still be engaged or promoted to fill a vacancy, especially in light of the principles of merit based selection set out in the laws of the Commonwealth.

Aside from the Public Service Act 1999, the Public Service Regulations 1999, Directions made under the Public Service Act by the Australian Public Service Commissioner, under the FOI Act I request access to:

- a) documents about merit based selection of candidates to fill vacancies in the Australian Public Service; and (Request A)*
- b) to the extent that the documents provided under a) do not address the matter, documents indicating that, despite failing to meet essential criteria for a vacancy, a person may be engaged where there is "a clear pathway to eligibility within a reasonable time after the recruitment process." (Request B)*

I would also like access to documents that set out the powers of the Australian Public Service Commissioner to conduct investigations of his own motion, as well as documents setting out the circumstances in which the Commissioner would exercise such powers." (Request C)

- I have identified **forty-seven (47)** 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

- I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
- For each part of your request I have decided:

Request A	To grant you access in full to twenty-two (22) documents and in part to two (2) documents (for a total of twenty-four (24) documents). I consider all of these documents are broadly about merit-based selection of candidates to fill vacancies in the APS.
Request B	To grant you access in full to one (1) document. I note this document has also been produced as part of Request A above. I consider the document broadly provides when a candidate may be engaged or promoted without meeting formal qualification requirements.
Request C	To grant you access in part to twenty-three (23) documents.

- My reasons are set out in **Attachment B**.

Documentation for Requests A & C

- Please note that some of the documents produced for Request A and C of your FOI request are draft documents that were, or are, under development.
- These draft documents:
 - provide general guidance for APS agency's with respect to recruitment. It is important to note that some of these documents are under review and may be discarded, substantially updated or changed to reflect changes in legislation and policy.
 - provide general guidance for Commission staff assisting the Australian Public Service Commissioner (Commissioner) with the handling of any complaints made in relation to Agency Heads, Statutory Officeholders and APS employees. It is important to note that these documents only provide high level guidance and the Commission assesses each complaint taking into consideration the specific circumstances of each complaint.

Deletion of exempt matter or irrelevant material

- 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.
- 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

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

Review rights

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

Yours sincerely

Charmaine Sims

Charmaine Sims

Authorised FOI decision maker

21 March 2022

ATTACHMENT A

Schedule of Documents		
Document	Document Title	Basis for redactions
Request A		
1	1. Application of merit principle – Answers to standard questions	Not applicable.
2	2 Assessment Methodology Guide Draft	s 47C and s 47F
3	3. Bulk Recruitment – Answers to standard queries	Not applicable.
4	4. Certification of SES exercise by APS Commissioner’s Representative	Not applicable.
5	5. Competitive selection process – Answers to standard queries	Not applicable.
6	6. Conditions of Engagement – APSC Webpage	Not applicable.
7	7. Creating, Using and Sharing Merit Lists – APSC Webpage	Not applicable.
8	8. Employment Principles – APSC Webpage	Not applicable.
9	9. Government’s Merit and Transparency Policy – APSC Webpage	Not applicable.
10	10. Guidance for Commissioner’s Representative	Not applicable.
11	11. Merit lists – Answers to standard queries	Not applicable.
12	12. Module 12 slides – Myths in Merit	Not applicable.
13	13. Non-ongoing temporary employment – APSC Webpage	Not applicable.
14	14. Non-ongoing employment	Not applicable.
15	15. Non-ongoing employment - Legislation	Not applicable.
16	16. One Pager – Merit Lists - FAQs	Not applicable.
17	17. Outreach program - FAQs	Not applicable.
18	18. Outreach Program – presentation talking points	Not applicable.
19	19. Recruitment Guidelines – Running Draft	s 47C and s 47F
20	20. Recruitment Guidelines (Under Review)	Not applicable.
21	21. Circular 2021-03 Fair Work Act changes	Not applicable.
22	22. Senior Executive Service (SES) Recruitment – APSC Webpage	Not applicable.
23	23. The APS Merit Principle – APSC Webpage	Not applicable.
24	24. Affirmative measure for recruiting people – APSC Webpage	Not applicable.
Request B		
6.	6. Conditions of Engagement – APSC Webpage (as produced in Request A above)	Not applicable.
Request C		
25	1. AH and SOH Complaints_Processes and Considerations	s 47E
26	1A. AH and SOH Complaints	s 47C, s 47E and s 47F. Certain material out of scope.
27	1B. AH and SOH Complaints_Processes and Considerations	s 47C, s 47E and s 47F
28	1C AH and SOH Complaints_Processes and Considerations	s 47E. Certain material out of scope.
29	2. Atta A_Process Flowchart	Not applicable
30	2A. AH Process Flowchart V1	Certain material out of scope.
31	2B. SOH Process Flowchart	Certain material out of scope.
32	2C. Preliminary Considerations Flowchart	Certain material out of scope.
33	2D. Att A AH and SOH Process Flowchart	Certain material out of scope.

