



John Mullen and Australian Aged Care Quality Agency (Freedom of information) [2017] AICmr 11 (1 February 2017)

Decision and reasons for decision of
Australian Information Commissioner, Timothy Pilgrim

Applicant:	John Mullen
Respondent:	Australian Aged Care Quality Agency
Decision date:	1 February 2017
Application number:	MR15/00418
Catchwords:	Freedom of Information — Documents to which secrecy provisions of enactments apply — Whether disclosure of personal information unreasonable — Whether disclosure would have a substantial adverse effect on the management or assessment of personnel — (CTH) <i>Freedom of Information Act 1982</i> ss 38, 47E, 47F

Decision

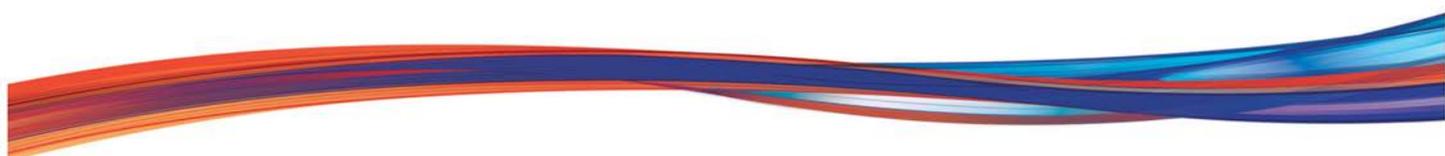
1. Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I set aside the decision of the Australian Aged Care Quality Agency (the Agency) of 12 October 2015. I substitute my decision that:
 - the material that the Agency found to be exempt under s 47F of the FOI Act is not exempt
 - the applicant's personal information that the agency found to be exempt under s 38 of the FOI Act is not exempt, and
 - the remaining material that the Agency found to be exempt under s 38 is exempt under this provision.

Scope of IC review

2. The applicant was the complainant in a Commonwealth Ombudsman matter relating to an issue that he had raised through the then Aged Care Complaints Scheme in 2012.
3. On 12 August 2015, the applicant applied to the Commonwealth Ombudsman for access to documents concerning the Ombudsman's investigation of the complaint.
4. On 20 August 2015, the Commonwealth Ombudsman transferred the request to the Agency.
5. On 12 October 2015, the Agency advised the applicant that it had identified 13 documents within the scope of the request. The Agency refused the applicant access to 11 documents in part¹ and two documents in full² (the documents). In making its decision, the Agency relied on the personal privacy exemption (s 47F) and secrecy provisions exemption (s 38) of the FOI Act.
6. On 10 December 2015, the applicant sought IC review of the Agency's decision under s 54L of the FOI Act.
7. On 4 July 2016, the Agency submitted that staff names and titles are exempt under s 47E(d) of the FOI Act. The Agency said that disclosing staff details would facilitate direct contact by the applicant in future. The Agency contends that contact outside the streamlined complaints process would have a substantial adverse effect on the efficient conduct of the Agency's operations.
8. In this IC review, I have considered whether the documents:
 - are exempt under s 38, or
 - conditionally exempt under either s 47F or s 47E, and if conditionally exempt, whether, on balance, it would be contrary to the public interest to give the applicant access to conditionally exempt documents at this time.
9. In making my decision, I have had regard to the following:
 - the Agency's decision and reasons for decision
 - the documents
 - the FOI Act, in particular ss 38, 47E and 47F
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular paragraphs [5.118] — [5.125], [6.95] — [6.103] and [6.120] — [6.160]
 - relevant case law, and
 - the parties' submissions.

¹ Identified on the Agency's schedule of documents as documents 1–8 and 11–13.

² Documents 9 and 10.



