



[REDACTED]

**FEDERAL COURT OF AUSTRALIA**

Your Ref:  
Our Ref:

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

13 August 2020

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

**Request under the Freedom of Information Act**

I refer to your request of 14 June 2020 (**FOI request**), communicated by email to the Federal Court of Australia (the **Court**), for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

I would like access to the record of, or a formal statement of the reasons for, a final decision given in exercise of a power to:

- a) recruit each ongoing SES employee (i.e. SES1, SES2 or SES3 officers) from outside the APS from 1 July 2016 to the date of this request into the 'single administrative entity',
- b) promote each ongoing APS employee (including an SES employee) from within the APS to an SES position in the 'single administrative entity' from 1 July 2016 to the date of this request (a record or formal statement containing the name of an employee whose name was not published in the Public Service Gazette because the Agency Head decided not to include the employee's name in a notification because of the employee's personal or work-related circumstances can be redacted),
- c) transfer each ongoing SES employee from another public service agency to the 'single administrative entity' from 1 July 2016 to the date of this request,
- d) recruit each non-ongoing SES employee (i.e. SES1, SES2 or SES3 officers) from outside the APS from 1 July 2016 to the date of this request into the 'single administrative entity',
- e) promote each non-ongoing APS employee (including an SES employee) from within the APS to an SES position in the 'single administrative entity' from 1 July 2016 to the date of this request (a record or formal statement containing the name of an employee whose name was not published in the Public Service Gazette because the Agency Head decided not to include the employee's name in a notification because of the employee's personal or work-related circumstances can be redacted),
- f) transfer each non-ongoing SES employee from another public service agency to the 'single administrative entity' from 1 July 2016 to the date of this request.

On 26 June 2020, the Court acknowledged receipt of your FOI request and advised you that, because your request covered documents that contained personal information about past and present Court employees, the Court was required under section 27A of the FOI Act to consult with the persons concerned before making a decision about the release of documents. For that reason, the period for processing your request was extended by a further period of 30 days in accordance with subsection 15(6) of the FOI Act.

## **Authorised decision-maker**

I am authorised under subsection 23(2) of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

## **Decision**

I have decided to grant you access to the documents you have sought, with redactions made to the documents with respect to information that is conditionally exempt under subsections 47E(c) and 47F(1) of the FOI Act and contrary to the public interest under subsection 11A(5).

In making my decision I have had regard to:

- a. the terms of your FOI request;
- b. the nature and content of the documents sought by your request;
- c. the relevant provisions of the FOI Act and case law considering those provisions;
- d. the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**);
- e. the submissions of individuals whose personal information was included in the documents you requested.

## **Reasons for Decision**

### ***Searches undertaken***

Searches were undertaken by senior staff of the Court's People and Culture team to identify all documents falling within the scope of your request. These searches were extensive and extended to discussions with the senior staff. I am satisfied that by conducting these searches the Court has taken all reasonable steps to identify the documents captured by your request.

As a result of the searches undertaken, a total of twelve (12) documents were identified. Each of these documents is a Selection Advisory Committee Report (**Selection Report**), and in some instances relevant accompanying emails, for each SES employee recruited, promoted or transferred into or by the "single administrative entity" from 1 July 2016 to 14 June 2020, in accordance with the terms of your FOI request. The schedule accompanying this letter contains a more precise description of each document identified.

### ***Documents conditionally exempt under s 47E(c)***

I consider that each document falling within the scope of your request contains information that is conditionally exempt under paragraph 47E(c) of the FOI Act which relevantly prescribes that:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to ... have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.*

The FOI Guidelines provide the following elaboration on subsection 47E(c):

6.113 Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- an effect would reasonably be expected following disclosure
- the expected effect would be both substantial and adverse.

6.114 For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.

The Selection Reports which were identified as falling within the scope of your FOI request relate to both the “management of personnel” (in the sense of relating to the recruitment activities of the entity) and the “assessment of personnel” (in the sense of containing an assessment of the skills, knowledge, experience and attributes of internal and external applicants for SES positions).

