

Our Ref: FOI-2024/0328114738

25 June 2024

Mr Alex Pentland

**By email:** [foi+request-11282-efe5a1a1@righttoknow.org.au](mailto:foi+request-11282-efe5a1a1@righttoknow.org.au)

Dear Mr Pentland

## **Internal review request under the *Freedom of Information Act 1982 (Cth)***

I refer to your email dated 26 May 2024 to the Australian Human Rights Commission (**Commission**) requesting an internal review of the Commission's decision dated 29 April 2024 (**29 April Decision**).

This letter is to advise you of my decision in relation to the requested internal review. I am an officer authorised under s 23(1) of the *Freedom of Information Act 1982 (Cth)* (**FOI Act**) to make decisions in relation to FOI requests.

### **FOI request and the Decision**

1. On 28 March 2024, you emailed the Commission requesting access to "correspondence between officials of the Australian Human Rights Commission relating to Lorraine Finlay's piece in *The Nightly* titled "Do not turn a blind eye to hate / In silence, anti-Semitism and racism flourishes".
2. As a result of communications with my colleague Jessica Tran, on 3 April 2024, you agreed to reduce the scope of your request to correspondence sent between relevant Commission staff who were involved in preparing Commissioner Lorraine Finlay's article in *The Nightly* published on 27 March 2024 (**Opinion Piece**). In that correspondence, you also agreed to the redaction of names and personal details of non-SES Commission staff in the documents under s 22 of the FOI Act.
3. On 29 April 2024, you were provided with the decision in relation to your FOI request along with a schedule of documents (**Schedule**) and a bundle of the documents being released to you. The 29 April Decision was as follows:

- access was granted in full to documents 1, 4, 5, 7, 20, 21, 22, 23, 23A, 24A, 25, 26, 28 and 29 in the Schedule
  - partial access was granted to documents 3, 24 and 27 in the Schedule, with redactions made under s 22 of the FOI Act
  - partial access was granted to documents 2, 6, 8, 9 to 15, 16 to 19 in the Schedule, with redactions to those documents made under either or both s 47C and s 47E of the FOI Act, and redactions made under s 22 of the FOI Act
  - access was refused to documents 1A, 2A, 5A, 9A and 15A in the Schedule, being draft copies of the Opinion Piece, under s 47C of the FOI Act.
4. On 28 May 2024, you requested an internal review of the 29 April Decision, specifically the decisions to refuse access to documents or parts of documents under s 47C and s 47E of the FOI Act.

### **Decision and reasons for decision**

5. I have decided to affirm the original 29 April Decision. This means that I have decided to refuse access to documents or parts of documents in accordance with the 29 April Decision. My reasoning is set out below.
6. I have taken the following material into account in making my decision:
- the correspondence between you and the Commission in relation to your FOI request and request for an internal review
  - the FOI Act
  - the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act
  - relevant case law.

### ***Deliberative processes – section 47C of the FOI Act***

7. In the 29 April Decision, access was refused to documents 1A, 2A, 5A, 9A and 15A, and redactions were made to documents 2, 6, 8, 9 to 15, and 16 to 19, on the basis that the withheld information is 'deliberative matter' and considered exempt from disclosure under s 47C of the FOI Act.
8. Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure if it contains deliberative matter.
9. Deliberative matter is content that is in the nature of, or relating to either:

- a) an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- b) a consultation or deliberation that has taken place, in the course of, or for the purpose of, a deliberative process of the government, an agency or minister.

10. As stated in paragraphs 12 and 13 of the 29 April Decision, deliberative matter may include a collection of facts or opinions, the pattern of facts or opinions considered, or interim decisions or deliberations. Deliberative matter does not include operational information or purely factual material, or a decision reached at the end of the deliberative process. I also note paragraphs 14 and 15 of the 29 April Decision which further sets out what a deliberate process involves.
11. I have examined unedited copies of the documents at issue. Documents 2, 6, 8, 9 to 15, and 16 to 19, comprise parts that express opinions, advice, recommendations and the weighing up and evaluation of arguments and considerations in relation to the evolution of the Opinion Piece including the drafts of the Opinion Piece before it was finalised. It is clear to me that such discussions were interim in nature, as those involved provided opinions and suggestions and sought clarification on certain points in the Opinion Piece in its draft versions. I am of the view that these discussions were not intended to be considered as 'final' but were a part of the process before arriving at a final product. In my view, these documents contain deliberative matter.
12. Documents 1A, 2A, 5A, 9A and 15A are working drafts of the Opinion Piece. These are not the final product and content was edited, deleted, and added to as the draft evolved. In my view, these documents are deliberative matter.
13. The preparation of drafts in the process of arriving at a final product, and such internal discussions as described above is an operational function of an agency.
14. However, pursuant to s 11A(5) of the FOI Act, a document must be disclosed even if it is conditionally exempt, unless disclosure of the document would be contrary to the public interest. In my view, disclosure of the redacted/withheld material, would be contrary to the public interest.
15. In forming this view, I have had regard to the below matters.
16. Disclosing the documents would promote the objects of the FOI Act (s 11B(3)(a)). I consider that this is the only factor in favour of disclosure and that it is outweighed by other factors. Given the other material disclosed, I

am not satisfied that disclosure of the withheld material would inform public debate on a matter of public importance (s 11B(3)(b)).

