

Dear FOI Contact Officer

OAIC ref: MR23/01428 | APSC ref: LEX 767

We refer to your notice of Information Commissioner Review (**IC Review**) and request for documents received on 19 December 2023.

The requested documents were provided on 10 May 2024 and we now provide our submissions in this matter. We thank you for your patience.

Scope of IC Review

1. This IC Review Application concerns an Internal Review (**IR**) decision made by Amanda Harmer of the Australian Public Service Commission (**the Commission**) on 27 October 2023.
2. During the IR stage, the Commission affirmed the original decision which found that no documents exist within scope of the Applicant's request pursuant to section 24A(1) of the *Freedom of Information Act (1982)* (**FOI Act**).
3. The Applicant's request was submitted through the Right to Know website on 30 August 2023, and sought access to the following documents from the Commission:

"[A]ny and all documents sent or received by, or prepared for, or prepared by, or made use of by each of:

a) Gordon de Brouwer,

b) Peter Woolcott,

c) Helen Wilson,

d) Rina Bruinsma,

e) Grant Lovelock,

f) Jo Talbot,

g) Charmaine Sims,

h) any occupants, whether in a substantive or acting capacity, of the role of Assistant Commissioner, Integrity, Performance and Employment policy,

in respect of inadequate investigations, or in respect of reports of inadequate investigations, relating to misconduct in the Australian Public Service, or any kinds of unlawful conduct by officials in the Australian Public Service (including agency heads and statutory office holders), from 1 January 2020 to 29 August 2023."

4. We understand the Applicant is seeking IC Review because they disagree with the Commission's finding that, despite reasonable steps being taken to find the requested documents, no documents falling within the scope of the applicant's request were found to exist (s 24A(1)).
5. In their Application for IC review, the Applicant submitted:

The decision is wrong because the statement that there are no documents that can be found is false.

As I have already stated, I know the documents exist because they have been published in various places, including on Right to Know (AU).

Commission submissions

6. The Application for IC Review indicates the Applicant is seeking documents which are published online. The Applicant has provided the following links in their Application form and has stated, *"There are other documents that are within the scope of my request that have been published on other websites. I will provide links when requested."*

https://www.righttoknow.org.au/request/9867/response/31994/attach/14/Questions%20on%20notice%20Estimates.pdf?cookie_passthrough=1

https://www.righttoknow.org.au/request/9867/response/31994/attach/15/18%20March%202022%20McKay%20to%20Woolcott.pdf?cookie_passthrough=1

7. The Commission submits the Application for IC Review is not directed towards gaining access to documents held by the Commission, as the Applicant already has access to the documents they claim fall within the terms of the request through publically available sources. Rather, the Commission is of the view that the Applicant's motivation in submitting the request is twofold:
 - i. The Applicant is attempting to use the FOI system to resolve their grievances regarding the Commission's handling of the Public Interest Disclosure (PID) investigation, by characterising the Commission's PID investigation as 'inadequate' and seeking an FOI decision from the Commission that accords with this characterisation; and
 - ii. The Applicant is intending to annoy and harass Commission staff by initiating a request for documents that the Applicant already has access to. This in turn creates a psychosocial hazard in relation to workplace interactions and behaviours, by harassing or intimidating staff and creating stress and anxiety in the recipients of the Applicant's emails.
8. For example, in response to correspondence from the Commission asking the Applicant to refine the scope of the request on the basis that it was too broad to process in its current form, the Applicant responded on 6 September 2023 and stated:

"As a Commonwealth integrity agency, the response to my FOI request should be that there are no documents that fall within the scope of the request"

because Commonwealth integrity agencies should not be conducting inadequate investigations (i.e. investigations not conducted according to law). That being said, a set of materials has come to my attention that has prompted me to make this FOI request.

...

Of course, if you are about to claim that processing a request in respect of documents in the possession of 7 identified individuals and an office holder about inadequate investigations (i.e. investigations not conducted according to law), or in respect of reports of inadequate investigations (i.e. reports of investigations not conducted according to law), relating to misconduct in the Australian Public Service, or any kinds of unlawful conduct by officials in the Australian Public Service (including agency heads and statutory office holders) would substantially and unreasonably divert the resources of the entire Australian Public Service Commission from its other operations, then the Australian Public Service Commission is in deeper trouble than I thought.”

9. Despite the Commission’s view that the Applicant’s motivation in submitting the request is not related to obtaining access to documents, the Commission nevertheless processed the Applicant’s request of 30 August 2023 in good faith and did not consider the Applicant’s reasons for seeking access to the documents when making its primary and internal review decisions.

