

Dear FOI Contact Officer

OAIC ref: MR24/00901 | APSC ref: LEX 1155

We refer to your notice of Information Commission Review (**IC Review**) received on 20 August 2024 seeking information outlined in paragraph 3.14 of the *Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews (Directions)*.

Please find our submissions in this matter below.

Scope of IC Review

1. This IC Review application concerns an internal review decision made by Ms Melanie McIntyre of the Australian Public Service Commission (**Commission**) on 15 May 2024.
2. The Commission understands from the Notice of IC Review that the Applicant has sought a review of the Commission's decision to refuse access to parts of the document and contends that a substantially less redacted version of the document had been released under the *Freedom of Information Act 1982 (FOI Act)*. The Commission provides these submissions to assist the Information Commission to deal with the IC Review.
3. As an overarching submission that informs all the Commission's actions with respect to this request, this request relates to a document produced in the course of PID investigation under the *Public Interest Disclosure Act 2013 (PID Act)*, prior to 1 July 2023.
4. The Commission submits that, prior to 1 July 2023, section 65 of the PID Act operated to apply an offence to disclosure of protected information obtained in the course of conducting an investigation. This means that it would, in the view of the Commission, possibly be an offence to release this particular document in full or significantly redacted, revealing confidential, protected information, to the Applicant. There do not appear to be any relevant exemptions under subsection 65(2) that apply to an FOI Act request. An excerpt of the provision as at 30 June 2023 is Document 12 in the document bundle. For the benefit of the Applicant, who will not have access to the bundle, we also extract it here:

65 Secrecy—general

(1) A person commits an offence if:

(a) the person has information (**protected information**) that the person obtained:

(i) in the course of conducting a disclosure investigation; or

(ii) in connection with the performance of a function, or the exercise of a power, by the person under this Act; and

(b) the person:

(i) discloses the information to another person; or

(ii) uses the information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) Subsection (1) does not apply if:

(a) the disclosure or use is for the purposes of this Act; or

(b) the disclosure or use is for the purposes of, or in connection with, the performance of a function, or the exercise of a power, of the person under this Act; or

(c) the disclosure or use is for the purposes of, or in connection with, taking action in response to a disclosure investigation; or

(e) the protected information has previously been lawfully published, and is not intelligence information; or

(f) the protected information is intelligence information that has previously been lawfully published, and the disclosure or use occurs with the consent of the principal officer of the agency referred to in section 66 as the source agency for the intelligence information.

Note: A defendant bears an evidential burden in relation to a matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).

(3) Except where it is necessary to do so for the purposes of giving effect to this Act or another law of the Commonwealth, a person is not to be required:

(a) to produce to a court or tribunal a document containing protected information; or

(b) to disclose protected information to a court or tribunal.

Background

5. On 17 March 2024, BZ (**Applicant**), submitted a FOI request (LEX 876) seeking an unredacted copy of a Public Interest Disclosure (**PID**) report made by the Commission regarding the recruitment of registrars of the Federal Court of Australia. A copy of the FOI request is Document 1 of the attached document bundle.
6. On 9 April 2024, the Commission had released a partially redacted version of the Document in response. A copy of this Document is Document 2 of the document bundle. The accompanying decision notice, dated 9 April 2024, is at Document 3 of the document bundle.
7. On 15 April 2024, BZ (**Applicant**), made an internal review application of the primary decision (LEX 954). On 15 May 2024, the Commission affirmed its original decision to partially release the documents. The internal review decision notice is Document 4 in the document bundle.

Further engagement with applicant

8. On 4 September 2024, the Commission wrote to the Applicant initiating engagement in line with the Directions, suggesting further discussion to be held via telephone conversation to resolve or narrow the issues in dispute. A copy of the letter sent to the Applicant arranging contact is at pages 31 and 32, Document 5 in the document bundle.
9. On the same day, the Applicant indicated their preferred mode of communication is email, see page 31 of Document 5.
10. On 11 September 2024, the Commission proceeded to engage with the Applicant via email, seeking further information on the substantially redacted version of the relevant document the Applicant refers to.

