



Australian Government

Australian Public Service Commission

Cynthia T

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

Our Reference: LEX 1073 (872)

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 1073.
2. My decision applies in relation to the release of one (1) document in part that was previously found to be exempt in full under sections 24A(1) of the FOI Act.
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 15 April 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 13 February 2024, you requested access to the following:

“The report issued from the Office of the Commonwealth Ombudsman, dated 15 December 2022, which “includes the Office’s findings, comments and suggestions relating to an investigation, communicated to [the Australian Public Service Commission].”
8. On 12 March 2024, SM, as Authorised Decision Maker refused access to one document on the grounds of sections 47E(d), 47F and 11A of the FOI Act. I outline the reasoning behind this decision below.

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

9. 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. For this exemption to apply, it is necessary that the predicted effect ‘would, or could reasonably be expected to’ occur.
10. The Authorised Decision Maker was required to assess whether there existed 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.
11. 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.”
12. The document found in scope included material containing findings, comments and suggestions relating to an investigation by the Ombudsman under subsection 12(4) of the Ombudsman Act 1976. The Ombudsman is an investigative agency, involved in administering and enforcing the *Public Interest Disclosure Act 2013* (PID Act).
13. 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.
14. The Authorised Decision Maker considered that the release of this document was likely to have a larger effect of inhibiting or discouraging staff from freely and effectively communicating with investigative agencies on matters relating to PIDs. The Authorised Decision Maker was satisfied 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 47 – Personal Privacy

15. 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).
16. 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.

17. The Authorised Decision Maker considered that the document contained such matters; specifically, the names of individuals. 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...
18. 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]).
19. 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.
20. 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).
21. 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].

22. The Authorised Decision Maker identified the following factors that did 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 falling within scope of your FOI request;
 - 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.
23. The Authorised Decision Maker therefore decided to the extent that the document included 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

24. Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless access to the document would, on balance, be contrary to the public interest.
25. The Authorised Decision Maker considered the public interest exemption factors in favour of disclosure at subsection 11B(3) of the FOI Act, including the extent to which access to the document would promote the objects of the FOI Act and inform debate on a matter of public importance.
26. The following factors were identified as weighing against disclosure:
- disclosure of individuals' personal information will not advance scrutiny of any decisions falling within the scope of your FOI request;
 - disclosure would prejudice individuals' right to privacy;
 - disclosure could lead to unwarranted approaches to the 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.
27. Subsection 11B(4) of the FOI Act lists factors that are irrelevant to determining whether access would be in the public interest. These factors were not considered.

28. On balance, it was found that disclosure of the 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. These factors outweighed disclosure 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.

Internal Review

29. On 14 March 2024, you sought an internal review of the original decision.
30. On 15 April 2024, you were provided with a decision relating to your internal review request which affirmed the earlier decision to refuse access to the document under sections 47E and 47F, and on the basis the disclosure is not in the public interest.
31. On 27 June 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:

"I would like a review of the decision in relation to a report issued by the APSC by the Commonwealth Ombudsman in December 2022"

Reasons for Decision

32. I have reviewed this matter and consider I am in a position to grant access in part to the document made under section 12(4) of the *Ombudsman Act 1976*. Accordingly, I have decided to make a revised decision under section 55G of the FOI Act.
33. My reasons are as follows
34. Paragraph 6.19 of the FOI Guidelines provides further detail on the factors that favour disclosure in the public interest. The Commission has 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.
35. The Commission is 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

36. The Commission will provide the OAIC with a copy of this revised decision.

Application for Information Commissioner Review – Review Rights

37. The OAIC is currently conducting an IC review of the Commission's internal review decision to refuse access to the documents requested. 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.

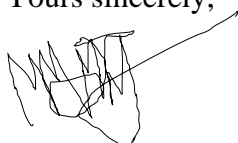
38. The scope of your IC review emphasised that you are seeking access to the section 12(4) document. This revised decision has provided you with access to part of the document. I therefore kindly ask you to consider withdrawing your application for IC review on the basis that your concerns have been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

39. 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

40. 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,

A handwritten signature in black ink, appearing to read 'Melanie McIntyre', with a long horizontal line extending to the right.

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