



Our reference: FOIREQ17/00014

Dear Mr Tonoli,

Outcome of your FOI request

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Amanda Nowland, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 15 March 2017, you requested access to:

any documents or correspondence pertaining to the ATO rejecting Freedom of Information requests from the website 'righttoknow.org.au' at or after September 22, 2016.

I identified 76 documents which fell within the scope of your request.

With regard to the documents you requested, I have decided that the documents you have requested are exempt under section 47E(d) (certain operations of agencies) of the FOI Act. My reasons for this decision are set out below.

Decision and reasons for my decision

Material taken into account

I have taken the following material into account in making my decision:

- the content of the documents that fall within the scope of your request
- the FOI Act (specifically section 47E(d))
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- IC review decisions of *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11 and *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19

Public interest conditional exemptions – certain operations of agencies

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act 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 documents you have requested relate to current investigations being undertaken by the OAIC. Section 76 of the FOI Act provides that:

- (1) An investigation must be conducted in private and in a way the Information Commissioner thinks fit.

The OAIC is bound by the FOI Act to conduct its investigations in private and has no discretion in this matter. The OAIC does not disclose the particulars of an investigation being undertaken by the OAIC. If the OAIC released the particulars of investigations it would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Complainants would not be willing to make complaints to the OAIC if the complaints process was made public. Further, respondents would not be forthcoming with dealing with complaints if the particulars of the complaint was disclosed to third parties. The publication or release of particulars of investigations would impede the investigation process and hinder the ability of the OAIC to regulate the FOI Act.

I have also considered the FOI Guidelines and decisions by the Information Commissioner as set out below.

The FOI Guidelines (at [6.122]) provide that section 47E(d) may apply to documents that relate to a complaint made to an investigative body. Specifically the FOI Guidelines state that:

The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.

In the IC Review decision of *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11, the former Freedom of Information Commissioner (FOI Commissioner) considered a request for documents relating to an investigation of the Commonwealth Ombudsman. The *Ombudsman Act 1976* provides that 'an investigation under this Act shall be conducted in private ... and in such manner as the Ombudsman thinks fit'. The FOI Commissioner was satisfied:

that the Ombudsman Act does not provide authority for the disclosure, to the ABC, of the information contained in the documents sought by the ABC in this case. In fact, the Ombudsman Act precludes that disclosure.

A central function of the Ombudsman is the investigation of complaints about the administrative actions of departments and agencies. As noted in above, the Ombudsman Act establishes a framework within which those investigations are conducted in private, and information disclosed or obtained under the Act is treated confidentially.

Similarly, in *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, the former FOI Commissioner decided that disclosure of information about a complaint made to the ACCC could reasonably be expected to affect the willingness of people to make complaints to the ACCC. This would have a substantial adverse effect on the proper and efficient conduct of the operations of the ACCC.

I am satisfied that the documents you have requested are documents about OAIC investigations and if disclosed would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC. The disclosure of the documents could reasonably affect the willingness of people to make complaints to the OAIC.

In my view, public disclosure of the particulars of an OAIC investigation would have a substantial adverse impact on the operations of the OAIC and the documents are therefore conditionally exempt under s 47E(d).

Public interest test

I have found that the documents relevant to your request are conditionally exempt under s 47E(d) of the FOI Act. 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'.

Section 11B(3) of the FOI Act lists factors that favour access when applying the public interest test. Disclosure of the documents relevant to your FOI request would promote the objects of the FOI Act.

The FOI Guidelines also include a non-exhaustive list of further factors that favour disclosure. Having regard to that list, I consider there are two factors that favour disclosure of the relevant documents:

- disclosure promotes the objects of the FOI Act including to enhance scrutiny of government decision making, and
- disclosure informs debate on a matter of public importance, including to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency.

In considering the public interest factors against disclosure, I consider that the disclosure of the document could reasonably be expected to:

- prejudice the future conduct of the Information Commissioner's investigation function, and
- prejudice the OAIC's ability to obtain information.

I give both these factors substantial weight, especially given the legislative framework of the FOI Act (section 76) that requires that the Information Commissioner conducts investigations in private.

On balance, I have decided that it would be contrary to the public interest to give access to the documents.

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 FOI Act. An internal review will be conducted, to the extent possible, by an officer of the 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 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 (AAT).

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.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI 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 FOI Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the AAT.

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

Applications for internal review or IC review can be submitted to:

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Yours sincerely



Amanda Nowland
Assistant Director
Dispute Resolution

13 April 2017