



13/15758

20 November 2013

Mr G King
foi+request-408-95296d49@righttoknow.org.au

Dear Mr King

Freedom of Information Request no. FOI13/160

The purpose of this letter is to give you a decision about access to documents that you requested from the Attorney-General's Department (the department) under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Catherine Smith, Assistant Secretary, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 19 September 2013, you requested:

'access to a list of all carriers and nominated carriage service providers who have submitted interception capability plans (IC plans) to the Communications Access Coordinator under Part 5 - 4 of the Telecommunications (Interception and Access) Act 1979.'

On 25 September 2013, the department acknowledged your request as a valid request under s 15 of the FOI Act.

I have identified that the department has no discrete documents that fall within the scope of your request. I did this by arranging for an electronic search of departmental records and by making inquiries with staff likely to be able to locate relevant documents.

The department does, however, have information that falls within the scope of your request. While there is no general obligation on agencies to reduce information to written documentary form in order to facilitate an FOI request, section 17 of the FOI Act states that:

(1) *Where:*

...

(c) *The agency could produce a written document containing the information in discrete form by:*

(i) *The use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*

(ii) *The making of a transcript from a sound recording held in the agency;*

The agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

As the name of each carrier and/or nominated carriage service provider that has submitted an IC Plan to the department is electronically stored, the department has produced, in accordance with section 17 of the FOI Act, a document capturing the information that you have sought. There is therefore one document within the scope of your request.

With regard to this one document, I have decided to refuse access in full. More information, including the reasons for my decision, is set out below.

I note that licensed telecommunications carriers and nominated carriage service providers have an obligation under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to provide interception capability plans. A register of licensed carriers is publicly available on the Australian Communications and Media Authority (ACMA) website. This register is established and maintained by ACMA under section 84 of the Telecommunications Act 1997. While the register does not include nominated carriage service providers, it does include an exhaustive list of licensed carriers and may be beneficial for you to review given carrier legislative obligations under that Act. The register can be accessed at:

<http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Licensing/register-of-licensed-carriers-licensing-i-acma>.

The statutory timeframe for processing your original request would have expired on 21 October 2013. Under the FOI Act, where a document includes business information relating to an organisation, an agency should give that third party organisation a reasonable opportunity to make a submission that the document should be exempt from disclosure under s 47 FOI Act (trade secrets) or conditionally exempt under s47G FOI Act (public interest conditional exemptions - business) and that disclosure would be contrary to the public interest, before making a decision to give access (s 27 FOI Act). For this reason the time for processing your request was extended by 30 days in order to allow for appropriate consultation. The statutory timeframe for processing this request now expires on 20 November 2013.

Decision and reasons for decision

With regard to the document identified in the attached schedule, I have decided to **refuse access in full** under the following sections of the FOI Act:

- section 33 – Documents affecting national security, defence or international relations;
- section 37 – Documents affecting law enforcement and protection of public safety;
- section 45 – Documents containing material obtained in confidence; and
- section 47G – Public interest conditional exemptions – business.

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 sections 33, 37, 45 and 47G); and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

My reasons for refusing access are given below.

Documents affecting national security, defence or international relations

The document you have sought is exempt in full under section 33(a)(i) of the FOI Act, which states that:

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;*

...

The term 'security of the Commonwealth' is defined in section 4(5) to extend to:

- (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and*
- (b) *the security of any communication system or cryptographic system of the Commonwealth or of another country used for:*
 - (i) *the defence of the Commonwealth or of any country allied or associated with the Commonwealth; or*
 - (ii) *the conduct of the international relations of the Commonwealth.*

The document you have sought is a list of all carriers who are obliged to submit an IC Plan under section 196 of the TIA Act and all nominated carriage service providers who are required to submit an IC Plan under section 197 of the TIA Act. According to section 195 of the TIA Act this IC Plan must provide, amongst other information, the policies of the carrier or carriage service provider in relation to interceptions and the locations at which communications passing over a telecommunications system are intercepted or proposed to be intercepted by the carrier or provider. Identifying a business on this list would, therefore, indicate that this business performs, or could have the capacity to perform, these interception functions under the TIA Act. Paragraphs 5.33 and 5.34 of the Office of the Australian Information Commissioner (OAIC Guidelines) explain the 'mosaic theory', which holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations. I am satisfied that this list of carriers and nominated carriage service providers could be used to assist in the process of ascertaining, by the application of the 'mosaic' method of analysis, the identity of a carrier or carriage service provider that is not capable of, or has not been asked, to establish interception capabilities.

