



Australian Government
Australian Public Service Commission

Andorra Loom

By email: foi+request-9598-039ef005@righttoknow.org.au

Our reference: LEX 373

Dear Andorra

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 22 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. On 22 November 2022, you requested access to documents in the following terms:

“I am seeking all correspondence between the Commission and the Government relating to the announcement of a new interim workplace relations policy by the Minister for Finance, Senator the Hon Katy Gallagher.

I am not seeking drafts of the above documents.”

4. On 13 December 2022, you agreed to extend the timeframe for providing a response to your request until 10 January 2023.
5. On 18 January 2023, the Office of the Australian Information Commissioner (the OAIC) granted a further extension for providing a response to your request until 9 February 2023.
6. I have identified 27 documents in scope of your request.

Decision

7. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
8. I have decided to:
 - grant access in full to Documents 6b, 6c and 6d; and
 - grant partial access to Documents 1 – 6a and Documents 7 – 27 because I consider parts of the documents are exempt.

9. **Attachment A** sets out the grounds, where applicable, on which the documents are exempt.

10. My reasons are set out in **Attachment B**.

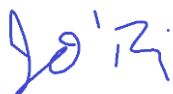
Contacts

11. 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.

Review rights

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

Yours sincerely



James O'Reilly

Authorised FOI decision maker

9 February 2023

ATTACHMENT A**SCHEDULE OF DOCUMENTS**

Document	Exemption
1	Released in part. Section 47F (personal privacy) of the FOI Act applies.
2	Released in part. Section 47F (personal privacy) of the FOI Act applies.
3	Released in part. Section 47F (personal privacy) and section 34 (Cabinet documents) of the FOI Act applies.
4	Released in part. Section 47F (personal privacy) and section 34 (Cabinet documents) of the FOI Act applies.
5	Released in part. Section 47F (personal privacy) and section 34 (Cabinet documents) of the FOI Act applies.
6	Released in part. Section 47F (personal privacy) of the FOI Act applies.
6a	Released in part. Section 34 (Cabinet documents) of the FOI Act applies.
6b	Released in full.
6c	Released in full.
6d	Released in full.
7	Released in part. Section 47F (personal privacy) of the FOI Act applies.
8	Released in part. Section 47F (personal privacy) of the FOI Act applies.
9	Released in part. Section 47F (personal privacy) of the FOI Act applies.
10	Released in part. Section 47F (personal privacy) of the FOI Act applies.
11	Released in part. Section 47F (personal privacy) of the FOI Act applies.
12	Released in part. Section 47F (personal privacy) of the FOI Act applies.
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16	Released in part. Section 47F (personal privacy) of the FOI Act applies.
17	Released in part. Section 47F (personal privacy) of the FOI Act applies.
18	Released in part. Section 47F (personal privacy) of the FOI Act applies.
19	Released in part. Section 47F (personal privacy) of the FOI Act applies.
20	Released in part. Section 47F (personal privacy) of the FOI Act applies.
21	Released in part. Section 47F (personal privacy) of the FOI Act applies.
22	Released in part. Section 47F (personal privacy) of the FOI Act applies.

23	Released in part. Section 47F (personal privacy) of the FOI Act applies.
24	Released in part. Section 47F (personal privacy) of the FOI Act applies.
25	Released in part. Section 47F (personal privacy) of the FOI Act applies.
26	Released in part. Section 47F (personal privacy) of the FOI Act applies.
27	Released in part. Section 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 I have had regard to:
 - the terms of your request;
 - the contents of the documents;
 - the FOI Act; and
 - the FOI Guidelines issued by the Australian Information Commissioner (the Guidelines).

Section 34 of the FOI Act – Cabinet documents

3. Section 34 of the FOI Act provides that:
 - (1) A document is an exempt document if:
 - (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
 - (b) it is an official record of the Cabinet; or
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
 - (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.
 - (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
 - (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.
4. Paragraph 5.55 of the Guidelines provides that the Cabinet exemption in section 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet system) is not undermined. As public interest is implicit in the purpose of the exemption itself, the section 34 exemption is not subject to the public interest test.
5. I am satisfied that the material contained with Documents 3, 4, 5 and 6a contains Cabinet deliberations regarding the *Public Sector Interim Workplace Arrangements 2022*. To my knowledge, these deliberations have not been officially disclosed. For this reason, I consider the material within Documents 3, 4, 5 and 6a to be exempt from disclosure under subsection 34(3) of the FOI Act to the extent that the relevant material would reveal Cabinet deliberations.

