



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

Stephanie

By email: [foi+request-9381-8dacf2ea@righttoknow.org.au](mailto:foi+request-9381-8dacf2ea@righttoknow.org.au)

Our reference: LEX 354

Dear Stephanie,

**Freedom of Information request**

1. I am writing about your 22 October 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 16 September 2022, you requested access to documents in the following terms:

*a) any and all documents in the possession of the APSC in relation to selection process that saw Colin Campbell promoted from an Executive Level 2 classified role to fill an SES Band 2 “Senior Registrar” vacancy (see Promotion Notice OC-031524); and*

*b) any and all certifications in the possession of the APSC issued under either s 21 of the Australian Public Service Commissioner’s Directions 2016 or s 26 the Australian Public Service Commissioner’s Directions 2022 by the Australian Public Service Commissioner’s representatives who participated in selection processes for the SES Band 2 “Senior Registrar” vacancy.*

*You are welcome to redact the Australian Public Service Commissioner’s representatives’ signatures from the certificates.*

4. On 19 October 2022, Ms Charmaine Sims, General Counsel, responded to your request.
5. Ms Sims advised you in her decision letter that the Commission had identified 19 documents exclusively in scope of Part (a) of your request, and 2 documents in scope of both Part (a) and Part (b) of your request.

6. Of the 21 total documents, Ms Sims decided to:
  - grant full access to one document, being Document 6;
  - grant part access to 3 documents, being Documents 4c, 5b, and 7, on the basis they were exempt in part; and
  - refuse access to 17 documents, being Documents 1, 1a, 1b, 2, 2a, 3, 4, 4a, 4b, 4d, 4e, 4f, 4g, 5, 5a, 5c, and 5d, on the basis they were exempt in full.
7. On 22 October 2022, you requested internal review of Ms Sims' decision on the grounds that the Commission incorrectly applied both conditional exemptions (sections 47E and 47F) on the 17 documents that were exempt in full.

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

8. I am authorised under subsection 23(1) of the FOI Act to make FOI internal review decisions.
9. 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 Sims' decision. Internal review is a merit review process and I may exercise all the powers available to the original decision maker.
10. I have decided to vary Ms Sims' decision in relation to 9 of the 17 documents and grant you access to:
  - 8 documents in part, being Documents 1a, 1b, 2, 3, 4b, 4g, 5, and 5a; and
  - one document in full, being Document 2a.
11. I have decided to affirm Ms Sim' decision in relation to 8 of the 17 documents, being Documents 1, 4, 4a, 4d, 4e, 4f, 5c, and 5d.
12. A Schedule of Documents is provided in **Attachment A**.
13. My reasons are set out in **Attachment B**.

### **Contacts**

14. If you require clarification on matters in this letter please contact the Commission's FOI Officer by telephone on (02) 6202 3720 or by email at [foi@apsc.gov.au](mailto:foi@apsc.gov.au).

### **Review rights**

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Clare McLean', written in a cursive style.

Clare McLean

Authorised FOI decision maker

18 November 2022

## ATTACHMENT A

### SCHEDULE OF DOCUMENTS

Document	Description	Exemptions
1	Email chain between Federal Court and Commission dated 13 December 2019	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
1a	Attachment 1a	Released in part. Section 47F (personal privacy) of the FOI Act applies.
1b	Attachment 1b	Released in part. Sections 42 (legal professional privilege) and 47F (personal privacy) of the FOI Act applies.
2	Email chain between Federal Court and the Commission dated 14 April 2020 - 5 May 2020	Released in part. Section 47F (personal privacy) of the FOI Act applies.
2a	Attachment 2a	Released in full.
3	Email chain between Federal Court and the Commission dated 14 April 2020 - 5 May 2020	Released in part. Section 47F (personal privacy) of the FOI Act applies.
4	Email from Federal Court to the Commission dated 23 June 2020	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
4a	Attachment 4a	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
4b	Attachment 4b	Released in part. Section 47F (personal privacy) of the FOI Act applies.
4d	Attachment 4d	Exempt in full.

		Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
4e	Attachment 4e	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
4f	Attachment 4f	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
4g	Attachment 4g	Released in part. Section 47F (personal privacy) of the FOI Act applies.
5	Email from Federal Court to the Commission dated 22 December 2020	Released in part. Section 47F (personal privacy) of the FOI Act applies.
5a	Attachment 5a	Released in part. Section 47F (personal privacy) of the FOI Act applies.
5c	Attachment 5c	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.
5d	Attachment 5d	Exempt in full. Sections 47E (certain operations of agencies) and 47F (personal privacy) of the FOI Act applies.

