

FOI

From: Christine <foi+request-9021-97860512@righttoknow.org.au>
Sent: Wednesday, 15 June 2022 12:29 PM
To: FOI
Subject: Freedom of Information request - Concerning revelations about APSC PID investigation

Dear Australian Public Service Commission,

On 10 February 2022, an article was printed in The Australian. The title of the article was Top judge warned of registrar overhaul.

According to the article:

a) “[Justice Greenwood] objected to plans to downgrade the classification that one existing registrar would be appointed to – a decision the court’s chief executive and senior officials attempted to blame on the Australian Public Service Commission.”

b) “Federal Court bureaucrats had circumvented the cap on the number of staff by hiring them at lower levels and using special agreements to increase their pay – by up to \$50,000 – and their titles.”

c) On 18 October 2018 Justice Greenwood wrote in an email:

i. “Warwick tells me that there is a problem because the (APSC) has a veto on any SES appointments.”

ii. “To solve the problem, Warwick wants to downgrade the role from an SES position, avoid the APSC’s veto and appoint [Murray].”

d) “[Warwick] Soden had claimed that [Murray Belcher], a man who had been at the court for many years could not be given the original Senior Executive Service classification advertised because it would be vetoed by the APSC representative.”

e) Justice Greenwood noted that “Sia spoke to me briefly before she went on leave and apparently the (APSC) representative was concerned that [Murray Belcher] was not very forthcoming about the changes to the management system or otherwise he would make to improve the work of the court.”

f) Justice Greenwood noted “First, Warwick’s advice that the APSC has a veto on appointment is wrong.”

g) Justice Greenwood noted “The true position is that neither Warwick nor Sia want to appoint [Murray Belcher]. The so called ‘veto’ is a red herring to prevent [Murray Belcher] being awarded the position.”

h) Justice Greenwood noted that “The SES classification, you will find, will have been taken somewhere else in the organisation ...”

The issues highlighted in the article appear to have been the subject of a PID investigation that Ms Kate McMullan of your office considered.

It appears that the following was recorded in Ms McMullan's report (https://www.righttoknow.org.au/request/request_for_documents_relating_t#outgoing-17862):

Findings

On the balance of probabilities, I find that this assertion about the Australian Public Service Commissioner’s representative is not substantiated. On the basis of materials provided by the FCSA including a selection report, I find that the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner’s representative on the selection panel) to be the preferred candidate for the advertised position. On the balance of probabilities, I find that no “veto power” was exercised or purported to be exercised by the Australian Public Service Commissioner’s representative. On the balance of probabilities I find that Mr Belcher was appointed to a[n] [Executive Level 2] position on the basis of a role review ...

In those circumstances, it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner’s representative had exercised a “veto power”; however, in absence of a “veto power” being exercised or being purported to be exercised, any incorrect statement by Mr Soden (whether due to a misstatement on Mr Soden’s behalf, a misunderstanding on Justice Greenwood’s behalf, a miscommunication between the two, or for some other reason) about action taken by the Australian Public Service Commissioner’s representative would not in and of itself constitute disclosable conduct. On that basis, I make no further findings about any such comments that may have been made.

That is very concerning because it looks to me like Ms McMullan set out a series of conjectures and, on the basis of those conjectures, made "no further findings about any such comments that may have been made". It looks to me like Ms McMullan refused to properly engage in her role as investigator under the PID Act.

I certainly do not think that Justice Greenwood misunderstood anything based on what has been published in The Australia.

Under the FOI Act I would like access to:

- a) any and all invitations to meet with Kerryn-Vine Camp for the purposes of Ms McMullan's PID investigation;
- b) any and all invitations to meet with Warwick Soden for the purposes of Ms McMullan's PID investigation;
- c) any and all invitations to meet with Justice Greenwood for the purposes of Ms McMullan's PID investigation;
- d) any and all documents relating to the meeting with Kerryn-Vine Camp for the purposes of Ms McMullan's PID investigation;
- e) any and all documents relating to the meeting with Warwick Soden for the purposes of Ms McMullan's PID investigation;
- f) any and all documents relating to the meeting with Justice Greenwood for the purposes of Ms McMullan's PID investigation.

Yours faithfully,

Christine

Please use this email address for all replies to this request:

foi+request-9021-97860512@righttoknow.org.au

Is foi@apsc.gov.au the wrong address for Freedom of Information requests to Australian Public Service Commission? If so, please contact us using this form:

https://www.righttoknow.org.au/change_request/new?body=apsc

This request has been made by an individual using Right to Know. This message and any reply that you make will be published on the internet. More information on how Right to Know works can be found at:

<https://www.righttoknow.org.au/help/officers>

Please note that in some cases publication of requests and responses will be delayed.

If you find this service useful as an FOI officer, please ask your web manager to link to us from your organisation's FOI page.



Australian Government

Australian Public Service Commission

Christine

By email: foi+request-9021-97860512@righttoknow.org.au

Our reference: <SHC22-29055> <LEX 189>

Dear Christine

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 15 June 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. A copy of your original FOI request is attached.

Decision on your FOI request

4. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
5. Subsection 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document if the agency is satisfied that all reasonable steps have been taken to find the document and the agency is satisfied that the document does not exist.
6. I am satisfied that all reasonable steps have been taken to find any document relevant to parts (a) – (f) of your request. Searches included retrieval of former employees' correspondences from our ICT service provider, and examination of those results.
7. No documents were found. I have therefore decided to refuse your request for access under section 24A of the FOI Act.

Contacts

8. 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

9. 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 be the name 'Giordina' written in a cursive, looped style.

Giordina Strangio

Authorised FOI decision maker

7 July 2022

ATTACHMENT A**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

FOI

From: Marcus <foi+request-9022-302cf14e@righttoknow.org.au>
Sent: Wednesday, 15 June 2022 2:20 PM
To: FOI
Subject: Freedom of Information request - Disturbing but unsurprising revelations about APSC PID investigation

Dear Australian Public Service Commission,

On 10 February 2022, an article was printed in The Australian. The title of the article was Top judge warned of registrar overhaul.

According to the article:

a) “[Justice Greenwood] objected to plans to downgrade the classification that one existing registrar would be appointed to – a decision the court’s chief executive and senior officials attempted to blame on the Australian Public Service Commission.”

b) “Federal Court bureaucrats had circumvented the cap on the number of staff by hiring them at lower levels and using special agreements to increase their pay – by up to \$50,000 – and their titles.”

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i. “Warwick tells me that there is a problem because the (APSC) has a veto on any SES appointments.”

ii. “To solve the problem, Warwick wants to downgrade the role from an SES position, avoid the APSC’s veto and appoint [Murray].”

d) “[Warwick] Soden had claimed that [Murray Belcher], a man who had been at the court for many years could not be given the original Senior Executive Service classification advertised because it would be vetoed by the APSC representative.”

e) Justice Greenwood noted that “Sia spoke to me briefly before she went on leave and apparently the (APSC) representative was concerned that [Murray Belcher] was not very forthcoming about the changes to the management system or otherwise he would make to improve the work of the court.”