6. Additionally, I am satisfied that the material in Document 6a contains an exact extract from a document that was submitted to Cabinet for consideration. Under Paragraph 5.72 of the Guidelines, a document that refers to a Cabinet meeting date or Cabinet document reference number contains an extract from a Cabinet document for the purposes for section 34(2) of the FOI Act. Further, the Guidelines provide that the section 34(2) exemption does not require that the decision maker be satisfied that disclosure would cause damage, it is enough that the document in question quotes any information from a document described in section 34(1).
7. For this reason, I consider the material in Document 6a that is an exact extract from a document that was submitted to the Cabinet for its consideration and brought into existence for the dominant purpose of submission for consideration by Cabinet, to be exempt from disclosure under subsection 34(2) of the FOI Act to the extent that it contains an extract from, a document to which subsection (1) applies.
8. I have had regard to the public statements made by Minister for the Public Service, Senator the Hon Katy Gallagher, in relation to the matter, and I do not consider that disclosure of Cabinet deliberations or Cabinet meeting dates and references contained in the Documents 3, 4, 5 and 6a have occurred. Accordingly, I am satisfied that Documents 3, 4, 5 and 6a are exempt from release in part under subsection 34(3) of the FOI Act. I am also satisfied that Document 6a is exempt from release in part under subsection 34(2) of the FOI Act.

Conditional exemptions

Section 47F – personal information

9. Section 47F of the FOI Act provides a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information of any person.
10. 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
 - whether the information or opinion is recorded in a material form or not.
11. I consider the nature of Documents 1 – 6 and 7 – 27, being documents relating to implementation and administration of the *Public Sector Interim Workplace Arrangements 2022*, contain personal information of both public servants and ministerial staff that is not publicly known or accessible. Specifically, the names and position details of non-SES level staff and ministerial staff, and the direct telephone numbers of staff at all levels.
12. I have had regard to the matters I must consider under subsection 47F(2) of the FOI Act in determining whether disclosure would involve the unreasonable disclosure of personal information.
13. 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:

...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... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

14. Other factors to be considered include the nature, age and current relevance of the information, any opposition to disclosure held by the person that the personal information relates to, and the circumstances of an agency's collection and use of the information ('FG' and *National Archives of Australia* [2015] AICmr 26 at [47]).
15. I note that in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020), Deputy President S A Forgie found (at [130]):

An individual may include his or her direct telephone number in correspondence directed to other persons. Unless published on an agency's website or made public in some other way, such as on a pamphlet or report available to the public, I consider that disclosure of an individual's telephone number in his or her place of employment is unreasonable. Its disclosure will provide an avenue by which others may choose to express their displeasure with the individual or with that for which he or she is responsible but its disclosure does not make any positive contribution to increasing public participation in Government processes or in increasing scrutiny, discussion, comment and review of the Government's activities.

16. In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines provide, at paragraphs 6.144 and 6.145:

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).

17. Relevant to personal information of certain 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: *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83].
18. I have identified the following factors that, in my view, do not support release of the personal information under section 47F of the FOI Act:
 - the individuals' personal information, in particular their names, will identify them;
 - the names, position details, direct work emails and work numbers of non-SES level staff and ministerial staff are generally not well known or publicly available;
 - the direct telephone numbers of SES staff are generally not well known or publicly available;

- it would prejudice the relevant individuals' right to privacy;
- the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;
- the disclosure of this information will not advance scrutiny of any decisions falling within the scope of your FOI request, particularly with regard to staff who are not the 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;
- the disclosure of this information could expose public servants to unsolicited and inappropriate approaches by external parties;
- the release of some of the individuals' personal information may cause stress for them or other detriment; and
- no public purpose or interest in increasing transparency of government would be achieved through the release of this personal information.

19. Considering the above factors, I strongly consider it would be unreasonable to disclose the personal information of non-SES level staff and ministerial staff, and the phone numbers of SES staff in the documents. Therefore, I have decided that to the extent Documents 1 – 6 and 7 – 27 include this type of personal information, those parts of the documents are conditionally exempt from disclosure under section 47F of the FOI Act.

Section 11B – public interest test

20. In relation to the personal information of both non-SES and SES level staff contained in Documents 1 – 6 and 7 – 27, I have considered the public interest factors in favour of disclosure at subsection 11B(3) of the FOI Act, including the extent to which access to the documents would promote the objects of the FOI Act and inform debate on a matter of public importance.

21. I have identified the following factors as weighing against disclosure:

- disclosure could be expected to interfere with the privacy of individuals;
- disclosure could prejudice the protection of the individuals' right to privacy;
- disclosure of certain personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
- 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; and
- there is a public interest in APS employers fulfilling their obligations under the *Work Health and Safety Act 2011*, in particular by preventing the exposure of staff members from potential harassment or threats in a public forum.

22. 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.

23. On balance, I find that the public interest factors against disclosure outweigh the public interest factors favouring disclosure.

24. Accordingly, I am satisfied that the conditionally exempt material contained in Documents 1 – 6, and 7 – 27 is contrary to the public interest.

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