



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

22 June 2022

Stephanie
Right to Know

By email: foi+request-8790-691f3b01@righttoknow.org.au

Dear Stephanie,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) dated 23 April 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Your request is too lengthy to extract in this letter.

On 9 May 2022, the Court acknowledged receipt of your FOI request. As advised in the letter sent to you on 11 May 2022, your request seeks access to documents that contain personal information about individuals. It was considered that the individuals concerned might reasonably have wished to contend that the documents were conditionally exempt under section 47F of the FOI Act, and access to the documents would, on balance, be contrary to the public interest under the FOI Act.

In accordance with subsection 27A(3) of the FOI Act, the Court was required to give those individuals a “*reasonable opportunity to make submissions in support of the exemption contention*” before making a decision on the release of the documents that contain personal information about them.

For this reason, the Court determined that, under subsection 15(6) of the FOI Act, it was appropriate to extend the period for processing your request to 22 June 2022.

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

Extensive searches were undertaken by staff of the Court to identify any documents falling within the scope of your request. These searches included consultations with senior staff in the Court’s People and Culture team, searches of the Court’s human resources and recruitment inboxes, searches of staff emails, searches of the human resources shared drive, and searches

of the Court's electronic document, records management and information systems. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.

As a result of the searches undertaken, no documents were identified that set out the specific information you have requested. There was, however, information found from these searches that was relevant to your request but did not exist in a discrete written form. This is discussed further below.

Decision

Apart from three (3) exceptions, I have decided to grant you access to the information sought by providing you with a written compilation of that information. The exceptions to that grant of access is the information you have sought regarding the:

1. names of certain Senior Executive Service (SES) employees,
2. dates certain SES employees were first engaged/transferred/promoted to the Court, and
3. dates certain SES employees retired/resigned/were terminated, if any.

I have determined that the information listed in items one (1) to three (3) above is conditionally exempt pursuant to sections 47E(c), 47E(d) and 47F of the FOI Act. I am satisfied that the information is conditionally exempt as it would have an adverse effect on the operations of an agency and/or be an unreasonable disclosure of personal information. Further and on balance, disclosure would be contrary to the public interest under subsection 11A(5).

On this basis, I have decided to refuse access to these portions of your FOI request only.

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

- the terms of your request;
- the relevant provisions of the FOI Act and relevant case law;
- the third party submissions received following consultations under section 27A of the FOI Act;
- consultations with the Federal Circuit and Family Court of Australia (FCFCOA) with respect to information concerning FCFCOA employees that is captured by the terms of your request;
- 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

Provision of documents under section 17 of the FOI Act

Your FOI request includes the following statement:

If the documents do not exist in discrete form but can be prepared under section 17 of the FOI Act, please prepare the documents accordingly.

Section 17 of the FOI Act provides:

- (1) *Where:*
- (a) *a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;*
 - (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and*
 - (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
 - (c) *the agency could produce a written document containing the information in discrete form by:*
 - (i) *the use of a computer program or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
 - (ii) *the making of a transcript from a sound recording held in the agency;**the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.*
- (2) *An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.*

The FOI Guidelines provide:

3.210 Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded. Examples include a transcript of a sound recording, a written compilation of information held across various agency databases, or the production of a statistical report from an agency's dataset. The obligation to produce a written document arises if:

- *the agency could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and*
- *producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s 17(2)).*

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession. [Footnote omitted].

Based on the extensive searches conducted by staff of the Court's People and Culture team and discussions had with those staff members, I have determined that the information you have requested does not exist in a discrete written form in a manner that corresponds to the categories of information set out in your FOI request. Rather, the information sought is held in an online platform utilised by the Court's People and Culture team and would need to be retrieved and collated to fulfil your FOI request.

As paragraph 2.33 of the FOI Guidelines explains, the FOI Act does not ordinarily "require any agency to create a new document in response to a request for access". However, given the application of section 17 of the FOI Act, I have decided to provide a written compilation of the information sought, apart from the portion of information that I have determined is conditionally exempt under subsections 47E(c), 47E(d) and 47F(1) and would be contrary to the public interest to disclose under subsection 11A(5) of the FOI Act.

For the avoidance of doubt that exempt information is:

- the names of certain past and present SES employees of the Court,
- the date certain SES employees were first engaged/transferred/promoted to the Court, and
- any dates that certain SES employees retired/resigned/were terminated.

