



Australian
Human Rights
Commission

Consultation regarding the disclosure of public servants' names and contact details in the context of Freedom of Information requests

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
OFFICE OF THE AUSTRALIAN INFORMATION COMMISSIONER**

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1 Executive Summary

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Office of the Australian Information Commissioner (OAIC) regarding the disclosure of public servants' names and contact details in the context of Freedom of Information (FOI) requests.
2. The Commission commends the OAIC for acknowledging agency concerns and undertaking this consultation into whether the *Guidelines issued by the Australian Information Commissioner under section 93A of the Freedom of Information Act 1982 (Cth)* (FOI Guidelines) provide sufficient and appropriate guidance in relation to the disclosure of the personal information of public servants in the current information access landscape.
3. The Commission recognises the critical role that the *Freedom of Information Act 1982 (Cth)* (FOI Act) and the FOI Guidelines play in facilitating open government in Australia. The FOI Act is a powerful instrument of public sector accountability by providing a right of access to Commonwealth government documents and increasing the scrutiny of public decision-making. The FOI Guidelines provide valuable assistance to FOI practitioners who must navigate a complex and technical area of law in the processing of FOI requests.
4. In light of the available caselaw, the Commission considers that the FOI Guidelines generally provide appropriate guidance regarding the disclosure of public servants' names and contact details in the context of FOI requests.
5. However, the Commission would welcome further guidance from the OAIC about what might constitute 'special circumstances' for the purpose of the personal privacy exemption in the FOI Act. As discussed below, the Commission submits that — in certain situations — the privacy interests of junior public servants should be acknowledged in the FOI Guidelines as potentially constituting 'special circumstances'. This is particularly the case when an FOI request would identify a junior member of staff with limited decision-making authority, against their wishes, in circumstances where a matter is socially divisive and may attract public attention.
6. While the Commission has been guided by the consultation questions posed in the OAIC discussion paper, this submission does not seek to respond to each question individually.

2 Human rights considerations

7. The right to access documents and information held by public institutions has been recognised as an integral part of the right to freedom of expression. This is reflected in article 19 of the Universal Declaration of Human Rights which states that freedom of expression encompasses the freedom to 'seek, receive and impart information and ideas through any media and regardless of frontiers'. Right of access to government information has also been considered a corollary of freedom of expression in other major international treaties, including the *International Covenant on Civil and Political Rights* (ICCPR).¹
8. The FOI Act reflects the premise that information held by Commonwealth government agencies is a national resource and should only be withheld if there are legitimate reasons to prevent its disclosure. This requires an assessment of the balance to be struck between the important objective of open government and other rights that might be engaged by the disclosure of government information — for example, the right to privacy.
9. Article 17 of the ICCPR protects the right to privacy. It provides:
 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.
10. As stated by the United Nations Office of the High Commissioner for Human Rights 'non-arbitrary' means that any interference with the right to privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable — that is, proportionate and necessary to achieve a legitimate objective — in the particular circumstances.²
11. While the pursuit of open government is clearly a legitimate objective, the Commission considers that public servants — in particular, junior public servants with limited decision-making authority — have privacy interests that need to be appropriately weighed in any disclosure framework. This has become increasingly important with the advent of social media and digital technologies and the concomitant rise of cyberbullying, online stalking and harassment.

3 The current position

12. The Commission often processes FOI requests that include documents containing the personal information of its staff. This is usually because the relevant staff member was involved, to some degree or extent, with the work that is the subject of the documents and the FOI request.
13. Section 47F of the FOI Act conditionally exempts documents (or parts of documents) where disclosure would involve the unreasonable disclosure of personal information of any person. This exemption is intended to protect the personal privacy of individuals, including public servants. As a conditional exemption, s 47F of the FOI Act is also subject to a further 'contrary to the public interest' test.³
14. In its discussion paper, the OAIC states that 'it has long been considered that in general, disclosure of public servants' names in response to an FOI request would not be unreasonable'.⁴ Attachment A of the discussion paper sets out a list of cases decided by the Administrative Appeals Tribunal and the Australian Information Commissioner where this principle is largely affirmed.
15. The OAIC's view, as expressed in the FOI Guidelines, is that:

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.⁵

4 The Commission's views and concerns

16. The FOI Guidelines provide limited guidance about what might constitute 'special circumstances' for the purpose of the s 47F exemption. The FOI Guidelines make the following points:
 - there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether his or her name would be reasonable to disclose.
 - a document may be exempt 'for another reason', for example, where disclosure would, or could reasonably be expected to endanger the life or physical safety of any person (s 37(1)(c)).

