



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

A.B.N. 49 110 847 399

Your Ref:
Our Ref:

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

1 August 2022

Stephanie
via Right to Know

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

Dear Stephanie,

Request for an internal review under the *Freedom of Information Act 1982*

I refer to your email of 2 July 2022 sent to the External.FOI@fedcourt.gov.au mailbox of the Federal Court of Australia (**Court**) seeking an internal review of a decision made on behalf of the Court on 22 June 2022.

I am authorised under the FOI Act to make a decision on behalf of the Court in relation to your internal review request. In conducting the internal review, I note that s 54C of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) requires me to review the original FOI decision and make a fresh decision on behalf of the Court. I also acknowledge that an internal review is a merit review process and that, as set out in paragraph 9.34 of the FOI Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**), an internal review officer should “*bring a fresh, independent and impartial mind to the review.*”

Background

On 23 April 2022, you sent an email to the External.FOI@fedcourt.gov.au mailbox of the Court (**FOI request**) seeking access to documents under the FOI Act. Your request is too lengthy to extract here but, in summary, your request was divided into four (4) parts and each part sought several pieces of information about Senior Executive Service (**SES**) employees. You stated in your FOI request that, if the documents did not exist in discrete form but could be prepared under s 17 of the FOI Act, the Court should “*prepare the documents accordingly*”.

In a decision dated 22 June 2022, the original decision-maker explained that the information you requested was not available in discrete form in written documents of the Court. However, given the application of s 17 of the FOI Act and your specific request regarding the provision of information under s 17, the decision-maker decided to grant you access to a written compilation of the information sought, subject to the exclusion of information from that written compilation that was conditionally exempt under ss 47E and 47F of the FOI Act and was, on balance, contrary to the public interest to disclose under s 11A(5) of the FOI Act. The specific information that the decision-maker determined was exempt from disclosure was: the names of SES employees, the dates that SES employees were first engaged/transferred/promoted by the Court, and the dates that certain SES employees retired/resigned/were terminated.

On 2 July 2022, you sent an email to the Court's External.FOI@fedcourt.gov.au mailbox seeking an internal review of that decision under the FOI Act.

According to paragraph 9.34 of the FOI Guidelines, an internal review officer should “*consider all issues raised by the person applying for internal review*”. In that regard, I note that you state in your internal review request that you “*disagree that any of ss 47C, 47E and 47F apply to the documents requested*”. While I will consider your contentions regarding the application of ss 47E and 47F in the reasons for my decision below, I note that the original decision-maker did not make any determination regarding the applicability of s 47C to the information requested. Similarly, I have decided that s 47C is not applicable to the information sought.

In your internal review request you also make reference to allegations levelled against the management of the Court, also contained in articles published in *The Australian*. On the basis of these allegations, you claim there is a public interest in knowing who the Court's SES officers are and “*whether their classification allocations were applied on the basis of merit*”. You also state that any claims “*about mental health, the cohesion, and the like, of registrars is trumped by the public interest in shining a light on illegality and unlawfulness*”.

Having carefully reviewed all relevant material, it is difficult to see a direct link between the substance of the allegations you have referred to and the specific information sought in your FOI request. I note that the Court has not commented publicly on whether the substance of the allegations, and information related to those allegations, is true or is an accurate reflection of the Court's records. As an internal review officer, it would be inappropriate for me to comment on those allegations in any detail, especially in circumstances where the Australian Public Service Commission (APSC) investigation referred to in *The Australian* articles was conducted pursuant to the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**). As such, the APSC's investigation remains subject to the secrecy provisions of the PID Act. Additionally, there is a Commonwealth Ombudsman investigation underway concerning that APSC investigation, for which findings are yet to be handed down. Nonetheless, I will very briefly address in my decision the relevance of the existence of the allegations to the public interest test under s 11A(5) of the FOI Act.

Finally, I note that your internal review request make several comments about the promotion of SES employees with respect to Part 4 of the written compilation document issued to you with the original FOI decision. I will address those comments in the section of my decision below in which I discuss the searches undertaken and the provision of a new written compilation document to you.

Summary of internal review decision

After reviewing the original FOI decision dated 22 June 2022 and considering your FOI request afresh, I have decided to grant you access, in accordance with s 17 of the FOI Act, to a written compilation of the information sought in your original FOI request, subject to the exclusion of information that is conditionally exempt under ss 47E and 47F of the FOI Act and would, on balance be contrary to the public interest to disclose under s 11A(5) of the FOI Act. The reasons for my decision are set out below.

Material taken into account

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

- your original FOI request of 23 April 2022;
- the decision letter issued to you and dated 22 June 2022;
- your internal review request dated 2 July 2022;
- the written compilation of information provided to you under s 17 of the FOI Act;
- the records of searches conducted by staff of the Court;
- third party submissions received following consultation under s 27A of the FOI Act;
- the FOI Act and relevant case law; and
- the FOI Guidelines.