Unlike other information you have requested which, generally speaking, could apply to more than one Court staff (for example, your request for the primary locations of occupation), the names and employment date information is information that could identify the relevant individuals. In particular, disclosure of any specific employment date could be compared with other information that is available online (such as through LinkedIn) to identify the person concerned.

Conditional exemptions under sections 47E(c) and 47E(d) of the FOI Act – Operations of an agency

I consider that the names and employment dates of SES officers falling within the scope of your FOI request are conditionally exempt from disclosure under subsections 47E(c) and 47E(d) of the FOI Act.

Sections 47E(c) and (d) relevantly provide that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, do any of the following:

...

- (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.*

The FOI Guidelines provides the following in relation to subsection 47E(c):

6.113 Where the document relates to the agency’s policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- *an effect would reasonably be expected following disclosure*
- *the expected effect would be both substantial and adverse.*

6.114 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.*

[footnotes omitted]

The names and employment dates of SES officers you have requested clearly relate to the “*management of personnel*” in the sense of relating to SES employees who were recruited, promoted and compensated as part of the broader human resource practices and activities of the Court.

Paragraph 6.123 of the FOI Guidelines provides guidance on section 47E(d):

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

The names of certain SES employees of the Court, the date certain SES employees were first engaged/transferred/promoted to the Court, and any dates that certain SES employees retired/resigned/were terminated clearly bear on the Court's "proper and efficient operations".

Many of the SES employees are Registrars of the Court who are critical to the Court's proper and efficient operations. Registrars provide support to the Court's Judges, as well as exercising various powers delegated by Judges and performing important statutory functions assigned to them by legislation.

I now turn to the question of whether disclosure of the documents would or could reasonably be expected to have a substantial adverse effect on the management and assessment of Court staff and on the Court's proper and efficient conduct of operations.

As at the date of writing this decision, the Court has received a large number of FOI requests and internal review requests through the "Right to Know" website seeking documents concerning the Court's recruitment processes of certain staff, including SES employees. All of the requests are publicly available on the "Right to Know" website.

The public availability of the requests is relevant because Court staff are able to access the requests, many of which expressly name individual staff members and make adverse assertions or observations about those individuals. Indeed, a number of the requests make strongly worded comments about Court staff and one applicant has even advised that they had monitored the social media accounts of particular Court employees and printed copies of their online profiles.¹

Many of the individuals consulted under section 27A of the FOI Act expressed concern for their personal privacy and disclosure of their personal information which, generally speaking, is not publicly available. Based on the objections received, I consider such disclosure would adversely affect the concerned individuals' interests and potentially lead to stress and anxiety in the workplace, especially considering the nature and extent of the access requests made through the "Right to Know" website to date.

I consider that this would likely have a substantial impact on the operations of the Court having regard to the number of individuals you have requested personal information about. It is imperative that Court staff are provided with a safe and secure workplace to ensure the proper and efficient conduct of its operations. In fact, there is a public interest in Australian Public Service (APS) employers fulfilling their obligations under the *Work Health and Safety Act 2011* (Cth).

¹ See, for example, https://www.righttoknow.org.au/request/request_for_email_correspondence#incoming-25359.

I have concluded that disclosure of the information you have requested that could identify SES employees, such as their names and employment dates, would be reasonably likely to have adverse consequences of the kind contemplated by section 47E of the FOI Act including an adverse impact on the performance and morale of Court employees which would, in turn, have a substantial adverse effect on the Court's management of personnel and on the Court's proper and efficient conduct of its operations.

For these reasons, I conclude that disclosure of the names of past and present SES employees of the Court, the date SES employees were first engaged/transferred/promoted to the Court, and any dates that those SES employees retired/resigned/were terminated is conditionally exempt under section 47E of the FOI Act.

As discussed later in my decision, I am satisfied that disclosure would be contrary to the public interest under subsection 11A(5) of the FOI Act.

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

I consider that the names and employment dates of SES officers falling within the scope of your FOI request are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act, which 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.

Paragraph 6.135 of the FOI Guidelines provides further guidance on the issue of who is reasonably identifiable:

... whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.

Your FOI request seeks a range of personal details concerning SES employees, including the names of past and present SES employees of the Court, the date SES employees were first engaged/transferred/promoted to the Court, and any dates that those SES employees retired/resigned/were terminated.

