



Australian Government

Department of Veterans' Affairs

Australian Information Commissioner Discussion Paper

Disclosure of public servants' names and contact details under the *Freedom of Information Act 1982*

Submission by the Department of Veterans' Affairs

These responses encompass the Department of Veterans' Affairs (the Department) views on the eight specific questions raised in the respective discussion paper. The Department welcomes the opportunity to make submissions in respect to these matters.

It is noted that the discussion paper relates only to the circumstances in which public servants' names and contact details are included in documents at issue, and the FOI Act provisions that Commonwealth agencies have relied on to withhold this information from disclosure — namely sections 22 (relevance), 47E(c) (substantial adverse effect on the management or assessment of personnel), 47E(d) (substantial adverse effect on agency operations) and 47F (personal privacy).

The Department understands that it is the IC's intention to make submissions it receives publicly available. The Department consents for these submissions to be published.

The Department is committed to establishing a culture of transparency and building trust with the veteran community and is undergoing a significant reform process in order to achieve this transformation. Central to this transformation is shifting the Department's emphasis on compensation and rehabilitation to a focus on the lifetime wellbeing of veterans. This will fundamentally change the nature of the Department – client relationship. A key aspect of this transformation is improving the way in which the Department communicates with its clients.

The Department acknowledges that the disclosure of a range of information about the Department and its processes is an important component of increasing transparency. In respect to its decision-makers (delegates), the Department has renewed its commitment to ensuring that delegate's determine claims under the legislation, relevantly, in a manner that promotes public trust and confidence (see clause 7(2)(c) of the *Australian Veterans' Recognition (Putting Veterans and Their Families First) Bill 2019*). In appropriate circumstances, this may mean the disclosure of the names and contact details of a delegate determining a claim.

However, until the transformation process is further advanced, the Department's current practice is to not release the personal details of staff and delegates. The Department considers that, in the majority of cases, the disclosure of the first name, position title and unique staff position number is sufficient to balance the need for transparency in decision-making with the need to ensure the work, health and safety of staff of the Department.

The Department has had the opportunity to consider the submissions made to the IC by the Australian Public Service Commission on this issue. The Department generally agrees with those submissions, save for the submissions in relation to the disclosure of the personal information of statutory decision-makers, for the reasons set out above.

Consultation questions

The Department's response to the consultation questions set out in the IC's discussion paper are set out below.

1. Question One – 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?

- 1.1. Yes, the Department has concerns about releasing the names and contact details of staff in response to FOI requests.
- 1.2. The Department has an important role in providing support and information to veterans and their families, Australian Defence Force personnel and other categories of people. The services provided by the Department are varied and include pensions and compensation, health care, rehabilitation and counselling services, history and education related services. The Department is undergoing a significant transformation process in order to better deliver to clients and fundamentally change its relationship with clients by focusing on the lifetime wellbeing of veterans and moving away from an historical focus on claims management and rehabilitation.
- 1.3. Part of this transformation process is focused on improving communications between the Department and its clients.
- 1.4. The Department has a large (and growing) client base. Many of those clients are vulnerable persons. By the nature of their service, clients of the Department are possessed of a highly capable skill set. In certain instances this can be coupled with mental health conditions (for example, psychosis, paranoia, substance abuse and mood disorders). The Department has established special communication arrangements for such clients in order to better assist them navigate the claims process and access services they are entitled to. However, it is not always apparent when clients are vulnerable or have mental health condition and in some

cases, this can present later in the course of the Department's dealings with the client. In order to facilitate quick and consistent contact with the Department, specific channels of communication have been implemented which enable clients and other relevant stakeholders to contact the Department in a way that ensures all Departmental resources are managed as efficiently as possible.

- 1.5. The Department considers the release of staff names and contact details could enable these established communication channels to be by-passed. This will have an impact on the proper and efficient conduct of the operations of the agency, including on its ability to retain staff or effectively manage the wellbeing and safety of staff.
- 1.6. The Department has experienced a range of incidents which have negatively impacted on the health and safety of its staff as a result of a staff member's name and contact details becoming known the clients. Some de-identified examples, and examples which are a matter of public record, are set out in **Box 1** below. These examples are non-exhaustive and intended to provide a sample of the types of work health and safety issues experienced by staff of the Department.

