



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

24 March 2022

Shaun
Right to Know

By email: foi+request-8497-a860d75b@righttoknow.org.au

Dear Shaun,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) of 22 February 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

On the 27th of October 2021, Rohan Muscat in the position of National Registrar, responded to a FOI communication "A Court of Law" dated 22 October 2021 and can be viewed at the following URL:

https://www.righttoknow.org.au/request/a_court_of_law

Rohan's Response:

https://www.righttoknow.org.au/request/a_court_of_law#incoming-22951

In Rohan's response, Rohan either deliberately or from oversight re-styled the scope of the documents sought by changing "a man (or woman)" to "person" (a legal entity) as the part response below shows:

Documents that cannot be found or do not exist – subsection 24A(1)

The second part of your email says that you "require the internal policy or directive or law or rule (or other)" that would be relied upon by public servants including to deny a person right to justice and access to the Court. To the extent that your request – or at least this part of your request – does seek access to "a document of an agency", I am unable to provide you with any such documents, because those documents cannot be found or do not exist.

I require any internal emails or documents that relate to the response to the original FOI communication; and an explanation from Rohan why the scope was changed; and a qualified employee to correctly carry out a search of said documents from said FOI communication.

Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

Searches undertaken

Searches were undertaken by staff of the Court to identify documents falling within the scope of your request. These searches included discussions with the relevant staff and searches of their email inboxes. I am satisfied that, by conducting these searches, the Court has taken all reasonable steps to identify the documents captured by your request.

As a result of the searches undertaken, one document was identified as falling within the scope of your FOI request.

Decision

I have decided, pursuant to subsection 47C(1)(a) of the FOI Act, to refuse your request for access to documents as I am satisfied that the document identified is conditionally exempt as its disclosure under the FOI Act would disclose a deliberative matter and would also, on balance, be contrary to the public interest under subsection 11A(5).

I have also decided to refuse your request on the basis that the document contains personal information, and that information is exempt from disclosure under subsections 47F(1) and 11A(5) of the FOI Act.

I have taken the following into account in making my decision:

- the terms of your request;
- the content of the documents that fall within the scope of your request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the *Freedom of Information (Charges) Regulations 2019*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Reasons for Decision

Conditional exemption under section 47C of the FOI Act – Deliberative processes

I have considered whether the document is conditionally exempt from disclosure under subsection 47C(1) of the FOI Act.

Subsection 47C(1) prescribes that:

*A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*

(c) *the Government of the Commonwealth.*

In relation to requests that concern conditionally exempt documents containing deliberative matter, the FOI Guidelines provides the following at 6.52:

... *Deliberative matter is content that is in the nature of, or relating to either:*

- *an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- *a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).*

Relevantly, the FOI Guidelines also provide:

6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.58 A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹

6.59 'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.²

6.60 The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.³

6.61 A deliberative process may include the recording or exchange of:

- *opinions*
- *advice*
- *recommendations*

¹ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

² *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

³ See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General's Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

- *a collection of facts or opinions, including the pattern of facts or opinions considered*⁴
- *interim decisions or deliberations.*

I am required to assess the material to decide if it relates to a deliberative matter or is in the nature of the deliberative processes.⁵ Upon assessment, I am satisfied that the document that falls within the scope of your request includes content of a deliberative matter, as it records an exchange about the decision-making process regarding the FOI request in question. Specifically, it contains a discussion between colleagues prior to the making of a final decision. Therefore, it is conditionally exempt under subsection 47C(1) of the FOI Act.

Conditional exemption under section 47F of the FOI Act – Personal privacy

I have also considered whether the documents are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act.

Subsection 47F(1) prescribes that:

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).

The term “personal information” is defined in subsection 4(1) of the FOI Act to have the same meaning as in section 6 of the *Privacy Act 1988* (Cth), that is:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:
(a) whether the information or opinion is true or not; and
(b) whether the information or opinion is recorded in material form or not.

The document found, includes names, email addresses, and direct telephone numbers, which is clearly “personal information” as defined in subsection 4(1) of the FOI Act.⁶ The document also contains other personal information that bears no relevance to your request for example, reference to an employee taking leave.

To determine whether this personal information is conditionally exempt under subsection 47F(1), I am required to consider whether disclosure of that personal information would be unreasonable.

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

...whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...it is also necessary in my view to take into consideration the public

⁴ See *Chapman and Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

⁵ *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

⁶ FOI Guidelines, paragraph 6.152.

interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

In relation to the matters that ought to be taken into account in determining whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act prescribes that:

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.*

In relation to requests for documents that contain personal information about public servants, the FOI Guidelines stipulate the following:

6.156 A document may, however be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.

It is recognised that the publication of the names and titles of public servants is relatively uncontroversial. However, direct contact numbers and email addresses are, for the most part, not well-known nor available from publicly accessible sources. Further, as mentioned above, the other personal information contained in the document is not relevant to your FOI request.

