# **Submission to the Australian Information Commissioner**

# Disclosure of public servants’ names and contact details under the FOI Act

**Overview**

1. Section 41 of the *Public Service Act 1999* (PS Act) sets out the Australian Public Service Commissioner’s (the Commissioner’s) functions. These functions include to uphold high standards of integrity and conduct in the Australian Public Service (APS) and to provide advice and assistance to Agencies on public service matters.
2. The Australian Public Service Commission (the Commission) is committed to positioning the APS workforce for the future and promotes regular review of policy matters that affect the APS for contemporary relevance. The Commission welcomes the opportunity to make a contribution to the discussion about disclosure of public servants’ personal information in the freedom of information (FOI) context.
3. Section 47F of the *Freedom of Information Act 1982* (FOI Act) provides that:

*General rule*

*(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

*(2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*

*(a) the extent to which the information is well known;*

*(b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*

*(c) the availability of the information from publicly accessible sources;*

*(d) any other matters that the agency or Minister considers relevant.*

1. There is no distinction in section 47F between public servants’ personal information and personal information generally.
2. Paragraph 6.153 of the Australian Information Commissioner’s FOI Guidelines currently 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* (emphasis added)*.*

1. The FOI Guidelines distinguish public servants’ personal information from the personal information of persons generally. The Guidelines create a default assumption that disclosure of public servants’ personal information is not unreasonable on the grounds that the information would reveal ‘only’ that the public servant was performing their public duties.
2. The reference to personal information in these submissions refers to the names, role or function and contact details of employees.
3. The Commission notes that the above extract from the Guidelines adopt the approach in FOI Memoranda 94 which was produced in 1994. The Commission is of the view that it is timely for this default assumption to be revised to take into account the information technology changes that have occurred over the last 25 years, current community concerns about privacy protection and the changed FOI landscape.
4. The Commission is of the view that where APS employees’ personal information is captured within the scope of a valid FOI request, section 47F of the FOI Act should be available to refuse access where disclosure would be unreasonable, having regard to the mandatory factors set out at paragraphs 47F(2)(a)-(d) of the FOI Act.
5. That is, where the personal information is well known, is known to be or have been associated with the matters dealt with in the document, or is available from publicly accessible sources, the Commission is of the view that disclosure would not be unreasonable.
6. However, if that personal information is not publicly available or well known, the Commission submits that the test of unreasonableness would generally be made out, and that the relevant Agency should not be required to show that ‘special circumstances’ exist. The ‘special circumstances’ requirement in the FOI Guidelines appears to place an additional test over and above those mandatory considerations for determining unreasonableness set out in section 47F of the FOI Act.
7. The Commission further notes that it does not consider that ‘[public servants’ personal information] may often also be publicly available, such as on an agency website’. Most Agencies have established structures and conventions for contacting public servants, reflecting the level of responsibility, transparency and accountability of public servants both legally and practically. Agencies ought to be able to maintain these established communication methods for contact with the public. The Commission submits that it would be unreasonable in appropriate cases for disclosure of contact details of public servants if that would result in members of the public subverting those established processes.

**The disclosure of APS employees’ personal information**

1. The default policy position that disclosure of public servants’ personal information is not unreasonable set out at paragraph 6.153 of the FOI Guidelines is not in conformity with the obligations agencies have under the Australian Privacy Principles (APPs) which provide that disclosure of personal information should only occur in prescribed circumstances.
2. In all other circumstances, Australian Government agencies have processes in place to ensure compliance with the APPs when it concerns the personal information of individuals, including their own APS employees.
3. The Commission’s view is that this default approach in the FOI Guidelines does little to further the Objects of the FOI Act, noting that the language in the Objects of the FOI Act which focus on information held by and actions taken *by Government*, not individuals serving the Government of the day.
4. The transparency and accountability of the conduct of APS employees are met by other avenues for complaint handling and review of decisions.
5. All APS employees are bound by the APS Values and Code of Conduct and are accountable to their Agency Heads for performance of their duties under the PS Act. Any individual can write to an Agency Head to pursue a complaint or seek review of a decision. A complainant does not necessarily require individuals’ specific details to enable appropriate action to be taken.
6. Like many APS agencies, the Commission deals with numerous complaints each year from members of the public or from other APS employees. Most Commission employees who are involved in handling complaints do not have a formal decision-making role. For example, some employees receive complaints on public-facing telephone services or email addresses. These employees may be involved in communicating directly with complainants and providing advice to other employees within the Commission, including decision makers.
7. It is commonplace for FOI applicants to seek information in connection with complaints and grievances. The Commission submits that the specific personal information of employees who merely have a processing or advisory role would generally have little relevance to the FOI applicant. In other words, in relation to the public interest test associated with a conditional exemption such as s 47F, in many cases no public purpose would be achieved by disclosure of public servants’ personal information. The public interest in knowing information about how a decision was made could be satisfied, for example, by disclosure of the role title without disclosing the name of the individual. The public interest in being able to communicate with agencies could be satisfied by disclosure of general contact details that are publicly available rather the direct contact details of individuals.
8. It is accepted that disclosure of the identity of an employee with a formal decision making role would generally not be unreasonable and the public interest generally would weigh in favour of disclosure. The FOI Act itself reflects this generally recognised distinction between decision makers and other employees. Sections 26, 29 and 24AB of the FOI Act each make it mandatory to provide certain personal information about decision makers or consultation contacts.
9. In *‘BA’ and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner reconsidered a number of earlier cases dealing with the disclosure of certain ‘vocational assessment information’. Before ‘BA’, the general position was essentially that it was not unreasonable to disclose the written job applications of successful applicants for positions in the APS.
10. In ‘BA’, the Information Commissioner decided that the default position “*should be reassessed in light of changes in privacy law, information technology and community concern about privacy protection*” (paragraph 2).
11. At paragraphs 81 and 82, the Information Commissioner made a number of observations about the dissemination of information on the internet (emphases added):

