

## ATTACHMENT B

### Open response to OAIC discussion paper questions – Disclosure of public servants' names and contact details

**Q1: Does your agency have concerns about releasing the names and contact details of staff in response to FOI requests? If so, what are your concerns? Has your agency experienced any specific work health and safety issues as a result of a person's name or contact details being released in response to an FOI request?**

1. The department provides a diverse range of social, welfare and health services to almost every Australian through its Centrelink, Child Support and Medicare programs. The department supports the most vulnerable people in the community, with whom departmental staff have close contact through a large network of call centres and face-to-face service centres. We are one of the few government agencies with a face-to-face presence.
2. The department has two main concerns about releasing the full names and contact details of staff.<sup>25</sup> Firstly, the department has established methods and dedicated points of contact for members of the public, including general enquiry email addresses and telephone numbers. These methods have been established to avoid individual departmental officers being contacted directly by customers to deal with queries they are not trained or authorised to handle. The department receives over 48 million phone calls per year. The release of staff contact details would undermine established methods of contact and cause delays and inefficiencies in the delivery of services.
3. These concerns were accepted by the Administrative Appeals Tribunal in *Utopia and ASIC*,<sup>26</sup> where it was held:

While an APS employee must act in accordance with the Code of Conduct and adhere to the APS Values, that does not equate with his or her being contactable on his or her private telephones or email by any member of the public at any time of the day or night. The same applies even if the numbers were related to telephone services provided to them by ASIC. ASIC is entitled to put in place a means by which contact is made with its officers and a means by which members of the public are able to make contact to make complaints, convey information and so on. Against that background, it is unreasonable to disclose the contact details about the ASIC officers concerned.

4. Similarly, in *PX and AFP*,<sup>27</sup> the Information Commissioner accepted that the disclosure of staff members' direct contact details would have a substantial and adverse effect on the operations of an agency in circumstances where the agency has procedures in place to manage contact with members of the public.
5. Secondly, and most importantly, the release of staff details puts the staff member at risk of abuse, harassment and intimidation. The vast majority of interactions between staff and customers of the department are friendly and respectful. However, incidents of customer aggression do occur. In the 2017-18 financial year, departmental staff reported 7,465 such incidents (on average approximately 30 incidents each business day).

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<sup>25</sup> The department's concerns about the release of names and contact details apply equally to all workers, including contractors and public servants, as does the department's work health and safety duties.

<sup>26</sup> [2017] AATA 269, [126]

<sup>27</sup> [2019] AICmr 8, [63]-[64]



6. The release of staff names and contact details increases the risk that incidents of aggression could be directed against staff outside of their place of work and in their private lives.
7. The department has a comprehensive program to prevent and manage the risk of customer aggression. In relation to identity protection, this includes:
  - educating staff on personal and identity security;
  - not requiring staff to disclose their full name or direct contact numbers to customers or members of the public with whom they deal<sup>28</sup> and recommending that staff only record their first name or logon ID in documentation;
  - not disclosing staff surnames or direct contact numbers when releasing documents to customers<sup>29</sup>, members of the public, courts or tribunals;<sup>30</sup>
  - transferring staff members who have been the target of aggression to a different office and/or issuing them with a new work phone number or email address;
  - banning aggressive customers from attending departmental offices in person, and shifting their case-management to another staff member in an undisclosed location.
8. Because of these measures, the surnames of junior staff and direct contact numbers are rarely disclosed outside the department. However, there are numerous actual incidents which demonstrate the potential risk faced by departmental staff when even minimal personal details are disclosed. There are also numerous incidents which demonstrate the real risk of staff members being personally targeted by customers physically outside their place of work and being located and personally targeted online. The department has detailed nine such examples in its confidential response to the OAI. These examples describe staff members being harassed, abused, threatened and followed outside work – including at their home. In seven of these examples, the department needed to assist staff members to obtain a court-ordered personal protection order to ensure their safety. These are not isolated incidents.
9. The potentially extreme and tragic consequences of customers fixating on particular staff members was brought into sharp focus in September 2014, when a customer of Work and Income New Zealand (WINZ) (the department's equivalent agency in New Zealand) entered an office with a shotgun and opened fire, killing two staff members and seriously injuring a third. At sentencing, it was noted that the customer had made careful preparations, with a hit list of WINZ staff members at that office with whom he held grievances.<sup>31</sup>
10. The department acknowledges that it is not possible to predict and rule out the risk of such attacks altogether but takes the view that any action that can reasonably be taken to minimise the level of risk against staff should be taken.

