



Australian Government

Australian Public Service Commission

Cynthia T

By Email: <foi+request-10772-2062ee1b@righttoknow.org.au>

Our Reference: LEX 864 (761)

Dear Applicant

Freedom of Information request

1. The purpose of this correspondence is to advise you of a revised decision the Australian Public Service Commission (Commission) has made under section 55G of the *Freedom of Information Act 1982* (FOI Act) in relation to LEX 864.
2. My decision applies in relation to the release of one (1) document in part.
3. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au.

Revised Decision

4. I have made a decision to vary the internal review decision made by Sam Montenegro, FOI decision maker, on 29 January 2024.
5. In varying this decision, I have decided to release a single document to you in part.

Authority to make decision

6. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
7. On 19 October 2023, you requested access to the following:

“Under the Freedom of Information Act 1982 (Cth), I request any reports on the operations of the Australian Public Service Commission given during the 2022-2023 financial year by the Commonwealth Ombudsman.”
8. On 19 November 2023, I as Authorised Decision Maker refused access to any documents. In providing that decision I noted that no documents falling under the parameters of “report AND operations” were located.
9. On 16 December 2023, you sought an internal review of the original decision.

10. On 29 January 2024, you were provided with a decision relating to your internal review request which affirmed my earlier decision to refuse your request for access to the documents under section 24A(1) of the FOI Act.
11. On 8 March 2024, the Office of the Australian Information Commissioner (OAIC) sent the Commission a notice under section 54Z of the FOI Act advising that the OAIC had commenced a review of the Commission's internal review decision. In your application you made reference to an investigation conducted by the Office of the Commonwealth Ombudsman:

“According to the decision maker, the “document located and within the scope of your request includes the Office’s findings, comments and suggestions relating to an investigation, communicated to an agency under s 12(4) of the Ombudsman Act 1976.”
12. I have reviewed this matter and consider I am in a position to grant access in part to the document communicated to the Commission under section 12(4) of the *Ombudsman Act 1976* and identified at **Attachment A**. Accordingly, I have decided to make a revised decision under section 55G of the FOI Act.
13. The Commission will provide the OAIC with a copy of this revised decision.

Reasons for Decision

14. In making my revised decision on your request, I have had regard to:
 - the terms of your request;
 - the primary and internal review decisions;
 - the terms of your application for IC review through the OAIC;
 - the further primary and internal review decisions, and application for IC review through the OAIC for MR24/00880;
 - the FOI Act; and
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).
15. The section 12(4) document did not fall within the original scope of your request as the document is not a report.
16. I have reviewed all of the material available to me, as outlined at paragraph 14 of this letter, and I have decided to grant access to the document identified in Attachment A in part.
17. I consider that it would be contrary to the public interest to release the personal information contained within the document at this time or that disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient

conduct of the operations of the Commission, for the purposes of sections 47F, 47E(d) and 11A(5) of the FOI Act.

18. Accordingly, I have decided to release the document to you in part.

19. My reasons are at **Attachment B**.

Application for Information Commissioner Review – Review Rights

20. The OAIC is currently conducting an IC review of the Commission's internal review decision. Under section 55G(2)(b) of the FOI Act, the Information Commissioner (IC) must deal with your IC review application as if it were an IC review application of this revised decision.

21. The scope of your IC review emphasised that you are seeking access to the section 12(4) document. This revised decision has provided you with access to part of the document. I therefore kindly ask you to consider withdrawing your application for IC review on the basis that your concerns have been addressed.

22. You can contact the OAIC by email at foidr@oaic.gov.au or by phone on 1300 363 992 to advise whether you wish to proceed with your application.

Contacts

23. If you require clarification on matters in this letter please contact the Commission's FOI Officer by email at xxx@xxxx.xxv.au

Yours sincerely,



Melanie McIntyre
Authorised FOI decision maker
12 July 2024

ATTACHMENT A

SCHEDULE OF DOCUMENTS

Document	Pages	Description	Exemptions
1	1 - 8	Section 12(4) of the Ombudsman Act letter	Released in part

REASONS

Exemptions

1. In finding the document is exempt, I have applied the following exemptions:
 - a) paragraph 47E(d) – Certain operations of agencies; and
 - b) section 47F – Personal privacy.