- where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.⁶
17. Understandably, the term 'special circumstances' is not defined exhaustively in the FOI Guidelines. By its nature, 'special circumstances' cannot be a closed category — it will depend on a context-specific analysis of the individual situation. However, the Commission considers that there is an opportunity for the OAIC to provide further guidance to FOI practitioners about what might constitute 'special circumstances' for the purposes of ascertaining when the disclosure of personal information of public servants will be 'unreasonable' under the s 47F conditional exemption.
 18. In the Commission's view, the evolution of digital technologies and social media has significantly changed the information landscape that public servants operate within and that 'special circumstances' and the 'contrary to the public interest' test need to be considered and understood within this context.

4.1 Junior public servants

19. The Commission accepts that the public has a legitimate interest in being able to ascertain the identity of public servants who make decisions that affect their rights and interests. This is an important part of a system of accountable and transparent government decision-making. However, the Commission submits that there is much less of a public interest in identifying junior public servants who lack the relevant authority to make decisions that affect such rights and interests.
20. Under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), the Commission has the statutory function of inquiring into and attempting to conciliate complaints of unlawful discrimination under Commonwealth anti-discrimination statutes.⁷ The AHRC Act also empowers the Commission to investigate and attempt to conciliate acts and practices done 'by or on behalf of the Commonwealth' said to be inconsistent with human rights recognised in certain international instruments,⁸ as well as complaints of discrimination in employment on a broad range of grounds, including social origin, nationality, religion, political opinion, trade union activity, criminal record and sexual orientation.⁹
21. Under the AHRC Act, responsibility for the investigation and conciliation of complaints is vested in the President of the Australian Human Rights Commission. As permitted by the AHRC Act, the President has delegated the administration of the Investigation and Conciliation Service (ICS) to the

Director and Deputy Director of the ICS — both senior public service roles. Consequently, it is usually these delegates of the President who make the significant decisions regarding the acceptance, handling, investigation, conciliation and termination of complaints by the Commission.

22. While delegates of the President make the decisions, the decisions are usually communicated by conciliators — typically more junior staff members who are responsible for the everyday carriage of complaints, including liaising directly with the parties.
23. Junior staff members are also often involved in implementing projects in the Policy section of the Commission which works closely with the Commission's seven special-purpose Commissioners — the Race Discrimination Commissioner, the Human Rights Commissioner, the National Children's Commissioner, the Sex Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Age Discrimination Commissioner and the Disability Discrimination Commissioner.
24. The Commission is often called upon to make finely balanced decisions about issues that are the subject of impassioned societal debate. Recent discussions about racial vilification, freedom of speech, freedom of religion and LGBTI equality rights are good cases in point.
25. Decisions of the Commission are rightly scrutinised by the media and the general public and can involve — or attract comment from — high-profile figures within the Australian community. While most commentary about the Commission is responsible, some is not. In some cases, anger about a Commission decision, a complaint, or its outcome, is translated into aggressive and abusive behaviour towards the agency and its staff. The effect of this abuse is often magnified by digital technologies and social media.
26. In the Commission's view, the range of risks faced by public servants in the online environment are not adequately captured by the reference in the FOI Guidelines to risks to the 'life or physical safety' of a person.¹⁰
27. In 2018, the Australian Public Service Commission produced a policy framework for managing the cyber-bullying of APS employees by members of the public.¹¹ This framework recognises that cyber-bullying can be difficult to deal with because it is distinct from other kinds of bullying in several key ways. In particular:
 - it allows a potentially global audience to view or participate

- it is often anonymous, making it hard to hold perpetrators to account
 - it can take place at any time of the day, seven days a week
 - it has a degree of permanence, as information put online can be difficult to remove and may be recorded and archived
 - it may be difficult to escape from, given the pervasiveness of the need to be always 'connected'
 - content can be duplicated easily and is often searchable.¹²
28. Frontline Commission staff can experience bullying and harassment by aggrieved members of the public in the course of their work. This includes junior staff who answer telephone, email or in-person inquiries from the public through the Commission's National Information Service (NIS), or who have otherwise received inappropriate email or other communications. Further public dissemination of the contact details of junior staff may increase this risk. The potential impact of harassment, cyber-bullying and inappropriate online conduct on the health of its employees is something that the Commission takes very seriously — as it is required to do under *Work Health and Safety Act 2011* (Cth).
29. The advent and ubiquity of social media can also blur the boundaries between employees 'performing their public duties' and their private lives. For example, the identity of a public servant associated with a particular matter may become known by way of an FOI request, reported in the media, and then that employee may be inappropriately targeted and harassed on their personal social media accounts where they are identified by their real name.
30. Social media is now a principal way in which many people engage with the world. It plays an important and valuable role in the lives of numerous Australians — particularly the younger cohort of 'digital natives' (now adults) who have never known a world without social media. For some of these people, requiring them to change decades-old social media profiles or interact under a pseudonym, is a considerable imposition.
31. Statutory officeholders and senior public servants occupy significant positions of trust and privilege within the Australian community. Their roles often include the legal authority to make decisions that directly affect the rights and interests of other members of the community. These roles carry significant responsibilities, as well as influence. The Commission considers that it is appropriate for senior members of the Australian Public Service (APS) to bear public scrutiny for their decisions or the decisions of an agency in which they occupy a senior role.