Reasons for internal review decision

Searches undertaken and provision of documents under s 17 of the FOI Act

The original FOI decision includes details of the searches undertaken by staff at the Court in response to your FOI request. It explains that the searches were extensive and included discussions with relevant Court staff, searches of employee inboxes, search of network drives and wider searches of the Court's document, records management and information systems. As a result of these searches, it was determined that the information sought in your FOI request was not available in discrete form in written documents of the Court. Instead, it was determined that the information sought in your FOI request was available in an online platform utilised by the Court's People and Culture team and could be retrieved and collated in the form of a written document in compliance with s 17 of the FOI Act.

For the purpose of this internal review, I have carefully reviewed the records of the searches previously conducted and the written compilation that was prepared and issued to you with the original FOI decision. In conducting that review, I decided it was appropriate to have further discussions with staff at the Court who conducted those searches and that further searches should be conducted by the relevant staff. As a result of those discussions and further searches, I have decided that the information retrieved and collated in the written compilation document provided to you was accurate with respect to Parts 1, 2, and 3 of your FOI request and does not require amendment. However, in relation to Part 4 of your FOI request, I have determined that the information provided to you in the original written compilation requires amendment for reasons I will explain below.

With respect to Part 4 of your original FOI request, I have determined that your reference to SES employees who were "*promoted*" within the Court, should reasonably be interpreted as a reference to "*promotion*" as defined in the *Australian Public Service Commissioner's Directions 2022*. Specifically, s 6 of those Directions defines "*promotion*" as follows:

6 Meaning of promotion

In this instrument, a reference to a **promotion** is a reference to the ongoing assignment of duties to an ongoing APS employee at a classification that is in a higher classification group than the classification group that includes the employee's current classification, in the same or another Agency, other than:

- (a) the allocation of a higher classification within the same broadband in the same Agency; or
- (b) the allocation of an operational classification to a trainee.

Note: The following are not promotions:

- (a) following a voluntary temporary reduction in an ongoing APS employee's classification—the ongoing assignment of duties to the employee at the original classification;
- (b) the temporary assignment of duties to an APS employee at a higher classification than the employee's current classification.

As a result of further searches conducted by staff of the Court applying the definition of “promotion” extracted above, it became apparent that the written compilation originally provided to you in response to Part 4 of your FOI request included information about Court employees who were not, in accordance with the relevant definition, “promoted” to SES positions in the Court. For this reason, I have decided to issue a new written compilation to you containing the information sought. That new written compilation accompanies this decision and applies the definition of “promotion” extracted above to Part 4 of your FOI request. As I will discuss in more detail below, the written compilation excludes material that I have determined is conditionally exempt under ss 47E and 47F of the FOI Act and would, on balance, be contrary to the public interest to disclose under s 11A(5) of the FOI Act.

Conditional exemption – operations of an agency

In relation to the conditional exemption contained in s 47E of the FOI Act, I agree with the original decision-maker that the names and employment dates of SES officers are conditionally exempt under both ss 47E(c) and 47E(d) of the FOI Act. The relevant provisions of the FOI Act and FOI Guidelines are set out in the original FOI decision, so I will not repeat them here.

For the conditional exemption contained in s 47E(c) to apply, the material must relate to either the “management of personnel”¹ or the “assessment of personnel”². I am satisfied, as the original decision-maker was, that the names and employment dates of the relevant SES officers relate to the “management of personnel”, in the sense of being information about SES officers who were recruited or promoted by the Court and being information regarding the terms of employment of those officers.

In relation to the conditional exemption contained in s 47E(d) of the FOI Act, I find that disclosure of the names and dates of employment of SES officers would bear on the “proper and efficient conduct of the operations”³ of the Court in the sense that the relevant SES officers, many of whom are Registrars of the Court, play a vital role in the management of the Court's administrative affairs as well as the exercise of the Court's substantive judicial function, all of which has a direct impact on the Court's “proper and efficient” conduct of operations.

¹ See paragraph 6.114 of the FOI Guidelines.

² Ibid.

³ Section 47E(d) of the FOI Act.

I also note the guidance contained in paragraph 6.123 of the FOI Guidelines that the conditional exemption in s 47E(d) does not apply to documents that reveal “*unlawful activities or inefficiencies*”. Despite the allegations contained in your internal review request, I find that the disclosure of the names and dates of employment of SES officers does not, in any way, reveal “*unlawful activities or inefficiencies*”⁴ and, therefore, I have decided that the conditional exemption contained in s 47E(d) remains applicable.