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, for example, for identity profiling or theft or unwanted contact.** Here I note that the documents in this case include the applicant’s five page curriculum vitae, which lists her qualifications, employment history, award recognition, personal attributes and skills, hobbies and interests, and referees. Even deleting her date of birth and contact details, as the MPC proposed to do, may not impede someone else from building a larger profile of the applicant or even finding her date of birth and contact details from other sources.

1. The Commission submits that the statements in ‘BA’ can also apply to names and contact details of APS employees in appropriate circumstances. The statements about the impact of technology and current attitudes to privacy, in particular, are relevant to employees’ personal information, regardless of whether they are public or private sector employees.
2. In addition to the statements made by the Information Commissioner in ‘BA’, the Commission submits that disclosure of the identity of APS employees now has much greater privacy impacts than in the past. Before the broad community use of social media, the disclosure of an APS employee’s name on a document might have permitted an FOI applicant to determine an individual’s telephone number or address. Today, an individual’s identity may be connected effortlessly with a vast range of personal information available through social networks, such as: photographs; friends’ and family members’ identities and photographs; employment histories; social activities and interests; personal opinions, including political opinions, and so on.
3. In the five years since ‘BA’ was decided, community concerns about the handling of personal information in electronic form have increased markedly. Since ‘BA’ was decided there have been several well-known data breach incidents involving social media companies, such as the [Cambridge Analytica scandal](https://arstechnica.com/series/cambridge-analytica-facebook/)[[1]](#footnote-1). As recently as 25 July 2019, Facebook has been [fined $5 billion](https://arstechnica.com/tech-policy/2019/07/ftc-fines-facebook-5-billion-imposes-new-privacy-oversight/)[[2]](#footnote-2) for privacy breaches and subjected to greater oversight by the United States Federal Trade Commission. In relation to public servants, broader community sentiment represented by media reporting appear to support the withholding of personal information of scientists in matters of dispute between Government and third parties[[3]](#footnote-3). In that case, concerns were raised by public servants of their personal information being researched online.
4. It is also clear that the Office of the Australian Information Commissioner acknowledges as part of this discussion paper that agencies are generally concerned about these issues:

*The Office of the Australian Information Commissioner (OAIC) is aware of agency concerns about the disclosure of public servants’ names and contact details in the context of FOI requests, both in response to FOI requests and when requests are being processed.*

1. The Commission is aware of a number of cases where FOI applicants have used the personal information of APS employees obtained through documents disclosed under the FOI Act to telephone, email, and physically approach public servants inappropriately. We do not propose to outline these specific circumstances here noting that other agencies may provide this information as part of their submissions.
2. In the Commission’s own experience the ability of FOI applicants to anonymously request access to documents through the Right to Know (RtK) website has significantly changed the nature of FOI.
3. A number of requests made to the Commission through the RtK website have involved applicants making unsubstantiated allegations about Commission employees and specifically requesting the personal information of APS employees. It is common for an anonymous FOI applicant to make repeated and further unsubstantiated comments each time he or she corresponds with the Commission as part of the processing of the request. For example, statements in the nature of ‘the APSC has acted illegally and improperly’, ‘[Ms X, public servant has] engaged in obfuscation … breached her legal obligations’ and ‘Such documents are likely to include further evidence to support an allegation that Ms X has acted illegally’[[4]](#footnote-4). On this basis, applicants assert that employees’ names must be disclosed.
4. In at least one such case, the Commission has found that disclosure of personal information would be unreasonable because it would permanently and publicly connect individuals to defamatory information. It may be difficult to establish special circumstances exist where an applicant has not yet posted defamatory information. However, this does not change the possibility of defamatory information and/or unsubstantiated allegations being made publicly *after* disclosure of an individual APS employees’ personal details.
5. The Commission further notes that personal information of APS employees can also be used in creative ways. For example, the release of public servants names in access to documents under the FOI Act has resulted in those names (or the names of relatives of those persons – presumably obtained through online research) being used as pseudonyms for subsequent FOI applications. The Commission considers this bullying and trolling-type behaviour of anonymous FOI applicants concerning.
6. The Commission submits that in the current FOI and information technology environment, even the potential for an APS employees’ personal information to be used in this way can have a negative impact on the health and wellbeing of APS employees who are simply performing their duties. The possible consequences of this on an APS workforce are hard to quantify but as an example, some agencies have reported difficulty recruiting to FOI positions in this environment, others have reported individual APS employees expressing concern should their personal information be released.