This cumulative information would reasonably be expected to prejudice past, present and future national security as it would enable diversionary actions to avoid and frustrate investigations. As identified in *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988] AATA 110 (8 April 1988) 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.' This expectation of damage is real and substantial, in comparison to 'something that is irrational, absurd or ridiculous' as interpreted by the Federal Court of Australia in *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 at 106. I have examined the contents of this document and have reached the conclusion that disclosure of this document would, or could reasonably be expected to, cause damage to the security of the Commonwealth. This is because disclosure would result in the release of information about which carrier does, or could, contribute to sensitive national security capabilities. Additionally, I consider disclosure of this document would result in an intangible loss of trust in this department (as a trusted recipient of confidential information on behalf of the Australian Government) along with a

tangible reduction in the future flow of meaningful information to this department concerning interception capabilities. Accordingly, I am satisfied that this document is exempt in full under section 33(a)(i).

Documents affecting enforcement of law and protection of public safety

The document you have requested is exempt in full under section 37(2)(c) 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:

....

(c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

As discussed above, the document sought is a list of all carriers and nominated carriage service providers that have submitted an IC Plan to the department under the TIA Act. By being identified as a carrier and nominated carriage service provider on this list, the information that a particular business is engaged in the field of telecommunication interceptions is implied. The use of telecommunication interceptions is a lawful method of preventing, detecting and investigating unlawful activity in order to protect public safety. The identity of all the carriers and nominated carriage service providers involved in telecommunication interceptions is not publicly known. Whilst this information may not in itself cause harm, in combination with other known information, this may contribute to a complete picture which results in harm ('the mosaic theory'). This is because the existence or non-existence of an interception capability plan can be utilised by those wishing to conduct unlawful activity to assist with the creation of a list of telecommunications carriers to be avoided. This would reasonably be expected to prejudice the maintenance or enforcement of lawful methods for the protection of public safety as it would provide authoritative information on how to undertake diversionary actions in attempts to avoid and frustrate detection or investigation of unlawful activity, including activity that could prejudice national security. Accordingly, I consider this document exempt in full under section 37(2)(c) of the FOI Act.

Documents containing material obtained in confidence

Section 45 of the FOI Act 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.

Part 5 of the Australian Information Commissioner's Guidelines explain that to found an action for breach of confidence under subsection 45(1), the following five criteria must be satisfied:

- the information must be specifically identified;
- it must have the necessary quality of confidentiality
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.

The document you have requested identifies carriers and carriage service providers that have submitted an IC Plan to the department. This process of submitting an IC Plan was undertaken by the carriers to the department on a mutual understanding of confidence. This is supported by section 202 of the TIA Act which expressly requires the Communications Access Coordinator to keep the IC Plans received on a confidential basis and not to release information to any person

without the prior written permission of the carrier. The department has responsibility for administering the *Telecommunications (Interception and Access) Act 1979* and considers this relationship of confidentiality to apply to the IC Plan inclusive of the identity of those carriers and carriage service providers that submitted the IC Plan. The documents are treated as confidential by the department, securely stored and only staff with a 'need to know' are provided access to the documents. It is clear that the statutory guarantee of confidentiality does not contemplate that the information will be released to third parties. Unauthorised disclosure of this information would reasonably be expected to cause detriment to the carriers as commercial entities. For example by providing information that a carrier is meeting its statutory obligations and implying that particular capabilities are in existence, this could reasonably result in a tangible financial loss resulting from exposure of valuable business information. Carriers are required to maintain confidentiality about all aspects of their systems and would expect that the department maintain a similar level of confidentiality about carriers. I consider that if the information was disclosed in response to this request it would found an action for breach of confidence and, accordingly, I am satisfied that the document is exempt in full under section 45(1) of the FOI Act.

Public interest conditional exemption – Business

Material contained in the document you have requested is conditionally exempt under section 47G(1)(a) of the FOI Act. This subsection states:

- (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;*

...

I consider that the release of the list of carriers and nominated carriage service providers would disclose information relating to the lawful business affairs of the carriers and nominated carriage service providers, namely that these organisations have submitted an IC Plan to the Communications Access Co-ordinator under section 196 and section 197 of the TIA Act. Knowledge of whether or not individual licensees have complied with their statutory obligations could reasonably be expected to damage the reputation of the organisation and impact on their ability to engage with other providers. The reasonable likelihood of this occurring has been confirmed in consultation with the carriers. In addition, during consultation conducted with carriers it was identified that the list could be open to misinterpretation given the nature of the business entities holding licences, the timeframes in which they are submitted and different levels of compliance which may be assumed if such a list were disclosed.