34	2E. Att A Process Flowchart V3	Certain material out of scope.
35	2F. Att A Process Flowchart V4	Certain material out of scope.
36	2G. Att A Process Flowchart V5	Certain material out of scope.
37	2H. AH flowchart v0	Certain material out of scope.
38	2I. SOH diagram	Not applicable.
39	3. Att B Powers to Inquire	Not applicable.
40	4. Att C Public Interest Considerations	Not applicable.
41	5. Att D Informal Resolution Considerations	Certain material out of scope.
42	7. Att F_TBC_Considerations for Investigations DRAFT	s 47E
43	7. x [Template c] – Reg 6 Considerations	Not applicable.
44	8. Handling Misconduct Guide Chapters 4, 6, 7, and 8	Not applicable.
45	9. BP – Allegations made against Agency Heads and Statutory Office Holders UNCLEARED	s 22 and s 47F
46	10. AH Complaints Considerations	Not applicable
47	11. Re AH Investigations redrafted wording for consideration (before I edit full doc and flowchart)	s 47 C and 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:
 - the terms of your request;
 - the content of the relevant documents you have requested;
 - the relevant provisions of the *Freedom of Information Act 1982* (FOI Act);
 - FOI guidelines issued by the Australian Information Commissioner and published on the Office of the Australian Information Commissioner (OAIC) website.

Section 47C – Documents subject to deliberative processes

3. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. Deliberative matter generally consists of:
 - an opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a deliberative process of the Commission.
4. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.
5. Some of the documents that fall within the scope of your request contain material which record the deliberative processes of the Commission. This deliberative material concerns communications between Commission staff in:
 - determining how to update draft recruitment guidance material by reference to opinions on what the best approach may be and which Commission staff to contact.
 - determining the best manner in which to support the Commissioner in his function of inquiring into alleged breaches of the APS Code of Conduct by Agency Heads, Statutory Officeholders and APS employees.
6. This material constitutes an exchange of opinions and deliberations by Commission staff and does not involve a final decision or finding made by the Commissioner or his delegates.
7. Where applicable I have considered and identified specific deliberative material and separated these from factual material contained in the documents.
8. For the reasons outlined above I am of the view that the release of relevant parts of the requested documents would contain the deliberative processes of the Commission and are therefore conditionally exempt under section 47C of the FOI Act. My consideration of the public interest is provided separately below.

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

9. 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.
10. 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 investigating instances where Agency Heads, Statutory Officeholders and APS employees (including SES employees) may have breached the APS Code of Conduct.
11. These are important statutory functions to ensure that the Commissioner can investigate any potential breaches of the APS Code of Conduct taking into consideration the factors outlined in the PS Act and the *Public Service Regulations 1999* (Cth) (PS Regs).
12. Any complaints and potential investigations are treated with the utmost confidence and even within the Commission information is only shared with the Commission staff on a “need-to-know” basis. Given the nature of the complaints and allegations made against Agency Heads, Statutory Officeholders and APS employees being able to conduct these inquiries in strict confidence is of vital importance in ensuring that the Commission can support the Commissioner with these functions.
13. Some of the documents that you have requested contain material which provide specific detail on how the Commission investigates these complaints. Release of such material could reasonably hinder the work of the Commission in the investigating future complaints and trying to build a relationship of trust with any complainants or other individuals providing the Commission with evidence.
14. The disclosure of such information would likely have a substantial adverse effect on the Commission’s ability to undertake these investigations in a confidential manner and would undermine the trust in the Commission from any individuals who may seek to make a complaint.
15. 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

16. 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.
17. Personal information means 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
 - the information or opinion is recorded in a material form or not.

18. A number of your requested documents capture the personal information of public servants and other individuals.
19. 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].
20. 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.
21. 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:
 - the individual's personal information, in particular their full names or initials, will identify them;
 - 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 in the course of their ordinary duties;
 - 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:
 - where the documents pertain to sensitive matters that those individuals were working on;
 - where the documents pertain to a potential complaint against an Agency Head, Statutory Officeholder or APS employee, the likelihood that individuals may suffer harassment is increased; and
 - 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; and
 - no public purpose or interest in increasing transparency of government would be achieved through the release of the information.
22. 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.
23. I have therefore decided that to the extent the documents include personal information about non-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

24. 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 section 47C, paragraph 47E(d) and section 47F of the FOI Act.

Factors in favour of disclosure

25. 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:

- promote the objects of the FOI Act (including all the matters set out in sections 3 and 3A); and
- inform debate on a matter of public importance.

26. 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.

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.

Factors against disclosure

28. I have identified the following factors as weighing against disclosure of the documents you have requested:

- the disclosure of the Commission's deliberative processes will hinder the Commission's future deliberative processes and efficiency with which the Commission can update guidance or support the functions of the Commissioner;
- the disclosure of certain information will significantly undermine the Commission's ability to investigate any complaints made against Agency Heads, Statutory Officeholders and APS employees this will have a substantial and adverse effect on the proper and efficient operations of the Commission; and
- 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.

29. 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 47C, 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 a Freedom of Information (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* (the FOI Act) you may be able 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 Officer
 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 (the 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