Subsection 47E(d) – Certain operations of agencies – substantial adverse effect on the proper and efficient conduct of the operations of an agency

2. Paragraph 47E(d) of the FOI Act provides that a document is conditionally exempt from disclosure if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
3. For this exemption to apply, it is necessary that the predicted effect ‘would, or could reasonably be expected to’ occur.
4. The term ‘could’ in this instance, as the FOI Guidelines state at 5.17, requires an analysis of whether there exists a reasonable expectation that an event, effect or damage could occur. This ‘reasonable expectation’ cannot be a mere risk, possibility or chance of prejudice. It must be based on reasonable grounds, a real, significant or material possibility of prejudice, as the FOI Guidelines at 5.18 state.
5. Paragraph 6.122 of FOI Guidelines also state that paragraph 47E(d) also applies to documents that relate to a complaint made to an investigative body, noting that “the disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the efficient conduct of the investigative body’s operations.”
6. The document found in scope includes material containing findings, comments and suggestions relating to an investigation by the Ombudsman under subsection 12(4) of the *Ombudsman Act 1976*.
7. The Ombudsman is an investigative agency, involved in administering and enforcing the *Public Interest Disclosure Act 2013* (PID Act).
8. Pursuant to subsection 8(2) of the Ombudsman Act, Ombudsman investigations are dealt with in private and the protection of those who make disclosures is central to the Public Interests Disclosure (PID) Scheme.
9. In my view the release of this document is likely to have a larger effect of inhibiting or discouraging staff from freely and effectively communicating with investigative agencies on matters relating to PIDs.

10. It is my view that public detriment could reasonably be expected if the Ombudsman is compromised in its ability to obtain confidential information as part of future investigations.

Section 47F – Personal privacy

11. Section 47F of the FOI Act conditionally exempts a document where “its disclosure would involve the unreasonable disclosure of personal information about any person.” Access must be provided unless access would, on the balance, be contrary to the public interest. (subsection 11A(5) of the FOI Act).

12. Personal information means information or an opinion about an identified individual, of an individual who is reasonably identifiable:

- whether the information or opinion is true or not; and
- whether the information or opinion is recorded in a material form or not.

13. It is my view that the document contains such matter.

14. In considering what is unreasonable, the Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at [51] stated:

...whether a disclosure is ‘unreasonable’ requires... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

15. Other factors to be considered include the nature, age and current relevance of the information, any opposition to disclosure held by the person that the personal information relates to, and the circumstances of an agency’s collection and use of the information (*‘FG’ and National Archives of Australia* [2015] AICmr 26 at [47]).

16. In *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020), Deputy President S A Forgie found (at [130]):

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

17. In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines provide, at paragraph 6.144:

For example, in Colakovski v Australian Telecommunications Corp, Heerey J considered that ‘... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable’. This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access to contrary to s 11(2).

18. Relevant to personal information of certain public servants, under the FOI Act there is no presumption that agencies and ministers should start from the position that the inclusion of the full names of staff in documents increases transparency and the objects of the FOI Act: *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [83].

19. In my view the following factors do not support the release of this personal information under section 47F of the FOI Act:

- the individuals’ personal information, in particular their name, will identify them;
- the personal information is unique and relates specifically to the individuals, and is generally not well known or publicly available as it relates to the findings of a private Ombudsman investigation;
- the FOI Act does not control or restrict the subsequent use or dissemination of information released under the FOI Act;
- the disclosure of this information will not advance scrutiny of any decisions;
- the disclosure of this information could expose concerned individuals to unsolicited and inappropriate approaches by external parties;
- release of the individuals’ personal information may cause stress for them or other detriment; and
- disclosure would prejudice the individuals’ right to privacy.

20. In my view to the extent that the document includes personal information of individuals, those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of their personal information.

Section 11A – Public interest test

21. 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.
22. I 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.
23. I identified the following factors as weighing against disclosure:
 - disclosure of individuals' personal information will not advance scrutiny of any decisions;
 - disclosure would prejudice individuals' right to privacy;
 - disclosure could lead to unwarranted approaches to the individuals which would adversely impact their ability to perform their role and functions.
 - disclosure would reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information;
 - disclosure would reasonably be expected to prejudice the proper and efficient conduct of the investigations by the Ombudsman; and
 - disclosure could be expected to undermine the confidentiality provisions which are central to the PID Scheme.
24. 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.
25. On balance, the Commission submits that disclosure of the whole document would be contrary to the public interest. To the extent that the material contained in the document is conditionally exempt under paragraph 47E(d) and section 47F of the FOI Act, those parts are exempt from disclosure.
26. In my view these factors outweigh disclosure of the whole document for the purposes of promoting the objects of the FOI Act, including to inform the community of Government operation and inform on a matter of public confidence.
27. Paragraph 6.19 of the FOI Guidelines provides further detail on the factors that favour disclosure in the public interest. I have identified the following factors as weighing in favour of disclosure of parts of the document:
 - The disclosure will promote the objects of the FOI Act.
 - This includes information about the operations of Government and its practices, policies, and guidelines when dealing with members of the public.

- The disclosure will reveal the reason for a government decision and provide background and contextual information that informed the decision.
- The disclosure will enhance the scrutiny of government decision making.
- The disclosure will contribute to the administration of justice, including procedural fairness.

28. I am prepared to release content in the document that relates to feedback from the Ombudsman that the Commission should take steps to improve its handling of similar matters in future. For this reason the Commission has prepared a marked up version of the document that releases this information in part.