



Australian Government
Attorney-General's Department

13/14748

9 December 2013

Mr G King
PO BOX 1098
HAWKS BURN VIC 3142

By email only: foi+request-375-0424d68b@righttoknow.org.au

Dear Mr King

Freedom of Information Request no. FOI13/141– internal review

I am writing to advise you of my decision in relation to your request for internal review of a decision by the Attorney-General's Department (the department) to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act).

Background

I, Geoff McDonald, First Assistant Secretary, am an officer authorised under subsection 23(1) of the FOI Act to make decisions on behalf of the department in relation to FOI requests.

On 3 September 2013, you requested:

Access to the interception capability plans (IC plans) of all carriers and nominated carriage service providers given to the Communications Access Coordinator under Part 5-4 of the Telecommunications (Interception and Access) Act 1979.

On 19 September 2013, you agreed with the department to revise your request to:

Access to the 20 most recently submitted interception capability plans (IC plans) of carriers and nominated carriage service providers given to the Communications Access Coordinator under Part 5-4 of the Telecommunications (Interception and Access) Act 1979.

On 7 November 2013, the department provided you with a decision in relation to your request. The department identified 20 documents which fell within the scope of your request. The department advised you that it had decided to refuse access in full to the documents on the basis that they were exempt under sections 33(a)(i), 37(2)(b), 45(1), 47(1)(b), 47B, 47F and 47G(1)(a) of the FOI Act.

On 9 November 2013, you requested an internal review of the original decision. In your application you raised several concerns regarding the original decision maker's application of the FOI Act to the documents. I have endeavoured to address your concerns as part of my review.

Decision

In accordance with subsection 54C(3) of the FOI Act, I have reviewed the earlier decision in the matter. I arranged for further searches for documents and consulted with relevant staff within the department. I have identified 20 documents as falling within the scope of your request. I have reviewed these documents and decided to **affirm** the original decision to refuse access to the documents on the basis that they are exempt in full under sections 33(a)(i), 37(2)(b), 45(1), 47(1)(b), 47B, 47F and 47G(1)(a) of the FOI Act. The reasons for my decision are as follows.

Reasons for decision

I consider that documents 1 – 20 are exempt from disclosure under sections 33(a)(i), 37(2)(b), 45(1), 47(1)(b), 47B, 47F and 47G(1)(a) of the FOI Act. I consider that the reasons provided by the original decision maker involve a correct application of these provisions.

Firstly, I will respond to the comments in your request for internal review.

You noted:

1. Sufficient, fact-based analysis of the various exemptions has not occurred to establish a reasonable expectation of events, effects or damages. The quoted exemptions are concerned with a chance of prejudice and are speculative at best.

The concept of reasonable expectation of damage has been interpreted by the Federal Court of Australia in *Attorney-General's Department v. Cockcroft* (1986) 64 ALR 97 at 106 as requiring '... a judgment to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous.' Part 5 of the guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the OAIC Guidelines) provides further guidance on what is meant by the 'could reasonably be expected' test:

... the test requires the decision maker to assess the likelihood of the predicted or forecast event, effect of damage occurring after disclosure of the documents ... the use of the word 'could' in this qualification is less stringent than 'would', and requires no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences ... the reasonable expectation test refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future.

I am satisfied that the original decision-maker correctly applied this test in the application of the section 33(a)(i), 37(2)(b) and 47(1)(b) exemptions and the application of the section 47B and 47G(1)(a) conditional exemptions. My decision to affirm the original decision on these documents follows close consideration of documents 1- 20 and my expectation that real harm would follow release of this material under FOI. This will be explored further in my reasons below.

You also noted in your application for internal review:

2. I dispute the balance found in the conditional exemption public interest tests. Given the current, widespread public concern regarding unrestrained

government surveillance, these documents have a very clear potential to inform debate on a matter of public importance.

As part of this internal review, I have carefully considered the application of the public interest factors in relation to sections 47B, 47F and 47G(1)(a) of the FOI Act, and provide my reasons below.