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<sup>28</sup> The *Department of Human Services Agreement 2017-2020* states at clause H6: 'Employees will have a choice about whether they provide their full name or only their first name in response to public enquiries, including in correspondence and face to face contact, unless legislation requires otherwise.'

<sup>29</sup> This includes under administrative access arrangements. The department's approach to requests under the *Freedom of Information Act 1982* is discussed further in response to Question 3, 4 and 7.

<sup>30</sup> Surnames are redacted in most instances on the basis that the information is not relevant to the issue in the proceedings. Where relevant, a confidentiality order may be sought.

<sup>31</sup> David Clarkson and Martin van Beynen, 'Ashburton Work and Income shooter Russell John Tully sentenced to life with 27 years non parole' (27 May 2016) Stuff <<https://www.stuff.co.nz/national/crime/80448132/ashburton-work-and-income-shooter-russell-john-tully-faces-sentencing>>.



**Q2: Have your agency's views on this issue changed over time? If so, please describe any factors that have affected your agency's approach, including technological, environmental or legal factors.**

11. The department's approach has changed over time. This has been influenced, among other things, by:

- the increasing volume of documents held by the department which contain the personal information of staff members (e.g. emails);
- the increasing ease by which information can be disseminated widely and anonymously online;
- the increasing concern among staff and the community about the privacy of personal information and the rise of identity theft;
- advancements in understanding about the impact and best-practice management of workplace aggression, particularly from individuals who may have fixated grievances against staff; and
- legal developments, particularly in work health and safety duties and privacy law.

**Q3: Does your agency advise staff, including contractors undertaking functions on behalf of the agency, that names and contact details may be released in response to an FOI request as part of your agency's training and induction programs?**

12. The department advises staff, including contractors, that documents that include staff names may, in some circumstances, need to be released under the FOI Act. However, providing such advice to staff does not diminish the department's duties to staff under s 19 of the *Work Health and Safety Act 2011* (**WHS Act**) or the department's obligation to provide employees with a choice about provision of their full name, which arises under clause H6 of the *Department of Human Services Agreement 2011-2014* (**Enterprise Agreement**).

**Q4: How do you balance work health and safety considerations with the objects of the FOI Act, which include increasing public participation in Government processes with a view to promoting better-informed decision making and increasing scrutiny, discussion, comment and review of the Government's activities?**

13. The department takes seriously its duties under the WHS Act. The WHS Act requires persons conducting a business or undertaking, like the department, to *ensure* the safety of workers, so far as is reasonably practicable.<sup>32</sup> The guiding principle is that workers should be given the *highest level of protection* against harm to their health, safety and welfare from risks arising from work as is reasonably practicable.<sup>33</sup>

14. The meaning of the phrase 'reasonably practicable' was considered by the High Court in *Slivak v Lurgi*<sup>34</sup>, in which Justice Gaudron observed:

...the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgement in light of all the facts.

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<sup>32</sup> *Work Health and Safety Act 2011*, s 19.

<sup>33</sup> *Work Health and Safety Act 2011*, sub-s 3(2).

<sup>34</sup> (2001) 205 CLR 304, 322.

Nevertheless, three general propositions are to be discerned from the decided cases:

- the phrase 'reasonably practicable' means something narrower than 'physically possible' or 'feasible';
- what is 'reasonably practicable' is to be judged on the basis of what was known at the relevant time;
- to determine what is 'reasonably practicable' it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.

15. In FOI matters, very little may be known about the applicant. All that is required is an electronic address to send notices. The actual or perceived reasons for the applicant seeking access to documents are also irrelevant.<sup>35</sup> For this reason, it can be very difficult for the department to assess the likelihood of a risk occurring. However, it generally will be 'reasonably practicable' to take steps to protect the names and contact details of its staff members from release.
16. Work health and safety duties are absolute. Where there are competing considerations, work health and safety are, as the law requires, given priority.
17. While the objects of the FOI Act reflect a desire to promote better informed decision-making, increased scrutiny, discussion, comment and review,<sup>36</sup> the right of access to information is not absolute. For example, this right is qualified where:
  - disclosure would, or could reasonably be expected to, endanger the life or physical safety of a person (section 37(1)(c) of the FOI Act);
  - disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management of personnel by the Commonwealth and contrary to the public interest (section 47E(c) of the FOI Act);
  - disclosure would, or could reasonably be expected to, have a substantial adverse effect on the operations of an agency and contrary to the public interest (section 47E(d) of the FOI Act); or
  - disclosure of personal information would be unreasonable and contrary to the public interest (section 47F of the FOI Act).
18. The WHS Act requires consultation be undertaken with workers in certain circumstances.<sup>37</sup> The department's work health and safety policies provide that 'relevant information about matters that may affect workers health and safety must be shared early enough to enable workers and health and safety representatives time to consider the matters, discuss them and then provide feedback.' Accordingly, the department may consult with individual staff members in circumstances where information about them (such as their name) is being considered for release under FOI.
19. However, the department generally takes the view that there is little public interest in the names of junior staff, and staff contact details. In *Patricia Hudson and Child Support Registrar*,<sup>38</sup> the AAT found:

While the concept of "public interest" has been described as being amorphous, it has also been described as something that is of serious concern to the public, not merely of individual

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<sup>35</sup> *Freedom of Information Act 1982*, sub-s 11(2).

<sup>36</sup> *Freedom of Information Act 1982*, s 3.

<sup>37</sup> *Work Health and Safety Act 2011*, pt 5 div 2.

<sup>38</sup> 1998] AATA 863, [27].



interest. Aside from a member of the public knowing with whom he or she is dealing, there would appear to be generally little public interest in a third party knowing with whom that member of the public had communicated within the Agency. In the Tribunal's view the applicant's interest is that of an individual and there is no public interest element to it.

20. In contrast, the primacy of work health and safety considerations is reflected in relevant decisions, including *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection*<sup>39</sup> and *'IN' and Australian Taxation Office*.<sup>40</sup>
21. Where risks to the health and safety of staff exist, the WHS Act requires that the risk is eliminated or mitigated so far as is reasonable. The department considers that the exemption of staff names and direct contact details from documents released in the public domain is an important risk control.
22. The commitment contained in the Enterprise Agreement to allow employees a choice, where possible, in relation to the release of full names recognises the sensitivity and importance of this issue to our employees.

**Q5: If your agency considers that disclosure of a public servant's name or contact details will negatively impact their health or safety, what evidence do you require before deciding that their name or contact details are exempt from disclosure?**

23. The department considers health and safety risks on a case-by-case basis. As mentioned at paragraph 18 above, the department may consult with staff members to discuss their concerns in a particular case. However, the department processes over 6,000 FOI requests a year<sup>41</sup> and it is not generally practical, within the 30-day processing time, to consult with every affected staff member.
24. The department does not require specific evidence that staff *will* be negatively impacted by the disclosure of their information; the risk of such harm can generally be deduced from the department's operating environment.
25. The FOI Act does not restrict the use or further disclosure of documents to which access is given, and in fact requires the publication of certain documents. A decision to give an applicant access to documents is therefore made in the knowledge that they may share the content of the documents with others or publish them to a larger audience ('FG' and *National Archives of Australia*<sup>42</sup>).
26. The decision in *Victoria Police v Marke*<sup>43</sup> (*Marke*) is often cited as authority for the proposition that it is wrong to proceed on the basis that disclosure to the applicant was disclosure to the world at large. This proposition is also set out in paragraph 3.36 of the FOI Guidelines. However, the circumstances in *Marke* were unique. The applicant had informed the relevant tribunal that they sought the information, including names, for the limited purpose of exonerating themselves, that they would not release it to the world at large, and that they were a police officer who understood sensitive and confidential information. The court's conclusion in this case should not be applied as a principle of general application.

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<sup>39</sup> [2016] AICmr 25, [50].

<sup>40</sup> [2016] AICmr 33, [13].

<sup>41</sup> In respect of the 2018-19 financial year.

<sup>42</sup> [2015] AICmr 26, [41], [44].

<sup>43</sup> [2008] VSCA 218.