Documents to which secrecy provisions of enactments apply (s 38)

10. As discussed in the Guidelines and in IC review cases,³ the main requirement of this exemption is that a document is exempt from disclosure if disclosure is prohibited under a provision of an enactment - specified in Schedule 3 to the FOI Act, or if s 38 of the FOI Act is expressly applied to the document by a provision of any other enactment.
11. The Agency decided that two documents are exempt in full,⁴ and five documents are exempt in part under s 38.⁵ These seven documents include correspondence between the Agency and the Commonwealth Ombudsman enclosing documents such as the assessment contact report in relation to the aged care facility, a checklist for internal quality assessors and the assessment workbook. Schedule 3 of the FOI Act specifies s 86-2(1) of the *Aged Care Act 1997* (Cth).
12. Section 86-2(1) of the *Aged Care Act* relevantly provides:

A person commits an offence if:

- (a) the person makes a record of, discloses or otherwise uses information; and
- (b) the information is * protected information; and
- (c) the information was acquired by the person in the course of performing duties or exercising powers or functions under this Act or the *Aged Care (Transitional Provisions) Act 1997*...

13. 'Protected information' is defined in s 86-1 of the *Aged Care Act*:

In this Part, **protected information** is information that:

- (a) was acquired under or for the purposes of this Act or the *Aged Care (Transitional Provisions) Act 1997*; and
- (b) either:
 - (i) is * personal information; or
 - (ii) relates to the affairs of an approved provider...

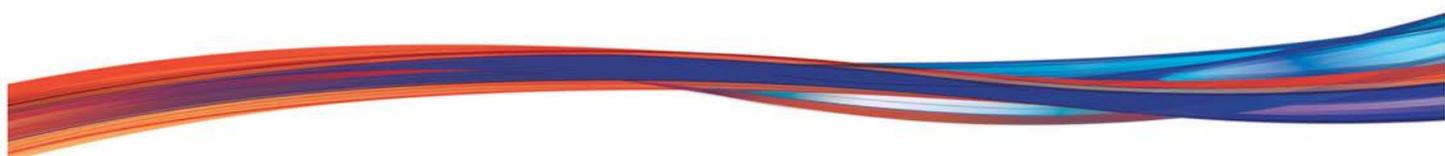
14. The applicant submits:

... Section 86-2(1) says it is an offence to release "protected information", but the information I have requested is not "protected information"...

³ Generally, see *Office of the Australian Information Commissioner, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* at [5.118] – [5.125]; *'CZ' and Department of Health* [2014] AICmr 103; *Byrne and Private Health Insurance Ombudsman* [2014] AICmr 50; *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623; *Sweeney and Australian Prudential Regulation Authority* [2013] AICmr 67.

⁴ Documents 9 and 10.

⁵ Documents 6-8 and 11-12.



15. In its reasons for decision the Agency said:

The 5 documents that I have decided to release with redactions and 2 documents that I have decided to refuse access to contain information in relation to approved providers acquired for the purposes of Part 4.1, 4.2 or 4.3 of the Aged Care Act. This information is prohibited from being disclosed under section 86-2(1) of the Aged Care Act for the following reasons:

- the information was acquired under Part 4.1, 4.2 or 4.3 of the Aged Care Act in the course of performing functions delegated under section 96-2(1) of the Aged Care Act, namely the performance of functions relating to the auditing and review of accreditation standards under the *Quality Agency Reporting Principles 2013* (Cth);
- the documents involve information that is either personal information or information that relates to the affairs of an approved provider; and
- disclosure of the information is not excluded by s86-2(2) from the prohibition against disclosure.

As information in these documents is prohibited from being disclosed under section 86-2(1) of the Aged Care Act, I find that the information is exempt from disclosure under section 38(1) of the FOI Act.

16. The Agency submits:

... The objective of the protected information provisions in the *Aged Care Act 1997* is not just to protect the personal privacy of residents... The quality and integrity of monitoring, assessment and enforcement functions requires residents and providers of aged care services to be encouraged to provide information without concerns that information will be disclosed further without consideration of the appropriateness and consequences of that disclosure.

