



Australian Government
Australian Public Service Commission

V Champion

By email: foi+request-9867-67924904@righttoknow.org.au

Our reference: LEX 450

Dear V Champion

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 30 January 2023 for access to documents held by the Australian Public Service Commission (Commission).
2. On 1 February 2023, the Commission advised you that the timeframe for responding to your request was extended by 30 days under subsection 15(6) of the FOI Act to 31 March 2023.
3. 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

4. You requested access to documents on the following terms:

"I refer to the survey currently being conducted by the APSC in relation APS Bargaining. That survey was notified to members of the APS by way of an email sent by APSC Deputy Commissioner, Workplace Relations Bargaining Taskforce, Peter Riordan. The platform used to conduct the survey appears to be provided by Qualtrics.

Under the FOI Act, I request a copy of the contract entered into between the APSC (obo the Commonwealth) with the survey platform provide."

5. As part of your request, you consented to the exclusion of any fees and charges, and personal information of any person who was not, at the relevant time, a member of the APS or a statutory officer. This information has been excluded under section 22 of the FOI Act.
6. I have identified two (2) document in scope of your request.

7. Please be advised the Commission's contract with Qualtrics was made under the Cloud Services Panel arrangement which is managed by the Digital Transformation Agency (DTA). The Commission does not hold a copy of the Panel Head Agreement between DTA and Qualtrics.

Decision

8. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
9. I have decided to grant partial access to both documents because I consider parts of the documents are exempt under sections 47F and 47G of the FOI Act.
10. **Attachment A** sets out the grounds on which the documents are exempt.
11. My reasons are set out in **Attachment B**.

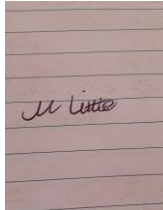
Contacts

12. 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

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

Yours sincerely

A photograph of a handwritten signature 'M Little' on a piece of lined paper. The signature is written in dark ink and is slightly slanted.

Mitchell Little

Authorised FOI decision maker

31 March 2023

SCHEDULE OF DOCUMENTS

Document	Description	Exemptions
1	Qualtrics Contract	Section 47F (personal privacy) and section 47G (business information) of the FOI Act applies.
2	Variation of Contract	Section 47F (personal privacy) of the FOI Act applies.

Reasons for decision

1. The following paragraphs outline my reasons for determining the specified exemptions set out in **Attachment A**.
2. In making my decision, I have had regard to:
 - the terms of your request;
 - the nature and content of the documents that fall within scope of your request;
 - the relevant provisions of the FOI Act and case law concerning those provisions;
 - submissions by Qualtrics received following formal third party consultation; and
 - FOI Guidelines issued by the Australian Information Commissioner.

Section 47F of the FOI Act – personal information

3. 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.
4. 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.
5. I consider both documents contain personal information of public servants. Document 1 contains the name and phone number of a non-SES level officer. Document 2 contains the name of a non-SES level officer and digital signatures of both a non-SES and SES level officer.
6. Relevant to 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: *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83].
7. With the substantial increase in electronic requests and related correspondence, a rise in anonymous applications as well as requests affecting the safety and wellbeing of employees, the Commission now assesses whether a disclosure of public servants' personal information in requests is unreasonable under section 47F of the FOI Act.
8. In considering what is unreasonable, the Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at [51] 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.”

9. 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.”*

10. 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 would be unreasonable because:

- the individuals’ personal information, in particular their names, will identify them;
- the individuals’ names, phone numbers and signatures are generally not well known or publicly available;
- the disclosure of this information will not advance scrutiny of any government decisions falling within the scope of your FOI request, particularly regarding non-SES staff who are not relevant decision-makers and act under the direction of senior staff within relevant agencies in the course of their ordinary duties;
- the release of some of the individuals’ personal information may cause stress for them or other detriment; and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

11. Considering the above factors, I have decided that to the extent the documents include personal information of non-SES staff members and digital signatures of SES staff members, those parts of the documents are conditionally exempt from disclosure under section 47F of the FOI Act.