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g) Justice Greenwood noted “The true position is that neither Warwick nor Sia want to appoint [Murray Belcher]. The so called ‘veto’ is a red herring to prevent [Murray Belcher] being awarded the position.”

h) Justice Greenwood noted that “The SES classification, you will find, will have been taken somewhere else in the organisation ...”

The issues highlighted in the article appear to have been the subject of a PID investigation that Ms Kate McMullan of your office considered.

It appears that the following was recorded in Ms McMullan's report (<https://www.righttoknow.org.au/request/r...>

Findings

On the balance of probabilities, I find that this assertion about the Australian Public Service Commissioner’s representative is not substantiated. On the basis of materials provided by the FCSA including a selection report, I find that the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner’s representative on the selection panel) to be the preferred candidate for the advertised position. On the balance of probabilities, I find that no “veto power” was exercised or purported to be exercised by the Australian Public Service Commissioner’s representative. On the balance of probabilities I find that Mr Belcher was appointed to a[n] [Executive Level 2] position on the basis of a role review ...

In those circumstances, it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner’s representative had exercised a “veto power”; however, in absence of a “veto power” being exercised or being purported to be exercised, any incorrect statement by Mr Soden (whether due to a misstatement on Mr Soden’s behalf, a misunderstanding on Justice Greenwood’s behalf, a miscommunication between the two, or for some other reason) about action taken by the Australian Public Service Commissioner’s representative would not in and of itself constitute disclosable conduct. On that basis, I make no further findings about any such comments that may have been made.

That is very concerning because it looks to me like Ms McMullan set out a series of conjectures and, on the basis of those conjectures, made "no further findings about any such comments that may have been made". It looks to me like Ms McMullan refused to properly engage in her role as investigator under the PID Act.

I certainly do not think that Justice Greenwood misunderstood anything based on what has been published in The Australian.

Under the FOI Act I would like access to:

- a) any and all correspondence between Kerryn Vine-Camp and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- b) any and all correspondence between Warwick Soden and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- c) any and all correspondence between Justice Greenwood and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- d) any and all documents exchanged between Kerryn Vine-Camp and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- e) any and all documents exchanged between Warwick Soden and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- f) any and all documents exchanged between Justice Greenwood and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted.

Yours faithfully,

Marcus

Please use this email address for all replies to this request:

foi+request-9022-302cf14e@righttoknow.org.au

Is foi@apsc.gov.au the wrong address for Freedom of Information requests to Australian Public Service Commission? If so, please contact us using this form:

https://www.righttoknow.org.au/change_request/new?body=apsc

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Australian Government

Australian Public Service Commission

Marcus

By email: foi+request-9022-302cf14e@righttoknow.org.au

Our reference: <SHC22-29057> <LEX 190>

Dear Marcus

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 15 June 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. A copy of your original FOI request is attached.

Decision on your FOI request

4. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
5. Subsection 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document if the agency is satisfied that all reasonable steps have been taken to find the document and the agency is satisfied that the document does not exist.
6. I am satisfied that all reasonable steps have been taken to find any document relevant to parts (a) – (f) of your request. Searches included retrieval of former employees' correspondence by our ICT service provider, and examination of those results.
7. No documents were found. I have therefore decided to refuse your request for access under section 24A of the FOI Act.

Contacts

8. 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

9. 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 be the name 'Giordina' written in a cursive style.

Giordina Strangio

Authorised FOI decision maker

7 July 2022

Rights of Review

Asking for a full explanation of a Freedom of Information decision

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Email: foi@apsc.gov.au

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Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

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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

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Complaints to the Information Commissioner and Commonwealth Ombudsman

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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



Australian Government
Australian Public Service Commission

“Alex”

By email: foi+request-9016-24befa8f@righttoknow.org.au

Our reference: <SHC22-28931><LEX187>

Dear “Alex”

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 12 June 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. Your full request is enclosed.
4. I have identified two documents relevant to your request.

Decision

5. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
6. For each part of your request I have decided:

Part 1	All reasonable steps have been taken to find any document relevant to Part 1 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 1 of your request under section 24A of the FOI Act.
Part 2	All reasonable steps have been taken to find any document relevant to Part 2 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 2 of your request under section 24A of the FOI Act.
Part 3	I have decided to refuse access to two documents (Documents 1 and 2) because I consider they are exempt in full. Attachment A sets out the grounds on which the documents are exempt. My reasons are set out in Attachment B .

Part 4	All reasonable steps have been taken to find any document relevant to Part 4 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 4 of your request under section 24A of the FOI Act.
Part 5	All reasonable steps have been taken to find any document relevant to Part 5 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 5 of your request under section 24A of the FOI Act.
Part 6	All reasonable steps have been taken to find any document relevant to Part 6 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 6 of your request under section 24A of the FOI Act.
Part 7	All reasonable steps have been taken to find any document relevant to Part 7 of your request. I am satisfied that the documents not exist. I refuse Part 7 of your request under section 24A of the FOI Act.
Part 8	All reasonable steps have been taken to find any document relevant to Part 8 of your request. I am satisfied that the documents not exist. I refuse Part 8 of your request under section 24A of the FOI Act.
Part 9	All reasonable steps have been taken to find any document relevant to Part 9 of your request. I am satisfied that the documents not exist. I refuse Part 9 of your request under section 24A of the FOI Act.
Part 10	All reasonable steps have been taken to find any document relevant to Part 10 of your request. I am satisfied that the documents not exist. I refuse Part 10 of your request under section 24A of the FOI Act.
Part 11	All reasonable steps have been taken to find any document relevant to Part 11 of your request. I am satisfied that the documents not exist. I refuse Part 11 of your request under section 24A of the FOI Act.
Part 12	All reasonable steps have been taken to find any document relevant to Part 12 of your request. I am satisfied that the documents not exist. I refuse Part 12 of your request under section 24A of the FOI Act.
Part 13	All reasonable steps have been taken to find any document relevant to Part 13 of your request. I am satisfied that the documents not exist. I refuse Part 13 of your request under section 24A of the FOI Act.
Part 14	All reasonable steps have been taken to find any document relevant to Part 14 of your request. I am satisfied that the documents not exist. I refuse Part 14 of your request under section 24A of the FOI Act.
Part 15	I have decided to refuse access to one document (Document 2) because I consider it is exempt in full. Attachment A sets out the grounds on which I consider the document is exempt. My reasons are set out in Attachment B .

Deletion of exempt matter or irrelevant material

7. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

8. Relevant to deleting exempt or irrelevant content from a document, the FOI Guidelines provide:

“3.98 Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.”

9. I consider the objects of the FOI Act will not be served by providing access to an edited version of the documents because extensive editing is required that would leave only a skeleton of the former documents, conveying little content or substance.

Contacts

10. 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

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

Yours sincerely



Giordina Strangio

Authorised FOI decision maker

4 July 2022

ATTACHMENT A

SCHEDULE OF DOCUMENTS

Document	Description	Grounds
1	Email correspondence between Commission and Federal Court of Australia titled "PRIVATE AND CONFIDENTIAL" dated 27 October 2020	Sections 22 (editing), 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.
2	Judicial Registrar Recruitment Outcome document prepared by Federal Court of Australia	Sections 22 (editing and irrelevance), 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.