17. One relevant public interest factor against disclosure identified in the FOI Guidelines is that disclosure could reasonably be expected to prejudice the management function of an agency.<sup>1</sup>The list of factors set out in the Guidelines is non-exhaustive.
18. Relevant management functions of the Commission include promoting an understanding and acceptance, and the public discussion, of human rights in Australia.<sup>2</sup> The Opinion Piece by the Human Rights Commissioner, concerns a topical human rights issue. The withheld documents and parts of documents contain discussions that ultimately go towards determining how best the Commission can promote an understanding of the human rights issues at play in this particular context, and how best to promote public discussions around such issues.
19. I am satisfied that disclosure of the withheld material could reasonably be expected to inhibit the effectiveness of the evaluation and decision-making processes of the Commission relevant to exercising this function.
20. There is a public interest in protecting the integrity of decision-making processes. This can be done by separating the final decisions from the opinions and discussions around specific decisions made along the way and provided at earlier stages of the consideration of a matter. The opinions expressed in the withheld material were preliminary in nature, they did not necessarily constitute final decision and were not intended to be viewed as constituting final decisions.
21. Having regard to all these matters, I am satisfied that disclosure of the withheld material in these documents would be contrary to the public interest.
22. I have reviewed the reasons provided for refusing access to these documents and parts of documents as set out in the 29 April Decision. I refer to paragraph 23 of that decision:

I consider that there is public interest in protecting drafts of opinion pieces intended for publication and related discussions, allowing for frank consideration of the issues and open collaboration between Commission staff (including the President and Commissioners). The draft Opinion Piece contains preliminary views by its author and was not intended to be viewed or

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<sup>1</sup> Australian Information Commissioner, FOI Guidelines [6.22(n)].

<sup>2</sup> *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(g).

published in that form, the draft opinion piece therefore represents the thinking process prior to producing the final product. I consider there is public interest in protecting the integrity of decision-making, to separate material that was contemplative in nature and the final decision.

I agree with this assessment.

23. To the extent that there is material in the documents likely to inform debate on a matter of public importance, I consider that it is contained in the parts of the documents that have been released.
24. Having regard to the considerations set out above, I am satisfied that the reasons provided by the original decision maker were correct and affirm the 29 April Decision to redact parts of documents 2, 6, 8, 9 to 15, 16 to 19 under s 47C of the FOI Act, and to refuse access to documents 1A, 2A, 5A, 9A and 15A under s 47C of the FOI Act.

***Certain operations of the agency – section 47E of the FOI Act***

25. In the 29 April Decision, access was also refused to parts of documents on the basis that disclosure would have a substantially adverse effect on the proper and efficient conduct of the Commission's operations and are conditionally exempt from disclosure under s 47(E)(d) of the FOI Act. With reference to the Schedule and bundle of documents provided to you, redactions were made under s 47(E)(d) to documents 2, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, and 19.
26. I have examined unedited copies of the documents at issue. For the reasons set out below, I am of the view that the redacted parts of these documents are conditionally exempt under s 47(E)(d) of the FOI Act and that it would be contrary to the public interest for the withheld parts of these documents to be released to you.
27. Under s 11(1)(g) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), one of the Commission's functions is to promote an understanding and acceptance, and the public discussion, of human rights in Australia. In section 3.1 above, at paragraphs 18, I have outlined why I am of the view that the documents captured by your FOI request were created in exercising this function.
28. To be able to do this effectively, it is vital that Commission staff, especially senior staff who are responsible for making decisions at the highest level, can communicate with one another in a candid fashion. An important part of being able to communicate frankly with colleagues is the expectation that some discussions will be kept confidential. Often these is no specific

intention for the discussions to be treated as confidential but due to the nature of the information discussed, disclosure would or could reasonably be expected to come as a surprise to those providing it and could discourage them from speaking candidly which would hinder the best interests of the agency in carrying out its functions. Confidentiality of certain discussions provide an incentive to those within the Commission to fully, and without hesitation, participate openly in the Commission's internal deliberative processes to best assist the agency to carry out its functions.

29. Under s 11A(5) of the FOI Act, a document must be disclosed even if it is conditionally exempt, unless disclosure of the document would be contrary to the public interest. In my view, disclosure of the parts of the documents in question would be contrary to the public interest.
30. I have reviewed the reasons given in the 29 April Decision as to why the original decision maker concluded that disclosure of this material would be contrary to the public interest. In my view, the considerations and assessment set out in paragraphs 35 to 41 of that decision are correct.
31. The only additional comment I will make on this point is that while I consider that the overarching substantive subject matter of the published Opinion Piece and related discussions may in a general sense relate to a matter of public importance, the documents in question specifically contain Commission staff's deliberations and internal working processes that were not intended to be viewed as final decisions. Therefore, I consider that release of these documents would only inform debate on a matter of public importance to a limited extent.
32. Accordingly, it is my view that disclosure of the parts of the documents in question would be contrary to the public interest.

## **Your review rights**

### **Information Commissioner review**

33. Under s 54L of the FOI Act, you may apply to the Oaic to review my decision. An application for review by the Oaic Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:
  - online: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>
  - email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
  - post: GPO Box 5218, Sydney, NSW, 2001

- in person: Level 3, 175 Pitt Street, Sydney, NSW

34. More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'HPanditharatne'.

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