

Dear FOI Contact Officer

**OAIC ref: MR23/01386 | APSC ref: LEX 811**

We refer to your notice of Information Commissioner Review (**IC Review**) and request for documents received on 9 February 2024.

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

### **Scope of IC Review**

1. This IC Review application concerns a primary decision made by Melanie McIntyre of the Australian Public Service Commission (**the Commission**) on 17 November 2023.
2. The Commission understands from the Notice of IC Review that the agency's decision was deemed to have been refused on 16 November 2023 under section 15AC of the *Freedom of Information Act 1982* (**FOI Act**), and as such, the OAIC will treat the Commission's primary decision as a submission. The Commission provides these further submissions to assist the Information Commissioner to deal with the Application.
3. The Applicant's request was received by the Commission on 16 October 2023. A copy of the Applicant's request has been included at page 1 of the document bundle.
4. On 13 November 2023, the Commission initiated a request consultation process with the Applicant on the basis that processing the request in its current form would substantially and unreasonably divert the Commission's resources from its other operations. The Applicant responded on the same day and declined to revise their request stating:

*"Having considered your letter, I am not inclined to and, thus, will not revise my FOI request.*

*The reasons you have provided are incoherent and irrelevant. Also, the time estimate you have provided to process the request is beyond excessive. The estimate is orders of magnitude beyond what would reasonably be required to handle such a straightforward request.*

*Paragraphs 13 and 14 of your decision suggest to me that you have not read my FOI request well enough.*

*Paragraph 11 is just strange. Why would the contents of a role review document, that would contain no personal information (it's a review of a role, which is independent of any person who holds the role), need to be redacted? It's an impersonal document that, in the ordinary course, would be made available to any member of the public. Also, why would*

*there be such a “volume of material” in respect of a role review for a single role that you would need 78 hours to process the request?*

*Of what relevance is paragraph 12 to my FOI request? The FOI process is not suspended because an agency has a priority matter to deal with. If this were the case, then, by way of example, Services Australia would have suspended all FOI processing during the Robodebt Royal Commission. That did not happen. There is no basis in law for what you have noted in paragraph 12 of your decision.*

*There’s nothing difficult about the request. I note that an article published in The Australian on 10 February 2022 provides the following in relation to the role review of the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland:*

*Ms McMullen’s investigation concluded that “a role review process ... had resulted in certain positions being found suitable for either (classification)” (i.e. Legal 2 or SESB1). (See: [https://www.fedcourt.gov.au/data/assets/pdf\\_file/0010/99370/PA2925-0656-4.-Email-to-Ms-Vine-Camp-dated-3-May-2022.pdf](https://www.fedcourt.gov.au/data/assets/pdf_file/0010/99370/PA2925-0656-4.-Email-to-Ms-Vine-Camp-dated-3-May-2022.pdf))*

*Ms McMullen was provided with the role review document/s and made a material decision based on the role review document/s. It’s just a matter of providing the role review document (or documents), isn’t it? Why would there be a practical refusal ground in respect of a request for documents in relation to a single role review process?*

*You are clearly aware that there have been decisions made in respect of the same document/s, which means the documents would also be close to hand. And if there have been decisions made in respect of the same document/s by the APSC, what’s this about needing 78 hours to process the request?*

*All a bit odd.”*

5. We understand the Applicant is seeking IC Review because they disagree with the Commission’s finding that, following a request consultation process, a practical refusal reason still exists in relation to the request (section 24(1)(b)).
6. In their correspondence to the Oaic of 23 January 2024, the Applicant confirmed they wish to proceed with their Application for IC Review and stated:

*“[T]he “substantive” decision that Melanie McIntyre provided is preposterous.*

*The Federal Court has noted that the document that I seek does not exist: <https://www.righttoknow.org.au/request/r...> Even though the Federal Court has said that the document does not exist, journalists at The Australian quoted an official in the APSC noting that the document does*

exist because she based a decision on it: <https://archive.org/download/2022-02-10-...>

*Melanie McIntyre claims that the Federal Court “is the agency most likely to hold the records you are seeking” and for that reason stated that processing my request “would be an unreasonable diversion of the Commission’s resources”. But the Federal Court does not have the document and an official in the APSC has been quoted in The Australian to have a copy of the document that I have sought. So my request was made to the correct agency. More importantly, Melanie McIntyre’s opinion about another agency having the document has no relevance to the issue of a practical refusal ground existing.*

*Melanie McIntyre also claimed that processing my “request would be a substantial diversion of the Commission’s resources because many of these documents relate to previous FOI requests or related or similar matter”. That can’t be right. I asked the APSC for the role evaluation record, prepared between 1 January 2017 and 31 December 2020, that shows that the SES Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court was, in the light of the work value of the group of duties described in the work level standards and a proper job analysis, lawfully reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000 (Cth). This document has nothing to do with FOI requests.*

*On those bases, Melanie McIntyre said that “the amount of time estimated to process your request remains the same as the consultation notice”, which was 78 hours: <https://www.righttoknow.org.au/request/1...> That’s just not correct. It will not take 78 hours to make a decision in relation to a role evaluation record for a single role in the Federal Court, which an official in the APSC noted was the basis for a decision she made that was the subject of critical comment by a Federal Court judge: <https://archive.org/download/2022-02-10-...> The estimate is clearly preposterous and is based on a flawed premise, which is that processing my “request would be a substantial diversion of the Commission’s resources because many of these documents relate to previous FOI requests or related or similar matter”.*

### Engagement with the Applicant

7. On 5 June 2024, the Commission wrote to the Applicant for the purpose of attempting to resolve or at least narrow the issues in dispute in the IC review. The Commission asked the Applicant to explain why they disagree with the APSC’s decision and what action the Commission could take to resolve their concerns. See copy of engagement email attached.
8. On 7 June 2024, the Applicant responded to the Commission’s engagement email and referred the Commission to their earlier responses of 13 November 2023 to the APSC and 23 January 2024 to the OAIC as setting out the

reasons why they disagree with the Commission's primary decision. A copy of the Applicant's response is attached.

