



Australian Government
Australian Public Service Commission

L Marsten

By email: foi+request-9533-5f1f4356@righttoknow.org.au

Our reference: LEX 361

Dear L Marsten

Freedom of Information request

1. I am writing about your Freedom of Information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) made on 5 November 2022 for access to documents held by the Australian Public Service Commission (Commission).
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au

Documents relevant to your request

3. You requested access to documents in the following terms:

Under the FOI Act, I request access to the particulars of the report on the operations of the APSC by the Commonwealth Ombudsman in respect of the investigation conducted by the Office of the Commonwealth Ombudsman into correspondence sent to the management of Right to Know by legal counsel at the APSC.

4. The context you provided for the scope of your request was:

On 26 October 2020 an article was published on the website of the Guardian Australia.

The article was written by Christopher Knaus. The title of the article is “Key federal agency cleared of intimidating FOI website Right to Know”. The article can be accessed here:

www.theguardian.com/australia-news/2020/oct/27/key-federal-agency-cleared-of-intimidating-foi-website-right-to-know.

The article

The article is set out below:

An investigation has cleared one of Australia's leading federal government agencies of threatening and intimidating a volunteer-run transparency website that hosted freedom of information documents about its former boss.

The Guardian revealed earlier this year that the Australian Public Service Commission's chief legal counsel had written to the not-for-profit Right to Know website last October, demanding it remove "defamatory material".

Right to Know hosts FOI documents and associated correspondence in an effort to improve government transparency.

The warning concerned FOI correspondence about the former APSC commissioner John Lloyd and his well-known dealings with the rightwing Institute for Public Affairs, of which he is a former director.

The applicant, an anonymous user named Fliccy, had become frustrated by the agency's repeated delays and refusals to release documents. They named individual public servants, accused them of failing to comply with FOI law and alleged more serious corruption and misconduct.

The APSC warned Right to Know that by hosting the correspondence between Fliccy and the agency, it was publishing "defamatory material" that included "false and unsubstantiated allegations" against its public servants.

"We request that you immediately remove the following defamatory posts from your website," the letter said.

The letter was marked "OFFICIAL: Sensitive legal privilege" and highlighted a recent court decision that found website owners could be held liable for material published on their sites by third parties.

The APSC has strenuously denied it intended to convey a threat to the Right to Know volunteers.

Following the Guardian's story, an unidentified public servant complained to the commonwealth ombudsman, alleging the APSC's conduct in writing the letter had amounted to legal misconduct.

The commonwealth cannot sue for defamation, either on behalf of itself or individual public servants, and the complaint argued that the APSC's letter breached rules against improperly invoking the coercive powers of a court and threatening proceedings without proper basis.

The complaint argued the use of the marking "legal privilege" showed the APSC intended to "convey a legal threat of litigation".

The ombudsman investigated the complaint but earlier this month found that the APSC had not intended to threaten or intimidate the website.

“The investigator does not accept that [the author of the letter] was making a threat – actual or implied – that the agency could, or would, itself instigate legal proceedings on the behalf of the three named employees,” the ombudsman’s report said.

The ombudsman found it was not unreasonable for the APSC to alert the website to “the potential risk of legal liability”.

The ombudsman found that the APSC’s course of action had actually avoided the need for the individual employees to take court action, and that the letter did “not seem unreasonable or indicative of an intention to intimidate”.

“That is, by seeking [the website’s] agreement to remove certain material without the need for the three individuals to resort to (possible) personal legal remedies,” the report said.

The ombudsman did find that the use of the “legal privilege” marker may have been “misguided” but found the author’s explanation for using that marker was plausible.

“In any case, the investigator considers that a marker without the words ‘legal privilege’ should have been used.”

The ombudsman’s office said it was unable to comment on the complaint, which was made under the Public Interest Disclosure Act. It noted that “public interest disclosures are subject to the secrecy provisions of the Public Interest Disclosure Act”.

The APSC said it welcomed the ombudsman’s report and its findings.

The complainant said the decision effectively told all public servants that, should they find a publication they disagreed with or believed to be defamatory, they could use the resources of the commonwealth to contact the author and warn them they would be held liable for defamation if it was not removed.

FOI request

According to section 17AD(d) of the Public Governance, Performance and Accountability Rule 2014 (Cth):

an annual report for a non-corporate Commonwealth Entity (like the Australian Public Service Commission) for a reporting period must include information on the management and accountability of the entity for the period in accordance with section 17AG of the Public Governance, Performance and Accountability Rule 2014 (Cth).

