



# **‘BR’ and Department of Finance [2014] AICmr 39 (26 May 2014)**

Decision and reasons for decision of  
Privacy Commissioner, Timothy Pilgrim

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<b>Applicant:</b>	<b>‘BR’</b>
<b>Respondent:</b>	<b>Department of Finance</b>
<b>Decision date:</b>	<b>26 May 2014</b>
<b>Application numbers:</b>	<b>MR12/00122</b>
<b>Catchwords:</b>	<b>Freedom of Information — Personal information — Whether unreasonable to disclose personal information of successful applicants in recruitment process— (CTH) <i>Freedom of Information Act 1982</i> s 47F</b>

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## **Summary**

1. I set aside the internal review decision of the Department of Finance<sup>1</sup> (the Department) of 15 June 2012 and substitute my decision, under s 11A(5) of the *Freedom of Information Act 1982* (the FOI Act), refusing access to the documents sought.

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<sup>1</sup> Formally the Department of Finance and Deregulation.

## Background

2. On 30 December 2011, a person (the FOI applicant) applied to the Department for access to documents relating to a Departmental recruitment process (Executive Level 2 position). The FOI applicant had applied for a position but was unsuccessful. On 30 January 2012, the FOI request was revised to be for access to '... documents to the following in respect of the successful applicant: 1) individual assessment at interview; 2) Application form; 3) CV ...'
3. On 7 February 2012, the Department consulted with the successful candidate (the IC review applicant) in the recruitment process under s 27A to advise it had identified documents concerning him and to ascertain whether he objected to the disclosure of those documents.<sup>2</sup> On 15 February 2012, the IC review applicant advised the Department of his objection to the disclosure of the documents under ss 45, 47C, 47E and 47F.
4. On 16 March 2012, the Department advised the IC review applicant that it had identified three documents within the scope of the FOI applicant's request. The Department released all three documents in part. In making its decision, the Department relied on the personal privacy exemption (s 47F). The Department edited all three documents to remove material it considered to be exempt under s 47F. In its statement of reasons, the Department advised the IC review applicant that it was only able to consider his submissions to the application of s 47F. The Department also notified the FOI applicant of the above decision on the same day.
5. On 11 April 2012, the IC review applicant, as an affected third party to the Department's decision of 16 March 2012, lodged an application for IC review of the Department's decision in relation to all three documents under s 54M of the FOI Act.<sup>3</sup>
6. On 15 April 2012, the FOI applicant sought internal review of the Department's access refusal decision of 16 March 2012.
7. On 20 April 2012, the Department issued the IC review applicant and the FOI applicant with a substituted decision, to address an omission made in the original decisions of 16 March 2012. In making its substituted decisions, the Department made a further exemption under s 47F; editing the name of the IC review applicant within the documents. The remainder of its original decisions remained unchanged. The Department advised the IC review applicant that the FOI applicant had sought internal review of its access refusal decision and advised the FOI applicant that the IC review applicant had applied for an IC

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<sup>2</sup> The successful candidate is an affected third party under s 53C of the FOI Act.

<sup>3</sup> I note that on 14 August 2012, the FOI applicant sought IC review of the Department's access refusal decision under s 54L of the FOI Act in relation to the same material. The FOI applicant's request for IC review of the Department's access refusal decision is the subject of a separate decision. See *'BS' and Department of Finance* [2014] AICmr 40.

review. The Department advised both the FOI applicant and the IC review applicant that it was seeking advice from the Office of the Australian Information Commissioner on whether it was appropriate to undertake an internal review whilst an IC review of the access grant decision is on foot.<sup>4</sup>

8. On 11 May 2012, the Department wrote to the FOI applicant and the IC review applicant, providing them both a further opportunity to make submissions in the context of the application for internal review. The IC review applicant provided the Department with verbal submissions and the FOI applicant provided written submissions for the Department's consideration.
9. On 15 June 2012, the Department advised the FOI applicant and the IC review applicant that it affirmed its decision of 16 March 2012 (as substituted on 20 April 2012). The Department advised that exemptions were maintained, but altered the form of access; from release of copies of documents to the FOI applicant, to an opportunity to inspect the documents.