I am therefore satisfied that disclosure of this list could reasonably be expected to unreasonably affect the carriers and carriage service providers adversely in respect of their commercial and financial activities and their ability to engage with other carriers in the competitive telecommunications market. Accordingly, I have decided that the whole document is conditionally exempt under section 47G(1)(a).

In addition, the document you have sought also contains information that is conditionally exempt under the other limb of this conditional exemption. Section 47G(1)(b) of the FOI Act states:

(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:*

...

(b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

As stated above, the document you have sought identifies carriers and carriage service providers that have submitted an IC Plan to the department. This supply of information is utilised by the department for the discrete purpose of administering the TIA Act. Consultation with carriers have indicated that disclosure of this information could reasonably be expected to put in jeopardy or, at least, diminish the quantity and quality of this business information flowing to the Commonwealth as a result of the loss of business trust between the carriers and the department. I am therefore satisfied that disclosure of this list could reasonably be expected to prejudice the future supply of information to the Commonwealth. Accordingly, I have decided that the document is conditionally exempt under section 47G(1)(b).

Under the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest (section 11A(5)). Using Part 6 the Australian Information Commissioner's Guidelines, I have identified the following factors as relevant in determining whether the disclosure would be in the public interest:

Specific harm:

- *'unreasonable disclosure of industry bodies' business affairs'*

Factors favouring disclosure:

- *'to promote the objects of this FOI Act'* by providing the Australia community with access to information held by the Commonwealth Government (section 11B(3)(a)); and
- *'to inform debate on a matter of public importance'* (section 11B(3)(b)).'

Factors against disclosure:

- *'could reasonably be expected to prejudice an agency's ability to obtain confidential information;'* (OAI Guidelines paragraph 6.29);
- *'could reasonably be expected to prejudice an agency's ability to obtain similar information in the future'* (OAI Guidelines paragraph 6.29); and
- *'could reasonably be expected to prejudice security, law enforcement, public health or public safety'* (OAI Guidelines paragraph 6.29)

In accordance with section 11B(4) of the FOI Act, I have ensured that no irrelevant factors have been considered in reaching this decision. It is essential for the administration of the TIA Act, and the execution of broader Government policy, that the department receives a flow of information that is comprehensive, detailed and accurate from businesses involved in interception capabilities. This depends upon maintaining a strong working relationship with private enterprise and business confidence in the ability of the officers of the Attorney-General's Department to maintain the confidentiality of the information provided. Releasing this list would reduce business trust in the

government and impact on the willingness of carriers to provide information to the department in the future.

As identified above, a list of all licensed carriers is publicly available on the ACMA website: <http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Licensing/register-of-licensed-carriers-licensing-i-acma>.

Licensed carriers and nominated carriage service providers are required under the TIA Act to lodge an annual IC Plan. Access to this list may provide you with the information you have sought without divulging information likely to cause the detriment mentioned above to the department, carriers and nominated carriage service providers. The availability of the ACMA register means that policy debate on the topic of telecommunication interceptions can occur without the identity of each carrier or carriage service provider being made public. In my view, these factors against disclosure of the material (for instance '*prejudice security, law enforcement or public safety*') outweigh the factors in favour of disclosure (such as '*to give the Australian community access to information held by the Government of the Commonwealth*'). Accordingly, I am satisfied that the documents indicated are conditionally exempt under section 47G(1)(a) of the FOI Act and that disclosure would be contrary to the public interest.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

online: foi@ag.gov.au
post: FOI and Privacy Section
Office of Corporate Counsel,
Attorney-General's Department,
3-5 National Circuit
Barton, ACT 2600

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, 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:

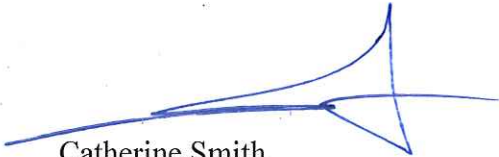
online: <https://forms.business.gov.au/aba/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

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

If you wish to discuss this decision, please contact Elise Perry by email at foi@ag.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Catherine Smith', written over a horizontal line.

Catherine Smith
Assistant Secretary