According to section 17AG(3)(b)(iii) of the Public Governance, Performance and Accountability Rule 2014 (Cth):

the annual report must include information on the most significant developments during the period in external scrutiny of the entity, and the entity’s response to that scrutiny, including particulars of any report on the operations of the entity given during the period by the Commonwealth Ombudsman.

The Commonwealth Ombudsman provided the APSC with a report on the operations of the APSC in respect of correspondence sent to the management of Right to Know by the APSC's legal counsel.

I have reviewed the APSC's annual reports and have not been able to identify the particulars of any report on the operations of the APSC by the Commonwealth Ombudsman in respect of the investigation conducted by the Office of the Commonwealth Ombudsman into correspondence sent to the management of Right to Know by legal counsel at the APSC."

5. On 8 November 2022, the Commission undertook an informal consultation with you to clarify or revise the scope of your request.
6. On that same day, you clarified the scope of your request as follows:

I have not requested "the Public Interest Disclosure (PID) report relating to correspondence sent to the management of Right to Know by legal counsel at the Commission.

I have requested access to the "particulars of the report on the operations of the APSC by the Commonwealth Ombudsman in respect of the investigation conducted by the Office of the Commonwealth Ombudsman into correspondence sent to the management of Right to Know by legal counsel at the APSC", such particulars being a necessary inclusion in the annual report of the Australian Public Service Commission under section 17AG(3)(b)(iii) of the Public Governance, Performance and Accountability Rule 2014 (Cth).

Decision on your FOI request

7. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
8. I am satisfied that all reasonable steps have been taken to find documents within scope of your request, and that no such documents meeting the description of what you have asked for can be found or exist.
9. As such, I refuse your request for access to documents pursuant to section 24A of the FOI Act.

Reasons for decision

Section 24A – documents that cannot be found or do not exist

10. Subsection 24A(1) of the FOI Act provides:

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document; and
 - (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency or Minister's possession but cannot be found; or
 - (ii) does not exist.

11. The Office of the Australian Information Commissioner (OAIC) has issued guidelines pursuant to section 93A of the FOI Act. At paragraphs 3.88 to 3.93 of these guidelines, the OAIC provides guidance as to the meaning of the term 'all reasonable steps' in subsection 24A(1).
12. Having regard to OAIC's guidance, I have taken into account the subject matter of your request and consulted with colleagues in the Governance and Parliamentary Team within the Commission. The Governance and Parliamentary Team is responsible for producing the Commission's annual reports.
13. The Director of the Governance and Parliamentary Team has advised me that there are no 'particulars of the report on the operations of the APSC by the Commonwealth Ombudsman in respect of the investigation conducted by the Office of the Commonwealth Ombudsman into correspondence sent to the management of Right to Know by legal counsel at the APSC' contained in the Commission's 2017-18, 2018-19, 2019-20, 2020-21, and 2021-22 financial year annual reports.
14. Accordingly, I have decided to refuse your request for access under section 24A of the FOI Act.

Additional information

15. Your request states any 'particulars of the report on the operations of the APSC by the Commonwealth Ombudsman in respect of the investigation conducted by the Commonwealth Ombudsman into correspondence sent to the management of Right to Know by legal counsel at the APSC' are a necessary inclusion in the Commission's annual reports under subparagraph 17AG(3)(b)(iii) of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule).
16. The Commission is of the view subparagraph 17AG(3)(b)(iii) of the PGPA Rule does not apply to findings of PID investigations by the Commonwealth Ombudsman. In fact, it would be highly unusual (and contrary to policy intent behind the PID scheme) for the Commission (or any agency) to reference findings and recommendations of PID investigations conducted by the Commonwealth Ombudsman in the 'External Scrutiny' section of their annual reports.
17. The PID scheme promotes integrity and accountability across the Commonwealth public sector and provides a protected space for all current and former public officials (disclosers) to make disclosures relating to suspected wrongdoing or misconduct. Findings and recommendations arising from the Commonwealth Ombudsman's PID investigations are generally provided to the agency's executive and relevant team for consideration.
18. Further, the Commission notes that the Commonwealth Ombudsman, as part of its functions, is required to report on PIDs in their annual report. This is done at a very high level given the secrecy provisions in the PID Act.

Contacts

19. If you require clarification on matters in this letter please contact the Commission's FOI Officer by telephone on (02) 6202 3500 or by email at foi@apsc.gov.au

Review rights

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

Yours sincerely

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

Clare McLean

Authorised FOI decision maker

5 December 2022

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission; and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au
Post: The FOI Officer
 Australian Public Service Commission
 B Block, Treasury Building
 GPO Box 3176
 Parkes Place West
 PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (the OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application:**

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au