



# Express law

*fast track information for clients*

20 MARCH 2014

## Recent decision revisits approach to release of vocational assessment information of successful job applicant

The decision of the Information Commissioner (the Commissioner) in ['BA' and Merit Protection Commissioner \[2014\] AICmr 9](#) (30 January 2014) takes a fresh look at release of personal information of successful candidates in a public service employment process under the *Freedom of Information Act 1982* (FOI Act). The decision departs from the historical approach to releasing such information, with the Commissioner concluding that there is no longer a sound legal basis for the longstanding view that it is not unreasonable to disclose vocational assessment information under the FOI Act.

### *The background facts*

The applicant (BA) was promoted to a position within the Department of Human Services. An unsuccessful candidate (the FOI Applicant) for the same role sought release of BA's vocational assessment documents – for example, information on vocational competence and work aspirations contained in job applications, comparative assessment reports and referee reports. The Merit Protection Commissioner (MPC) decided to grant access to those documents. BA sought review of the MPC's decision to grant access to her personal information.

### *Vocational assessment information is personal information*

The Commissioner confirmed that the scope of the term 'personal information' in s 47F of the FOI Act is not limited to information of a private concern or individual nature. It applies equally to vocational assessment and routine work information.

### *Is disclosure unreasonable?*

In general, the Commissioner found that it was unreasonable to disclose the majority of personal information sought by the FOI applicant, as the information was contained in documents authored by the applicant for the specific purpose of obtaining the promotion, with a particular limited audience in mind and with the expectation that it would be treated confidentially. The Commissioner also noted that disclosure of these kinds of documents would be inconsistent with the confidentiality that applies to established APS personnel practices.

Further, the applicant had not consented to disclosure and it would be unfair to treat her differently from unsuccessful applicants, whose personal information has always been protected.

### *Is disclosure against the public interest?*

The Commissioner found that 3 important changes influence the weight that should be attached to public interest findings in earlier decisions:

— the development of privacy law

- the prevalence of information-sharing technology
- community concerns about information privacy.

In particular, he found that earlier decisions failed to pay sufficient regard to the rigorous framework for protecting personal information that has developed under the *Privacy Act 1988*. Also, 'disclosure to the world at large' has a different meaning given developments in information technology that allow for publication, dissemination and manipulation of information online, sometimes for indefinite periods.

The Commissioner weighed these factors against the public interest in disclosure of the information, considering the objects of the FOI Act and the need for fairness and transparency in public sector selection processes. The Commissioner set aside the MPC's access grant decision and substituted a decision to refuse access under s 47F of the FOI Act to some of the documents and grant access to other documents.

The Commissioner noted that disclosure under the FOI Act is not the most effective or proportionate way to ensure integrity in a selection process. He said that views expressed in the earlier cases should no longer have decisive sway over whether disclosure of a successful candidate's vocational assessment information is unreasonable or contrary to the public interest. However, he stressed that each FOI request of this nature should be considered on its merits in all of the circumstances.

### ***Implication of decision for agencies***

---

The Commissioner determined that changes to the law and society necessitate a reconsideration of the principle that the public interest in the integrity of government appointment processes outweighs other competing interests, including the privacy of the successful applicant.

However, this decision should not be interpreted as replacing one general rule with another. Agencies should carefully consider the facts and circumstances of each FOI application when determining whether or not to grant access to vocational assessment information. Other relevant public interest considerations, such as alleged unfairness or impropriety in the selection process, may lead to a different outcome.

*For further information please contact:*

**Elena Arduca**

Senior Executive Lawyer  
T 03 9242 1473  
[elena.arduca@ags.gov.au](mailto:elena.arduca@ags.gov.au)

**Justin Davidson**

Senior Executive Lawyer  
T 02 6253 7240  
[justin.davidson@ags.gov.au](mailto:justin.davidson@ags.gov.au)

**Jane Lye**

Senior Executive Lawyer  
T 07 3360 5736  
[jane.lye@ags.gov.au](mailto:jane.lye@ags.gov.au)

**Tara McNeilly**

Senior General Counsel  
T 02 6253 7374  
[tara.mcneilly@ags.gov.au](mailto:tara.mcneilly@ags.gov.au)

---

**Important:** The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to: <mailto:unsubscribe@ags.gov.au>