As discussed in my reasons above, specific employment dates can easily be used to identify the individuals concerned if those dates are compared with publicly available information. Therefore, I consider the names and employment date information of certain SES employees is clearly “*personal information*” as defined in subsection 4(1) of the FOI Act.

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

The FOI Guidelines list at paragraph 6.143 additional factors, which are outlined in the leading Information Commissioner review decision on section 47F of the FOI Act. In that decision, *'FG' and National Archives of Australia* [2015] AICmr 26, the Information Commissioner held that the following factors are relevant to the question of whether disclosure would be unreasonable:

- the nature, age and current relevance of the information*
- any detriment that disclosure may cause to the person to whom the information relates*
- any opposition to disclosure expressed or likely to be held by that person*
- the circumstances of an agency's collection and use of the information*
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act*
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and*
- whether disclosure of the information might advance the public interest in government transparency and integrity.*

In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines further provide, at paragraph 6.144:

For example, in Colakovski v Australian Telecommunications Corp, Heerey J considered that '... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable'. This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2). [Footnotes omitted].

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

6.153 Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.

6.154 When considering whether it would be unreasonable to disclose the names of public servants, there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether his or her name would be unreasonable to disclose. In seeking to claim the exemption an agency needs to identify the special circumstances which exist rather than start from the assumption that such information is exempt.

6.155 In Maurice Blackburn Lawyers and Department of Immigration and Border Protection [2015] AICmr 85, where the agency raised the concern that disclosure would affect the personal safety of its officers, the Information Commissioner said that there is no apparent logical basis for distinguishing between the disclosure of SES officers and other officers' names, particularly where the purported concern is that disclosure could affect personal safety.

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. [Footnotes omitted].

I accept that most of the personal information you have requested pertains to the usual duties and responsibilities of past and present SES employees. In addition, a limited amount of the information is already publicly available (though not in the form you have requested), such as the SES rank and employment status of the relevant SES employees. Therefore, in the absence of any special circumstances existing, most of the personal information you have requested would not be unreasonable to disclose.

However, with respect to the portions of your request that seek access to the names and employment date information of certain SES officers, I am of the view that special circumstances exist so as to render disclosure of that personal information unreasonable to disclose in the circumstances.

In *Maurice Blackburn Lawyers and Department of Immigration and Border Protection (Maurice Blackburn)*,² Acting Australian Information Commissioner Timothy Pilgrim found:

[21] However, the thrust of the Departments [sic] argument is that disclosure may cause its officers to become the subject of personal attack, public backlash, or to have their safety threatened. In particular, I note the Department's view that disclosure in an electronic environment would be disclosure to the world at large.

[22] In 'FG', the former Australian Information Commissioner explained that the FOI decision-maker should not assume that disclosure of information to an applicant is disclosure to the world at large. Rather an agency may take into account the applicant's reasons for seeking access and their intended or likely use and dissemination of the information.

² [2015] AICmr 85 (18 December 2015).

[23] *In the present case, the applicant submits that it is seeking to identify the number of persons involved in a departmental decision that affected it. There is nothing before me that indicates the applicant would disseminate the names of those persons. Further, I am mindful that it may be open to the Department not to publish the documents on its disclosure log. ...*

[26] *Similarly, in the present case, I do not agree with the Department that its operations on Christmas Island present a 'special circumstance' justifying exemption of departmental officers' names. While I accept the Department's submissions that there is a heightened level of media attention and criticism towards the Department, and that the Department has concerns about security, as I explained above at [23], there nothing before me that indicates that the applicant is seeking to disseminate the names of the departmental officers in this case. [Footnotes omitted].*

Your request, alongside the numerous other FOI requests that have been made to the Court since February 2022 from the “Right to Know” website, has the potential to adversely impact the well-being and productivity of Court staff. There is compelling evidence on the “Right to Know” website that makes it clear that it is common for applicants making requests on similar topics to disseminate the names of Court staff and to do so in circumstances where adverse comments are made regarding the relevant staff. There is also evidence to suggest, unlike in the circumstances of *Maurice Blackburn*, that the names and employment date information of certain SES officers, if disclosed at this time, will be disseminated.