**The distinction between the Senior Executive Service and APS employees**

1. Paragraph 6.153 of the FOI Guidelines currently 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.*

1. The statement in paragraph 6.153 that personal information “*may often also be publicly available*” is somewhat misleading. In fact, most public servants’ contact details are not publicly available – see further at paragraph 43 below.
2. Paragraph 6.154 of the FOI Guidelines provides:

…*there is no basis under the FOI Act for agencies to start from the position that the classification level of a department officer determines whether his or her name would be unreasonable to disclose*.

1. Paragraph 6.155 of the FOI Guidelines includes:

… *the Information Commissioner said that there is no apparent logical basis for distinguishing between the disclosure of SES officers and other officers’ names*.

1. The Commission submits there are relevant distinctions between senior public servants – nearly always being members of the Senior Executive Service (SES) – and APS employees generally that are directly relevant to the question whether disclosure of an individuals’ personal information would be unreasonable.
2. SES employees are distinguished from non-SES employees in a legal sense. They are also treated differently in practical, governance and cultural senses within the APS.
3. Legally, the SES is a distinct cohort of APS employees. Section 35 of the PS Act sets out the constitution and role of the SES. Subsection 35(2) of the PS Act provides:

*The function of the SES is to provide APS wide strategic leadership of the highest quality that contributes to an effective and cohesive APS.*

1. Subsection 35(3) of the PS Act provides:

*For the purpose of carrying out the function of the SES, each SES employee:*

*(a) provides one or more of the following at a high level:*

*(i) professional or specialist expertise;*

*(ii) policy advice;*

*(iii) program or service delivery;*

*(iv) regulatory administration; and*

*(b) promotes cooperation within and between Agencies, including to deliver outcomes across Agency and portfolio boundaries; and*

*(c) by personal example and other appropriate means, promotes the APS Values, the APS Employment Principles and compliance with the Code of Conduct.*

1. The employment arrangements for SES employees are substantially different to APS employees. SES employees are normally not covered by agencies’ enterprise agreements and they generally negotiate their individual terms and conditions of employment directly with the relevant Agency Head. SES employees’ remuneration reflects the additional roles and responsibilities of SES employees compared with APS employees generally.
2. It is widely understood in the APS that SES employees are subject to higher degrees of transparency and accountability than APS employees generally. For example, SES employees are routinely required to attend and provide evidence publicly at Senate Estimates hearings. SES employees’ details are usually published in agency structure charts on agency websites and in the Australian Government directory at [www.directory.gov.au](http://www.directory.gov.au). Non-SES APS employees’ details are not generally published in this manner.
3. For the reasons provided above, the Commission submits that senior public servants – in nearly all cases employees at the SES classification – are to be distinguished from
non-SES employees.
4. The approach to distinguish personal information of APS employees at the SES classification is also consistent with paragraphs 47F(2)(a) and (c) of the FOI Act which emphasise the extent to which information is well known or available from publicly accessible sources.
5. The Commission is of the view that disclosure of SES employees’ personal information that is available from publicly accessible sources would not be unreasonable under the FOI Act. This broadly reflects the current approach taken by agencies.
6. Having considered the nature and role of APS employees at differing levels, from a legal and practical perspective, the Commission considers it reasonable to distinguish SES employees (as representative in almost all cases as the senior public servants accountable for APS decision making) from other APS employees.
7. Taking all of the above into account, the Commission supports a policy position that acknowledges that disclosure of non-SES employees under the FOI Act could be unreasonable where the factors in subsection 47F(2) are satisfied without the additional requirement for agencies to show ‘special circumstances’ exist.
1. https://arstechnica.com/series/cambridge-analytica-facebook/ [↑](#footnote-ref-1)
2. https://arstechnica.com/tech-policy/2019/07/ftc-fines-facebook-5-billion-imposes-new-privacy-oversight/ [↑](#footnote-ref-2)
3. http://theconversation.com/adani-has-set-a-dangerous-precedent-in-requesting-scientists-names-120487 [↑](#footnote-ref-3)
4. https://www.righttoknow.org.au/body/apsc [↑](#footnote-ref-4)