



[REDACTED]

**FEDERAL COURT OF AUSTRALIA**

Your Ref:  
Our Ref:

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

11 August 2020

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

**Request under the Freedom of Information Act**

I refer to your email to the Federal Court of Australia (the **Court**) of 12 June 2020, requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). In that email, you set out four requests for documents containing information about past and present SES employees of the “single administrative entity”, as well as documents containing information regarding the entity’s “SES cap” (**FOI request**). The content of your FOI request is too lengthy to extract in this letter.

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 Court employees, under section 27A of the FOI Act the Court was required to consult with the persons concerned before making a decision about the release of the 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**

Apart from one exception, I have decided to grant you access to the information sought by providing you with a written compilation of information that corresponds with the categories set out in your FOI request. The only exception to that grant of access is the information you have sought regarding the reasons an SES employee’s employment with the “single administrative entity” ended. I have determined that such information is conditionally exempt under subsection 47F(1) of the FOI Act and would be contrary to the public interest to disclose under subsection 11A(5) and, on that basis, I have decided to refuse access to that portion of your FOI request only.

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 information you

## **Reasons for Decision**

### ***Searches undertaken***

Searches were undertaken of the Court's records by senior staff of the Court's People and Culture team. These searches were extensive and extended to several discussions with the senior staff members to determine the extent to which, if at all, the relevant documents existed. I am satisfied that by conducting these searches the Court has taken all reasonable steps to identify the documents you have requested.

### ***Provision of documents under section 17 of the FOI Act***

Your FOI request includes the following statement:

*If the documents do not exist in a discrete form then, in accordance with section 17 of the Freedom of Information Act 1982, I request that the relevant officer handle the request as though it were a request for access to a written document by using a computer or other equipment to retrieve and collate the stored information into a document.*

Section 17 of the FOI Act provides:

- (1) *Where:*
  - (a) *a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;*
  - (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and*
  - (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
  - (c) *the agency could produce a written document containing the information in discrete form by:*
    - (i) *the use of a computer program or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
    - (ii) *the making of a transcript from a sound recording held in the agency;*
- the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.*
- (2) *An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.*

The FOI Guidelines provide:

*3.204 Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded. Examples include a transcript of a sound recording, a written compilation of information held across various agency databases, or the production of a statistical report from an agency's dataset. The obligation to produce a written document arises if:*

- *The agency could produce a written document containing the information by using a ‘computer or other equipment that is ordinarily available’ to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and*
- *Producing a written document would not substantially or unreasonably divert the resources of the agency from its other operations (s 17(2)).*

*If those conditions are met the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency’s possession.*

Based on the extensive searches conducted by staff of the Court’s People and Culture team, I have determined that the information you have requested does not exist in a discrete written form in a manner that corresponds to the categories of information set out in your FOI request. Rather, the information sought is held across various Court databases and would need to be retrieved and collated to match each category of your FOI request.

As explained in paragraph 2.33 of the FOI Guidelines, the FOI Act does not ordinarily “require any agency to create a new document in response to a request for access”. However, given the application of section 17, I have decided that you should be provided with a written compilation of the information sought, apart from the portion of information that I have determined is conditionally exempt under subsection 47F(1) and would be contrary to the public interest to disclose under subsection 11A(5).

***Certain information conditionally exempt under s 47F(1)***

I consider that a portion of the information you have requested is 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.*

Requests 1 to 3 contained in your FOI request seek documents that contain the names and other personal details of past and present SES employees engaged by the “single administrative entity”. This information is clearly “personal information” as defined in subsection 4(1) of the FOI Act.

In considering whether such information is conditionally exempt under subsection 47F(1), 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 the matters that ought to 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.*

The FOI Guidelines explain further at paragraph 6.143, with reference to the decision of ‘FG’ and National Archives of Australia [2015] AICmr 26, that other factors which are relevant to the question of whether disclosure would be unreasonable include:

- *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 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.*

I accept that most of the personal information you have requested in requests 1 to 3 of your FOI request pertains to the usual duties or responsibilities of past and present SES employees of the “single administrative entity”. In addition, some of the information you have requested is publicly available, such as the names, position titles and primary locations of the SES employees. Therefore, in the absence of any special circumstances existing, most of the personal information you have requested would not be unreasonable to disclose.

