



Australian Government
Australian Public Service Commission

Anonymous

By email: foi-request-8633-abfd90bc.x1q0a@aleeas.com

Our reference: LEX 491

Dear Anonymous

Freedom of Information request

1. I am writing about your Freedom of Information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) made on 27 February 2023 for access to documents held by the Australian Public Service Commission (Commission).
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au.

Documents relevant to your request

3. You requested access to documents in the following terms:

Under the FOI Act, I request access to the documents containing logically probative and relevant evidence that demonstrates that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000.

4. The context you provided for the scope of your request is too lengthy to reproduce here, noting it is contained in your email request.
5. In reviewing the context, I understand this request concerns documents that an individual, Ms Kate McMullan, considered as part of a Public Interest Disclosure (PID) investigation.
6. As decision-maker for this FOI request, I note that I had no involvement in this specific PID investigation which occurred in 2020. Therefore, as an unrelated third party, I am unable to assess whether documents considered by Ms McMullan during this specific PID investigation were 'logically probative' or 'relevant.'
7. In light of the above, I believe there is sufficient basis to be satisfied your request does not provide such information concerning the document/s as is reasonable necessary to enable me to identify it (paragraph 24AA(1)(b) of the FOI Act).

8. However, in consideration of the objects of the FOI Act, being the promotion of transparency and facilitation of access to information held by government, I have interpreted your request to mean documents Ms McMullan considered that might contain logically probative and relevant evidence that demonstrates that 'the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000.'
9. I have identified two (2) documents relevant to your request.

Decision on your FOI request

10. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
11. I have decided to refuse access to the documents because I consider they are exempt in full.
12. **Attachment A** sets out the grounds on which the documents are exempt.
13. My reasons are set out in **Attachment B**.

Deletion of exempt matter or irrelevant material

14. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of the request.
15. Relevant to deleting exempt or irrelevant content from a document, the FOI Guidelines provide:

3.98 Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

16. I consider the objects of the FOI Act will not be served by providing access to an edited version of the documents because extensive editing is required that would leave only a skeleton of the former documents, conveying little content or substance.

Contacts

17. If you require clarification on matters in this letter please contact the Commission's FOI Officer by telephone on (02) 6202 3500 or by email at foi@apsc.gov.au.

Review rights

18. You are entitled to seek review of this decision. Your review rights are set out at **Attachment C**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Clare McLean', is enclosed within a red rectangular border.

Clare McLean

Authorised FOI decision maker

29 March 2023

ATTACHMENT A

SCHEDULE OF DOCUMENTS

Document	Description	Exemptions
1	Email correspondence between the Commission and Federal Court of Australia dated 27 October 2020	Sections 47C and 47E of the FOI Act apply.
2	Word document titled 'Judicial Registrar Recruitment'	Sections 47C, 47E, and 47F of the FOI Act apply.

ATTACHMENT B

Reasons for decision

1. In making my decision on your request, I have had regard to:
 - the terms of your request;
 - the contents of the documents;
 - the *Public Interest Disclosure Act 2013* (PID Act);
 - the *Public Service Act 1999* (PS Act);
 - the FOI Act; and
 - the FOI Guidelines issued by the Australian Information Commissioner.

Section 47E – Certain operations of agencies

2. Subsection 47E(d) of the FOI Act provide that a document is conditionally exempt from disclosure if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
3. The Australian Public Service Commissioner (the Commissioner) and his delegates have a number of inquiry functions under the PS Act, including in relation to the investigation of certain public interest disclosures under the PID Act.
4. It is important that the Commissioner and his delegates are able to properly undertake activities under the PID Act. The PID scheme promotes integrity and accountability across the Commonwealth public sector and provides a protected space for all current and former public officials ('disclosers') to make disclosures relating to suspected wrongdoing or misconduct.
5. I have considered that under the PID scheme, information collected during the course of a PID investigation is protected under section 65 of the PID Act.
6. I have decided that release of both documents under the FOI Act would likely undermine the protections provided under the PID scheme, and likely discourage current and former public officials to make PID disclosures or to involve themselves in PID investigations. The success of any PID investigation process relies heavily on the willingness of individuals to participate in the PID scheme in a frank and candid manner.
7. Further, I consider that the release of both documents would also likely have a larger effect of inhibiting or discouraging Commission staff to freely and effectively communicate on matters relating to the PID Act, including in the consideration and assessment of material subject to a PID investigation.
8. Should individuals be unwilling or unable to effectively participate in the PID scheme, this would ultimately have a substantial adverse effect on the Commission's ability to carry out its obligations under the PID Act, including its ability to ensure that allegations of misconduct are being investigated and where necessary take appropriate action in a proper and efficient manner.