Section 11A – public interest test

12. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless access to the document would, on balance, be contrary to the public interest.

13. I have considered the public interest exemption factors in favour of disclosure at subsection 11B(3) of the FOI Act, including the extent to which access to the document would promote the objects of the FOI Act and inform debate on a matter of public importance.
14. I acknowledge that there are factors that favour disclosure. Disclosure would:
- increase scrutiny, discussion, comment and review of the Government's activities; and
 - inform debate on a matter of public importance.
15. However, the public interest factors favouring disclosure must be balanced against any public interest factors against disclosure: *'ACF' and Australian Public Service Commission (Freedom of information)* [2022] AICmr 73 (31 October 2022) at [69].
16. I have identified the following factors as weighing against disclosure:
- disclosure of individuals' personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
 - disclosure would prejudice individuals' right to privacy;
 - disclosure could lead to unwarranted approaches to the non-SES staff member which would adversely impact their ability to perform their role and functions, noting that general enquiry 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.
17. 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.
18. On balance, I find disclosure of parts of the documents would be contrary to the public interest. To the extent the material contained in the documents is conditionally exempt under section 47F of the FOI Act, those parts are exempt from disclosure.

Section 47G of the FOI Act – business information

19. Section 47G of the FOI Act provides that a document is conditionally exempt if disclosure of information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking would, or could reasonably be expected to:
- affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
20. I have decided that disclosure of the relevant material in Document 1 would have an unreasonable adverse effect on the commercial or financial affairs of Qualtrics. The test of reasonableness applies not to the claim of harm but to the objective assessment of the

expected adverse effect. Notably, the operation of this business information exemption depends on the effect of disclosure, rather than the precise nature of the information itself.

21. The relevant material in Document 1 contains information that is confidential and commercially sensitive in nature. Specifically, it is information about how Qualtrics deliver their software and services. Qualtrics is currently known for providing experience management software and services, and the disclosure of this material would damage their competitiveness.
22. Disclosure of the relevant material would have an unreasonable adverse effect on the commercial or financial affairs of Qualtrics as it will expose this information to competitors. Competitors could leverage the information to mirror, or improve on the service-offering Qualtrics currently provides, thereby diminishing Qualtrics' competitive capabilities.
23. Considering the above factors, I have decided that to the extent Document 1 includes business information about Qualtrics, and processing this request would involve an unreasonable disclosure of business information about Qualtrics, those relevant parts of the documents are conditionally exempt from disclosure under section 47G of the FOI Act.

Section 11A – public interest test

24. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless access to the document would, on balance, be contrary to the public interest.
25. I have considered the public interest exemption factors in favour of disclosure at subsection 11B(3) of the FOI Act, including the extent to which access to the document would promote the objects of the FOI Act and inform debate on a matter of public importance.
26. I acknowledge that there are factors that favour disclosure. Disclosure would:
 - increase scrutiny, discussion, comment and review of the Government's activities; and
 - inform debate on a matter of public importance.
27. However, the public interest factors favouring disclosure must be balanced against any public interest factors against disclosure: *'ACF' and Australian Public Service Commission (Freedom of information)* [2022] AICmr 73 (31 October 2022) at [69].
28. I have identified the following factors as weighing against disclosure:
 - disclosure of the relevant material will reveal confidential and commercially sensitive information of Qualtrics and could reasonably be expected to prejudice the competitive commercial activities of Qualtrics; and
 - disclosure of this information could set a dangerous precedent for disclosure of confidential and commercially sensitive information contained in contracts between government and suppliers, and could impact the willingness of potential suppliers to apply for tenders in future.

29. 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.
30. On balance, I find disclosure of parts of the documents would be contrary to the public interest. To the extent the material contained in the documents is conditionally exempt under section 47G of the FOI Act, those parts are exempt from disclosure.

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) you may be able 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