17. Section 86-2 of the Aged Care Act creates an offence where a person discloses protected information that the person had acquired in the course of performing duties or exercising powers or functions under the Aged Care Act.

18. I have examined the seven documents. It is clear from the character and content of the documents that the documents:

- were acquired by the Agency under or for the purposes of the Aged Care Act, and
- contain personal information or relate to the affairs of an approved provider.

19. This is 'protected information' under s 86-1 of the Aged Care Act. I accept that the Agency acquired this information under Part 4.1, 4.2 or 4.3 of the Aged Care Act in the course of performing functions delegated under s 96-2(1) of the Aged Care Act.

20. I am satisfied that disclosure of the material that the Agency found exempt under s 38 is captured by s 86-2(1) of the Aged Care Act. This material is exempt under s 38 of the FOI Act unless the document contains personal information about the applicant such that s 38(2) applies.



21. Some of the protected information in two documents,⁶ such as parts of file notes that record telephone conversations with the applicant, is the applicant's personal information. The applicant's personal information is not exempt under s 38 of the FOI Act.⁷

Personal privacy exemption (s 47F)

22. As discussed in the Guidelines and in IC review cases,⁸ the main requirements of this public interest conditional exemption are that a document contains 'personal information'; disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)); and it would be 'contrary to the public interest' to release the material at the time of the decision (s 11A(5)).
23. The Agency decided that 11 documents contain personal information that would be unreasonable to disclose.⁹ This information comprises staff names and titles.

24. The Guidelines explain:

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.¹⁰

25. The applicant submits:

...I think it only reasonable that the name and function title of the author and addressee of correspondence be released ... removing them from individual items correspondence ... only serves to frustrate efforts to understand the history of events...

26. The Agency submits:

Based on the information we consider that it is likely that disclosure of the staff member's details would be unreasonable due to the FOI applicant's obsessive pursuit of this matter and the fact that the staff member at the time is no longer the relevant contact...

... Given that many of those officers are no longer employed by the Quality Agency any attempts to contact them about this matter would likely cause them distress or inconvenience...

27. It is not in dispute that the officers were conducting their usual duties or responsibilities. However, the Agency essentially submits that there are special circumstances surrounding the nature and extent of the previous contact of the applicant that make the disclosure of staff names and titles unreasonable.¹¹

⁶ Documents 6 and 7.

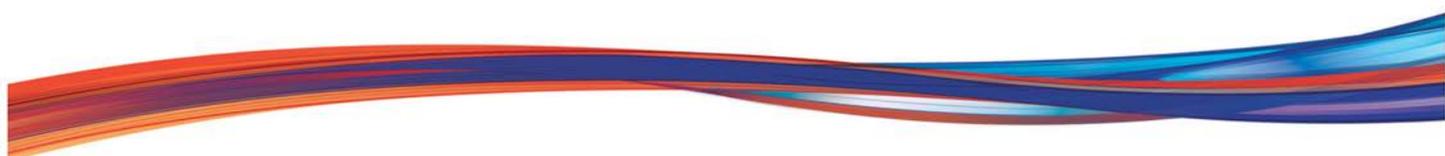
⁷ FOI Guidelines, [5.121].

⁸ Generally, see *Guidelines* [6.124]-[6.160]; *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85; *'HV' and Department of Finance* [2015] AICmr 84; *'HT' and the Australian Human Rights Commission* [2015] AICmr 82; *'HQ' and Department of Defence* [2015] AICmr 79; *'HK' and Department of Defence* [2015] AICmr 72; *'CX' and Department of Human Services* [2014] AICmr 102 and *'FG' and National Archives of Australia* [2015] AICmr 26.

⁹ Documents 1-8 and 11-13.

¹⁰ *Guidelines* [6.153].

¹¹ See discussion in *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 at [26] – [28].