Example 1 – See the *TYGJ and Information Commissioner* [2017] AATA 150 (27 September 2017) (see paragraph [125] and following https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2017/1560.html?context=1;query=TYGJ;mask_path=). In this instance the client set up a website which was mostly designed to criticise particular staff members and included their personal information (name and contact details) and encouraged public criticism of those staff members. Staff members identified on the website felt harassed.

Example 2 – See the *Federal Court decision of AIT18 v Australian Information Commissioner* [2018] FCAFC 192 (see <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2018/192.html>) for an example of where a client, having been dissatisfied with the processing of his claim by the Department, had engaged with vitriolic, threatening and offensive language towards staff.

Example 3 – A client searched for a staff member of the Department on social media following a negative determination on a claim. By coincidence an unconnected administrative staff member at the office with lax social media privacy settings had the same name. The client mistakenly confronted the unconnected staff member in an aggressive, escalated manner in a public place after mistaking the staff member's identity.

Example 4 – A client contacts the Department multiple times a day (up to 125 times a day) providing threats, verbal abuse and racially motivated comments towards specific staff members of the Department.

Example 5 – A client continues to send staff members of the Department up to 80 emails per month. Once the client identifies a staff member's full name/contact details, they will be added to the bulk mail list.

Example 6 – A client publically posts staff member’s names and contact details on social media platforms. The client continuously attempts to publicly shame staff members of the Department and posts potentially defamatory information about these staff members in numerous social media forums.

Box 1.

- 1.7. The Department considers that its current practice of not disclosing the personal details of staff members is an appropriate way to manage the risks identified.
- 1.8. Finally, the Department’s workforce is comprised of a mix of permanent staff who are members of the Australian Public Service and Senior Executive Service, contractors, secondees (in some cases, seconded from private organisations), specialists, advisors and volunteers who assist the Department provide services to clients. The personal information of those contractors, secondees, specialists and advisors from private organisations would ordinarily sit outside the operation of the FOI Act.
- 1.9. Generally speaking, and particularly in circumstances where those contractors, secondees, specialists, advisors and volunteers are not exercising a statutory function (that is, they are not a statutory appointment and not exercising a statutory decision-making function) the Department considers it would be unreasonable to disclose the personal information of those individuals in response to an FOI request.

2. Question Two – 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.

- 2.1. The Department has always been mindful of its obligations to ensure the health and safety of its staff (including contractors, secondees, specialists, advisors and volunteers) and notes that with the recent amendment to the work health and safety legislation, that obligation to ensure work health and safety includes a personal liability for officers and directors of the Department.
- 2.2. Given the growth of social media, the Department’s concerns have increased, noting the improved ease and ability to collect personal information about a person from a range of online sources. Further, social media has facilitated the distribution of information online quickly and widely and in cases, in forums where a staff member whose personal information has been distributed, is unable to take steps to have the content removed. The information may be altered, redistributed and available online for an indeterminate period.
- 2.3. The Department notes it is not permitted under the FOI Act to restrict an FOI applicant’s use of information disclosed to them in response to an FOI request. A release under the FOI Act is considered to be a release to the world at large. Absent any ability to confine use of documents once released, there is no way to protect staff and others, from potential

defamation or abuse that may arise from release, particularly noting how easily and quickly information can disperse in an online environment.

- 2.4. Of importance, is that the FOI Act pre-dates the arrival of the modern digital connecting, and in particular, the impact of the internet and social media on the accessibility and use of information. The Department also considers the ability for FOI applicants to access information anonymously or through the use of a pseudonym, including through public websites or forums, has significantly changed the nature of the FOI landscape.
- 2.5. Of relevant, is the Information Commissioner's own comments in '*BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014):

*...81. A second change that in my view influences the weight to be attached to the earlier cases is that the FOI notion of 'disclosure to the world at large' has different meaning with developments in information technology. **It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information.** The view taken in earlier cases – that a successful applicant's claims should be opened to public scrutiny and their claim to privacy should be deemed as abandoned – **takes on a different hue when the publication and scrutiny can occur on the web or through email interchange. Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.***

*82. **There is also a growing and understandable concern that personal information that is made available on the web can be misused or used differently by others...***