27. The department acknowledges that many of the documents it releases under the FOI Act contain detailed personal information about an FOI applicant and that this may reduce the likelihood of the applicant publishing the documents in an unrestricted way. It is nonetheless possible for an applicant to extract and publish information from those documents, including staff names and contact numbers. The department's position is that it is not necessary to have actual evidence that an applicant will share information with others to find that dissemination is a reasonable possibility. Except in rare cases like *Marke*, given the proliferation of information online, there is a real risk that information accessed under the FOI Act, including staff names and direct contact numbers, may ultimately be received by a person who intends to use that information to abuse, harass or intimidate staff.
28. It is also not necessary to have actual evidence that staff members will be negatively impacted in this way. Such evidence will rarely exist, except with the benefit of hindsight. The tragic events in New Zealand in which a lone mission-oriented gunman fatally shot and wounded staff members (discussed at paragraph 9 above) were not reasonably predictable, as was acknowledged by the District Court at Wellington in the work health and safety prosecution that followed those events.<sup>44</sup> However, the court nevertheless found the Ministry of Social Development, which operated WINZ, guilty of failing to take all practicable steps to ensure the health and safety of its staff members. The court determined that the risk of harm to WINZ staff was predictable, considering the general incidence of violence towards WINZ staff nationally.<sup>45</sup> The court noted:

The fact that an organisation carries out a large number of interactions, only a relatively small proportion of which are violent, does not bring the hazard below the scope of reasonably predictability.<sup>46</sup>

29. The department gives appropriate weight to the general incidence of aggression faced by departmental staff (which, as noted at paragraph 5 above, averaged approximately 30 incidents per day in 2017-18), when determining whether to redact staff names and direct contact details.

**Q6: Do you consider the FOI Guidelines provide enough guidance for agencies when considering these issues?**

30. The department endorses the position of the APSC that the FOI Guidelines should be revised.
31. In particular the department considers that the following paragraphs of the FOI Guidelines do not give adequate weight to personal privacy and work health and safety considerations and may be misleading:

- Paragraph 3.36, which states:

...it would be incorrect for an agency to proceed on the premise that disclosure under the FOI Act is always the same as 'disclosure to the world at large'. Although the FOI Act does not limit further dissemination by the applicant, agencies should be aware that not every applicant would disseminate information obtained via an FOI request. Agencies should ensure that each case is examined on its own merits when deciding

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<sup>44</sup> *Worksafe New Zealand v Ministry of Social Development* [2016] NZDC 12806, [52].

<sup>45</sup> *Worksafe New Zealand v Ministry of Social Development* [2016] NZDC 12806, [50]-[88].

<sup>46</sup> *Worksafe New Zealand v Ministry of Social Development* [2016] NZDC 12806, [10].



whether disclosure of the information would be unreasonable under a particular exemption, where unreasonableness is a relevant consideration.

- Paragraph 6.153, which states:

Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.

32. The department looks forward to being consulted on the content of revised guidance.

**Q7: In what circumstances do you consider that a public servant's personal information (name and contact details) are irrelevant to the FOI request?**

33. In the substantial majority of requests received by the department, the applicant does not seek staff names and contact details. Unless it is evident from the nature of the request that a staff member's full name and direct contact details are relevant to the request, the department will advise an applicant that staff details will be considered out of scope.

34. Where the applicant does not request these details, junior staff surnames and direct contact details are removed under section 22 of the FOI Act. This is consistent with the Information Commissioner's findings in '*OA*' and *Department of Home Affairs*.<sup>47</sup>

35. Junior staff are considered to be non-Senior Executive Service (SES) staff members. The department distinguishes between SES and non-SES because:

- the names of all SES staff member are publicly available on the organisation chart accessible on the department's website and the Australian Government Directory; and
- the terms and conditions of SES staff are not governed by the Enterprise Agreement, and in particular, clause H6, which gives staff members a choice about the use of their full name.

36. In the department's experience, the vast majority of FOI applicants have no concerns with this approach. This reflects the reality that junior staff members are performing service delivery functions on behalf of the department and any enquiry or legal challenge to those functions or decisions will generally sit with the department rather than individual officers.

**Q8: Where you have withheld the names and contact details of public servants, what impact does deleting this information from documents have on the time it takes to process FOI requests?**

37. The department does not count the time taken to redact staff names and contact details when determining whether processing a request would substantially and unreasonably divert the department's resources, or whether to impose a charge or the amount of the charge to be imposed. The department redacts junior staff surnames and direct contact details on this basis in the majority of FOI requests and complies with its statutory timeframes in 99% of all requests.<sup>48</sup>

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<sup>47</sup> [2018] AICmr 22 at [14].

<sup>48</sup> In respect of the 2018-19 financial year.

38. In contrast, where junior staff names and contact details are included within the scope of a request, this usually adds to the processing time and applicable charges as the department needs to consider whether the information is exempt under the various provisions of the FOI Act identified above.