32. Junior public servants, however, are often required to implement directions and communicate, or give effect to, decisions that are not their own. Their behaviour, both inside and outside of work, is regulated by the APS Code of Conduct.¹³ The APS Code of Conduct requires an APS employee to comply with 'any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction'.¹⁴ This would often include a more senior member of the agency. There is significantly less public interest in disclosing the identity of a public servant who communicates a decision in respect of which they were not the decision-maker.
33. Junior APS employees are also more likely to be younger, at the earlier stages of their careers, on temporary work contracts and without the experience and social capital of older colleagues. They may be limited in their ability to respond publicly to personal attacks made in relation to their following of directions because of public service regulations relating to the disclosure of information,¹⁵ as well as limitations in the APS Code of Conduct. The APS Code of Conduct requires public servants to adhere to high standards of conduct in their dealings with the public — including in circumstances where members of the general public behave badly.¹⁶ Dealing with members of the public who are aggressive, critical and abusive can be stressful for APS employees, in particular for less experienced workers.
34. The Commission does not consider that it will always be unreasonable to disclose the names of junior staff in FOI requests. Within the Commission, there is a variety of attitudes among staff about the disclosure of their names through FOI. Nor does the Commission consider that there is, or should be, a blanket level at which all junior public servants names and contact details will be exempt from disclosure. This will need to be decided on an individual basis through consideration of the role and its responsibilities, as well as the nature of the information itself.
35. However, when an FOI request would identify a junior member of staff with limited decision-making authority — in circumstances where it is reasonably foreseeable that a matter may attract public attention and the particular staff member opposes the disclosure of their personal information — the Commission considers that this should be acknowledged in the FOI Guidelines as potentially constituting a 'special circumstance' for the purpose of s 47F of the FOI Act.
36. The Commission embraces the reasoning of the Victorian Civil and Administrative Tribunal in *Coulson v Department of Premier and Cabinet* when it decided that it would be unreasonable to disclose the personal

information of non-executive Victorian Public Service officers for reasons similar to the ones discussed above.¹⁷

4.2 Applicants with a propensity to pursue matters obsessively

37. The FOI Guidelines state that 'where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable'.¹⁸
38. For the reasons set out above, the Commission considers that, in the case of junior employees, it should not be necessary to demonstrate that a particular applicant has a propensity to pursue matters obsessively before a decision can be made not to disclose their names. Rather, FOI practitioners should be able to act on the basis of reasonably foreseeable risks to staff.
39. More generally, the Commission would welcome further guidance from the OAIIC about when an FOI practitioner might be satisfied that there are reasonable grounds for considering that an individual has a 'propensity to pursue matters obsessively' and how that decision should be communicated to an applicant.
40. While acknowledging that this will be a contextual decision that may depend, in part, on an agency's knowledge of an applicant's past behaviour, it would be useful to know if there are any considerations that the OAIIC considers particularly relevant in making this assessment.

¹ United Nations Human Rights Committee, *General Comment No 34, Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011).

² Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, 27th sess, Agenda Items 2 and 3, UN Doc A/HRC/27/37 (30 June 2014) 7 [21].

³ *Freedom of Information Act 1982* (Cth) s 11A(5).

⁴ Office of the Australian Information Commissioner, *Disclosure of public servants' names and contact details* (Discussion paper, July 2019) 2.

⁵ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (Combined 2019), [6.153].

⁶ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (Combined 2019), [6.153]–[6.156].

⁷ *Australian Human Rights Commission Act 1986* (Cth) pt IIB – Redress for unlawful discrimination.

- ⁸ *Australian Human Rights Commission Act 1986* (Cth) pt II div 3 – Functions relating to human rights.
- ⁹ *Australian Human Rights Commission Act 1986* (Cth) pt II div 4 – Functions relating to equal opportunity in employment.
- ¹⁰ *Freedom of Information Act 1982* (Cth), s 37(1)(c).
- ¹¹ Australian Public Service Commission, *Cyber-bullying of APS employees by members of the public* (2018).
- ¹² Australian Public Service Commission, *Cyber-bullying of APS employees by members of the public* (2018), 1.
- ¹³ *Public Service Act 1999* (Cth) s 13.
- ¹⁴ *Public Service Act 1999* (Cth) s 13(5).
- ¹⁵ *Public Service Regulations 1999* (Cth) reg 2.1.
- ¹⁶ Australian Public Service Commission, *Cyber-bullying of APS employees by members of the public* (2018), 2.
- ¹⁷ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229 (20 February 2018), [110]–[119].
- ¹⁸ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (Combined 2019), [6.156].