Your third concern in your application for internal review was:

3. In regards to material obtained in confidence and commercially valuable information, has any third-party consultation occurred to establish this as a valid concern?

Third party consultation was undertaken through email and telephone consultation with carriers that had submitted an interception capability plan (an ICP). Information gained from this process supported the view of the original decision-making that the section 45 exemption 'documents containing material obtained in confidence' and the section 47 exemption 'documents disclosing trade secrets or commercially valuable information' were applicable.

In accordance with section 54C(3) of the FOI Act, as part of this internal review, I am required to make a fresh decision. I have considered your request and have identified 20 documents that come within scope. Regarding the 20 documents set out in the attached schedule, I have decided to **affirm** the original decision to refuse access to the documents on the basis that they are exempt in full under 33(a)(i), 37(2)(b), 45(1), 47(1)(b), 47B, 47F and 47G(1)(a) of the FOI Act.

Documents affecting national security, defence or international relations

I have decided that the entirety of documents 1 to 20 are exempt under section 33(a)(i) of the FOI Act, which provides:

A document is an exempt document if disclosure of the document under this Act:

- (a) *would, or could reasonably be expected to, cause damage to:*
 - (i) *the security of the Commonwealth.*

....

I affirm the original decision that disclosure of the information in these documents about how interceptions occur under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) could, by application of the 'mosaic' technique of piecing together small and individual pieces of information, reasonably be expected to cause damage to the security of the Commonwealth. This cumulative damage that may flow from disclosure of documents as a group has been recognised in *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 at 425.

As identified in *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988] AATA 110 at 42 'disclosure of information could reasonably be expected to cause damage to security if it enables those engaged in espionage, sabotage, subversion, active measures of foreign intervention or terrorism to be better able to prevent a security organisation from obtaining information about their activities'. I am satisfied that knowledge of the carrier systems and technologies used to perform interception functions could be utilised by criminal elements to prevent organisations from obtaining information about their activities; an activity that is

undermining of the Commonwealth's interests. To release information concerning these capabilities could also reasonably be expected to impact the Australian Government's ability to maintain strong working relationships with these carriers, reducing the future flow of meaningful information to this department. I consider that it is this sort of damage that section 33(a)(i) of the FOI Act seeks to prevent. I am satisfied that the likelihood of this predicted effect of damage to the security of the Commonwealth is real and significant as per *Re O'Donovan and Attorney-General's Department* [1985] AATA 330; *Re Maher and Attorney-General's Department* [1986] AATA 16.

Accordingly, I am satisfied that documents 1 – 20 are exempt in full under section 33(a)(i).

Documents affecting law enforcement and protection of public safety

I have examined the contents of the documents 1 – 20 and have reached the conclusion that these documents are exempt in full under section 37(2)(b) of the FOI Act, which states that:

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

-
- (b) *disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;*
- ...

Documents 1 to 20 disclose information on lawful intelligence gathering through specifically referring to methods or procedures for interception under the TIA Act or by providing information from which the methods or procedures employed are capable of being inferred. To reveal this information would provide authoritative knowledge of how interception capabilities are utilised by the police for preventing or detecting positive breaches or evasion of the law in order to meet a perceived threat. As articulated in *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176:

... it is one thing for observers to deduce, with varying success from everyday experience, media reports and other informal sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agencies' own documents or in the proceedings of a Tribunal such as this what those methods and procedures are. The risk that they may be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them.

I have found this potential damage to be real and substantial, and not insignificant or nominal: *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 267. Without repeating my observations in relation to section 33(a)(i), which I consider apply with equal force here, the loss of the utility gained from the ICPs would have a significant and substantial detrimental effect on the integrity of the investigation, detection and prevention methods undertaken by carriers

and could reasonably be expected to compromise past, present and future investigations. As a result, I affirm the original decision that this material is exempt under section 37(2)(b) of the FOI Act.