The release of the Selection Reports without redactions would, or could reasonably be expected to, have a substantial adverse effect on the management of personnel by the Court in several respects. The first is that disclosure of the information would destroy trust in the confidentiality of the entity's recruitment and selection processes for SES positions. This would likely discourage prospective internal and external candidates from applying for SES positions and, ultimately, make it more difficult for the entity to attract high-calibre candidates to SES positions in future.

The assessment of each candidate contained within each Selection Report, includes information regarding the candidate's weaknesses and/or areas for development. The release of such information could reasonably be expected to create tension amongst employees of the entity by permitting comparisons between individuals, including between SES and non-SES employees. In addition, the disclosure of such information would likely undermine the high-level leadership and expertise that SES employees are recognised for and are expected to provide to the entity.

Finally, the release of the relevant Selection Reports would, or could, reasonably be expected to substantially damage the trust and morale of employees of the entity. This is because existing SES employees, as well as existing non-SES employees who have applied for SES positions, would have every expectation that the details of these recruitment processes would remain confidential. The disclosure of the Selection Reports would prejudice the protection of the employee's right to privacy and would potentially result in a deterioration of the morale and productivity of the relevant employees.

### ***Documents conditionally exempt under s 47F(1)***

In addition to being conditionally exempt under subsection 47E(c), I consider that the documents are also conditionally exempt under subsection 47F(1) of the FOI Act. Subsection 47F(1) prescribes that:

*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).*

The term “personal information” is defined in subsection 4(1) of the FOI Act to have the same meaning as in the *Privacy Act 1988* (Cth) (**Privacy Act**), that is:

*...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 material form or not.*

The Selection Reports contain information that is clearly “personal information” as defined in subsection 4(1) of the FOI Act. This information includes the name of the candidates and information about their skills, knowledge, experience, achievements, capabilities, personal attributes and performance in the interview. It also includes the Selection Advisory Committee’s assessment and rating of the candidate, as well as personal information regarding referees and members of the Selection Advisory Committee.

In considering whether this personal information is conditionally exempt under subsection 47F(1) of the FOI Act, I am required to consider whether the disclosure of personal information would be unreasonable.

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

*...whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...*

In relation to matters that must be taken into account in determining whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act prescribes that:

- (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.*

In relation to requests for documents that contain personal information about public servants, the FOI Guidelines stipulate the following:

*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.*

Apart from the name of each successful candidate, I consider that all other personal information contained in each Selection Report would be an “*unreasonable disclosure of personal information*” under subsection 47F(1) of the FOI Act. Such personal information is not well known and is not, generally-speaking, available from publicly accessible sources.

In addition, apart from the name of the successful candidate, the personal information contained in each Selection Report is not information that directly concerns the person's usual duties or responsibilities as a public servant. Rather, the relevant documents contain information that is unique and personal to each individual including their personal capabilities and attributes. In this regard, the FOI Guidelines state:

*6.157 There needs to be careful consideration of the exemption where the personal information does not relate to the public servant's usual duties and responsibilities. For example, if a document included information about an individual's disposition or private characteristics, disclosure is likely to be unreasonable. This would generally include the reasons a public servant has applied for personal leave, information about their performance management or whether they were unsuccessful during a recruitment process.*

The FOI Guidelines list the following additional factors, at paragraph 6.143, that are relevant to the question of whether disclosure would be unreasonable:

- *the nature, age and current relevance of the information*
- *any detriment that disclosure may cause to the person to whom the information relates*
- *any opposition to disclosure expressed or likely to be held by that person*
- *the circumstances of an agency's collection and use of the information*
- *the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act*
- *any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and*
- *whether disclosure of the information might advance the public interest in government transparency and integrity.*