However, with respect to your request for documents that provide “the reason” an SES employee “retired, resigned or was terminated”, I have decided that it would be unreasonable to disclose such personal information. Such personal information is not well known and nor is it available from publicly accessible sources. The only exception to this is where an Australian Public Service (APS) employee’s employment is terminated due to breach of the Australian Public Service Code of Conduct and the Agency Head is required to notify the

decision in the Public Service Gazette (clause 34(1)(e) of the *Australian Public Service Commissioner's Directions 2016*). In such an instance, such information would be available from a publicly accessible source. However, this is not applicable to any of the SES employees with respect to whom you have requested information.

Additionally, information regarding the reasons a person's employment ended is not information that directly concerns their usual duties or responsibilities. In this regard, the FOI Guidelines explain:

*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.*

Furthermore, the disclosure of information regarding the reasons that a person's employment ended may cause detriment to the person concerned. For example, if it were disclosed that a person's employment was terminated by the Court, it could be reasonably expected that this would have an adverse impact on the person's future employment prospects. If such information were to be disclosed, other Court employees may also lose trust and confidence in the ability of the Court to maintain confidentiality over their personal information.

Apart from circumstances where a person's employment has been terminated due to breach of the APS Code of Conduct (discussed above), it is otherwise difficult to see how disclosure of the reasons for a person's employment ending would advance the public interest in government transparency and integrity. Such reasons are personal and unique to the person concerned and it would be inconsistent with the Court's obligations under the Privacy Act to disclose such information with respect to past employees.

### ***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 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 further 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.*

Whilst disclosure might broadly promote the objects of the FOI Act by providing the Australian community with access to information held by an agency, I do not consider that the reasons for a person's employment ending would inform debate on a matter of public importance or promote effective oversight of public expenditure. As this is not an instance where an FOI applicant is seeking access to their own personal information, this is not a relevant factor to be considered.

Furthermore, information regarding the reasons a person's employment has ended is personal and unique to the person concerned and would not be of serious concern or benefit to the public, apart from the circumstances already discussed where an APS employee's employment is terminated due to breach of the APS Code of Conduct (which is not applicable to any of the past employees with respect to whom you have requested information). In addition, I do not consider that this information relates to matters of common concern or is relevant to all members, or a substantial section, of the public.

Whilst disclosure of this information might broadly be considered to promote the objects of the FOI Act, there are several factors already identified which weigh against a finding that it would be in the public interest to disclose the information requested regarding the reasons a person's employment ended.

As discussed above, the information is not well known or available from publicly accessible sources. It is information that is personal and unique to the person concerned and could reasonably be expected to prejudice the protection of the individual's right to privacy. In circumstances where a person's employment has been terminated, disclosure of this information could reasonably be expected to cause harm to the person concerned. Furthermore, the information does not directly relate to the performance of the person's usual duties or responsibilities as an employee of the Court. In addition, if this information were to be disclosed, other Court employees may lose trust and confidence in the ability of the Court to maintain confidentiality over their personal information.

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. On this basis, I have determined that the disclosure of reasons for a person's employment ending would be contrary to the public interest and should not be disclosed.

### **Access Format**

A written compilation of information that responds to your FOI request accompanies this letter. For ease of reference, the compilation utilises numbers and letters that correspond to your FOI request. As your FOI request was made by email, I have assumed that you would prefer access in the form of an electronic copy of the written compilation being emailed to you.

In relation to the information provided to you in response to requests 2 and 3 of your FOI request, I note that those persons acting in SES roles have not been included in the written compilation of information provided. Such persons are temporarily assigned those duties

under the *Public Service Act 1999* (Cth) and are not, strictly-speaking, “SES employees” of the Court as per your request.

### **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**