



Australian Government
Australian Public Service Commission

Saraswati

By email: foi+request-8663-f1ccab4a@righttoknow.org.au

Our reference: SHC22-5066

Dear Saraswati

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 27 March 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 refer to Document 29 published on the Right to Know website at https://www.righttoknow.org.au/request/selection_reports_national_judic_2#incoming-24808.

In Document 29, the following is noted:

"It was an anonymous complaint that was transferred from the Commonwealth Ombudsman to the APSC on 11 May 2020. The matter was investigated by Kate McMullen and finalised on 9 December 2020. A copy of the redacted report was sent to the discloser on 23 December 2020."

"The Commonwealth Ombudsman contacted the APSC on 20 December 2021 regarding the APSC's handling of this [redacted]. The Ombudsman is conducting a preliminary inquiry under section 7A of the Ombudsman Act to determine whether or not conduct an investigation."

"[Redacted] provided the requested documents to the Ombudsman on 14 January 2022. The Ombudsman advised that it will take some time to work through the documents and will contact us again in mid-February."

Under section 7A of the Ombudsman Act, the Ombudsman may conduct preliminary investigations. Under subsection 7A(1), for the purpose of conducting a preliminary investigation, the Ombudsman may make inquiries of the principal officer of the Department or prescribed authority or, if an arrangement with the principal officer of the Department or authority is in force under subsection (2), of such officers as are referred to in the arrangement.

Please provide any correspondence sent on 20 December 2021 from the Ombudsman to the APSC.

Please also provide a copy of any notice or correspondence transferring the anonymous complaint from the Commonwealth Ombudsman to the APSC on 11 May 2020.

Please also provide any senate estimates briefing materials (hot briefs or otherwise) prepared for Mr Woolcott for additional estimates in February 2022."

4. I have identified four (4) documents relevant to your request.

Decision

5. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.

6. I have decided to:

- refuse access to Document 1 because I consider the document is exempt in full; and
- grant part access to Documents 2, 3 and 4 because I consider parts of the documents are exempt.

7. **Attachment A** sets out the grounds, where applicable, on which the documents are exempt.

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

Deletion of exempt matter or irrelevant material

9. 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.

10. Relevant to deleting exempt or irrelevant content from a document, the FOI Guidelines provide:

"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.”

11. I consider the objects of the FOI Act will not be served by providing access to an edited version of Document 1 because extensive editing is required that would leave only a skeleton of the former document, conveying little content or substance.
12. I consider it is reasonably practicable to prepare edited versions of Documents 2, 3 and 4, having regard to the nature and extent of the modification required.

Contacts

13. 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

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

Yours sincerely



Giordina Strangio

Authorised FOI decision maker

8 April 2022

SCHEDULE OF DOCUMENTS

Document	Description	Exemptions
1	Email correspondence between Commonwealth Ombudsman and Commission dated 20 December 2021	Sections 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.
2	Email correspondence between Commonwealth Ombudsman and Commission dated 11 May 2020	Sections 22 (irrelevance), 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.
3	Letter from Commonwealth Ombudsman to Peter Woolcott AO dated 11 May 2020	Sections 22, 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.
4	Commissioner's Opening – Federal Court Public Interest Disclosure	Sections 22 and 47F (personal privacy) of the FOI Act apply.

Reasons for decision

1. I have decided to refuse access to Document 1 and parts of Documents 2 and 3.
2. In making my decision I considered:
 - the terms of your request;
 - the contents of the document;
 - the *Public Interest Disclosure Act 2013* (PID Act);
 - the *Public Service Act 1999* (PS Act);
 - the *Ombudsman Act 1976* (Ombudsman Act);
 - the FOI Act;
 - submissions by the Commonwealth Ombudsman received following consultation;
 - external legal advice provided to the Commission; and
 - FOI Guidelines issued by the Australian Information Commissioner.

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. The documents that fall within the scope of your request contain material which record the deliberative processes of the Commonwealth Ombudsman and the Commission. This deliberative material relates a PID investigation conducted by the Commission, and Commonwealth Ombudsman's assessment of whether to investigate a complaint.
6. For the reasons outlined above I am of the view that the documents contain deliberative matter and parts are therefore conditionally exempt under section 47C of the FOI Act.

Sections 47E(c) and 47E(d) FOI Act – Certain operations of agencies

7. Sections 47E(c) and 47E(d) of the FOI Act provide that a document is conditionally exempt from disclosure if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the management or assessment of personnel by an agency, or on the proper and efficient conduct of the operations of an agency.

Document 1

8. Document 1 concerns a current, ongoing, unfinalised investigation by the Commonwealth Ombudsman (Ombudsman).
9. I consider disclosure of Document 1 would have a substantial adverse effect on the ability of the Ombudsman to obtain information for its investigations, which are undertaken in private in accordance with section 8 of the Ombudsman Act and the confidentiality

provisions set out in section 35 of the Ombudsman Act. These provisions require and protect the confidentiality of information held by the Ombudsman in relation to Ombudsman investigations.