- 2.6. These statements are equally applicable to the details of public servants, regardless of whether they are public or private sector employees. With the changes in how we can communicate and share information, it is far easier to trace people and comment publicly about those individuals. There is little recourse for whether those comments are true or not, and it does not factor in the individuals' right to a private life outside of their employment. Community standards and expectations in relation to people's right to privacy has grown, and the fact that an individual may be a public servant should not result in an assumption that their rights to privacy and safety are of less importance to that of members of the public; particularly when the non-disclosure of their information in no way impacts on achieving transparency and accountability across government.
- 2.7. In previous years, the Department's practice was to issue hard copy documents predominantly by post. With the growth in communication mechanisms, and the internet, people are now able to make requests, and receive documents, in forms other than hard copy. We find that today, it is uncommon for an applicant to seek hard copies of documents. It is unknown how many requests would have been made by people using a pseudonym, but

it is expected to have been very few, if any. This is also because the majority of FOI requests are made by veterans wanting access to their own information or to documents related to their affairs. Of further relevance, the volume of material that is now available is far greater than in previous years; particularly following the Department's transition from paper-based files to digital records and work practices. This change in itself, has resulted in an increased workflow and duplication of records.

2.8. It is the Department's experience that the past years have shown an increase in the number of FOI requests made through a cloak of anonymity as well as through public channels. This in itself has changed the way in which the Department is expected to respond to requests, and subsequently, how documents are to be released.

2.9. Also, it is the Department's experience that anonymous FOI requests, or FOI requests made by an applicant adopting a pseudonym, are more likely to use aggressive or offensive language alongside the FOI requests and subsequent releases. Further, a number of FOI requests made to the Department through public websites include unsubstantiated allegations about the conduct of staff of the Department, who are often publicly named, or who would have otherwise been at risk of being publicly identified. At times the requests have included highly offensive language and comments that the Department considers to be at times, defamatory. The disclosure of staff information in connection with an FOI request of that nature, would publicly connect those staff names to those derogatory and/or defamatory comments. This can cause significant distress to staff and impacts on the Department's ability to manage and retain its staff. Further, without knowing the true identity of an access applicant, it can be difficult for the Department to properly consider the appropriateness for release of staff information.

2.10. The Department submits that the significant advances in technology, coupled with the ways in which the FOI Act is now being used to access information or air grievances, warrants a reconsideration of the FOI Guidelines to better reflect the current environment and community expectations in this regard. The Department recognises there is a tension between its focus transparency and better communication with its need to ensure the health and safety of staff of the Department.

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

3.1. Due to the nature of their work, with close direct engagement with veterans, some of the Department's business areas have developed practices which do not encourage the release of the personal information of staff members undertaking work connected to that business area. For example, some business areas require staff to use a standard signature / execution block which include the staff member's first name, designation and position number. This is also coupled with the use of a group email addresses (for example

Information.Access@dva.gov.au). Staff in those business areas are advised the Department will not otherwise disclose their full name and contact details.

- 3.2. In other instances staff are advised that certain information about them *may be* made publicly available while undertaking functions on behalf of the agency. However, staff are not advised specifically that their full names and direct contact details may be released in response to an FOI request.
- 3.3. Practices vary across the business areas of the Department, with some business areas providing information to staff as part of their business area specific induction process that their personal information will / will not be disclosed. We have not felt it necessary to implement binding rules, preferring instead to allow business areas to adapt flexible approaches depending on the nature of their interactions with veterans and the community.

4. *Question Four – 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?*

- 4.1. The Department is concerned to find the right balance between its obligation to ensure the health and safety of its staff with the objects of the FOI Act and the Department’s commitment to increasing transparency and building trust with the veteran community.
- 4.2. The Department’s duty to ensure the health and safety of its staff outweighs a general obligation to promote access to information under the FOI Act. It is noted that the mere fact a person may be a public servant, should not negate their right to work within a safe environment. These rights should be balanced with their right as an individual, to not have their surname and direct contact details released to the world at large, simply because they happen to be employed by the Department.
- 4.3. The Department considers that at this stage of its transformation process, and having regard to the examples provided in Box 1 above, in most cases releasing the first name of the staff member, their designation and unique position number is sufficient to meet the objects of the FOI Act. The release of this information increases the scrutiny and transparency of government decision-making. Further, the release of this information is sufficient for the access applicant to be able to identify staff members of the Department who have had some involvement in the matter the subject of the access application and is sufficient for the Department to confirm that any decision-making function has been undertaken within the staff member’s delegated authority. The Department acknowledges that releasing this information in connection with a delegate exercising a statutory decision-making function promotes better decision-making, greater accountability and transparency.