It is my view that this background to your request is relevant when considering the possible application of section 47F of the FOI Act. In circumstances where your request has been made through the “Right to Know” website and the history of similar requests involves both dissemination of personal information regarding Court staff and the use of information in ways the individuals concerned could reasonably consider to be harmful and detrimental, there is a reasonable prospect that the information you have requested that could identify SES employees may be disseminated and used in a similar manner. This may occur due to the use of the information by persons who are not necessarily involved or associated with your request.

In this context, the preservation of employees’ personal information has become increasingly important. It has also given particular credence to the notion outlined in *‘BA’ and Merit Protection Commissioner*³ that:

It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information. ... Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.

Importantly, as noted in *Maurice Blackburn*, Acting Information Commissioner Pilgrim considered that “*the safety of any officer, regardless of classification would be of equal concern to an agency*”.⁴ During my consideration of your request and consultations with the relevant individuals under section 27A of the FOI Act, it became evident that it would be unreasonable to release the names and employment dates of certain SES officers for safety and security reasons. Many of the individuals consulted hold roles as Registrars of the Court. These individuals exercise judge delegated functions in relation to which they are expected, and

³ [2014] AICmr 9 (30 January 2014) at [81].

⁴ *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 at [24].

indeed obligated, to make decisions in an independent and impartial manner. One key element in doing so is that these Registrars exercise such powers without any fear of personal retribution from a litigant or practitioner who is dissatisfied with their decisions. Personal information available in the public domain about these Registrars increases the risk of personal retribution. The Court takes the safety of its employees seriously.

Many of the individuals I consulted with pursuant to section 27A of the FOI Act strongly objected to the release of their personal information on the basis that disclosure would reveal personal information which is not publicly accessible, prejudice their rights to privacy, and adversely affect their interests and the interests of other individuals.

I consider that disclosure of the names and employment dates of SES staff could damage individual trust and confidence in the ability of the Court to protect their privacy rights, including because the information contains potentially identifying information of some Registrars who were the subject of a public interest disclosure.

Even if some of the names and employment dates of the relevant SES officers have previously been published online, I do not consider that this precludes me from finding that the information captured by your request is unreasonable to disclose. Even if some of the personal information was published in one context, this does not mean it is not personal information for the purposes of the *Privacy Act 1988* (Cth). Relevantly, the decision of *Re Jones and Commissioner of Taxation* [2008] AATA 834 provides, at paragraph [11], as follows:

When considering whether it is reasonable or not to disclose personal information, I regard the fact that the information may be available from other sources as merely a matter to be taken into account. For example that the will of the Applicant's deceased father was admitted to probate and hence might be the subject of a search at the Supreme Court registry does not of itself make the release of that document reasonable in these proceedings.

I am not prepared, in the current circumstances, to provide you with the names and employment dates of certain SES employees, nor am I prepared to confirm or deny whether any such previously published information is still accurate. The Court's annual report contains general details about SES employees. In addition to that publicly available information, I am prepared to grant you access to most of the other information you have requested about SES employees as part of collective information about SES staff generally. This approach is compatible with the concerns raised by the SES officers who objected to the disclosure of their personal information, except in circumstances where the release of information was provided to you in an anonymised form.

For all of the reasons above, I consider that special circumstances exist such that disclosure of the particular names and employment dates of certain SES employees would constitute an “*unreasonable disclosure of personal information*” under section 47F(1) of the FOI Act.

The only exception to refuse to provide you with the end date of employment of an SES officer is where an APS employee's employment is terminated due to breach of the APS Code of Conduct and the Agency Head is required to notify the decision in the Public Service Gazette (clause 34(1)(e) of the *Australian Public Service Commissioner's Directions 2016*). In such an instance, the information would be available from a publicly accessible source. However, this is not applicable to any of the SES employees with respect to whom you have requested information.

As discussed in the relevant section below, I am satisfied that disclosure would be contrary to the public interest under subsection 11A(5) of the FOI Act.

Public interest test

In finding that the names and employment dates of SES officers sought by your request are conditionally exempt under subsections 47E(c), 47E(d) and section 47F of the FOI Act, I must now consider whether, as a result of subsection 11A(5) of the Act, it would be contrary to the public interest to give you access at this time. In this regard, subsection 11A(5) of the FOI Act provides:

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.

Subsection 11B(3) of the FOI Act lists factors that must be taken into account in considering the public interest test as follows:

Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) inform debate on a matter of public importance;*
- (c) promote effective oversight of public expenditure;*
- (d) allow a person to access his or her own personal information.*

Subsection 11B(4) of the FOI Act lists factors that must not be taken into account in deciding whether access would be in the public interest. I have not considered those factors.