### **The scope of IC review access grant decisions**

10. Section 27A of the FOI Act provides for consultation with affected third parties before the disclosure of documents in response to an FOI application. A third party can contend that a document should be conditionally exempt from disclosure under s 47F (personal privacy) and that disclosure would be contrary to the public interest, before a decision is made on the FOI application.
11. In submissions to the Department, the IC review applicant contended that the documents were exempt under s 45 (documents containing material obtained in confidence) and conditionally exempt under ss 47C (deliberative processes), 47E (certain operations of agencies) and 47F (personal privacy).
12. As noted by the Freedom of Information Commissioner in the decision of *'E' and National Offshore Petroleum Safety and Environment Management Authority* [2012] AICmr 3:

An access grant decision involves consultation with an 'affected third party' (s 53C) which might be a State (ss 26A and 26AA), the Commonwealth (s 26AA), a person or their legal representative (ss 27 and 27A), or an organisation (s 27). The consultation procedure in each of these provisions gives the affected third party an opportunity to contend only that a specified exemption or exemptions should apply<sup>5</sup> (and, for conditional exemptions, that access would be contrary to the public interest). Similarly, review of an access grant decision, taken after a consultation under any of these provisions (not just under s 27), is restricted to consideration of the relevant exemption or exemptions.<sup>6</sup>

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<sup>4</sup> The Office of the Australian Information Commissioner advised the Department to proceed to process the internal review decision on the internal review application.

<sup>5</sup> In ss 26A and 26AA, the exemption is s 47B; in s 27, ss 47 and 47G; and in s 27A, s 47F.

<sup>6</sup> *'E' and National Offshore Petroleum Safety and Environment Management Authority* [2012] AICmr 3 [16].

13. Because the IC review applicant was consulted under s 27A, he was only able to make exemption contentions under s 47F. The Department did not invite the IC review applicant to make exemption contentions in relation to ss 45, 47C or 47E. Accordingly, in this IC review, I can only consider the IC review applicant's submissions in relation to the application of s 47F.

## Decision under review

14. The decision under review is the internal review decision of the Department on 15 June 2012.

## Personal privacy exemption (s 47F)

15. Section 4 of the FOI Act provides that 'personal information' has the same meaning as in the *Privacy Act* 1988. Section 6 of the Privacy Act provides that:

**personal information** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:  
(a) whether the information or opinion is true or not; and  
(b) whether the information or opinion is recorded in a material form or not.

16. The Australian Information Commissioner has issued Guidelines under s 93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. In relation to personal privacy, the Guidelines explain:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not however amount to the public interest test of s 11A (5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.<sup>7</sup>

17. The Department exempted documents 1, 2 and 3 under s 47F. A brief description of the documents is as follows:
- **Document 1:** Individual Assessment by the selection panel of the successful candidate.
  - **Document 2:** Application submitted by the successful candidate.
  - **Document 3:** Curriculum Vitae of the successful candidate.
18. The information that the Department exempted from the documents includes the responses provided on the job application form, the full name, residential address, email address, mobile telephone number, employee ID number, past

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<sup>7</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [6.127], footnotes omitted.

and current employment details and qualifications of the IC review applicant. Other information exempted by the Department includes the responses provided by the IC review applicant to key selection criteria and details of nominated referees.

19. The remaining information in the documents, that the Department decided could be released to the FOI applicant, includes the IC review applicant's first initial and full surname and comments and ratings by the selection panel made in relation to the IC review applicant.
20. The IC review applicant submitted that the documents contain personal information, judgements and opinions about him. The IC review applicant also submitted that '...[i] provided the information about myself in confidence in my application form, my CV and at interview, My individual assessment at interview is based on the information I provided in confidence.'
21. In its decision, the Department decided that disclosure of the IC review applicant's name '... despite clearly being personal information, would not amount to an unreasonable disclosure because that information is already known.' This is because the name of the IC review applicant was published in the Australian Public Service (APS) Gazette. The Department decided that it would be unreasonable to disclose the remaining personal information of the IC review applicant.
22. Vocational assessment information has recently been considered by the Information Commissioner and myself in a number of IC reviews.<sup>8</sup> In *'BA' and Merit Protection Commissioner* [2014] AICmr 9, the Information Commissioner found that 'personal information' can include the vocational assessment information of job applicants.
23. I have examined documents 1, 2 and 3 and am satisfied that those documents contain personal information recorded in a material form about the IC review applicant and that the IC review applicant's identity is apparent from those documents.
24. I also consider the knowledge of the FOI applicant in this IC review to be relevant in considering whether it would be unreasonable to disclose the documents. The FOI applicant is aware in part, the identity of the successful candidate as that name was published in the APS Gazette. Given this knowledge, disclosure of the information in the documents will enable the FOI applicant to directly attribute the information to the IC review applicant.
25. Document 1 contains the selection panel's assessment and rating of the IC review applicant's responses to the selection criteria and information provided by his referees. In addition to editing the IC review applicant's name, the

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<sup>8</sup> See *'BA' and Merit Protection Commissioner* [2014] AICmr 9, *'BC' and Australian Taxation Office* [2014] AICmr 12, *'BE' and Ors and Australian Taxation Office* [2014] AICmr 16 and *'BH' and Australian Taxation Office* [2014] AICmr 17.

