



**AUSTRALIAN
CRIMINAL
INTELLIGENCE
COMMISSION**

Our reference: [trim:\[18/251362\]](#)

4 September 2018

GPO Box 1936
Canberra City ACT 2601
Phone: +61 2 6268 7000
www.acic.gov.au

Snehan Kekre

By email: foi+request-4617-17516edb@righttoknow.org.au

Dear Snehan,

Freedom of Information Request ACIC 18-36 and 18-39

I refer to your requests for access to documents under the *Freedom of Information Act 1982* (FOI Act). This is a decision made under the FOI Act in relation to documents within the scope of that request.

Background to the Decision

Under FOI request 18-36 you have requested documents relating to:

In respect of the time period of May 2012 – June 2018

All briefings, communications, forms, reports, documents or media by ACIC personnel with government officials of the United States, the United Kingdom, Australia, Sweden and Ecuador, mentioning or regarding the not-for-profit media organization Wikileaks and its Australian staff, including but not limited to Julian Assange, and excluding duplicates of documents and drafts.

Under FOI request 18-39 you have requested documents relating to:

In respect of the time period of January 2015 to May 2018:

Documents authored and received by CrimTrac mentioning or regarding the non-for-profit media organisation, WikiLeaks, or its Australian staff, including but not limited to Julian Assange.

Authority and Materials Considered

I am authorised under section 23 of the FOI Act to make a decision concerning the information you have requested access to.

In reaching my decision I have taken into consideration:

- the relevant provisions of the FOI Act;
- relevant guidelines issued by the Office of the Australian Information Commissioner; and

- relevant Tribunal and Federal Court decisions concerning the operation of the FOI Act.

Summary of Decision - FOI request 18-36

I have refused your request for access to documents because the documents you have sought access to cannot be found or do not exist.

Reasons for Decision

Under section 24A of the FOI Act an agency may refuse access to a document if all reasonable steps have been taken to find the document and the agency is satisfied that the document is in the agency's possession but cannot be found or that the document does not exist.

The ACIC has taken comprehensive steps to locate the document, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the records management systems in place
- the individuals within the ACIC who might have been able to assist with the location of the documents, and
- the age of the documents.

Electronic searches were undertaken of ACIC holdings and no documents were identified within scope of this request.

I consider that reasonable steps have been taken to locate the documents that are the subject of your request. I am satisfied that the documents either cannot be found or do not exist.

Summary of Decision - FOI request 18-39

Documents identified

I have identified 11 documents as matching the description of your request. Details of those documents are set out at **Annexure A**.

Decision

I have decided that 11 documents are exempt from release on the basis of section 45 of the FOI Act.

Extracts of the relevant exemption provision is at **Annexure B**. An explanation of the exemption relied upon is set out below.

Section 45 – Documents containing material obtained in confidence

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure under the FOI Act would found an action, by a person, for breach of confidence. The documents within scope of your request are records of reports made to the Australian Cybercrime Online Reporting Network (ACORN). These reports are all material obtained in confidence by the ACIC.

According to paragraph [5.143] of the Office of the Australian Information Commissioner (OAIC) Guidelines to found an action for breach of confidence, the following five criteria must be satisfied in relation to the information:

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

I have considered each of these five criteria below.

1. Specifically Identified

In the context of ACORN, the information being sought constitutes specifically identified information.

2. Quality of confidentiality

Paragraph [5.146] of the OAIC Guidelines states that for information to have the quality of confidentiality it must be secret or only known to a limited group. The information provided is not in the public domain. The information has not been widely distributed to other agencies, and retains the quality of confidential material.

3. Mutual understanding of confidence

The privacy policy that is provided on the ACORN website states that any personal information being provided will only be used 'for the purposes of detecting, investigation and preventing criminal activity, and analysing cybercrime data.' The policy also states that 'We do not use, share or transfer personal information in connection with the website except as set out in this policy.'

There is a clear understanding and acceptance that information provided by a report to ACORN is under an obligation of confidence. It is reasonable to infer that there is a mutual understanding of confidence between people who report on ACORN and the agencies which action those reports.

