

Our ref: 2017/209

29 November 2016

Mr Kevin Zander
By e-mail: foi+request-2540-82fbbc21@righttoknow.org.au

Dear Mr Zander

Freedom of Information Request

I refer to your application of 31 October 2016 made to the Australian Federal Police, in which you sought access to documents in respect of internal investigations between 2013 and 2015 concerning a named AFP officer under the *Freedom of Information Act 1982* (the Act).

The Commissioner of the Australian Federal Police, being the principal officer of that Agency, has authorised me to make decisions on behalf of that agency in respect of the Act.

DECISION

Pursuant to section 25 of the Act, this agency neither confirms nor denies the existence of documents in relation to your request.

REASONS FOR DECISION

I believe that a document confirming or denying the existence of Professional Standards records in these circumstances would itself be an exempt document under section 37(1) of the Act.

Section 37(1) provides that:

A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;*
- (b) disclose, or enable a person to ascertain, the existence of or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or*
- (c) endanger the life or physical safety of any person."*

In applying section 25 of the Act, the AFP believes this situation to be similar to that considered by the Federal Court in the matter of *Re Department of Health and Bernard Vincent McKay v Lois Jephcott* [1985] FCA 370. I contend that, in applying that decision, I must consider a notional document having the characteristics of an internal investigations or complaint record ('the notional document'). It does not matter whether the notional document exists or not.

I must turn my mind to whether releasing an edited version of the notional document, and/or identifying its existence in a decision made pursuant to the requirements in section 26, would result in the non-exempt component of any such document and the decision itself becoming exempt documents.

Conversely, I must consider whether refusing a request, under section 24A, and thereby confirming that no document similar in nature to the notional document exists in relation to a particular individual at a particular point in time would make the refusal decision an exempt document.

The recent Administrative Appeals Tribunal decision in *Jones and the Australian Federal Police* [2016] AATA 329, highlighted the reliance on confidentiality within the AFP's professional standards framework. However, the Tribunal was not required to consider section 25 or sections 37(1) in that instance.

In *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52, the Privacy Commissioner considered the operation of section 25 with respect to paid informants. The Commissioner, in considering the application of section 37(1) noted that the mere confirmation of an absence of a confidential informant was determinative and, while there was press speculation as to the existence of paid informants in the circumstances outlined in the request, the AFP had never publicly acknowledged their existence.

Paragraph 5.44 of the Freedom of Information Guidelines issued by the Office of the Australian Information Commissioner indicates that section 25 'should be reserved strictly for cases where the circumstances of the request require it'. Where information as to a particular professional standards investigation is in the public domain, or an applicant seeks professional standards information in an aggregated form so as to appropriately de-identify it, then section 25 would be unlikely to apply. Accordingly, documents in those cases would need to be assessed and released in full or with exemptions or conditional exemptions applied.

As such, I can determine that the nature of the notional document I am considering is that:

- (1) it is connected, by way of the scope of the request, to one specific individual whose identity is readily apparent;
- (2) matters contained in the notional document are not already in the public domain; and
- (3) if the identity of the applicant cannot be established with certainty, it is possible that the request is being made by or on behalf of the individual whose records are being sought.

I find that the notional document would contain material that is exempt under section 37(1) and other material that is exempt or conditionally exempt, or that is not exempt. Exemptions under section 37(1) have been frequently applied

to documents or parts of documents relating to internal investigations and complaints.

I further find that it is reasonable to expect that, in some instances, revealing the mere existence of the notional document could jeopardise an ongoing investigation, by allowing an individual to deduce that such an investigation is occurring. Likewise, an individual with knowledge of particular subject matter could determine that the existence of the notional document requires that there must have been a confidential source or, conversely, the absence of documents requires that no such source existed.

I also find that it is possible, although unlikely, that should a confidential source in the notional document be identified in this way it could endanger the physical safety of that source.

In applying these considerations, I do not believe that I am required to only consider the documents, if any exist, associated with the named individual in this particular Freedom of Information request. The mosaic theory is particularly relevant to these considerations: *Re McKnight and Australian Archives* [1992] AATA 225. An inconsistent application of section 25 to the notional document could enable an individual to establish the existence of exempt information in future. That is, the AFP could receive identically worded FOI requests, consistent with the nature of the notional document detailed above but with each request referring to a different named AFP appointee. If the AFP applies section 25 in some, but not all, instances, it would be akin to confirming, in those cases where section 25 was applied, that an ongoing investigation or confidential source of information must exist.

Such an approach, if adopted, could severely undermine the AFP's ability to receive complaint information confidentially and to undertake professional standards investigations in a covert rather than overt fashion, as is needed from time to time.

REVIEW RIGHTS

If you are dissatisfied with this decision you can apply for internal or Information Commissioner (IC) Review. You do not have to apply for Internal Review before seeking IC review.

Internal Review by the AFP

Section 53A of the Act gives you the right to apply for an internal review in writing to this Department within 30 days of being notified of this decision.

No particular form is required but it would assist the decision-maker were you to set out in the application, the grounds on which you consider that the decision should be reviewed.

Applications for a review of the decision should be addressed to:

Freedom of Information Team
Australian Federal Police
GPO Box 401
Canberra ACT 2601

Review by the Information Commissioner (IC)

Alternatively, Section 54L of the Act gives you the right to apply directly to the IC or following an internal review with this Agency. In making your application you need to provide:

- an address for notices to be sent (this can be an email address).
- A copy of this decision.

It would also help if you set out the reasons for review in your application.

Applications for a review of the decision should be addressed to:

Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001.

Right to Complain

Section 70 of the Act provides that a person may complain to the IC about action taken by this Department in relation to your application.

A complaint to the IC may be made in writing and identify the agency against which the complaint is made.

The IC may be contacted on 1300 363 992. There is no particular form required to make a complaint, but the complaint should set out the grounds on which you consider the action should be investigation.

Yours sincerely,



Nathan Scudder
Coordinator
Freedom of Information
Australian Federal Police