ATTACHMENT B**Reasons for decision**

1. I have decided to refuse access to the documents in full because I have determined the documents are exempt in full.
2. In making my decision I considered:
 - the terms of your request;
 - the contents of the document;
 - the *Public Interest Disclosure Act 2013* (PID Act);
 - the *Public Service Act 1999* (PS Act);
 - the *Ombudsman Act 1976* (Ombudsman Act);
 - the FOI Act;
 - legal advice; and
 - the FOI Guidelines issued by the Australian Information Commissioner.

Section 47C – Documents subject to deliberative processes

3. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. Deliberative matter generally consists of:
 - an opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a deliberative process of the Commission.
4. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.
5. The documents that fall within the scope of your request contain material which record the deliberative processes of the Commission and the Federal Court of Australia. This deliberative material relates to how the PID investigation was conducted by the Commission, and contains material prepared or recorded as part of the deliberative PID process.
6. For the reasons outlined above I am of the view that the documents contain deliberative matter and parts are therefore conditionally exempt under section 47C of the FOI Act.

Sections 47E(c) and 47E(d) FOI Act – Certain operations of agencies

7. Sections 47E(c) and 47E(d) of the FOI Act provide 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, or on the proper and efficient conduct of the operations of an agency.
8. The Australian Public Service Commissioner (Commissioner) and his delegates have a number of inquiry functions under the PS Act, including in relation to the investigation of certain public interest disclosures under the PID Act.
9. It is important that the Commissioner and his delegates are able to properly undertake activities under the PID Act. 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.

10. I have considered that under the PID scheme information collected during the course of a PID investigation is protected under section 65 of the PID Act.
11. I have decided that release of material contained within the documents under the FOI Act would likely undermine the protections provided under the PID scheme, and likely discourage current and former public officials to make PID disclosures or to involve themselves in PID investigations. The success of any PID investigation process relies heavily on the willingness of individuals to participate in the PID scheme in a frank and candid manner.
12. Further, I consider that the release of the documents would also likely have a larger effect of inhibiting or discouraging Commission staff to freely and effectively communicate on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation. Should individuals be unwilling or unable to effectively participate in the PID scheme, this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act, including its ability to ensure that allegations of misconduct are being investigated and where necessary take appropriate action in a proper and efficient manner.
13. I note that the importance of protecting information collected during a PID investigation process was upheld in the recent Information Commissioner (IC) decision of '*YU*' and *Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021), where the IC accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
14. I consider release of the information in the document would jeopardise the confidentiality regime established by the *Public Interest Disclosure Act 2013*. There is no legislative or regulatory regime that requires the disclosure of the document requested. Rather, disclosure of the information would likely breach the Commission's privacy and confidentiality obligations under the Commonwealth Public Interest Disclosure scheme.
15. Further, the documents are documents being considered in a Commonwealth Ombudsman (Ombudsman) investigation which is current, ongoing and unfinalised. The Ombudsman initially made a preliminary inquiry about the matter, and subsequently decided to commence the investigation.
16. I consider disclosure of documents would have a substantial adverse effect on the ability of the Ombudsman to obtain information for its investigations, which are undertaken in private in accordance with section 8 of the Ombudsman Act and the confidentiality provisions set out in section 35 of the Ombudsman Act. These provisions require and protect the confidentiality of information held by the Ombudsman in relation to Ombudsman investigations.
17. I also consider disclosure of the documents would have the following substantial adverse effects on the Ombudsman's operations:

- Disclosure would discourage complainants from contacting the Ombudsman out of concern that it is not possible to keep relevant investigation information confidential. Where the requested document relates to an open complaint concerning an ongoing investigation, disclosure is likely to undermine effective oversight by the Ombudsman.
- Disclosure of the relevant document would discourage agencies or members of the public from providing information to the Ombudsman's office in relation to an investigation. The likely effect of this would be to impede the Ombudsman's ability to conduct thorough, efficient investigations availed of all relevant facts and information.

18. I have therefore decided disclosure of information relating to allegations, inquiries and investigations under the PID scheme and under the Ombudsman Act would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of public servants and on the proper and efficient conduct of the operations of the Commission and the Ombudsman.

Section 47F – personal information

19. 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.
20. 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.
21. The document contains the names and other personal information of public servants and other individuals, including information about their qualifications and employment history.
22. I have had regard to the matters I must consider under subsection 47F(2) of the FOI Act in determining whether the disclosure of the documents would involve the unreasonable disclosure of personal information.
23. 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].
24. 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 assesses whether a disclosure of public servants' personal information in requests is unreasonable under section 47F of the FOI Act.

25. I have identified the following factors that, in my view, do not support release of certain public servants' personal information under section 47F of the FOI Act:
- the individuals' personal information, in particular their names, will or may identify them;
 - the individuals' are generally not well or widely known to be associated with the relevant matter;
 - some of the personal information is qualitative assessments of public servants or other individuals which is extremely personal and sensitive;
 - the release of some of the individuals' personal information may cause stress for them or other detriment; and
 - disclosure would prejudice the individuals' right to privacy.
26. The level of personal information published in media articles by *The Australian* and on the Right to Know website may cause the concerned persons harm and distress. Due to the level of attention brought about by the articles disclosure of any personal information could reasonably be expected to interfere with the privacy of individuals. It follows I consider it would be unreasonable to disclose the personal information in the document given it is highly likely to lead to further harm and distress for those people and others.
27. I have therefore decided to the extent that the documents include personal information, those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of multiple persons' personal information.

Section 11A – public interest test

28. 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.
29. 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.
30. I have identified the following factors as weighing against disclosure:
- disclosure of certain personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
 - disclosure would prejudice the individuals' right to privacy;
 - APS employers must fulfil 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;
 - disclosure would undermine the confidentiality and secrecy provisions fundamental to the PID Scheme;
 - the disclosure of the Commission's deliberative processes will hinder the Commission's future deliberative processes and efficiency with which the Commission can support the functions of the Commissioner;
 - the disclosure of certain information have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission;

- disclosure may undermine the Commission's relationship with agencies and third party individuals;
- disclosure could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General, noting in particular that the documents are being considered in an open investigation and its disclosure may adversely affect the ability of the Ombudsman to finalise the matter; and
- disclosure would be inconsistent with relevant provisions of the Ombudsman Act relating to confidentiality and could reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information in the future.

31. 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.
32. The oversight of the Commonwealth Public Interest Disclosure scheme is a responsibility of the Commonwealth Ombudsman. I do not consider the information in the documents would be of serious concern or benefit to the public. In my view, it would merely satisfy the curiosity of others, which is not a consideration of the public interest test.
33. 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 47C, 47E and 47F of the FOI Act, the material is exempt from disclosure in full.