## ATTACHMENT B

### Reasons for decision

1. The following paragraphs outline my reasons for determining the specified exemptions set out in **Attachment A** for the documents falling within scope of your request.
2. In making my decision on your internal review, I have had regard to:
  - the terms of your request and your submissions;
  - the nature and content of the document that falls within the scope of your request;
  - the relevant provisions of the FOI Act and case law considering those provisions; and
  - FOI Guidelines issued by the Australian Information Commissioner (**the FOI Guidelines**).
3. 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 42 of the FOI Act – legal professional privilege*

4. Subsection 42(1) of the FOI Act exempts a document if it would be exempt from production in legal proceedings on the grounds of legal professional privilege. A document is exempt from production on the grounds of legal professional privilege if all of the following apply:
  - there exists a lawyer-client relationship;
  - there have been confidential communications which are recorded in the document;
  - the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
  - the privilege has not been waived.
5. Legal privilege applies in respect of confidential communications between a solicitor and a client made for the dominant purpose of giving or receiving legal advice and to documents produced for the dominant purpose of being used in actual litigation or litigation that is reasonably anticipated. It also extends to any documents which either directly reveal, or would allow a reader to infer, the nature, content, or substance of a confidential communication.

6. A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. This will depend on the circumstances, including whether the disclosure was for any advantage.
7. Subsection 42(2) of the FOI Act provides that a document is not exempt because of subsection 42(1) if the person entitled to claim legal professional privilege for production of the document in legal proceedings waives that claim.
8. I consider Document 1b contains a reference to legal advice relating to recruitment practices of the Federal Circuit and Family Court of Australia (FCFCOA).
9. Accordingly, I have decided the relevant section of the document containing a reference to legal advice is exempt from disclosure.

***Section 47E of the FOI Act – Certain operations of agencies***

10. Subsection 47E(c) of the FOI Act provides 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.
11. The Guidelines provide at paragraph 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; or
  - the assessment of personnel - including the broader performance management policies and activities concerning the competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.
12. Paragraph 6.116 of the Guidelines goes on to state that the decision maker may consider ‘the context of the document and the integrity of a system that may require those documents.’
13. As set out below, I consider Documents 1, 4, 4a, 4d, 4e, 4f, 5c, and 5d contain sensitive information relating to recruitment processes of the FCFCOA and the ‘management of personnel’ within the meaning of paragraph 47E(c) of the FOI Act. This includes an email trail containing a large excerpt of communication from the Australian Public Service Commissioner to Agency Heads that is not in the public domain, and an email with attachments containing selection committee reports and curricula vitae of job candidates.
14. I consider release of these documents relating to the FCFCOA’s recruitment processes leading to the decision to appoint a person to the FCFCOA would, or could, reasonably be expected to have a substantial adverse effect on the management of personnel by the FCFCOA by destroying the trust in the confidentiality and integrity of the recruitment processes of the FCFCOA.

15. These documents are closely connected with and form part of the relevant recruitment processes and management of personnel by the FCFCOA. The disclosure of these documents in the context of these recruitment processes would likely make it more difficult to attract high quality candidates for future recruitment processes.
16. In addition, disclosure of these documents is likely to create a substantial adverse effect on the trust and morale of existing employees at the FCFCOA. This stems from the fact that employees would have every expectation that details of the FCFCOA's recruitment processes, in particular documents such as selection committee reports and curricula vitae remain confidential.
17. Further, I consider release of Document 1 in particular will create a substantial adverse effect the Commission's operations, which include critical functions under the *Public Service Act 1999* to hold the integrity of the APS. This includes, but is not limited to, supporting quality public service workforce management and building leadership and public service capability, and fostering trust in public service integrity by providing advice to HR practitioners across the APS. There is every expectation that certain advice relating to recruitment matters, particularly when provided by the Commissioner to Agency Heads, remains confidential.
18. For the reasons above, I consider the documents are conditionally exempt from disclosure in full under subsection 47E(c) of the FOI Act.

#### Sections 11A and 11B – public interest test

19. Subsection 11A(5) of the FOI Act provides that an agency must give access to a 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.
20. I had regard to the public interest factors set out in section 11B of the FOI Act and accept that disclosure of the conditionally exempt material might broadly promote the objects of the FOI Act by providing the Australian community access to information held by the Government.
21. The FOI Act does not list any factors weighing against disclosure. However, the FOI Guidelines provide non-exhaustive list of factors that could be relevant and clarify that factors weighing against disclosure will depend on the circumstances.
22. I consider the following factors as weighing against disclosure:
  - disclosure could prejudice the FCFCOA's ability to obtain confidential information;
  - disclosure could prejudice the FCFCOA's ability to obtain similar information in the future;
  - disclosure could harm the interests of an individual or group of individuals;
  - disclosure could prejudice the management function of the FCFCOA; and
  - disclosure could prejudice the confidentiality and integrity of future recruitment processes of the FCFCOA.