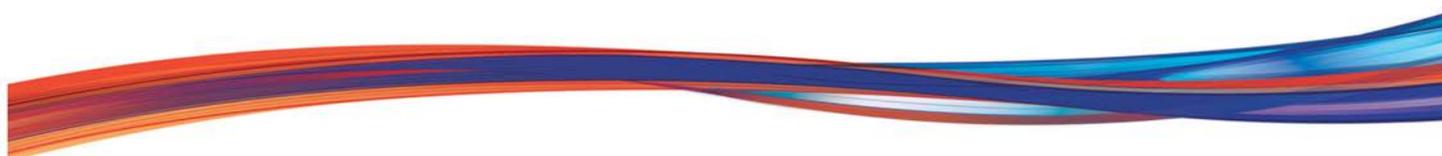


28. The Agency has not given details of specific contact that it considers problematic. The Agency refers to two telephone conversations that the applicant had with a senior staff member, two missed calls on a staff member's work mobile telephone and one voicemail message requesting a hard copy of the redacted documents. I am not satisfied that in this case the nature and extent of the previous contact of the applicant with Agency staff amounts to special circumstances that would make disclosure of the officers' names and titles unreasonable. Particularly as there is nothing to indicate that the applicant is likely to initiate contact with former Agency staff. With respect to current Agency staff, the Agency has not indicated that the applicant has contacted Agency staff outside the context of a complaint or request.
29. I am satisfied that disclosure in this case is not unreasonable for the purposes of s 47F(1).
30. The documents are not conditionally exempt under s 47F.
31. As I have found the documents are not conditionally exempt under s 47F, I am not required to consider whether it would be contrary to the public interest to give the applicant access to conditionally exempt documents for the purposes of s 11A(5).

Certain operations of agencies exemption (s 47E)

32. As discussed in the Guidelines and in IC review cases,¹² for a document to be conditionally exempt under s 47E(d) of the FOI Act, it would need to be shown that disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
33. During the course of this IC review, the Agency submitted that staff names and titles are also exempt under s 47E(d).
34. The Agency submits:
- ... the time and resources involved in responding to [the applicant's] requests, should they be made to individual officers and outside of the centralised complaints management process, will substantially and unreasonably divert the Quality Agency's resources away from managing other complaints in a timely way.
- ... Given the applicant's past history of contacting staff if the applicant is were to contact the names [sic] staff, it would potentially adversely impact our staff's future willingness and confidence in carrying their work in the future as they may feel we are not providing them with a safe working environment. As you would appreciate this may have far reaching impacts for the Agency.
35. However, the Agency has provided no evidence that the centralised complaints management process would be affected by the applicant directly contacting staff members, particularly as the Agency has also indicated that many of the relevant staff members no longer work at the Agency. Further, the Agency has not provided any evidence that the work of staff would be impacted by contact with the applicant.
36. The Agency's mere assertion that potential contact with staff members could affect the willingness and confidence of staff in carrying out their work in future is not enough to demonstrate that any substantial

¹² Generally, see *Guidelines* [6.95]-[6.103]; [6.120]-[6.123]; '*JM*' and *Australian Taxation Office* [2016] AICmr 60; '*JD*' and *Australian Taxation Office* [2016] AICmr 48; '*IN*' and *Australian Taxation Office* [2016] AICmr 33 and '*AW*' and *Australian Taxation Office* [2014] AICmr 1.



and adverse interference with its decision-making or other operations could reasonably be expected to result.

37. Under s 55D of the FOI Act, the Agency bears the onus of establishing that its decision is justified. For the reasons I have given above, I am satisfied that the Agency has not discharged its onus of establishing that disclosing staff names and titles could reasonably be expected to substantially and adversely affect the operations of the Agency.
38. The documents are not conditionally exempt under s 47E.
39. As I have found the documents are not conditionally exempt under s 47E, I am not required to consider the public interest test in s 11A(5).

Timothy Pilgrim
Australian Information Commissioner

1 February 2017

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 (AAT). 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. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