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



Australian Government

Australian Public Service Commission

Alex

By email: foi+request-9016-24befa8f@righttoknow.org.au

Our reference: LEX 230

Dear Alex,

Freedom of Information request

1. I am writing about your 12 July 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

Background

3. On 12 June 2022 you sent the Commission the **enclosed** FOI request. I have not reproduced your FOI request in this letter as it is over eight (8) pages in length.
4. On 5 July 2022, the Commission sent to you an email containing a decision notice dated 4 July 2022 from Giorgina Strangio, Assistant Commissioner, Integrity, Performance & Employment Policy Group responding to your request. Ms Strangio identified two (2) documents falling within scope of your request.
5. Ms Strangio refused access to the two documents in full. Ms Strangio's decision was based on a consideration of the conditional exemptions outlined in sections 47C, 47E and 47F of the FOI Act and the public interest factors outlined in section 11B of the FOI Act.
6. On 12 July 2022, you requested internal review of Ms Strangio's decision. Specifically, you do not consider that document 2 falls within scope of part 15 of your FOI request because you do not consider that document 2 could be a role review document.
7. It is not entirely clear whether, if document 2 was within scope of the request, you are also requesting internal review of the relevant conditional exemptions and the public interest test applied to document 2 in the original decision. As such, in the interests of completeness,

I have also considered the conditional exemptions and the public interest test as part of this internal review for document 2.

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 Strangio's decision. Internal review is a merit review process and I may exercise all the powers available to the original decision maker.
10. After considering your request, I am affirming Ms Strangio's initial decision in relation to part 15 of your request.

Reasons for decision

11. In making my decision on your internal review, I have had regard to:
 - a) the terms of your request and your submissions;
 - b) the content of document 2;
 - c) relevant provisions of the FOI Act;
 - d) The FOI guidelines on the Office of the Australian Information Commissioner (OAIC) website;
 - e) the *Public Interest Disclosure Act 2013* (PID Act);
 - f) the *Public Service Act 1999* (PS Act);
 - g) *Ombudsman Act 1976* (Ombudsman Act); and
 - h) legal advice.
12. 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.

Commentary regarding document 2

13. I note in your submissions, you consider that document 2 is not within scope of part 15 of your FOI request. Having reviewed document 2, I consider that, despite the name of the document, certain material in document 2 could be considered a role review, or in the alternative, form part of or be used as part of, a role review. Accordingly, I consider that document 2 is within scope of part 15 of your FOI request.

Deletion of exempt matter or irrelevant material

14. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.
15. Paragraph 3.98 of the FOI Guidelines provides further guidance on this issue. It provides:
- “Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.”*
16. In the circumstances, I consider the objects of the FOI Act will not be served by providing access to an edited version of document 2 since extensive editing is required that would leave only a skeleton of the former document, conveying little content or substance.

Section 47C – Documents subject to deliberative processes

17. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. Deliberative matter generally consists of:
- an opinion, advice or recommendation that has been obtained, prepared or recorded;
 - or
 - a deliberative process of the Commission.
18. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.
19. Document 2 contains material which record the deliberative processes of the Commission and the Federal Court of Australia. This deliberative material relates to information collection in the course of a PID investigation conducted by the Commission, and contains material prepared or recorded as part of the deliberative PID process. I also note that document 2 contains deliberative processes regarding recruitment decisions for the Federal Court of Australia as document 2 contains the relevant delegate’s analysis for the purposes of making recruitment decisions.
20. As such, I am of the view that document 2 contains deliberative matter and is therefore conditionally exempt under section 47C of the FOI Act.

Sections 47E(c) and 47E(d) of the FOI Act – Certain operations of agencies

21. Sections 47E(c) and 47E(d) of the FOI Act provide 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, or on the proper and efficient conduct of the operations of an agency.

22. As you would be aware, the Australian Public Service Commissioner (Commissioner) and the Commissioner's delegates have a number of inquiry functions under the PS Act. One of these inquiry functions is regarding the investigation of certain public interest disclosures under the PID Act.
23. It is important that the Commissioner and the Commissioner's delegates are able to properly undertake activities under the PID Act. 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 regarding suspected wrongdoing or misconduct.
24. I have considered that under the PID scheme, information collected during the course of a PID investigation is protected under section 65 of the PID Act.
25. I have decided that releasing the material in document 2 under the FOI Act would likely undermine the protections provided under the PID scheme and likely discourage current and former public officials:
 - a. to make PID disclosures; or
 - b. to involve themselves in PID investigations.
26. The success of any PID investigation process relies greatly on the willingness of individuals to participate in the PID scheme in a frank and candid manner.
27. Further, I consider that releasing document 2 would also likely have a larger effect of inhibiting or discouraging Commission staff to communicate openly on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation. If individuals are unwilling or are unable to effectively participate in the PID scheme, this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act. This would include its ability to ensure that allegations of misconduct are being investigated and, where necessary, take appropriate action in a proper and efficient manner.
28. The importance of protecting information collected during a PID investigation process was upheld in the Information Commissioner (IC) decision of '*YU*' and *Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021), where the IC accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
29. Further, document 2 is being considered in a Commonwealth Ombudsman (Ombudsman) investigation which is current, ongoing and unfinalised. The Ombudsman initially made a

preliminary inquiry about the matter. Following that preliminary inquiry, the Ombudsman decided to commence the investigation.

30. In the circumstances, I consider disclosure of document 2 would have a substantial adverse effect on the ability of the Ombudsman to obtain information for its investigations. As you may be aware, these investigations are undertaken in private in accordance with section 8 of the Ombudsman Act and the confidentiality provisions set out in section 35 of the Ombudsman Act. These provisions require and protect the confidentiality of information held by the Ombudsman in relation to Ombudsman investigations.
31. I also consider disclosure of document 2 would have the following substantial adverse effects on the Ombudsman's operations:
- Disclosure would discourage complainants from contacting the Ombudsman out of concern that it is not possible to keep relevant investigation information confidential. Where the requested documents relates to an open complaint concerning an ongoing investigation, disclosure is likely to undermine effective oversight by the Ombudsman.
 - Disclosure of the relevant documents would discourage agencies or members of the public from providing information to the Ombudsman's office in relation to an investigation. The likely effect of this would be to impede the Ombudsman's ability to conduct thorough, efficient investigations availed of all relevant facts and information.
32. Noting this, I have decided disclosure of information relating to allegations, inquiries and investigations under the PID scheme would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of Commission staff and on the proper and efficient conduct of the operations of the Commission and the Ombudsman.

Section 47F of the FOI Act – Personal privacy

33. A document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (section 47F).
34. In reviewing your request, I am satisfied that document 2 contains personal information because it contains the names and other personal information of public servants and other individuals. Document 2, also contains information regarding a recruitment process, includes information about a person's employment history.
35. Relevant to personal information of public servants, under the FOI Act, the case of *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83] noted 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.

36. 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.

37. Having regard to the matters I must consider under subsection 47F(2) of the FOI Act, I have identified the following factors that do not support release of the personal information contained in document 2:

- the individuals' personal information, in particular their names, will or is likely to identify them;
- some of the personal information is qualitative assessments of public servants or other individuals which is highly personal and sensitive;
- the individuals are generally not well or widely known to be associated with the relevant matter;
- the release of some of the individuals' personal information may cause stress for them or other detriment; and
- disclosure would prejudice the individuals' right to privacy.