4. Unauthorised disclosure or threatened disclosure

There is no authority to more broadly disclose reports to ACORN outside of the uses given in the privacy policy. The OAIC Guidelines provide that: *'The scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised. For example, the agency may have told the person providing the information about the people to whom the agency would usually disclose such information.'*

The privacy policy on the ACORN website clearly sets out the agencies and individuals to whom the information may be disclosed, stating that 'By submitting a report to the ACORN, you

consent to your personal information being provided to Australian policing and regulatory agencies.'

Disclosure under the FOI Act is not given as one of the permissible uses of the personal information being provided. There is no evidence that the individuals who provided the reports authorised the further disclosure of the information outside of the context of that which is provided for in the privacy policy. Consequently, disclosure under FOI would not be an authorised disclosure of the confidential information.

5. Detriment

While there is some uncertainty as to whether detriment must be established, the OAIC Guidelines say that it is prudent to assume that establishing detriment is necessary.¹

The release of the reports under FOI would undermine the confidential nature of the ACORN reporting system. Should the reports be released, it could result in third parties providing less detailed reports to ACORN, or a reduction in the number of individuals utilising the ACORN reporting system. This would cause a clear detriment to the effectiveness of ACORN as a reporting system.

I therefore determine that the 11 documents are confidential source information and exempt from release pursuant to section 45 of the FOI Act.

Your Review Rights

If you are dissatisfied with this decision you can apply for internal or Information Commissioner review. You do not have to apply for internal review before seeking Information Commissioner review.

Internal Review

You may seek internal review by making an application in writing to the ACIC within 30 days of being notified of this decision. A written application for a review should be sent to the FOI officer at foi@acic.gov.au, or by post to:

FOI Coordinator
Australian Criminal Intelligence Commission
GPO Box 1936
Canberra ACT 2601

Information Commissioner Review

Alternatively, you may apply in writing for review by the Information Commissioner. In making your application you need to provide:

- an address for notices to be sent (this can be an email address)

¹ At [5.155] of the OAIC Guidelines: The AAT has applied this element in numerous cases, but whether it must be established is uncertain. The uncertainty arises because of an argument that an equitable breach of confidence operates upon the conscience (to respect the confidence) and not on the basis of damage caused.

-a copy of this decision.

It would also help if you set out the reasons for review in your application. Requests for review must be in writing and can be made via the website (www.oaic.gov.au), by email at enquiries@oaic.gov.au, or by post at:

Office of the Australian Information Commissioner
GPO Box 5128
Sydney NSW 2001

If you are objecting to a decision to refuse access to documents you must apply to the Information Commissioner within 60 days of being given notice of the decision. You can contact the Information Commissioner by phone on 1300 363 992.

Right to Complain

You may make a complaint to the Information Commissioner about action taken by the ACIC in relation to your application. The complaint needs to be in writing and identify the agency against which the complaint is made.

The Information Commissioner 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 investigated.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Melanie Moss', written over a light blue horizontal line.

Melanie Moss

FOI Delegate

Annexure A - Schedule of documents – ACIC FOI request 18-39

Document no.	Date	Description	Decision on access	Exemption
1	9/10/2007	ACORN data	Access is refused on the basis of one or more specific exemption	s45
2	9/4/2008	ACORN data	Access is refused on the basis of one or more specific exemption	s45
3	19/2/2018	ACORN data	Access is refused on the basis of one or more specific exemption	s45
4	8/2/2018	ACORN data	Access is refused on the basis of one or more specific exemption	s45
5	1/2/2018	ACORN data	Access is refused on the basis of one or more specific exemption	s45
6	9/10/2017	ACORN data	Access is refused on the basis of one or more specific exemption	s45
7	9/10/2017	ACORN data	Access is refused on the basis of one or more specific exemption	s45
8	9/10/2017	ACORN data	Access is refused on the basis of one or more specific exemption	s45
9	9/10/2017	ACORN data	Access is refused on the basis of one or more specific exemption	s45
10	7/8/2017	ACORN data	Access is refused on the basis of one or more specific exemption	s45
11	4/8/2007	ACORN data	Access is refused on the basis of one or more specific exemption	s45

Annexure B – Extracts of the FOI Act

45 Documents containing material obtained in confidence

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.

2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:

(a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or

(b) an agency, the Commonwealth or Norfolk Island.