



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2016/201 Internal Review

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: James Smith

DECISION BY: Deborah Lewis
First Assistant Secretary
Corporate Services Division

Request for internal review

By email dated 16 February 2017 to the Department of the Prime Minister and Cabinet (the Department), Mr James Smith (the applicant) requested internal review of a primary decision dated 16 February 2017 made by Mr Nathan Heeney, Assistant Secretary, Chief Information Officer, under the *Freedom of Information Act 1982* (FOI Act).

Under section 54 of the FOI Act an applicant is entitled to apply for an internal review of a decision refusing to give access to a document in accordance with a request.

The initial FOI request and primary decision

In an email dated 22 November 2016 the applicant made a request under the FOI Act in the following terms:

I refer to the article in The Sydney Morning Herald 'Malcolm Turnbull's department buries 'urgent' review of offensive Wikipedia edits' at the following URL:

<http://www.smh.com.au/federal-politics/political-news/malcolm-turnbulls-department-buries-urgent-review-of-offensive-wikipedia-edits-20161121-gsuhou.html>

This is an FOI request for the following documents:

- 1. The resulting reports of findings from each of the Defence, Foreign Affairs and Trade, Health, Agriculture and Parliamentary Services departments.*
- 2. Documents created by DPMC which may be considered results of the 'initial investigation' by DPMC.*

- prejudice the effectiveness of those methods or procedures'.¹

The investigations undertaken in relation to Wikipedia edits and the subsequent reports back to the Department outline the methods in which the investigations were undertaken—this includes sensitive information, detailing how the investigations were conducted and what specific methods were used. If this information were to be disclosed I am satisfied that there would be a reasonable risk to the effectiveness of future investigations. Therefore, I am satisfied the five documents are exempt for the purposes of section 37(2)(b) of the FOI Act.

Section 47E – Public interest conditional exemptions – certain operations of agencies

A document is conditionally exempt under section 47E(d) where 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.

The FOI Guidelines state that:

‘A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantage outcomes’.²

Disclosure of the investigative methods of agencies into the conduct of staff would be reasonably likely to prejudice the effectiveness of those methods or procedure for investigating breaches in the future.

Subject to application of the public interest test, I am satisfied the documents are conditionally exempt under s14E(d) of the FOI Act.

Section 11A(5) – Public interest

Section 11A(5) of the FOI Act provides that an agency must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

In working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest, section 11B(3) of the FOI Act sets out four factors favouring access which must be considered if relevant.³ They are that disclosure would:

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure;
- allow a person to access his or her personal information.

I consider that release of the conditionally exempt material may promote the objects of the FOI Act, however I do not think the other public interest factors are relevant having regard to the nature of the conditionally exempt material.

In relation to public interest factors favouring non-disclosure of the conditionally exempt material, I agree with Mr Heeney’s assessment and find that release could reasonably be

¹ FOI Guidelines ‘Part 5- Exemptions’ (Version 1.4, December 2016), [5.108]

² [5.23]

³ FOI Guidelines ‘Part 6- Conditional Exemptions’ (Version 1.3, December 2016) [6.17].

On 16 February 2017, the Department notified the applicant of Mr Heeney's decision, to exempt five documents in full under section 37 (Law Enforcement) and section 47E (Operations of an Agency) of the FOI Act.

The applicant's submissions in support of the internal review request

In his email dated 16 February 2017 requesting internal review, the FOI applicant submitted the following:

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Department of the Prime Minister and Cabinet's handling of my FOI request 'Wikipedia edits made by public servants'.

A full history of my FOI request and all correspondence is available on the Internet at this address: https://www.righttoknow.org.au/request/wikipedia_edits_made_by_public_s

Authorised decision-maker

Section 54C(2) of the FOI Act provides that an agency must arrange for a person (other than the person who made the original decision) to review the decision. I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Internal review decision

I have decided to affirm Mr Heeney's decision to exempt each of the 5 documents in full under section 37 and section 47E of the FOI Act.

In reaching my decision I have had regard to:

- the documents relevant to the FOI request;
- Mr Heeney's decision dated 16 February 2017;
- the applicant's submissions in support of his request for internal review;
- relevant sections of the FOI Act;
- responses provided through third party consultations;
- relevant parts of the 'Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982*' (the FOI Guidelines).

Reasons for decision

Section 37 – Law enforcement

The FOI Guidelines state:

'Section 37(2)(b) exempts documents which, if released would, or could reasonably be expected to

- disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches of the law

expected to inhibit the ability of agencies conduct investigations in the future, in particular when required to provide reports on the outcomes.

Weighing the public interest factors for and against release, I attach more weight to the public interest factors against disclosure. In the circumstances, I am not satisfied that the public for release outweighs the public interest against release.

I therefore affirm Mr Heeney's decision and find that disclosure of the conditionally exempt material would be contrary to the public interest

Review rights

Information about the applicant's rights of review is attached to this decision.

Complaint rights

The applicant may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/foi-complaints>.



Deborah Lewis
First Assistant Secretary
Corporate Services Division

20 March 2017



Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see [How do I make an FOI complaint?](#)

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 5218, Sydney NSW 2001
fax: +61 2 9284 9666
email: enquixxx@xxxx.xxv.au
in person: Level 3
175 Pitt Street
Sydney NSW 2000



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: xxxxxxxxx@xxxx.xxx.au

write: GPO Box 5218, Sydney NSW 2001
or visit our website at **www.oaic.gov.au**