38. Noting the above, to the extent that document 2 contains personal information, I have decided that those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of multiple person's personal information.

Section 11A & B of the FOI Act – Public Interest test

39. 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 (Subsection 11A(5) of the FOI Act).

40. I have considered the public interest factors set out in section 11B of the FOI Act.

41. I consider the following factors favouring disclosure, as set out in subsection 11B(3) of the FOI Act, are relevant:

- access would promote the objects of the FOI Act; and
- access would inform debate on a matter of public importance.

42. However, I consider the following factors do not favour disclosure:

- disclosure would undermine the confidentiality and secrecy provisions fundamental to the PID Scheme;

- access could reasonably prejudice the privacy of the individuals;
 - disclosure may undermine the Commission's relationship with agencies;
 - disclosure may undermine the Commission's relationship with third party individuals;
 - 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;
 - disclosing the Commission's deliberative processes will hinder the Commission's future deliberative processes and efficiency with which the Commission can support the functions of the Commissioner;
 - disclosing the material would be inconsistent with relevant provisions of the Ombudsman Act relating to confidentiality and could reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information in the future;
 - disclosing the material could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman, noting in particular that document 2 is being considered in an open investigation and its disclosure may adversely affect the ability of the Ombudsman to finalise the matter;
 - release of the certain personal information does not advance scrutiny of any decisions falling within the scope of your request; and
-
- the disclosure of certain material would have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission.

43. I have not had regard to any irrelevant factors as set out in subsection 11B(4) of the FOI Act.

44. In this instance, I consider that the public interest factors against disclosure of the conditionally exempt material in document 2 outweighs the public interest factors favouring providing access.

45. I therefore find that the material in document 2 is subject to conditional exemptions under sections 47C, 47E and 47F of the FOI Act and that disclosure is not in the public interest.

46. Based on the reasoning above, I am satisfied that the Commission has taken appropriate steps in processing your request under the FOI Act and reasonably applied exemptions to exempt document 2 in full.

47. On this basis, I affirm the original decision to exempt document 2 in full.

Contacts

48. If you require clarification on matters in this letter please contact the Commission's FOI Officer by email at foi@apsc.gov.au

Review rights

49. You are entitled to seek review of this decision.

50. Your review rights are set out at **Attachment A**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vidya Vasudevan', with a horizontal line drawn through the bottom of the signature.

Vidya Vasudevan

Authorised FOI decision maker

27 July 2022

ATTACHMENT A

Rights of Review

Asking for a full explanation of a Freedom of Information decision

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You can **lodge your application:**

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

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

FOI

From: Marcus <foi+request-9022-302cf14e@righttoknow.org.au>
Sent: Wednesday, 15 June 2022 2:20 PM
To: FOI
Subject: Freedom of Information request - Disturbing but unsurprising revelations about APSC PID investigation

Dear Australian Public Service Commission,

On 10 February 2022, an article was printed in The Australian. The title of the article was Top judge warned of registrar overhaul.

According to the article:

a) “[Justice Greenwood] objected to plans to downgrade the classification that one existing registrar would be appointed to – a decision the court’s chief executive and senior officials attempted to blame on the Australian Public Service Commission.”

b) “Federal Court bureaucrats had circumvented the cap on the number of staff by hiring them at lower levels and using special agreements to increase their pay – by up to \$50,000 – and their titles.”

c) On 18 October 2018 Justice Greenwood wrote in an email:

i. “Warwick tells me that there is a problem because the (APSC) has a veto on any SES appointments.”

ii. “To solve the problem, Warwick wants to downgrade the role from an SES position, avoid the APSC’s veto and appoint [Murray].”

d) “[Warwick] Soden had claimed that [Murray Belcher], a man who had been at the court for many years could not be given the original Senior Executive Service classification advertised because it would be vetoed by the APSC representative.”

e) Justice Greenwood noted that “Sia spoke to me briefly before she went on leave and apparently the (APSC) representative was concerned that [Murray Belcher] was not very forthcoming about the changes to the management system or otherwise he would make to improve the work of the court.”

f) Justice Greenwood noted “First, Warwick’s advice that the APSC has a veto on appointment is wrong.”

g) Justice Greenwood noted “The true position is that neither Warwick nor Sia want to appoint [Murray Belcher]. The so called ‘veto’ is a red herring to prevent [Murray Belcher] being awarded the position.”

h) Justice Greenwood noted that “The SES classification, you will find, will have been taken somewhere else in the organisation ...”

The issues highlighted in the article appear to have been the subject of a PID investigation that Ms Kate McMullan of your office considered.

It appears that the following was recorded in Ms McMullan's report (<https://www.righttoknow.org.au/request/r...>

Findings

On the balance of probabilities, I find that this assertion about the Australian Public Service Commissioner’s representative is not substantiated. On the basis of materials provided by the FCSA including a selection report, I find that the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner’s representative on the selection panel) to be the preferred candidate for the advertised position. On the balance of probabilities, I find that no “veto power” was exercised or purported to be exercised by the Australian Public Service Commissioner’s representative. On the balance of probabilities I find that Mr Belcher was appointed to a[n] [Executive Level 2] position on the basis of a role review ...

In those circumstances, it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner’s representative had exercised a “veto power”; however, in absence of a “veto power” being exercised or being purported to be exercised, any incorrect statement by Mr Soden (whether due to a misstatement on Mr Soden’s behalf, a misunderstanding on Justice Greenwood’s behalf, a miscommunication between the two, or for some other reason) about action taken by the Australian Public Service Commissioner’s representative would not in and of itself constitute disclosable conduct. On that basis, I make no further findings about any such comments that may have been made.

That is very concerning because it looks to me like Ms McMullan set out a series of conjectures and, on the basis of those conjectures, made "no further findings about any such comments that may have been made". It looks to me like Ms McMullan refused to properly engage in her role as investigator under the PID Act.

I certainly do not think that Justice Greenwood misunderstood anything based on what has been published in The Australian.

Under the FOI Act I would like access to:

- a) any and all correspondence between Kerryn Vine-Camp and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- b) any and all correspondence between Warwick Soden and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- c) any and all correspondence between Justice Greenwood and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- d) any and all documents exchanged between Kerryn Vine-Camp and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- e) any and all documents exchanged between Warwick Soden and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted;
- f) any and all documents exchanged between Justice Greenwood and Kate McMullan for the purposes of the PID investigation Kate McMullan conducted.

Yours faithfully,

Marcus

Please use this email address for all replies to this request:

foi+request-9022-302cf14e@righttoknow.org.au

Is foi@apsc.gov.au the wrong address for Freedom of Information requests to Australian Public Service Commission? If so, please contact us using this form:

https://www.righttoknow.org.au/change_request/new?body=apsc

This request has been made by an individual using Right to Know. This message and any reply that you make will be published on the internet. More information on how Right to Know works can be found at:

<https://www.righttoknow.org.au/help/officers>

Please note that in some cases publication of requests and responses will be delayed.