Documents containing material obtained in confidence

Section 45 of the FOI states:

- (1) *A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island) for breach of confidence.*

An examination of documents 1- 20 has demonstrated to my satisfaction that the information contained within these documents has the necessary quality of confidentiality, given that the ICPs detail sensitive information about networks and systems. Both the giver of the information and the recipient of the information understood that the ICPs were communicated in confidence and that this confidence would be maintained. This is a legal duty set out under section 202 of the TIA Act, which expressly requires the Communications Access Coordinator to keep the ICPs received on a confidential basis. The department clearly accepted this obligation of confidence by marking the document as confidential, keeping the ICPs separate from documents that were not confidential and ensuring that the material was not disclosed to third parties without consent.

I am satisfied that there has been no express authorisation for the disclosure of this information, nor can there be taken to have been any implied authorisation. This is supported by the statutory guarantee of confidentiality, which does not contemplate that the information will be released to third parties. I accept, as stated in the original decision letter, that there is a strong likelihood that unauthorised disclosure would cause tangible financial loss from exposure of valuable business information. For the above reasons, I have found that the documents are exempt in full under section 45(1) of the FOI Act.

Documents disclosing trade secrets or commercially valuable information

Section 47 of the FOI Act provides that:

- (1) *A document is an exempt document if its disclosure under this Act would disclose:*

....

- (b) *any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

As explained in *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* (2001) 66 ALD 514 at 518-519 the term 'commercial value':

'does not mean that it should necessarily be capable of being sold or exchanged, in the manner of a trade secret, but simply that has a value capable of being described as commercial in character.'

I am satisfied that the business information contained within the ICPs such as the assessment of current interception capabilities and the indication of recent or future developments has value to the individual carriers in carrying out their activities in the

competitive telecommunications industry. The value of this information could reasonably be expected to be diminished or compromised if it was disclosed to a third party given that it could be used by competitors to hinder or block the individual carriers and, in turn, impact upon the ongoing profitability of the business operation. As a result, section 47 of the FOI Act applies to make documents 1 – 20 exempt from disclosure.

Public interest conditional exemption – Commonwealth – State Relations etc.

I have decided that the entirety of documents 1 – 20 is conditionally exempt under section 47B of the FOI Act. This provision states:

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or*
- (b) would divulge information or matter communicated in confidence by or on behalf of Government of a State or an authority of a State... to the Government of the Commonwealth... or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.'*

As explained in the original decision letter, information within documents 1 – 20 about how interceptions are conducted under the TIA Act is relied upon by State and Territory interception agencies. Divulging this information could reasonably be expected to undermine Commonwealth – State police operations and adversely affect the continued level of trust or co-operation in existing inter-office relationships. This in, turn, could reasonably be expected to impair the maintenance of the future flow of information to and from the Commonwealth. I have found the potential damage is real and substantial, and not insignificant or nominal: *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 267.

Section 11A(5) of the FOI Act provides that:

- (5) The agency or Minister 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.*

Consideration of whether disclosure is in the public interest is a balancing exercise. Fundamentally, the consideration of this '*depends on the particular facts of the matter and the context in which it is being considered*' (see 6.8 of the OAIC guidelines). Using Part 6 the Australian Information Commissioner's Guidelines, I have identified the following factors as relevant in determining whether the disclosure of this information would cause specific harm, in this case, damage to Commonwealth – State relations. I consider that disclosure would promote the objects of the FOI Act by providing the Australia community with access to information held by the Commonwealth Government (section 11B(3)(a)). Conversely, I consider that disclosure could reasonably be expected to prejudice security and law enforcement and the Department's future ability to work cooperatively with States and Territories. Ultimately, I find that, on balance, disclosure of the document would be contrary to

the public interest. I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information (see 6.9 of the OAIC Guidelines). In accordance with section 11B(4) of the FOI Act, I have not taken any irrelevant factors into account.

