



Our reference: FOIREQ13/00024

Geordie Guy

By email to: [foi+request-194-19707ecd@righttoknow.org.au](mailto:foi+request-194-19707ecd@righttoknow.org.au)

Dear Mr Guy

## Outcome of your Freedom of Information request

I refer to your request for access to information under the *Freedom of Information Act 1982* (Cth) (the FOI Act). I am a decision maker authorised by the Australian Information Commissioner under s 23(1) of the FOI Act.

Referring to the 'US Surveillance program – Statement from the Australian Privacy Commissioner' of 12 June 2013, you requested access to

- Drafts of this statement, as well as any internal correspondence regarding its content
- Requests either from the OAIC or other government departments or bodies that the OAIC and/or the privacy commissioner make such a public statement or any statement regarding media reports of US surveillance revelations
- Legal advice or other general advice that the OAIC has sought or received unsolicited, that concern the legal status or legal implications of recent US surveillance revelations
- Any documents which provide further detail regarding the aforementioned surveillance programs

## My decision

I have identified 16 documents that fall within the scope of your FOI request. In addition to seeking documents from relevant officers, searches were conducted of the OAIC's electronic records database, TRIM, for documents containing any of the terms PRISM, NSA, NSA surveillance and US surveillance. Under section 11A of the FOI Act, I must provide you with access to those documents unless they are exempt documents. There are a number of types of exempt documents, which are set out in Part IV of the FOI Act.

My decision is as follows:

- I have decided to release nine documents to you in their entirety (documents 1, 2, 4, 6, 9-12 and 16 listed in **Schedule A**).
- I have decided to grant you partial access to three documents (documents 7, 13 and 14 in the schedule).
- I have decided not to grant you access to four documents listed in the schedule (documents 3, 5, 8 and 15).

I note that the OAIC did not receive any requests for the office or the Australian Privacy Commissioner to make a public statement. However, several requests were received from media organisations and these are included as they were attached to internal correspondence about the issue. No legal advice was sought or received about the implications of the collection of information by the US government. The only information on the implications of the surveillance programs or considering them, is that which has been publically reported in the media.

A description of the documents and my decision on release in relation to each document is attached at **Schedule A**. The 12 documents I have decided to release in full or in part are attached with this decision in number order.

My reasons for refusing full access to the documents are set out below.

### **Deliberative processes exemption (s 47C)**

Section 47C of the FOI Act provides:

#### **47C Public interest conditional exemptions – deliberative processes**

##### *General rule*

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
- (a) an agency; or
  - (b) a Minister; or
  - (c) the Government of the Commonwealth; or
  - (d) the Government of Norfolk Island

The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. These Guidelines are published on the OAIC website.

As the Guidelines explain:

... the deliberative processes involved in the functions of an agency are its thinking processes—the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>1</sup>

The seven documents that I have decided contain exempt material are documents that include deliberative matter. They are emails sent within the OAIC for the purpose of considering how the office might respond to media about US surveillance.

The material is not operational material, nor purely factual. It does not include reports on scientific or technical matters, nor does it fall within other exclusions under s47C(3)(b) or (c).

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [6.62], quoting *Re Waterford and Department of the Treasury (No 2)* [1984] AATA 67, [58].

Therefore the documents are conditionally exempt under section 47C of the Act.

### **The public interest test**

Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

Of the factors favouring disclosure set out in s 11B(3), one is relevant to this IC review: promoting the objects of the FOI Act regarding increased scrutiny of Government activities. However, I do not regard this as being a strong factor as the documents do not shed light on Government decision-making. There are no other factors favouring disclosure. While I consider the issue of access of US surveillance and the extent to which this might affect Australian citizens is a matter of public interest and importance, I do not consider that documents related to preparation of a media statement would inform debate about this.

Against the factors favouring disclosure must be balanced the factors against disclosure. The essence of the media statement is that it represents a considered expression of the Commissioner's views on the operation of the Privacy Act and the role of the OAIC in relation to a particular issue. To release alternative or incomplete drafts of the statement would undermine the Commissioner's educative functions in promoting understanding of the operation of the Privacy Act.

I also consider that the exchange of views about the wording of a draft statement was done without an expectation that the comments and questions would be published. The effect of publication of such preparatory documents can reasonably be expected to impede the way that views are exchanged.

This is not a matter of draft and preparatory documents causing a loss of confidence to the Government, or misunderstanding or confusion. Nor is it due to the high seniority of the Commissioner – the same could be said of a media statement made under the name of the OAIC. Rather, it is that the drafts could reasonably be expected to impede the function and purpose of a media statement.

In balancing these factors—for and against disclosure—I give the greatest weight to the factors against disclosure.

However, pursuant to section 22 of the FOI Act, I consider that three of the documents can be edited to remove the exempt material. I have decided to grant you access with deletions to documents 7, 13 and 14, as attached in Schedule A.

### **If you disagree with my decision**

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

You have the right to apply for an internal review of my decision under Part VI of the Act. An internal review will be conducted, to the extent possible, by an officer of the Office of the Australian Information Commissioner (OAIC) who was not involved in or consulted in the

making of my decision. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

If you wish to apply for an internal review, please mark your application for the attention of the FOI Coordinator and email to [foi@oaic.gov.au](mailto:foi@oaic.gov.au) and state the grounds on which you consider that my decision should be reviewed.

### ***Further review***

You have the right to seek review of this decision by the Information Commissioner and the Administrative Appeals Tribunal.

You may apply to the Information Commissioner for a review of my decision (IC review). If you wish to apply for IC review, you must do so in writing within 60 days. Your application must provide an address (including an email address or fax number) that we can send notices to, and include a copy of this letter. A request for IC review can be made in relation to my decision, or an internal review decision. Our website provides information about how to apply for review at <http://www.oaic.gov.au/freedom-of-information/requesting-a-review>.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC. For this reason, if you make an application for IC review of my decision, it is likely that the Information Commissioner will decide (under section 54W(b) of the Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the Administrative Appeals Tribunal.

Section 57A of the Act provides that, before you can apply to the Administrative Appeals Tribunal for review of an FOI decision, you must first have applied for IC review.

If you are not happy with the way that I have dealt with your request, you can make a complaint to [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au). I would also be happy to discuss any concerns you might have and can be reached on 02 6239 9170.

Further information about FOI reviews and complaints, including our internal complaint handling and review of decisions policy is available on our website at [http://www.oaic.gov.au/foi-portal/review\\_complaints.html](http://www.oaic.gov.au/foi-portal/review_complaints.html).

Yours sincerely

[Signed]

Charine Bennett  
Director, Legal Services  
Corporate and Communication Branch

13 August 2013