If you find this service useful as an FOI officer, please ask your web manager to link to us from your organisation's FOI page.



Australian Government

Australian Public Service Commission

Marcus

By email: foi+request-9022-302cf14e@righttoknow.org.au

Our reference: <SHC22-29057> <LEX 190>

Dear Marcus

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 15 June 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. A copy of your original FOI request is attached.

Decision on your FOI request

4. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
5. Subsection 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document if the agency is satisfied that all reasonable steps have been taken to find the document and the agency is satisfied that the document does not exist.
6. I am satisfied that all reasonable steps have been taken to find any document relevant to parts (a) – (f) of your request. Searches included retrieval of former employees' correspondence by our ICT service provider, and examination of those results.
7. No documents were found. I have therefore decided to refuse your request for access under section 24A of the FOI Act.

Contacts

8. 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

9. 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 be the name 'Giordina' written in a cursive style.

Giordina Strangio

Authorised FOI decision maker

7 July 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



Australian Government

Australian Public Service Commission

Alex

By email: foi+request-9016-24befa8f@righttoknow.org.au

Our reference: LEX 230

Dear Alex,

Freedom of Information request

1. I am writing about your 12 July 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

Background

3. On 12 June 2022 you sent the Commission the **enclosed** FOI request. I have not reproduced your FOI request in this letter as it is over eight (8) pages in length.
4. On 5 July 2022, the Commission sent to you an email containing a decision notice dated 4 July 2022 from Giorgina Strangio, Assistant Commissioner, Integrity, Performance & Employment Policy Group responding to your request. Ms Strangio identified two (2) documents falling within scope of your request.
5. Ms Strangio refused access to the two documents in full. Ms Strangio's decision was based on a consideration of the conditional exemptions outlined in sections 47C, 47E and 47F of the FOI Act and the public interest factors outlined in section 11B of the FOI Act.
6. On 12 July 2022, you requested internal review of Ms Strangio's decision. Specifically, you do not consider that document 2 falls within scope of part 15 of your FOI request because you do not consider that document 2 could be a role review document.
7. It is not entirely clear whether, if document 2 was within scope of the request, you are also requesting internal review of the relevant conditional exemptions and the public interest test applied to document 2 in the original decision. As such, in the interests of completeness,

I have also considered the conditional exemptions and the public interest test as part of this internal review for document 2.

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 Strangio's decision. Internal review is a merit review process and I may exercise all the powers available to the original decision maker.
10. After considering your request, I am affirming Ms Strangio's initial decision in relation to part 15 of your request.

Reasons for decision

11. In making my decision on your internal review, I have had regard to:
 - a) the terms of your request and your submissions;
 - b) the content of document 2;
 - c) relevant provisions of the FOI Act;
 - d) The FOI guidelines on the Office of the Australian Information Commissioner (OAIC) website;
 - e) the *Public Interest Disclosure Act 2013* (PID Act);
 - f) the *Public Service Act 1999* (PS Act);
 - g) *Ombudsman Act 1976* (Ombudsman Act); and
 - h) legal advice.
12. 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.

Commentary regarding document 2

13. I note in your submissions, you consider that document 2 is not within scope of part 15 of your FOI request. Having reviewed document 2, I consider that, despite the name of the document, certain material in document 2 could be considered a role review, or in the alternative, form part of or be used as part of, a role review. Accordingly, I consider that document 2 is within scope of part 15 of your FOI request.

Deletion of exempt matter or irrelevant material

14. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

15. Paragraph 3.98 of the FOI Guidelines provides further guidance on this issue. It provides:

“Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.”

16. In the circumstances, I consider the objects of the FOI Act will not be served by providing access to an edited version of document 2 since extensive editing is required that would leave only a skeleton of the former document, conveying little content or substance.

Section 47C – Documents subject to deliberative processes

17. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. Deliberative matter generally consists of:

- an opinion, advice or recommendation that has been obtained, prepared or recorded;
- or
- a deliberative process of the Commission.

18. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.

19. Document 2 contains material which record the deliberative processes of the Commission and the Federal Court of Australia. This deliberative material relates to information collection in the course of a PID investigation conducted by the Commission, and contains material prepared or recorded as part of the deliberative PID process. I also note that document 2 contains deliberative processes regarding recruitment decisions for the Federal Court of Australia as document 2 contains the relevant delegate’s analysis for the purposes of making recruitment decisions.

20. As such, I am of the view that document 2 contains deliberative matter and is therefore conditionally exempt under section 47C of the FOI Act.

Sections 47E(c) and 47E(d) of the FOI Act – Certain operations of agencies

21. Sections 47E(c) and 47E(d) of the FOI Act provide 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, or on the proper and efficient conduct of the operations of an agency.

22. As you would be aware, the Australian Public Service Commissioner (Commissioner) and the Commissioner's delegates have a number of inquiry functions under the PS Act. One of these inquiry functions is regarding the investigation of certain public interest disclosures under the PID Act.
23. It is important that the Commissioner and the Commissioner's delegates are able to properly undertake activities under the PID Act. 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 regarding suspected wrongdoing or misconduct.
24. I have considered that under the PID scheme, information collected during the course of a PID investigation is protected under section 65 of the PID Act.
25. I have decided that releasing the material in document 2 under the FOI Act would likely undermine the protections provided under the PID scheme and likely discourage current and former public officials:
 - a. to make PID disclosures; or
 - b. to involve themselves in PID investigations.
26. The success of any PID investigation process relies greatly on the willingness of individuals to participate in the PID scheme in a frank and candid manner.
27. Further, I consider that releasing document 2 would also likely have a larger effect of inhibiting or discouraging Commission staff to communicate openly on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation. If individuals are unwilling or are unable to effectively participate in the PID scheme, this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act. This would include its ability to ensure that allegations of misconduct are being investigated and, where necessary, take appropriate action in a proper and efficient manner.
28. The importance of protecting information collected during a PID investigation process was upheld in the Information Commissioner (IC) decision of '*YU*' and *Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021), where the IC accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
29. Further, document 2 is being considered in a Commonwealth Ombudsman (Ombudsman) investigation which is current, ongoing and unfinalised. The Ombudsman initially made a

preliminary inquiry about the matter. Following that preliminary inquiry, the Ombudsman decided to commence the investigation.

30. In the circumstances, I consider disclosure of document 2 would have a substantial adverse effect on the ability of the Ombudsman to obtain information for its investigations. As you may be aware, these investigations are undertaken in private in accordance with section 8 of the Ombudsman Act and the confidentiality provisions set out in section 35 of the Ombudsman Act. These provisions require and protect the confidentiality of information held by the Ombudsman in relation to Ombudsman investigations.
31. I also consider disclosure of document 2 would have the following substantial adverse effects on the Ombudsman's operations:
- Disclosure would discourage complainants from contacting the Ombudsman out of concern that it is not possible to keep relevant investigation information confidential. Where the requested documents relates to an open complaint concerning an ongoing investigation, disclosure is likely to undermine effective oversight by the Ombudsman.
 - Disclosure of the relevant documents would discourage agencies or members of the public from providing information to the Ombudsman's office in relation to an investigation. The likely effect of this would be to impede the Ombudsman's ability to conduct thorough, efficient investigations availed of all relevant facts and information.
32. Noting this, I have decided disclosure of information relating to allegations, inquiries and investigations under the PID scheme would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of Commission staff and on the proper and efficient conduct of the operations of the Commission and the Ombudsman.