Cohort of Complex and Interrelated Matters

10. As previously advised to your office, this IC review is part of a larger cohort of complex and interrelated matters, where applicants have used pseudonyms to make requests to the Commission connected to a recruitment process in the Federal Court that was the subject of a *Public Interest Disclosure Act 2013* investigation by the Commission and subsequent complaint to the Commonwealth Ombudsman about that PID investigation. Some of these applicants have personally targeted, and harassed, Commission staff processing their requests. We understand through discussions with our colleagues, that similarly worded requests about the same or similar facts have also been received by the Commonwealth Ombudsman and the Federal Court of Australia.
11. To date, the Commission has received 121 such requests, many of which have been made in substantially similar terms and which refer to, and attach, documents released under separate FOI requests. Fourteen of these requests are currently before the Information Commissioner for IC review (refer to updated spreadsheet **attached** for a breakdown of these applications). We expect the number of IC reviews to continue to rise as the Commission continues to process requests from this cohort of applicants.
12. Internal and Information Commissioner reviews from these individuals are unusual in that they often do not seek access to information that was redacted or withheld, but rather assert the request was not adequately addressed and the Commission has either:

- i. provided access to documents which do not meet the terms of the request;
- ii. refused access to documents which are publically available or where the applicant already has possession; or
- iii. provided access to documents where the correct decision should have been that no documents exist (s 24A(1)).

Engagement with the Applicant

13. On 5 June 2024, the Commission wrote to the Applicant for the purpose of attempting to resolve or at least narrow the issues in dispute in the IC review. The Commission asked the Applicant to explain why they disagree with the APSC's decision and what action the Commission could take to resolve their concerns. See copy of engagement email attached.

14. On 6 June 2024, the Applicant responded and provided reasons why they disagree with the decision under review (attached). In their response, the Applicant stated:

"I applied for IC review of Amanda Harmer's decision because I was able to demonstrate that what Amanda communicated in her decision was plainly false. There are obviously documents within scope of my request. I provided links to some of those documents in my internal review request, which I invite you to again refer to. There are also other documents that have been published by the APSC demonstrating that there are in fact documents in the possession of the APSC that are within the scope of my request: e.g.

<https://archive.org/download/pid-2020-400006-investigation-into-registrar-appointments-federal-court-of-austr/PID-2020-400006%20-%20Investigation%20into%20registrar%20appointments%20%28Federal%20Court%20of%20Australia%20Statutory%20Agency%29.pdf>

There are others too.

The problem is that I do not just how many there are. Perhaps there will be documents that were sent to the APS Commissioner about the preliminary inquiry referred to in the Senate estimates pocket brief."

15. The Commission notes that the documents attached by the Applicant to their internal review request, and linked in their recent engagement response, were released by the APSC under FOI (see for example LEX 450). It therefore follows that many of the documents sought by the Applicant appear to have already been released by the Commission.

Objects of the FOI Act

16. The FOI Guidelines at 1.7 relevantly provide that, in performing functions and exercising powers under the FOI Act, agencies and ministers must consider

the objects of the FOI Act, which are contained within section 3 and relevantly include:

*Giving the Australian community access to information held by government, by requiring agencies to publish that information and **by providing for a right of access to documents [emphasis added];***
and

that powers and functions under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

17. The Commission submits that the IC review is not directed towards gaining access to documents, but rather, the applicant is seeking to address their perception that the recruitment decisions made by the Federal Court and the subsequent PID investigation undertaken by the Commission, were 'inadequate'. The Applicant has expressed in their IC review Application that the requested documents (which they claim support this proposition) "have been published in various places" and they can "provide links when requested". The Commission therefore submits that the Information Commissioner will not be able to make a decision that will be of any practical benefit to the Applicant, and therefore, to use the words of Blow DP in Re Reddish and Civil Aviation Safety Authority [1999] AATA 721 at [33] "*it would be a waste of everyone's time and money for [the application] to be allowed to remain on foot.*"
18. There has been a lot of discussion recently about the delays across the FOI system (including in the finalisation of IC reviews) and the improvements needed to bring about greater efficiencies across the FOI regime.¹ In the Commission's view, it is as important as ever that matters are prioritised where there is a genuine desire on the part of Applicants to gain access to documents. In circumstances where a request is not capable of conferring a practical benefit on the Applicant, such as where the Applicant already has access to the documents, continuing to review the matter will not, in the Commission's view, promote the objects of the FOI Act.
19. In light of the above reasons, the Commission respectfully submits that the Information Commissioner should exercise the discretion in section 54W(a)(i) of the FOI Act to discontinue the IC review on the basis that it is lacking in substance and is not made in good faith.

Please feel free to contact the Commission should you require any further information. The Commission understands that the Information Commissioner will share a copy of these submissions with the Applicant.

Yours sincerely Melanie McIntyre, General Counsel

¹ Legal and Constitutional Affairs References Committee report on the *Operation of Commonwealth Freedom of Information (FOI) laws*, December 2023, see for example paragraphs [5.9] to [5.20] commencing at page 89.