In relation to any opposition to disclosure expressed or likely to be held by the person to whom the personal information relates, I note that a significant number of SES employees who were consulted under s 27A objected to disclosure of the relevant Selection Report containing personal information about them. The various reasons given for the objections were:

- the information does not relate to the person's usual duties and responsibilities as a public servant
- the information relates to the person's personal affairs, which the Australian community would regard as sensitive
- the information is private and not well known or available from publicly accessible sources
- disclosure would have an adverse effect on the person concerned
- disclosure would damage the person's trust and confidence in their employer to maintain confidentiality over their personal information
- disclosure would undermine the morale of the person concerned, and potentially the workforce as a whole, by not protecting their privacy rights.

The terms of your FOI request do not necessarily suggest that you are seeking information regarding unsuccessful candidates. However, I note that the Selection Reports include personal information about both internal and external unsuccessful candidates. Unsuccessful candidates who are external to the entity were not consulted under s 27A of the FOI Act but I nonetheless consider that such individuals would likely oppose the disclosure of any personal information about them contained in the relevant Selection Report, including the release of their name. This is because applicants for advertised positions have every expectation that their personal information will be kept confidential at all stages of the selection process.

Disclosure of information regarding an external candidate's job application could have negative repercussions for that person at their current place of employment.

In relation to any detriment that disclosure of the information could cause to the person to whom the information relates, I consider it likely that the personal information contained within each Selection Report would have adverse consequences for the person concerned. In particular, the disclosure of the assessment of the candidates could cause tension and complications in the workplace where a person who was successful in their application works alongside someone who was unsuccessful. The release of such information could also create animosity towards the successful candidate by permitting comparisons between individuals. Given that the assessments contained within each Selection Report generally include an assessments of a person's weaknesses/areas for development, disclosure may also embarrass the person concerned and cause damage to their reputation.

The fact that the FOI Act "*does not control or restrict any subsequent use or dissemination of information released*" (see paragraph 6.143 of the FOI Guidelines), is also an important consideration in determining whether disclosure of the Selection Reports would be unreasonable. In *'BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner held at paragraph 81:

*... 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 ... 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.*

Accordingly, I consider that the personal information contained within the Selection Reports, apart from the successful candidate's name, would be unreasonable to disclose. The information is not well known and is not, generally-speaking, available from publicly accessible sources. The release of such information into the public domain has the potential to cause considerable harm and anxiety for the person to whom the information relates. There is also a real potential for the information to be misused and for the person's professional reputation to be damaged.

### ***Public interest test***

Subsection 11A(5) of the FOI Act provides that:

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

In considering that 'public interest test', a number of factors are set out in subsection 11B(3) of the FOI Act that must be taken into account. These are that disclosure would:

- *promote the objects of the FOI Act;*
- *inform debate on a matter of public importance;*
- *promote effective oversight of public expenditure; and*
- *allow a person to access his or her personal information.*

The FOI Guidelines provide the following elaboration on the 'public interest test':

6.5 *The public interest test is considered to be:*

- *something that is of serious concern or benefit to the public, not merely of individual interest*
- *not something of interest to the public, but in the interest of the public*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

I accept that there is a public interest in the integrity of public sector recruitment processes and that disclosure of the Selection Reports would go some way to promoting the objects of the FOI Act. Specifically, disclosure of the Selection Reports could be considered to promote “*better-informed decision-making*” by the public sector (s 3(2)(a) of the FOI Act) and to enhance “*scrutiny, discussion, comment and review*” of public sector activities (s 3(2)(b) of the FOI Act). The disclosure of the Selection Reports could be seen to allow the public, as well as unsuccessful candidates, to understand why one candidate was chosen over another and would ensure that Selection Advisory Committees were more accountable for their assessments and recommendations regarding candidates.