### Commission submissions

9. The Applicant's request seeks access to documents relating to recruitment in the Federal Court of Australia (**Federal Court**) from the Commission. In circumstances where it would otherwise have been appropriate for the Commission to transfer the request to the Federal Court under section 16 of the FOI Act as the agency most likely to hold the records sought by the Applicant, the Applicant has expressly stated "*do not transfer this request to the agency that officials in the APSC believe has the documents. If the requested documents are not in the control of the APSC, please simply refuse access to the documents under section 24A of the FOI Act.*"
10. The Applicant has indicated in their email to the OAIC of 23 January 2024 that they have previously requested the documents sought under this request from the Federal Court, however no documents within the scope of the request were identified and the request was therefore refused by the Federal Court under section 24A of the FOI Act.
11. On 13 June 2024, the Commission wrote to the Federal Court to query whether it has previously answered the same or a similarly worded request. On 17 June 2024, the Federal Court responded to our courtesy consultation and advised that "*this is an area that has been the subject of numerous requests*", and they have received two almost identical requests which can be located on the [Right to Know](#) website. The Federal Court advised that both requests were refused under section 24A(1) of the FOI Act on the basis that the documents either cannot be found or do not exist. The decision records detail that extensive searches were undertaken by the Federal Court to identify documents falling within scope.

### Abuse of Process

12. The Commission submits that the Application for IC Review is not directed towards gaining access to documents, but rather, the Applicant is attempting to use the FOI Act process to continue to agitate complaints that have already been investigated and dealt with, firstly by the Commission through a Public Interest Disclosure (PID) investigation, and a subsequent complaint to the Commonwealth Ombudsman about that PID investigation. This is demonstrated by the Applicant's comments to the OAIC of 23 January 2024 where they state the APSC must hold the role evaluation documents because an official in the APSC "*based a decision on it*". Further, in response to the Commission's request consultation notice, the Applicant stated on 13 November 2023:

*"You should have no trouble pulling the documents pertaining to Parts A, B and C from the PID investigation file prepared by Kate McMullan, assuming that they actually exist."*

13. Despite the Commission's view that the Applicant's motivation in submitting the request is not related to obtaining access to documents, the Commission nevertheless processed the Applicant's request of 16 October 2023 in good faith and did not consider the Applicant's reasons for seeking access to the documents when making its primary and internal review decisions.

#### Cohort of Complex and Interrelated IC Reviews

14. As previously advised to your office, this IC review is part of a larger cohort of complex and interrelated matters, where applicants have used pseudonyms to make requests to the Commission connected to a recruitment process in the Federal Court that was the subject of a *Public Interest Disclosure Act 2013* investigation by the Commission and subsequent complaint to the Commonwealth Ombudsman about that PID investigation. Some of these applicants have personally targeted, and harassed, Commission staff processing their requests. We understand through discussions with our colleagues, that similarly worded requests about the same or similar facts have also been received by the Commonwealth Ombudsman and the Federal Court.

15. To date, the Commission has received 121 such requests, many of which have been made in substantially similar terms and which refer to, and attach, documents released under separate FOI requests. Fourteen of these requests are currently before the Information Commissioner for IC review (refer to updated spreadsheet attached for a breakdown of these applications). We expect the number of IC reviews to continue to rise as the Commission continues to process requests from this cohort of applicants.

16. Internal and Information Commissioner reviews from these individuals are unusual in that they often do not seek access to information that was redacted or withheld, but rather assert the request was not adequately addressed and the Commission has either:

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

#### Objects of the FOI Act

17. The FOI Guidelines at paragraph [1.7] relevantly provide that, in performing functions and exercising powers under the FOI Act, agencies and ministers must consider the objects of the FOI Act, which are contained within section 3 and relevantly include:

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

*Promoting Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision making;*

*Promoting Australia's representative democracy by increasing scrutiny, discussion, comment and review of government activities; and*

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

18. The Commission submits that the IC Review is not directed towards gaining access to documents, but rather, the Applicant is attempting to use the IC review process to continue to agitate matters that have already been investigated by the Commonwealth and dealt with separately. The Commission submits that it is inappropriate that the FOI Act should become the platform to support the immoderate prolongation of a personal grievance (*Australian Securities and Investments Commission and Sweeney* [2013] AICmr 62, at [44]). The Commission also notes that the Agency most likely to hold the documents sought by the Applicant, the Federal Court, has already undertaken extensive searches for documents and has been unable to locate the documents sought.
19. There has been a lot of discussion recently about the delays across the FOI system (including in the finalisation of IC reviews) and the improvements needed to bring about greater efficiencies across the FOI regime.<sup>1</sup> In the Commission's view, it is as important as ever that matters are prioritised where there is a genuine desire on the part of applicants to gain access to documents, as opposed to furthering an ulterior purpose.
20. In light of the above reasons, the Commission respectfully submits that the Information Commissioner should exercise the discretion in section 54W(a)(i) of the FOI Act to discontinue the IC review on the basis that it is not made in good faith and represents an abuse of process.

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

Yours sincerely

Melanie McIntyre, **General Counsel**

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