Accordingly, I am satisfied that documents 1-20 are conditionally exempt from disclosure under section 47B of the Act and that disclosure would be contrary to the public interest.

Public interest conditional exemption – personal privacy

Section 47F of the FOI Act provides:

- (1) *A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

I have considered documents 1 – 20 and find that their disclosure under FOI would involve an unreasonable disclosure of personal information. As paragraph 6.116 of the OAIC Guidelines note, personal information is information that ‘identifies..... a person’. Further, as noted in 6.117 of the OAIC Guidelines, this can include a person’s name and telephone number. I am satisfied that the names, employment positions/titles and contact details of private sector employees contained within documents 1- 20 meet this definition of personal information.

I affirm that releasing this personal information would involve an unreasonable disclosure of personal information. In reaching this decision, I have considered the need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals as set out in *Re Chandra and the Minister for Immigration and Ethnic Affairs*:

...whether a disclosure is ‘unreasonable’ requires.... A consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information... and to weigh that interest in the balance against the public interest in protection of the personal privacy of a third party...

In my view, disclosing the personal information contained within documents 1-20 would, on balance, be contrary to the public interest. The reasons for this decision are consistent with those set out in the original statement of reasons. I am satisfied that the release of the material contained within the documents would not achieve nor promote the objects of the FOI Act. The personal information of private sector employees may be of limited interest to the public, though it is not necessarily in the public interest for the information to be disclosed. As a result, I am satisfied that the public interest in maintaining the individuals’ right to privacy outweighs any public interest in disclosure. Accordingly, I am satisfied that material within documents 1-20 is conditionally exempt under subsection 47F (1) of the FOI Act and that disclosure would, on balance, be contrary to the public interest.

Public interest conditional exemption – business

Material contained within documents 1 – 20 is conditionally exempt under section 47G of the FOI Act, which states that:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*
- (a) *would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.*

.....

The term ‘business affairs’ has been interpreted to mean ‘*the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs*’ as per *Re Cockcroft and Attorney-General’s Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462 at 464. I am satisfied that documents 1 – 20 contain information covering the business and commercial activities of each of the carriers and that disclosure of this information could reasonably be expected to affect the ability of the carrier or provider to compete in the telecommunications market.

I find that disclosing documents 1 – 20 would, on balance, be contrary to the public interest. I acknowledge that the disclosure of the documents could promote the objects of the FOI Act and inform debate on matters of public importance. As you have noted, there is a ‘*current, widespread public concern regarding unrestrained government surveillance*’ and, as a result, these documents have a ‘*clear potential to inform debate on a matter of public importance*’ as per section 11B(3)(b).

However, it is important to appreciate that the test is, relevantly, whether disclosure is *in* the public interest, not *of* interest to the public as per *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186. The material contained in the document may be of interest *to* the public, though it is not necessarily *in* the public interest for the document to be disclosed. If the carriers could not depend upon the departments’ undertaking of confidentiality they would be reasonably likely to be circumspect about disclosing information because of the detriment they could suffer as a result of inadvertent or voluntary disclosure. Such an outcome would deprive the department of valuable information about interception capabilities required to properly maintain the TIA Act. In addition, it would restrict the ability of carriers to conduct their lawful business affairs and, in my view, there is a strong public interest in businesses being able to pursue their lawful commercial activities in competitive markets.

In light of the considerations noted above, I find that the disclosure of the documents would, on balance, be contrary to the public interest. Accordingly, I find that the documents are exempt from disclosure under section 47G(1)(a) of the FOI Act.

Material taken into account

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

- the terms of your FOI request
- the original decision
- the comments included in your application for internal review
- the provisions of the FOI Act and
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act.

Information Commissioner review

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

I hope the above information is of assistance. If you wish to discuss this decision, please contact the action officer Elise Perry on (02) 6141 6666 or by e-mail to foi@ag.gov.au.

Yours sincerely,



Geoff McDonald
First Assistant Secretary

Attachments

A. Schedule of Documents