9. I note that the importance of protecting information collected during a PID investigation process was upheld in the recent Information Commissioner (IC) decision of '*YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021), where the IC accepted the relevant department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act.
10. Therefore, I have decided to conditionally exempt both documents in full because disclosure of both documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the Commission's operations.
11. My consideration of the public interest test in respect of the application of section 47E to Documents 1 and 2 is outlined further at paragraphs 26-30.

Section 47C – Documents subject to deliberative processes

12. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. Deliberative matter generally consists of:
 - an opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - a deliberative process of the Commission.
13. A deliberative process includes the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions and interim decisions and deliberations.
14. On review, both documents contain material which record the deliberative processes of the Commission and the Federal Court of Australia. This deliberative material relates to how the PID investigation was conducted by the Commission, and contains material prepared or recorded as part of the deliberative PID process.
15. For the reasons outlined above, I am of the view that both documents contain deliberative matter and parts are therefore conditionally exempt under section 47C of the FOI Act.
16. Given I have already conditionally exempted both documents in full under subsection 47E(d), I have not elaborated further on which specific parts of the documents I consider exempt under section 47C.
17. My consideration of the public interest test in respect of the application of section 47C to Documents 1 and 2 is outlined further at paragraphs 26-30.

Section 47F – personal information

18. Section 47F of the FOI Act provides that a document is conditionally exempt if it would involve the unreasonable disclosure of personal information about any person.
19. Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether:

- the information or opinion is true or not; and
 - the information or opinion is recorded in a material form or not.
20. I consider that Document 2 contains personal information of third parties, including information about their qualifications and employment history.
21. I have had regard to the matters I must consider under subsection 47F(2) of the FOI Act in determining whether the disclosure of the document, in absence of consent from those third parties, would involve the unreasonable disclosure of personal information.
22. I have identified the following factors that, in my view, do not support the release of personal information under section 47F of the FOI Act:
- the third party individuals' personal information, in particular their names, will identify them;
 - the personal information is unique and relates specifically to the third party individuals, and is generally not well known or publicly available;
 - some of the personal information is qualitative assessments of third party individuals which is extremely personal and sensitive;
 - the release of some of the third party individuals' personal information may cause stress for them or other detriment; and
 - disclosure would prejudice the third party individuals' right to privacy.
23. I have therefore decided to the extent that the documents include personal information of third parties, those parts are conditionally exempt from disclosure under section 47F of the FOI Act because disclosure would involve the unreasonable disclosure of multiple persons' personal information.
24. Given I have already conditionally exempted Document 2 in full under subsections 47E(c) and (d), I have decided it would not be appropriate for me to undertake consultations with the third party individuals on section 47F at this time.
25. My consideration of the public interest test in respect of the application of section 47F to Document 2 is outlined further at paragraphs 26-30.

Section 11A – public interest test

26. 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.
27. I have 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.
28. I have identified the following factors as weighing against disclosure:

- disclosure of third party individuals' personal information will not advance any scrutiny of any decisions falling within the scope of your FOI request;
- disclosure would prejudice the third party individuals' right to privacy;
- disclosure would undermine the confidentiality and secrecy provisions fundamental to the PID Scheme;
- disclosure would hinder the Commission's future deliberative processes and efficiency with which the Commission can support the functions of the Commissioner;
- the disclosure of certain information have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission; and
- disclosure would undermine the Commission's relationship with other agencies and third party individuals.

29. 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.

30. Accordingly, I am satisfied disclosure of the conditionally exempt documents is contrary to the public interest.

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission; and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au

Post: The FOI Officer
Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply

in writing for a review by the Office of the Australian Information Commissioner (the OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: www.oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au