Section 47F of the FOI Act – Personal privacy

33. A document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (section 47F).
34. In reviewing your request, I am satisfied that document 2 contains personal information because it contains the names and other personal information of public servants and other individuals. Document 2, also contains information regarding a recruitment process, includes information about a person's employment history.
35. Relevant to personal information of public servants, under the FOI Act, the case of *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83] noted 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.

36. 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.

37. Having regard to the matters I must consider under subsection 47F(2) of the FOI Act, I have identified the following factors that do not support release of the personal information contained in document 2:

- the individuals' personal information, in particular their names, will or is likely to identify them;
- some of the personal information is qualitative assessments of public servants or other individuals which is highly personal and sensitive;
- the individuals are generally not well or widely known to be associated with the relevant matter;
- the release of some of the individuals' personal information may cause stress for them or other detriment; and
- disclosure would prejudice the individuals' right to privacy.

38. Noting the above, to the extent that document 2 contains personal information, I have decided that those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of multiple person's personal information.

Section 11A & B of the FOI Act – Public Interest test

39. 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 (Subsection 11A(5) of the FOI Act).

40. I have considered the public interest factors set out in section 11B of the FOI Act.

41. I consider the following factors favouring disclosure, as set out in subsection 11B(3) of the FOI Act, are relevant:

- access would promote the objects of the FOI Act; and
- access would inform debate on a matter of public importance.

42. However, I consider the following factors do not favour disclosure:

- disclosure would undermine the confidentiality and secrecy provisions fundamental to the PID Scheme;

- access could reasonably prejudice the privacy of the individuals;
 - disclosure may undermine the Commission's relationship with agencies;
 - disclosure may undermine the Commission's relationship with third party individuals;
 - 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;
 - disclosing the Commission's deliberative processes will hinder the Commission's future deliberative processes and efficiency with which the Commission can support the functions of the Commissioner;
 - disclosing the material would be inconsistent with relevant provisions of the Ombudsman Act relating to confidentiality and could reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information in the future;
 - disclosing the material could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman, noting in particular that document 2 is being considered in an open investigation and its disclosure may adversely affect the ability of the Ombudsman to finalise the matter;
 - release of the certain personal information does not advance scrutiny of any decisions falling within the scope of your request; and
-
- the disclosure of certain material would have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission.

43. I have not had regard to any irrelevant factors as set out in subsection 11B(4) of the FOI Act.

44. In this instance, I consider that the public interest factors against disclosure of the conditionally exempt material in document 2 outweighs the public interest factors favouring providing access.

45. I therefore find that the material in document 2 is subject to conditional exemptions under sections 47C, 47E and 47F of the FOI Act and that disclosure is not in the public interest.

46. Based on the reasoning above, I am satisfied that the Commission has taken appropriate steps in processing your request under the FOI Act and reasonably applied exemptions to exempt document 2 in full.

47. On this basis, I affirm the original decision to exempt document 2 in full.

Contacts

48. If you require clarification on matters in this letter please contact the Commission's FOI Officer by email at foi@apsc.gov.au

Review rights

49. You are entitled to seek review of this decision.

50. Your review rights are set out at **Attachment A**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vidya Vasudevan', with a horizontal line drawn through the bottom of the signature.

Vidya Vasudevan

Authorised FOI decision maker

27 July 2022

ATTACHMENT A**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
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



Australian Government
Australian Public Service Commission

“Alex”

By email: foi+request-9016-24befa8f@righttoknow.org.au

Our reference: <SHC22-28931><LEX187>

Dear “Alex”

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 12 June 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. Your full request is enclosed.
4. I have identified two documents relevant to your request.

Decision

5. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
6. For each part of your request I have decided:

Part 1	All reasonable steps have been taken to find any document relevant to Part 1 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 1 of your request under section 24A of the FOI Act.
Part 2	All reasonable steps have been taken to find any document relevant to Part 2 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 2 of your request under section 24A of the FOI Act.
Part 3	I have decided to refuse access to two documents (Documents 1 and 2) because I consider they are exempt in full. Attachment A sets out the grounds on which the documents are exempt. My reasons are set out in Attachment B .

Part 4	All reasonable steps have been taken to find any document relevant to Part 4 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 4 of your request under section 24A of the FOI Act.
Part 5	All reasonable steps have been taken to find any document relevant to Part 5 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 5 of your request under section 24A of the FOI Act.
Part 6	All reasonable steps have been taken to find any document relevant to Part 6 of your request. I am satisfied that the documents either cannot be found or do not exist. I refuse Part 6 of your request under section 24A of the FOI Act.
Part 7	All reasonable steps have been taken to find any document relevant to Part 7 of your request. I am satisfied that the documents not exist. I refuse Part 7 of your request under section 24A of the FOI Act.
Part 8	All reasonable steps have been taken to find any document relevant to Part 8 of your request. I am satisfied that the documents not exist. I refuse Part 8 of your request under section 24A of the FOI Act.
Part 9	All reasonable steps have been taken to find any document relevant to Part 9 of your request. I am satisfied that the documents not exist. I refuse Part 9 of your request under section 24A of the FOI Act.
Part 10	All reasonable steps have been taken to find any document relevant to Part 10 of your request. I am satisfied that the documents not exist. I refuse Part 10 of your request under section 24A of the FOI Act.
Part 11	All reasonable steps have been taken to find any document relevant to Part 11 of your request. I am satisfied that the documents not exist. I refuse Part 11 of your request under section 24A of the FOI Act.
Part 12	All reasonable steps have been taken to find any document relevant to Part 12 of your request. I am satisfied that the documents not exist. I refuse Part 12 of your request under section 24A of the FOI Act.
Part 13	All reasonable steps have been taken to find any document relevant to Part 13 of your request. I am satisfied that the documents not exist. I refuse Part 13 of your request under section 24A of the FOI Act.
Part 14	All reasonable steps have been taken to find any document relevant to Part 14 of your request. I am satisfied that the documents not exist. I refuse Part 14 of your request under section 24A of the FOI Act.
Part 15	I have decided to refuse access to one document (Document 2) because I consider it is exempt in full. Attachment A sets out the grounds on which I consider the document is exempt. My reasons are set out in Attachment B .

Deletion of exempt matter or irrelevant material

7. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

8. Relevant to deleting exempt or irrelevant content from a document, the FOI Guidelines provide:

“3.98 Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.”

9. I consider the objects of the FOI Act will not be served by providing access to an edited version of the documents because extensive editing is required that would leave only a skeleton of the former documents, conveying little content or substance.