- 4.4. The fact that personal information about staff is withheld does not prevent an applicant from accessing their own personal information, or other information that is of value (such as the actual content and substance of the document being sought). These redactions do not prevent, for example, a client seeking a review of a decision made by a delegate, seeking more information from the Department, making a complaint about a staff member, or impact on their ability to scrutinise decision-making by the Department. An ability to use, understand or even administer justice, is in no way impacted by the withholding personal information of staff under the FOI Act.
- 4.5. Generally speaking, the Department does not consider the objects of the FOI Act are advanced by releasing the personal information (name and contact details) of staff of the Department who are not performing a statutory function and/or were not engaged as a statutory appointment, or those that are not permanent members of the Australian Public Service.
- 4.6. In relation to those staff members performing a statutory decision-making function, the Department repeats its comments above that Department has renewed its commitment to ensuring that delegate's determine claims under the legislation, relevantly, in a manner that promotes public trust and confidence (see clause 7(2)(c) of the *Australian Veterans' Recognition (Putting Veterans and Their Families First) Bill 2019*). In appropriate circumstances, this may mean the disclosure of the names and contact details of a delegate determining a claim. However, until the transformation process is further advanced the Department considers the release of the first name, designation and position number of a delegate is sufficient to enable the client to take such steps as may be necessary to understand the decision, contact the Department (through existing channels) should they wish to speak to the decision maker, and take steps to have the decision reviewed. Of note, is that it would be unusual for the Department to redact this type information under the FOI Act. It will often only be surnames and direct contact details that would be withheld from release.

5. *Question Five – 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?*

- 5.1. The Department considers whether it is appropriate to release the personal information of staff members on a case-by-case basis in response to an access application. Generally, the Department will release a staff member's personal information where the FOI applicant already knows the staff member's details or if the staff is an ongoing member of the Senior Executive.
- 5.2. In all other cases, where practicable and appropriate, the Department's FOI decision makers seek the views of a staff member regarding the proposed disclosure of their personal

information (through a mixture of formal and informal consultations) prior to a decision being made about disclosure.

- 5.3. Where it is not practicable or appropriate to seek those views, the FOI decision maker will redact the staff member's personal information in view of the health and safety issues experienced by staff members (some examples set out above in Box 1). Further, as members of the Australian community, staff would expect the Department to maintain a reasonable level of privacy, noting that public servants are not excluded from the operation of the *Privacy Act 1988* on the basis that they happen to be public servants. It also follows, that staff would expect the Department to take steps to protect their privacy and work, health and safety. Public servants also are generally aware of a range of negative consequences that can flow from disclosure of their personal information online, particularly if it is associated with a topic of public controversy or where an FOI applicant is pursuing a particular grievance.
- 5.4. Staff can however, elect to provide their full details to a client or stakeholder should they feel comfortable doing so and if appropriate in the circumstances.

6. *Question Six – Do you consider that FOI Guidelines provide enough guidance for agencies when considering these issues?*

- 6.1. Although the FOI Guidelines are not authoritative, they can provide valuable information to help FOI decision makers, particularly when certain issues have not yet been canvassed by a decision by the Information Commissioner or through the Administrative Appeals Tribunal.
- 6.2. The Department considers the FOI Guidelines may be of further assistance to agencies if practicable examples were provided (rather than references to case law that may not cover the wide ranging scenarios whereby disclosure may or may not be appropriate) which could be better understood by staff of respective agencies' and members of the public who are not FOI practitioners.
- 6.3. The main provision that seems to be relied on to consider the reasonableness of releasing public servants' details, seems to be section 47F of the FOI Act, and, whether 'special circumstances' may exist as defined by the FOI Guidelines.
- 6.4. Section 47F of the FOI Act makes no distinction between the personal information of a public servant and that of a non-public servant. However, the FOI Guidelines does seek to make such a distinction at paragraph 6.153:

*...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 (emphasis added)...*

- 6.5. It is understood that the above guideline was adopted from paragraphs 21 to 25 of the 1994 FOI Memoranda. The Department respectfully submits, that the Memoranda remains unclear on this issue, in that it did not sufficiently canvass or foresee the issues that agencies are now presented with. It also pre-dates the use of the internet and social media. Given the time that has since passed, the lack of definitive and far-reaching case law, and the fast paced and changing technological landscape, it would be helpful for this position to be revisited.
- 6.6. In this regard, the Department submits that the FOI Guidelines could also benefit from a discussion about the viability of, and circumstances in which, sections 47E(c) and (d) of the FOI Act may apply.
- 6.7. The Department itself, rarely relies on section 47F of the FOI Act, and instead refers to section 47E of the FOI Act. This seems more appropriate in that it requires the decision maker to consider whether release of the staffs' details would, or could, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency, or, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
- 6.8. Further, the Department refers to its submission above in response to question 2, in that there could be benefit in revising the FOI Guidelines so that it reflects a more contemporary view of how the FOI Act is used and the manner in which information can now be accessed and shared more widely. This includes consideration of the current FOI environment and the significant technological changes that have occurred since the commencement of the FOI Act.

7. Question Seven – In what circumstances do you consider that a public servant's personal information (name and contact details) are irrelevant to an FOI request?

- 7.1. Subject always to the specific terms of the FOI application, the Department considers in most instances, a public servant's personal information (name and contact details) are redundant to an FOI request. The object of the FOI Act is about disclosure of information held by Government, not about the disclosure of the personal information of public servants in a way which exposes them to being targeted in an online world.
- 7.2. The Department is consistently one of the highest recipients of FOI requests across the Commonwealth. From the thousands of requests managed by the Department each year, only a small percentage are not released in full. Of those, some will include the redaction of staff details, as well as any other material considered to be exempt from release. In requests where this information is withheld, it is our view that it almost never detracts from the main subject or content of the documents being sought. Staff details are often incidental to the document, and at times, superfluous to the substance of what an access applicant is seeking access to.

7.3. In our experience we are able to identify early in the decision-making process whether a public-servant's personal information is able to be released or whether consultation and/or redaction is required in a particular case.

8. *Question Eight – 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?*

8.1. Given that the only a small percentage of requests are released with redactions, the task of redacting the personal information of staff before making a decision is very manageable.

8.2. Having said that, as part of the Australian Government Digital Transition Policy, the Department has mostly transitioned to electronic files over paper files. This has significantly increased the amount of information held that may be responsive to an FOI request and has had an impact on processing times and the staffing commitment required for an agency of this size to manage its FOI case load more broadly. For example, duplicate copies of email chains may include the same content, and contain duplicate copies of signature blocks with staff names and contact telephone numbers. These need to be reviewed and, in some cases, redacted multiple times in responding to the FOI request. The Department requires the consent of the access applicant to delete these duplicate documents and, without consent, needs to produce each iteration of the email chain (and the personal information contained therein). The time required to redact the personal information contained in long email chains can be labour intensive and often repetitive work.

8.3. It is understood that in acknowledging FOI requests, some agencies adopt the practice of advising applicants that unless they state otherwise, all duplicate information and staff details will be removed and considered irrelevant to the request. While the Department does not make use of that practice, it does seem to be a more efficient way of managing that material and in responding to FOI requests. Of relevance, the Department has received complaints from applicants that they received duplicate information and that it then led to confusion. A practice such as the one above, may help make it clearer to applicants what the Department will not provide in response to the request and could help make the overall process more efficient (noting that the decision maker would no longer be required to consider relevant exemptions in the statement of reasons, which itself can take time to consider). This process would allow a more efficient process as well as give the applicants the opportunity to advise if they do not want that information considered irrelevant.

Summary

Although the functions of this Department differ from some agencies, in that we also have a service delivery component to our business, we strive to be as transparent as possible, including under the FOI Act. It is the practice of the Department, that where staff information is contained within

documents sought under the FOI Act, due consideration is afforded to both the FOI Act and surrounding circumstances.

Further, it is the Department's experience that very few FOI applicants have raised concerns, or sought internal or external review based on staff details having been withheld under the FOI Act. Applicants that may object include repeat access applicants, those that make requests under a pseudonym or through anonymity, or those that have particular or fixated issues with the Department or particular staff. As far as it is understood, this has not been a substantial issue for the Department or its FOI applicants.

The Department remains open to exploring these issues further with the IC and we are willing to engage in any further discussions where appropriate. These submissions are quite broad and do not necessarily take into account the individual circumstances that may apply to a particular FOI applicant or request. Where those individual situations arise, the Department will work with the IC to better understand the position the Department.

As explained above, the Department largely endorses the submissions made by the APSC, all but the one exception alluded to in our response. For those reasons, we have not sought to re-state what the APSC has already canvassed in its submission.