Department edited information about his past employment, projects he has worked on and his qualifications.

26. This is a document about the IC review applicant that has been authored by other people. The document records the selection panel's rating of the IC review applicant and their assessment of his strengths and weaknesses. While the assessment is relatively strong and unlikely to embarrass or damage the IC review applicant, it is nevertheless an assessment that is specifically about him and how he performed and was rated in applying for a position in the Department. I consider that the disclosure of this information would be unreasonable.

27. Documents 2 and 3 contain the job application and curriculum vitae of the IC review applicant. This includes responses to selection criteria and other personal information as described at [18] above. In *'BA' and Merit Protection Commissioner*, the Information Commissioner said (in relation the successful job applicant's responses to the selection criteria) at [95]:

My view is that it would be unreasonable to release those documents. They contain information that is distinctly personal about her career and how she perceives her own strengths. She prepared them for a specific purpose, with a particular audience in mind, and with the expectation that they would be treated confidentially by the recipients based on that understanding and practice. They are documents of a kind that people ordinarily share only with a selected few or for a specific purpose. Nor has the applicant consented to their wider dissemination.

28. Consistent with the decision of the Information Commissioner in *'BA' and Merit Protection Commissioner* and my recent decision of *'BH' and Australian Taxation Office* [2014] AICmr 17, I consider that it would be unreasonable to disclose the application and curriculum vitae of the IC review applicant in documents 2 and 3. This information was authored by the IC review applicant and contains details that are personal to his career, education and how he perceived his strengths. Further, the application was prepared for a specific purpose and provided to a limited audience on the understanding that the information was received in confidence and would not be disseminated beyond those managing the recruitment process.

29. Documents 1, 2 and 3 contain the full name of the IC review applicant. Consistent with the decision of the Information Commissioner in *'BA' and Merit Protection Commissioner*, with one qualification, I consider that it would not be unreasonable to disclose the name of the IC review applicant as this information was published in the APS Gazette. The qualification relates to the way the name is recorded in the relevant APS Gazette. In this instance, the Gazette does not record the full name of the IC review applicant; only the initial of his first name and the full surname is published. As such, in these circumstances, it would be unreasonable to disclose the IC review applicant's full name.

30. Other than the name of the IC review applicant (as it appears in the APS Gazette), it would be unreasonable to disclose the remaining information in documents 1, 2 and 3.

## Findings

31. With the exception of the IC review applicant's name (as it appears in the APS Gazette) documents 1, 2 and 3 are conditionally exempt under s 47F.

## The public interest test (s 11A(5))

32. I have found that documents 1, 2 and 3 are conditionally exempt under s 47F of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'. As the Guidelines explain, '[t]he pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure'.<sup>9</sup>
33. Of the factors favouring disclosure set out in s 11B(3), one is relevant to this IC review: promoting the objects of the FOI Act. As was observed by the Information Commissioner in *'BA' and Merit Protection Commissioner*, there are a number of further public interest factors that favour disclosure:
- an object of the FOI Act is to promote better informed decision-making and to enable public scrutiny of government activities and decisions (s 3), and
  - transparency regarding the successful candidate/s will enable other candidates to learn why another person was rated more highly.
34. The Guidelines also include a non-exhaustive list of factors against disclosure.<sup>10</sup> Of those factors, one is relevant to this IC review: disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.
35. The Information Commissioner in *'BA' and Merit Protection Commissioner* also noted the following factors against disclosure: the development of the framework for protecting personal information and the importance now given to privacy considerations; developments in information technology; and that transparency concerning only the successful candidate is not the most effective or proportionate means of achieving the public interest objective in favour of disclosure.
36. In balancing these factors—for and against disclosure—I give the greatest weight in this IC review to the factors against disclosure.

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<sup>9</sup> *Guidelines* [6.12].

<sup>10</sup> *Guidelines* [6.29].

## Findings

37. With the exception of the IC review applicant's name (as it appears in the APS Gazette), giving the FOI applicant access to documents 1, 2 and 3 would, on balance, be contrary to the public interest.

## Decision

38. Under s 55K of the FOI Act, I set aside the Department's decision of 15 June 2012, and decide, in substitution for that decision that documents 1, 2 and 3 are exempt under s 47F, however copies of the documents should be provided to the FOI applicant, edited so as not to disclose the information that I consider exempt under s 47F.

Timothy Pilgrim  
Privacy Commissioner

26 May 2014

### Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.