Contacts

10. 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

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

Yours sincerely



Giordina Strangio

Authorised FOI decision maker

4 July 2022

ATTACHMENT A**SCHEDULE OF DOCUMENTS**

Document	Description	Grounds
1	Email correspondence between Commission and Federal Court of Australia titled "PRIVATE AND CONFIDENTIAL" dated 27 October 2020	Sections 22 (editing), 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.
2	Judicial Registrar Recruitment Outcome document prepared by Federal Court of Australia	Sections 22 (editing and irrelevance), 47C (deliberative matter), 47E(c) and 47E(d) (operations of an agency), and 47F (personal privacy) of the FOI Act apply.

Reasons for decision

1. I have decided to refuse access to the documents in full because I have determined the documents are exempt in full.
2. In making my decision I considered:
 - the terms of your request;
 - the contents of the document;
 - the *Public Interest Disclosure Act 2013* (PID Act);
 - the *Public Service Act 1999* (PS Act);
 - the *Ombudsman Act 1976* (Ombudsman Act);
 - the FOI Act;
 - legal advice; and
 - the FOI Guidelines issued by the Australian Information Commissioner.

Section 47C – Documents subject to deliberative processes

3. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. Deliberative matter generally consists of:
 - an opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a deliberative process of the Commission.
4. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.
5. The documents that fall within the scope of your request contain material which record the deliberative processes of the Commission and the Federal Court of Australia. This deliberative material relates to how the PID investigation was conducted by the Commission, and contains material prepared or recorded as part of the deliberative PID process.
6. For the reasons outlined above I am of the view that the documents contain deliberative matter and parts are therefore conditionally exempt under section 47C of the FOI Act.

Sections 47E(c) and 47E(d) FOI Act – Certain operations of agencies

7. Sections 47E(c) and 47E(d) of the FOI Act provide 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, or on the proper and efficient conduct of the operations of an agency.
8. The Australian Public Service Commissioner (Commissioner) and his delegates have a number of inquiry functions under the PS Act, including in relation to the investigation of certain public interest disclosures under the PID Act.
9. It is important that the Commissioner and his delegates are able to properly undertake activities under the PID Act. 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.

10. I have considered that under the PID scheme information collected during the course of a PID investigation is protected under section 65 of the PID Act.
11. I have decided that release of material contained within the documents under the FOI Act would likely undermine the protections provided under the PID scheme, and likely discourage current and former public officials to make PID disclosures or to involve themselves in PID investigations. The success of any PID investigation process relies heavily on the willingness of individuals to participate in the PID scheme in a frank and candid manner.
12. Further, I consider that the release of the documents would also likely have a larger effect of inhibiting or discouraging Commission staff to freely and effectively communicate on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation. Should individuals be unwilling or unable to effectively participate in the PID scheme, this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act, including its ability to ensure that allegations of misconduct are being investigated and where necessary take appropriate action in a proper and efficient manner.
13. I note that the importance of protecting information collected during a PID investigation process was upheld in the recent Information Commissioner (IC) decision of '*YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021), where the IC accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
14. I consider release of the information in the document would jeopardise the confidentiality regime established by the *Public Interest Disclosure Act 2013*. There is no legislative or regulatory regime that requires the disclosure of the document requested. Rather, disclosure of the information would likely breach the Commission's privacy and confidentiality obligations under the Commonwealth Public Interest Disclosure scheme.
15. Further, the documents are documents being considered in a Commonwealth Ombudsman (Ombudsman) investigation which is current, ongoing and unfinalised. The Ombudsman initially made a preliminary inquiry about the matter, and subsequently decided to commence the investigation.
16. I consider disclosure of documents would have a substantial adverse effect on the ability of the Ombudsman to obtain information for its investigations, which are undertaken in private in accordance with section 8 of the Ombudsman Act and the confidentiality provisions set out in section 35 of the Ombudsman Act. These provisions require and protect the confidentiality of information held by the Ombudsman in relation to Ombudsman investigations.
17. I also consider disclosure of the documents would have the following substantial adverse effects on the Ombudsman's operations:

- Disclosure would discourage complainants from contacting the Ombudsman out of concern that it is not possible to keep relevant investigation information confidential. Where the requested document relates to an open complaint concerning an ongoing investigation, disclosure is likely to undermine effective oversight by the Ombudsman.
- Disclosure of the relevant document would discourage agencies or members of the public from providing information to the Ombudsman's office in relation to an investigation. The likely effect of this would be to impede the Ombudsman's ability to conduct thorough, efficient investigations availed of all relevant facts and information.

18. I have therefore decided disclosure of information relating to allegations, inquiries and investigations under the PID scheme and under the Ombudsman Act would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of public servants and on the proper and efficient conduct of the operations of the Commission and the Ombudsman.

Section 47F – personal information

19. 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.
20. 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.
21. The document contains the names and other personal information of public servants and other individuals, including information about their qualifications and employment history.
22. I have had regard to the matters I must consider under subsection 47F(2) of the FOI Act in determining whether the disclosure of the documents would involve the unreasonable disclosure of personal information.
23. 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].
24. 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 assesses whether a disclosure of public servants' personal information in requests is unreasonable under section 47F of the FOI Act.

25. I have identified the following factors that, in my view, do not support release of certain public servants' personal information under section 47F of the FOI Act:
- the individuals' personal information, in particular their names, will or may identify them;
 - the individuals' are generally not well or widely known to be associated with the relevant matter;
 - some of the personal information is qualitative assessments of public servants or other individuals which is extremely personal and sensitive;
 - the release of some of the individuals' personal information may cause stress for them or other detriment; and
 - disclosure would prejudice the individuals' right to privacy.
26. The level of personal information published in media articles by *The Australian* and on the Right to Know website may cause the concerned persons harm and distress. Due to the level of attention brought about by the articles disclosure of any personal information could reasonably be expected to interfere with the privacy of individuals. It follows I consider it would be unreasonable to disclose the personal information in the document given it is highly likely to lead to further harm and distress for those people and others.
27. I have therefore decided to the extent that the documents include personal information, those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of multiple persons' personal information.

Section 11A – public interest test

28. 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.
29. 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.
30. I have identified the following factors as weighing against disclosure:
- disclosure of certain personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
 - disclosure would prejudice the individuals' right to privacy;
 - APS employers must fulfil 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;
 - disclosure would undermine the confidentiality and secrecy provisions fundamental to the PID Scheme;
 - the disclosure of the Commission's deliberative processes will hinder the Commission's future deliberative processes and efficiency with which the Commission can support the functions of the Commissioner;
 - the disclosure of certain information have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission;

- disclosure may undermine the Commission's relationship with agencies and third party individuals;
- disclosure could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General, noting in particular that the documents are being considered in an open investigation and its disclosure may adversely affect the ability of the Ombudsman to finalise the matter; and
- disclosure would be inconsistent with relevant provisions of the Ombudsman Act relating to confidentiality and could reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information in the future.

31. 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.
32. The oversight of the Commonwealth Public Interest Disclosure scheme is a responsibility of the Commonwealth Ombudsman. I do not consider the information in the documents would be of serious concern or benefit to the public. In my view, it would merely satisfy the curiosity of others, which is not a consideration of the public interest test.
33. 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 47C, 47E and 47F of the FOI Act, the material is exempt from disclosure in full.

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