10. I also consider disclosure of Document 1 would have the following substantial adverse effects on the Ombudsman's operations:
- Disclosure would discourage complainants from contacting the Ombudsman out of concern that it is not possible to keep relevant investigation information confidential. Where the requested document relates to an open complaint concerning an ongoing investigation, disclosure is likely to undermine effective oversight by the Ombudsman.
 - Disclosure of the relevant document would discourage agencies or members of the public from providing information to the Ombudsman's office in relation to an investigation. The likely effect of this would be to impede the Ombudsman's ability to conduct thorough, efficient investigations availed of all relevant facts and information.

Documents 1, 2 and 3

11. Sections 47E(c) and 47E(d) of the FOI Act provide that a document is conditionally exempt from disclosure if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the management or assessment of personnel by an agency, or on the proper and efficient conduct of the operations of an agency.
12. The Australian Public Service Commissioner (Commissioner) and his delegates have a number of inquiry functions under the PS Act, including in relation to the investigation of certain public interest disclosures under the PID Act.
13. It is important that the Commissioner and his delegates are able to properly undertake activities under the PID Act. The PID scheme promotes integrity and accountability across the Commonwealth public sector and provides a protected space for all current and former public officials ('disclosers') to make disclosures relating to suspected wrongdoing or misconduct.
14. I have considered that under the PID scheme information collected during the course of a PID investigation is protected under section 65 of the PID Act.
15. I have decided that release of material contained within the documents under the FOI Act would likely undermine the protections provided under the PID scheme, and likely discourage current and former public officials to make PID disclosures or to involve themselves in PID investigations. The success of any PID investigation process relies heavily on the willingness of individuals to participate in the PID scheme in a frank and candid manner.
16. Further, I consider that the release of the documents would also likely have a larger effect of inhibiting or discouraging Commission staff to freely and effectively communicate on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation. Should individuals be unwilling or unable to effectively participate in the PID scheme, this would ultimately have a substantial adverse effect on

the Commission's ability to carry out its obligations under the PID Act, including its ability to ensure that allegations of misconduct are being investigated and where necessary take appropriate action in a proper and efficient manner.

17. I note that the importance of protecting information collected during a PID investigation process was upheld in the recent Information Commissioner (IC) decision of '*YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021), where the IC accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
18. I have therefore decided disclosure of information relating to allegations, inquiries and investigations under the PID scheme and under the Ombudsman Act would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of public servants and on the proper and efficient conduct of the operations of the Commission and the Ombudsman.

Section 47F – personal information

19. Section 47F of the FOI Act provides that a document is conditionally exempt if it would involve the unreasonable disclosure of personal information about any person.
20. 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.
21. I consider the documents contain personal information of public servants.
22. I have had regard to the matters I must consider under subsection 47F(2) of the FOI Act in determining whether the disclosure of the documents would involve the unreasonable disclosure of personal information.
23. Relevant to personal information of public servants, 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].
24. 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.
25. 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 individuals' personal information, in particular their names, will or may identify them;

- the names and contact details are generally not well known or publicly available;
- 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 within relevant agencies in the course of their ordinary duties;
- the release of some of the individuals' personal information may cause stress for them or other detriment; and
- no public purpose or interest in increasing transparency of government would be achieved through the release of the information.

26. Considering the above factors, I have 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.

Section 11A – public interest test

27. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless access to the document would, on balance, be contrary to the public interest.

28. I have considered the public interest exemption factors in favour of disclosure at subsection 11B(3) of the FOI Act, including the extent to which access to the document would promote the objects of the FOI Act and inform debate on a matter of public importance.

29. I have identified the following factors as weighing against disclosure:

- disclosure of certain personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
- there is a public interest in APS employers fulfilling their obligations under the *Work Health and Safety Act 2011*, in particular by preventing the exposure of staff members from potential harassment or threats in a public forum;
- the disclosure of the Commission's deliberative processes will hinder the Commission's future deliberative processes and efficiency with which the Commission can support the functions of the Commissioner;
- the disclosure of certain information have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission;
- disclosure may undermine the Commission's relationship with agencies and third party individuals;
- disclosure could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General (see Australian Information Commissioner's FOI Guidelines 6.22), noting in particular that Document 1 relates to an open investigation and its disclosure may adversely affect the ability of the Ombudsman to finalise the matter; and
- disclosure would be inconsistent with relevant provisions of the Ombudsman Act relating to confidentiality and could reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information in the future.

30. 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 considered these factors.

31. On balance, I find disclosure of parts of the documents would be contrary to the public interest. To the extent the material contained in the documents is conditionally exempt under 47C, 47E and 47F of the FOI Act, the material is exempt from disclosure in full or in part.

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