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Our ref: CRM2017/329

5 May 2017

Mr Mark R Diamond  
By email: [foi+request-2977-d5ce32c1@righttoknow.org.au](mailto:foi+request-2977-d5ce32c1@righttoknow.org.au)

Dear Mr Diamond,

On 23 January you wrote to the AFP seeking access under the *Freedom of Information Act 1982* (the FOI Act) to:

*I request access to any document(s) that shows how much it cost the Australian Federal Police to use malware produced by the Milan based software company known as Hacking Team in the years 2008, 2009, 2010. In case there is any difficulty in identifying the malware I'm referring to, it is the software that Hacking Team were pleased call "offensive security software", also known as "RCS" or "Remote Control System".*

On 7 February 2017 the AFP made a decision on your request. On 6 March 2017 you sought internal review of that decision.

This letter sets out my decision on this internal review. I am an authorised decision-maker under section 23 of the FOI Act.

## **DECISION**

Pursuant to section 25 of the Act, the AFP neither confirms nor denies the existence of documents in relation to your request in that in the event such documents did exist, they would be exempt documents 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:*

- ...
- (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...*

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 publically acknowledged their existence.

In relation to your request, I find that it is reasonable to expect that an individual would be able to 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. As such, this notional document would be an exempt document under section 37(1) of the Act.

## **REASONS FOR DECISION**

### **Material Taken Into Account**

In making my decision, I took account of:

- ❖ the terms of your request;
- ❖ relevant provisions of the FOI Act;
- ❖ the Department of Prime Minister and Cabinet's guidelines on FOI, available on the Department website; and

## **RIGHTS OF REVIEW**

If you are dissatisfied with this decision, you may seek a review by the *Information Commissioner (IC)*

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,

A handwritten signature in blue ink, appearing to read 'R. Nelson', written in a cursive style.

Robert NELSON  
Coordinator  
Support Capability  
Australian Federal Police