Turning to the question of whether disclosure of the documents would have a “*substantial adverse effect*”⁵ on the management and assessment of personnel by the Court, I find that the release of the documents would, or could reasonably be expected, to:

- destroy employees’ trust in the Court’s ability to protect their privacy and confidential information;
- discourage prospective job candidates from applying for roles at the Court due to the perceived inability of the Court to protect confidential employee information;
- cause considerable stress and anxiety for existing Court employees whose personal information is disclosed in response to your FOI request, resulting in a decline in the wellbeing and productivity of those employees;
- prejudice the protection of Court employees’ right to privacy generally, thus resulting in the curtailment of candid and open communication within the Court;
- in light of articles published in *The Australian* about the Court’s recruitment activities, adversely impact employee morale due to concerns that the personal information of Court employees will be again published in the media or elsewhere.

In particular, and as discussed by the original decision-maker, the effect of the disclosure of the names and employment dates of SES officers can be expected to be “*both substantial and adverse*”⁶ based on the history of similar FOI requests and the effect of those requests on the Court’s management of personnel and on the proper and efficient conduct of the Court’s operations. As outlined by the original decision-maker, a large volume of FOI requests by variously-named applicants have been made over recent months via the “Right to Know” website. Many of those requests, and accompanying online commentary, all of which are publicly-available via the “Right to Know” website, have included derogatory and offensive statements about named individuals which has caused stress, anxiety and harm to the individuals concerned. This evidences the substantial adverse effect that disclosure would, or could reasonably be expected to, have on the Court with respect to ss 47E(c) and 47E(d). Furthermore, as pointed out by the original decision-maker, the Court has obligations under the *Work Health and Safety Act 2011* (Cth) to provide its employees with a safe and secure workplace. This is imperative to the Court’s effective management of its personnel and to the proper and efficient conduct of the Court’s operations.

For all of the reasons outlined above, I have decided that the names and employment dates of SES officers are conditionally exempt under ss 47E(c) and 47E(d) of the FOI Act.

I will discuss below whether disclosure of those documents would also be contrary to the public interest under s 11A(5).

⁴ Paragraph 6.123 of the FOI Guidelines.

⁵ Section 47E of the FOI Act.

⁶ Paragraph 6.113 of the FOI Guidelines.

Conditional exemption – personal privacy

I have determined that the names and employment dates of the SES officers captured within the scope of your FOI request are conditionally exempt under s 47F of the FOI Act because their release would involve “*the unreasonable disclosure of personal information*”.⁷ As the relevant provisions of the FOI Act and FOI Guidelines are extracted in the original FOI decision, I do not propose to extract them again here.

As outlined in the original FOI decision, the names of SES officers are clearly “*personal information*” as defined in the FOI Act and *Privacy Act 1988* (Cth). The dates of employment of SES officers are also “*personal information*” as such dates can be used to identify the individuals concerned, especially when linked with other publicly-available information. Therefore, the employment dates provide information about individuals who are “*reasonably identifiable*”⁸ and, on this basis, constitute “*personal information*” under the FOI Act.

In relation to whether it would be unreasonable to disclose the “*personal information*” under s 47F of the FOI Act, I agree with the original decision-maker that “*special circumstances*”⁹ exist in relation to the information you have requested. As noted in the original FOI decision, paragraph 6.153 of the FOI Guidelines explains that where the personal information of public servants is included in a document because of their usual duties and responsibilities, it is not unreasonable to disclose the information unless special circumstances exist. In relation to the release of public servants’ names and other personal details, previous decisions of the Australian Information Commissioner have found “*special circumstances*” to exist in situations where public servants “*have been subject to abuse and threats from various persons and organisations*”¹⁰ and where “*a significant proportion of the accusations against the [relevant public servants] were unsubstantiated*”.¹¹ I find these past decisions to be applicable to the present circumstances.

As outlined in the original FOI decision, your FOI request, along with a large number of similar FOI requests, was made to the Court via the “Right to Know” website. All FOI requests made via this website, as well as FOI decisions responding to each request and commentary posted on the website by FOI applicants and others, are accessible to the public. The website has been utilised to publish offensive comments, unsubstantiated allegations and, at times, threats in relation to officers of the Court, including officers whose personal details fall within the scope of your FOI request. The publication of this material has had a significantly harmful impact on the health and wellbeing of the individuals concerned. In this context, I find that “*special circumstances*” do exist in relation to the names and dates of employment of the relevant SES officers and that, in such circumstances, the information would be unreasonable to disclose.

In addition to the above, and as discussed in the original FOI decision, the consultations conducted by the original decision-maker under s 27A of the FOI Act revealed that many of the relevant SES officers strongly objected to the release of their personal information for reasons including that disclosure would prejudice their right to privacy and would have an adverse effect on them. As pointed out in the original FOI decision, given that many of the

⁷ Section 47F(1) of the FOI Act.

⁸ See definition of “*personal information*” contained in s 6 of the *Privacy Act 1988* (Cth)

⁹ See paragraph 6.153 of the FOI Guidelines.