The disclosure of any of this information would not make any positive contribution to increasing public participation in Government processes or in increasing scrutiny, discussion, comment and review of the Government's activities.⁷ For instance, members of the public still have access to the general enquiry number of the Court, where matters are considered in the ordinary course.

For these reasons, I consider that disclosure of the direct telephone number and work email addresses of these public servants in their place of employment, and the other personal information contained in the document would constitute an "unreasonable disclosure of personal information". Accordingly, the documents you have requested may be conditionally exempt under subsection 47F(1) of the FOI Act.

Public interest test

In finding that the documents might be conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. This test is applied in addition to any public interest considerations already discussed above, and may result in the need to consider one or more factors twice.⁸

Section 11A(5) of the FOI Act provides:

⁷ See *Warren; Chief Executive Officer, Services Australia and (Freedom of information) [2020] AATA 4557 (9 November 2020)* at [129]-[130], per (Deputy President S A Forgie).

⁸ FOI Guidelines, paragraph 6.138.

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.

There are a number of factors that must be taken into account in considering the public interest test, which are set out in subsection 11B(3) of the FOI Act. There are also certain factors which must not be taken into account (see subsection 11B(4) of the FOI Act). The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19), and factors against disclosure (see paragraph 6.22), that may be relevant in certain circumstances.

Having regard to the relevant factors, I accept that the public interest factor favouring disclosure of the document, which also includes direct contact numbers and work email addresses, would be to promote the objects of the FOI Act. In particular, the pro-disclosure object to “facilitate and promote public access to information, promptly and at the lowest reasonable cost” (subsection 3(4) of the FOI Act). This factor favouring disclosure needs to be weighed against the factors against disclosure.

Disclosure of the document could:

- reasonably be expected to prejudice the protection of the public servants’ right to privacy, and
- may expose those staff to the risk of inappropriate and unsolicited approaches.

As I mentioned above, the direct contact numbers and email addresses of these public officials is information that is not generally well-known nor available from publicly accessible sources. It is difficult to see that disclosure of those numbers will contribute to scrutiny of the Government’s activities.

The other personal information contained in the document bears no relevance whatsoever to the FOI request. I am satisfied that the content of that information would not contribute to the scrutiny of the Government’s activities.

The public interest test in relation to the conditional exemption of deliberative process was discussed in *Wood; Secretary, Department of Prime Minister and Cabinet* [2015] AATA 945 where Deputy President Forgie at [69] spoke of the:

“essential balance that must be struck between making information held by government available to the public so that there can be increased public participation leading to better-informed decision-making and increased scrutiny and review of the government’s activities and ensuring that government may function effectively and efficiently.”

Forgie DP continued by noting:

*Section 11B(2) specifically states that s 11B does not limit s 11A(5) when it provides that the agency or Minister must give the person access to the document if, at the time, access to it would, on balance, be contrary to the public interest. By specifying in s 11B(4) five factors that are always irrelevant in deciding whether access would be contrary to the public interest and, in s 11B(3), four factors that favour access but specifying none that may not favour access, Parliament has implicitly recognised that the factors falling in that last category cannot be captured in that way. **Those factors are very dependent on the particular circumstances attending the way in which a document came into being and attending it subsequently** [emphasis added].*

Upon considering the document as a whole, the particular circumstances surrounding the document, and Deputy President Forgie's comments in *Wood*, I am satisfied that disclosure would not contribute to the scrutiny and review of the Government's activities. In fact, its disclosure may inhibit future deliberations, including deliberative discussions, being engaged in between colleagues prior to formal decisions being made.

For these reasons, I give the factors against disclosure greater weight than the factor favouring disclosure. I am satisfied that disclosure of the document would, on balance, be contrary to the public interest.

In any event, I consider that the direct contact numbers and work email addresses of public servants, and the further personal information in the document could reasonably be regarded as irrelevant to your request.

Redaction appropriate under section 22 of the FOI Act – Access to edited copies with exempt or irrelevant matter deleted

Section 22 of the FOI Act requires me to consider whether access may be granted to edited copies of the documents, with exempt or irrelevant matter deleted.

In relation to section 22 of the FOI Act, the FOI Guidelines explain, at paragraph 3.98:

Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

I consider that, under section 22, upon redacting the exempt information due to the conditional exemptions of deliberative processes and personal information, the document retains no value or meaning. It would therefore be futile to grant you access to redacted copies of the documents.

Charges

You have not been charged for the processing of your request.

Your Review Rights

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Federal Court for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

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

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australia 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: [https://forms.business.gov.au/aba/oaic/foi-review-/](https://forms.business.gov.au/aba/oaic/foi-review/)

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

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

Yours sincerely,



B Henderson
FOI Officer