23. As noted above, these documents relate to the FCFCOA's recruitment process. In particular, I consider there is a strong public interest in maintaining the confidentiality of selection committee reports and curricula vitae, noting the staff of the FCFCOA, and the Australian community generally, would have every expectation that such documents would not be released.
24. 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.
25. On balance, I find that the public interest factors against disclosure outweigh the public interest factors favouring disclosure.

### ***Section 47F of the FOI Act – personal information***

26. 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.
27. 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.
28. I consider all 17 documents contain personal information of public servants.
29. I consider 9 of these documents (being Documents 1, 1a, 1b, 2, 3, 4b, 4g, 5, and 5a) contain names, certain position titles, and emails of non-SES level staff of the Commission and FCFCOA, and/or direct phone numbers of staff at all levels.
30. I consider 7 of these documents (being Documents 4, 4a, 4d, 4e, 4f, 5c, and 5d consisting of selection committee reports and curricula vitae) contain personal information of senior and judicial staff members of the FCFCOA.
31. 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].
32. In considering what is unreasonable, the Administrative Appeals Tribunal 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.”*

33. The FOI Guidelines further provide, at paragraph 6.143:

*“As discussed in the leading s 47F IC review decision of ‘FG’ and National Archives of Australia [2015] AICmr 26, other factors considered to be relevant include:*

- 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 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 public interest in government transparency and integrity.”*

34. I have had regard to relevant case law and the matters in subsection 47F(2) of the FOI Act and consider the release of certain personal information of public servants contained in 16 of the 17 documents would be unreasonable because:

- the information is unique and relates specifically to the individual, and generally not well known or publicly available;
- it is likely the individuals concerned would not wish for the information to be disclosed without their consent;
- disclosure of the information would have an adverse effect on the health and wellbeing of the individuals concerned. In particular, it could expose the individuals to unsolicited and inappropriate approaches by external parties, despite the existence of more appropriate channels designed specifically for receiving and actioning general calls and enquiries;
- no public purpose or interest in increasing transparency of government would be achieved through the release of the information; and
- the disclosure of this information will not advance scrutiny of any decisions falling within scope of your FOI request, particularly with regard to staff who are not relevant decision-makers and non-SES level staff who are acting under the direction of senior staff within relevant agencies in the course of their ordinary duties.

35. In light of the above factors, I have decided that to the extent Documents 1, 1a, 1b, 2, 3, 4b, 4g, 5, and 5a contain names, certain position numbers and emails of non-SES level staff, and/or direct phone numbers of all staff, these parts are conditionally exempt from disclosure under section 47F of the FOI Act.
36. I have also decided that certain parts of Documents 4, 4a, 4d, 4e, 3f, 5c, and 5d contain personal information of senior and judicial staff members in selection committee reports and curricula vitae, these parts are conditionally exempt from disclosure under section 47F of the FOI Act. Given I have conditionally exempted these documents in full under subsection 47E(c), I have not elaborated further on which specific parts of these documents I consider to be conditionally exempt under section 47F.

#### Sections 11A and 11B – public interest test

37. Subsection 11A(5) of the FOI Act provides that an agency must give access to a 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.
38. I had regard to the public interest factors set out in section 11B of the FOI Act and accept that disclosure of the conditionally exempt material might broadly promote the objects of the FOI Act by providing the Australian community access to information held by the Government.
39. The FOI Act does not list any factors weighing against disclosure. However, the FOI Guidelines provide a non-exhaustive list of factors that could be relevant and clarify that factors weighing against disclosure will depend on the circumstances.
40. I consider the following factors as weighing against disclosure:
- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
  - disclosure could lead to unwarranted approaches to public servants which would adversely impact their ability to perform their role and functions, noting that general inquiry phone numbers and email addresses are available;
  - there is a public interest in APS employers satisfying their obligations under the *Work Health and Safety Act 2011* by preventing APS staff members from exposure to potential harassment or threats in a public forum; and
  - disclosure of certain personal information will not advance any scrutiny of any decisions falling within scope of your FOI request.
41. I have not had regard to any irrelevant factors as set out in subsection 11B(4) of the FOI Act.
42. I consider that the public interest factors against disclosure significantly outweigh the public interest factors favouring disclosure.

43. Accordingly, I am satisfied that disclosure of the conditionally exempt material contained in 16 of the 17 documents is contrary to the public interest.
44. Based on the reasoning above, I am satisfied the Commission has taken appropriate steps in processing your request under the FOI Act and reasonably applied exemptions to the 16 documents.

## **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)