Whilst disclosure of the Selection Reports might be considered to promote the objects of the FOI Act, there are several factors already identified that weigh against a finding that it would be in the public interest to disclose the documents. These factors are essentially the same as those that make the documents conditionally exempt under subsections 47E(c) and 47F(1) and can be summarised as follows:

- Disclosure of the information would destroy trust in the confidentiality of the entity’s recruitment processes for SES positions. This may discourage prospective candidates from applying for SES positions and make it more difficult to attract high-calibre candidates in the future.
- The release of the information could reasonably be expected to create tension amongst employees of the entity by permitting comparisons between individuals.
- Disclosure of the information, in particular the information that assesses the weaknesses of successful candidates, would undermine the high-level leadership and expertise that SES employees are expected to provide.
- The release of the Selection Reports could damage the trust and morale of employees of the entity because those employees who apply for SES positions would expect that details of the recruitment process would remain confidential. This, in turn, may result in a decrease in the productivity of the relevant employees.
- The Selection Reports contain personal information about candidates, referees and Selection Committee members that is private to each individual and is not well known or available from publicly accessible sources.
- Apart from the name of successful candidate, the personal information contained in each Selection Report is sensitive and is not information that directly concerns the person’s usual duties or responsibilities as a public servant.
- A significant number of persons consulted did not consent to the information being disclosed and, with respect to external individuals who were not consulted, it is highly likely that such individuals would object to the disclosure of personal information about them contained within the Selection Reports.
- Disclosure of the personal information contained in the Selection Reports would have an adverse effect on the persons concerned. It may cause tension and complications in

the workplace, create animosity between certain individuals, and may embarrass the person concerned and cause damage to their reputation.

- Because the FOI Act does not restrict any subsequent dissemination of information disclosed, the release of the Selection Reports into the public domain has the potential to result in misuse and to cause harm and anxiety for the persons concerned.

I give significant weight to each of the above factors and, after considering each factor and the weight to be given to each, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

In the decision of *'BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner came to the following conclusion at paragraph 106 in consideration of a very similar set of facts:

*... I have decided that it runs counter to the development of privacy law and practice in Australia to continue to release under the FOI Act the vocational assessment information of a successful candidate, where the candidate objects and the principal public interest reason for release is that the person was the successful candidate.*

Therefore, in light of the reasons and discussion provided above, I have decided that the disclosure of the Selection Reports without redactions would be contrary to the public interest and that, on that basis, access to the documents should be refused.

### ***Redaction appropriate under s 22***

Where access to the requested documents is refused, section 22 of the FOI Act provides that an edited copy of the documents may be provided if it is possible to redact exempt information. Under that section, irrelevant information may also be redacted. Notwithstanding my findings, detailed above, to refuse access to the documents on the basis that they are exempt under the FOI Act, section 22 requires me to consider whether access may be granted to the documents following the redaction of exempt information.

I note that there is a significant public interest in the promotion of the FOI Act by providing access to information held by the public sector, and enhancing the scrutiny of public sector decision-making. Access should therefore be given where it is possible to do so without disclosing exempt information.

The exempt information contained within each identified Selection Report can be protected by redaction. If this information is redacted, the Selection Reports retain meaning. In particular, the redacted Selection Reports retain meaning as a record of a final decision to recruit, promote or transfer each relevant SES employee as per the terms of your FOI request.

As it is therefore possible to promote the FOI Act by providing access to meaningful information whilst protecting exempt information, I have decided that it would be appropriate to grant you access to redacted copies of the Selection Reports.

### **Access Format**

You have not included in your request any indication of the format in which you seek access. All of the documents are available electronically and, as your FOI request was made by email, I assume that you would prefer access in the form of electronic copies of the identified documents being emailed to you. I have therefore decided to grant you access to all



documents in PDF format and release these to you by email. These documents, and the schedule describing each document, accompanies this letter.

### **Charges**

You have not been charged for the processing of your request.

### **Your review rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. The decision maker encourages you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### ***Internal review***

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of this decision. The internal review application must be made within 30 days of the date of this letter.

Where possible, please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

#### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Officer of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely



C Hammerton Cole  
**Registrar**