¹⁰ *Construction, Forestry, Mining and Energy Union and Australian Building and Construction Commission (Freedom of information)* [2017] AICmr 125 (1 December 2017) at [105]

¹¹ *Besser and Attorney-General’s Department* [2013] AICmr 12 at [30]

relevant SES officers are Registrars, disclosure of the personal information also generates safety and security risks given the nature of the role of Registrars of the Court, which includes the exercise of judge-delegated functions.

For all of the reasons outlined above, I have decided that disclosure of the names and employment dates of SES officers that fall within the scope of your FOI request would be an “*unreasonable disclosure of personal information*” and that such information is, therefore, conditionally exempt under s 47F of the FOI Act.

I will discuss the application of the public interest test under s 11A(5) below.

Public interest test

In light of my findings above regarding the names and employment dates of SES officers being conditionally exempt under ss 47E and 47F of the FOI Act, I must now consider whether, on balance, it would be contrary to the public interest under s 11A(5) of the FOI Act to give you access to the information at this time. For the reasons outlined below, I have determined that, on balance, disclosure of the information would be contrary to the public interest. I note that the original FOI decision included extracts from the relevant legislation, guidelines and case law, which I will not extract again here.

Subsection 11B(3) of the FOI Act requires me to take certain factors into account when applying the public interest test, while s 11B(4) provides a list of irrelevant factors that I must not take into account when applying the public interest test. I have complied with these obligations in making my decision. I also note that the FOI Guidelines, at paragraphs 6.19 and 6.22, provide guidance regarding factors that favour disclosure and factors that weigh against disclosure. I have adopted this guidance in making my decision.

In relation to the factors favouring disclosure, I accept that the release of names of SES officers might broadly promote the objects of the FOI Act by giving the Australian community access to information held by public sector agencies and enhancing “*scrutiny, discussion, comment and review*”¹² of public sector activities. However, I reject your claim that the allegations published on the “Right to Know” website and in *The Australian* mean that there is public interest in knowing the names and employment details of the Court’s SES officers. The allegations made via those two sources remain unsubstantiated and, furthermore, some of the SES officers captured by your FOI request have not yet been the subject of any allegations though may, in future, be the subject of allegations if their names were to be released. Furthermore, the weight to be accorded to this factor must be reduced in circumstances where some of the allegations you have referred to in your internal review request relate to an APSC investigation conducted pursuant to the PID Act which is subject to the confidentiality regime established by the PID Act. The weight to be accorded to this factor must also be limited in circumstances where a Commonwealth Ombudsman investigation is underway concerning that APSC investigation and is yet to be finalised.

While I accept that disclosure of the names and dates of employment of SES officers may go some way to promoting the objects of the FOI Act, there are several factors weighing against disclosure, some of which have already been discussed. In particular, the names and dates of employment would clearly identify the relevant SES officers and, if released, would harm the

¹² Paragraph 3(2)(b) of the FOI Act.

interests of the individuals concerned, as well as jeopardising the health and safety of these individuals by putting them at risk of being the subject of further unsubstantiated allegations and, potentially, offensive comments and threats. Furthermore, the release of the relevant information would have a substantial adverse impact on the Court's ability to protect employee privacy and maintain a safe and secure workplace, thus negatively impacting the Court's management of its personnel and the proper and efficient conduct of the Court's operations.

The original FOI decision included a list of factors that the decision-maker determined were factors weighing against disclosure of the names and employment dates of SES officers. I will not re-identify each of these factors here, but I note that I have carefully reviewed the factors and agree with the original decision-maker that all factors listed should be accorded considerable weight, particularly in relation to the harm that disclosure would cause to the relevant individuals.

After balancing all of the factors that favour and disfavour disclosure, I have decided that the benefit to the public resulting from disclosure is outweighed by the benefit to the public in not disclosing the information. On this basis, I have decided that disclosure of the names and employment dates of the relevant SES officers would, on balance, be contrary to the public interest and that access should therefore be refused.

Access Format

As discussed earlier in this decision, I have determined that it is appropriate to issue you with a new written compilation of the information sought which applies the definition of "promotion" contained in s 6 of the *Australian Public Service Commissioner's Directions 2022*. That written compilation excludes the names and dates of employment of SES officers, which I have decided are conditionally exempt under ss 47E and 47F of the FOI Act and would, on balance, be contrary to the public interest to disclose under s 11A(5) of the FOI Act.

The new written compilation accompanies this decision and, given your internal review request asks that the email address foi+request-8790-691f3b01@righttoknow.org.au be used for all replies to your request, I have decided to provide the written compilation to you in PDF format and release it to you via that email address.

Your review rights

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. 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/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

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

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner 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

A handwritten signature in black ink, appearing to be 'C Hammerton Cole', written in a cursive style.

C Hammerton Cole
Registrar