



**Australian Government**  
**Australian Public Service Commission**

Saraswati

By email: [foi+request-8663-f1ccab4a@righttoknow.org.au](mailto:foi+request-8663-f1ccab4a@righttoknow.org.au)

Our reference: SHC22-27376

Dear Saraswati

**Freedom of Information request**

1. I am writing about your 22 April 2022 internal review request made under the *Freedom of Information Act 1982* (FOI Act), of a decision issued 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](http://www.legislation.gov.au).

**Background**

3. On 27 March 2022 you requested access to the following documents under the FOI Act:

*"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](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. On 8 April 2022 Ms Giorgina Strangio, Assistant Commissioner, Integrity, Performance & Employment Policy Group responded to your request. Ms Strangio identified four (4) documents that fell within scope of your request.
5. Ms Strangio granted you access in part to documents 2 – 4 and refused access in full to document 1. Ms Strangio’s decision was based on a consideration of the conditional exemptions outlined in sections, 47C, 47E(c), 47E(d) and 47F of the FOI Act and the public interest factors outlined in section 11B of the FOI Act.
6. On 22 April 2022, you requested internal review of Ms Stangio’s decision, specifically documents 1 and 3.

#### **Decision on your request for internal review**

7. I am authorised under subsection 23(1) of the FOI Act to make FOI internal review decisions.
8. My role is to make a new decision on your request for internal review independently and impartially from the original decision maker. I was not involved or consulted in the making of Ms Strangio’s decision. Internal review is a merit review process and I may exercise all the powers available to the original decision maker.
9. After considering your request, I have decided to affirm Ms Strangio’s decision with regard to documents 1 and 3.

#### **Reasons for decision**

10. In making my decision on your internal review, I have had regard to:

- the terms of your request and your submissions;
- 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;

- legal advice provided to the Commission; and
- FOI Guidelines issued by the Australian Information Commissioner.

11. I am satisfied that your request was valid under subsection 15(2) of the FOI Act and the scope of your request was sufficiently defined so that the Commission could locate the documents that you were seeking access to.

### **Section 47C – Documents subject to deliberative processes**

12. 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.
13. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.
14. I consider that documents 1 and 3 contain material which record the deliberative processes of the Commonwealth Ombudsman and the Commission. This deliberative material relates to a PID investigation conducted by the Commission, and Commonwealth Ombudsman's assessment of whether to investigate a complaint.
15. For the reasons outlined above I am of the view that documents 1 and 3 contain deliberative matter. Therefore, those parts are conditionally exempt under section 47C of the FOI Act.

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

16. 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***

17. Document 1 concerns a current, ongoing, unfinalised investigation by the Commonwealth Ombudsman (Ombudsman). I consider the investigation to be still ongoing because the investigation by the Ombudsman into the handling of the PID has not been finalised. That is, the preliminary investigation under section 7A of the Ombudsman Act forms a part of the overall investigation under section 8 of the Ombudsman Act.
18. Noting the above, I am of the view that disclosing 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.
19. Furthermore, I also consider disclosing Document 1 would have the following substantial adverse effects on the Ombudsman's operations:

- Discouraging 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.
- Discouraging 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.

### ***Document3***

20. 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.
21. The PID scheme promotes integrity and accountability across the Commonwealth public sector. The PID scheme provides a protected space for all current and former public officials ('disclosers') to make disclosures relating to suspected wrongdoing or misconduct. Noting this, ensuring the Commissioner and his delegates are able to properly undertake activities under the PID Act is of great importance.
22. I consider that under the PID scheme information collected during the course of a PID investigation is protected under section 65 of the PID Act.
23. Noting this, I consider that releasing the 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.
24. Further, I consider that releasing the documents would also likely discourage 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.
25. If individuals are 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.
26. 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.

27. Noting the reasons discussed above, I have decided that 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**

28. 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.

29. 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.

30. I consider the documents 1 and 3 contain personal information of public servants.

31. I have considered the matters under subsection 47F(2) of the FOI Act in determining whether the disclosure of the documents would involve the unreasonable disclosure of personal information.

32. Regarding 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. This was considered in the AAT decision in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83].

33. It is also common knowledge that 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.

34. In this instance, I consider that the following factors do not support release of certain public servants' personal information under section 47F of the FOI Act:

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

35. In light of 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**

36. 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. As I have found that document 1 is conditionally exempt in full and certain material in document 3 is conditionally exempt, I must now consider this issue regarding public interest.

37. Regarding the factors in favour of disclosure at subsection 11B(3) of the FOI Act, I consider that disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance.

38. Regarding the factors against disclosure I consider the following factors to weigh against disclosure:

- a) 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;
- b) disclosure of certain personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
- c) 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;
- d) the disclosure of certain information have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission;
- e) disclosure is likely to undermine the Commission's relationship with agencies;
- f) disclosure is like to undermine the Commission's relationship with third party individuals;
- g) 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
- h) 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.

39. 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.

40. In weighing the factors for and against disclosure, in this instance, I consider that disclosure of document 1 and parts of document 3 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.

## **Contacts**

41. 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](mailto:foi@apsc.gov.au).

## **Review rights**

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

Yours sincerely



Marco Spaccavento

Authorised FOI decision maker

16 May 2022

## **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.

### **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](http://www.oaic.gov.au)

Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001

Email: [enquiries@oaic.gov.au](mailto: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](http://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](http://www.ombudsman.gov.au)