11. On the same day, the Applicant provided details of the document, that is, the date of release, agency that released the document and the FOI reference number. The Applicant also provided a link to the substantially unredacted document that the Applicant asserts was released by the Commonwealth Ombudsman.
12. On 17 September, the Commission wrote back to the Applicant notifying them that the link provided could not be opened. The Commission requested the Applicant to provide a working link, or the document itself as an attachment to enable the Commission to assist further. Correspondence in relation to further engagement is Document 6 in the document bundle.
13. On Sunday 22 September 2024, the Applicant provided the substantially redacted version of the document in question, via personal email address, as Right to Know does not have capabilities to share/upload documents. The correspondence and attached document from the Applicant are Document 7 and Document 8, respectively.
14. On 24 September, the Commission consulted again with the Commonwealth Ombudsman, seeking confirmation whether they had released the relevant document under the FOI Act, correspondence at Document 9. We note that we had engaged with the Ombudsman in 2023 seeking confirmation on the release of this document, in relation to a request from another applicant under the FOI Act, correspondence at Document 10. This matter is now at the IC Review stage (*Ref: MR24/00108, Our ref: LEX 964*). As a result of this matter, the Commission will now seek to make submissions on that matter, given the further information obtained.
15. On 26 September 2024, the Commonwealth Ombudsman clarified that the documents the Applicant had provided to the Ombudsman, which captured the Document in question, were provided back to the Applicant under the FOI Act, referred to in Document 11.
16. That is:
 - a. the Ombudsman received a request under the FOI Act on 10 November 2021 that included the document that was substantially un-redacted;
 - b. and so in the FOI Act decision the Ombudsman made on 14 January 2022 (FOI-2020-10120), provided the same document back as part of the FOI Act decision at that time.
17. This is a different understanding of the facts than the Commission had at the time of making its decisions at first instance and on review, given the correspondence from the Ombudsman at Document 10.

Commission's submissions

Conditional exemptions and public interest test

18. The Commission relies on the reasoning outlined in the original FOI decision dated 9 April 2024 (Attachment A, paragraphs 4 – 23), and internal review decision notice dated 15 May 2024 (Attachment A, paragraphs 2 – 23), in relation to the application of section 47E(c), section 47E(d) and section 47F conditional exemptions to the document, see Document 4 and 5, respectively.

19. The Commission refers to the decision dated 21 November 2023, by acting Freedom of Information Commissioner, Elizabeth Hampton, in '*YU and Bureau of Meteorology (Freedom of information)* [2021] AICmr 75 (***YU and BOM***), which involves, amongst other documents, an investigation report made under section 51 of the PID Act. This decision upheld the importance of protecting information collected during a PID investigation process, and accepted that certain operations of the agency may be undermined if the confidentiality established under the PID Act was circumvented by a request for information under the FOI Act, see Paragraph 31 of the *YU and BOM* decision.
20. In the decision of *YU and BOM*, the Information Commissioner was in favour of the submitted public factors against disclosure, and was satisfied that disclosure could reasonably be expected to:
 1. Prejudice an agency's ability to obtain confidential information.
 2. Impede the integrity of the confidential investigation process under the PID Act.
 3. Impede an agency's ability to effectively and efficiently manage its employees.
21. The Commission submits that these factors also formed part of its public interest test under section 11A(5), when making its own primary decision (dated 9 April 2024) in this matter, which can be found at Attachment A, paragraphs 24 - 29, page 18 of Document 3 in the document bundle, as well as its internal review decision (dated 15 May 2024), Attachment A, paragraphs 24 – 29, page 28 of Document 4.
22. We acknowledge that there had been a miscommunication between the Commission and the Ombudsman, and we had provided a partial release decision on the basis that the Ombudsman had not previously released the document under the FOI Act to the Applicant.
23. Paragraph 3.18 of the FOI Guidelines provide the following:

An FOI decision maker must approach each decision with an open mind...and is not prevented from making a decision by reason of having dealt previously with a similar issue or applicant, or having expressed a view about FOI Act principles or requirements.
24. The Commission submits that it is not bound by FOI decisions made by other agencies, and as the author of the Document, the Commission maintains its position that the exemptions applied on the Document, should remain. It also maintains the reasoning as stated in the decisions at first instance, and on review.
25. To re-iterate, the release of an unredacted version of this document by the Commission, would undermine the Commission's obligation to carry out its functions under the PID Act, including its ability to maintain confidentiality and protect information obtained during an investigation.
26. At Paragraph 44 of the decision in *YU and BOM*, the Information Commissioner was satisfied that there is strong public interest in ensuring the confidentiality protections under the PID Act are maintained, and by operation of section 65 of the PID Act. We

also, again, refer to section 65 of the PID Act relating to disclosures made prior to 1 July 2023, as is the case for this request.

Applicant already has access to the documents

27. In the present matter, the correspondence with the Applicant indicates that the Applicant is seeking documents which they already have access to, see Document 6.
28. The Commission does not propose to make a decision under section 55G to again 'release under the FOI Act' a document provided by the Applicant that they already have access to. The Commission maintains that the conditional exemptions apply to protect the information.
29. In light of the above reasons, the Commission respectfully submits that the Information Commissioner should exercise discretion under section 55K of the FOI Act affirming the IC reviewable decision.

Please feel free to contact the Commission should you require further information.

The Commission has provided a copy of these submissions to the Applicant.