The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19) and against disclosure (see paragraph 6.22) that may be relevant in certain circumstances. Included in the factors weighing against disclosure in paragraph 6.22 of the FOI Guidelines are the following:

- (h) could reasonably be expected to prejudice an agency's ability to obtain confidential information*
- (i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future*
- ...
- (k) could reasonably be expected to harm the interests of an individual or group of individuals*
- ...
- (n) could reasonably be expected to prejudice the management function of an agency*

In relation to the harm that may result from disclosure, the FOI Guidelines state at paragraphs 6.20 and 6.21:

The FOI Act does not list any factors weighing against disclosure. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that harm may result from the disclosure of some types of documents in certain circumstances; for example, where disclosure could prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information. Such policy considerations are reflected in the application of public interest factors that may be relevant in each particular case.

Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.

Having regard to all of the relevant factors, I accept that disclosure of the names and employment dates of SES officers might broadly promote the objects of the FOI Act by providing to the Australian community access to information held by the Government, increasing knowledge about Government activities, enhancing the scrutiny of Government decision-making, and potentially even promoting effective oversight of public expenditure. However, apart from circumstances where a person's employment has been terminated due to breach of the APS Code of Conduct (discussed above), it is otherwise difficult to see how disclosure of information such as the dates a person started and/or ended their employment would advance the public interest in government transparency and integrity.

There are several factors, many of which have already been identified, that weigh against a finding that it would be in the public interest to disclose such information. The factors against disclosure are that it could reasonably be expected to:

- prejudice the protection of the individual right to privacy,
- jeopardise the safety and wellbeing of the relevant SES employees,
- negatively impact the ability of public servants to perform their current roles, which would have an adverse effect on the operations of the Court,
- lower the morale of employees and lead to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court,
- cause distress and anxiety for the individuals concerned, including in relation to the potential media attention that may follow the release of the documents,
- adversely affect the interests of the SES officers and the interests of other individuals, and
- expose the individuals concerned to an increased risk of harm.

Paragraph 6.5 of the FOI Guidelines provides elaboration on the public interest test including, relevantly, that the public interest is “*not something of interest to the public, but in the interest of the public*”.⁵ I am unable to see how names of SES officers or dates they commenced or left employment – which is personal and unique to the people concerned – would be of serious concern or benefit to the public. Disclosure of personal information of that nature would, in my view, likely do no more than excite or satisfy the curiosity of others, particularly in circumstances where the remainder of the information you have requested regarding the Court's SES officers is being provided to you.

Relevantly, paragraph 6.7 of the FOI Guidelines provides as follows:

*Disclosure of conditionally exempt documents is required unless in the particular circumstances and, **at the time of the decision**, there is, on balance, countervailing harm which offsets the inherent public interest of giving access. [Emphasis added].*

I consider that the factors against disclosure (set out above) carry with them a very real and grave risk of harm to the Court and its personnel should some of the information requested be released. I give significant weight to each of the above factors and, after considering each

⁵ See also *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186, at [188] (Griffiths CJ).

factor and the weight to be given to each, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding that information at this time.

Accordingly, I give the factors against disclosure greater weight than the factors favouring disclosure. I am satisfied that disclosure of the names and employment dates of SES officers in these circumstances would, on balance, be contrary to the public interest.

Access Format

In your FOI request, you request that the email address foi+request-8790-691f3b01@righttoknow.org.au be used for all replies to the request. On this basis, I have decided to grant you access to a written compilation of a majority of the information you have requested by email, subject to three exceptions:

1. the names of each SES employee,
2. the date each SES employee was first engaged/transferred/promoted to the Court, and
3. the dates those SES employees retired/resigned/were terminated, if any.

The document accompanies this letter.

In relation to the information provided to you in response to your FOI request, I note that those persons acting in SES roles have also been included in the written compilation of information provided. This is because each of those persons were temporarily assigned duties in an SES position for a period of three months or more, and are required to be reported by agencies as part of their SES cap.⁶

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 the decision. 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 Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

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

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

⁶ See <https://www.apsc.gov.au/working-aps/aps-employees-and-managers/senior-executive-service-ses/ses-cap>.

made in writing within sixty (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/>

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 Office of the Australian Information Commissioner (OAIC) website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson
FOI Officer