



AFP
AUSTRALIAN FEDERAL POLICE

Our ref: CRM2019/82

21 September 2018

Mr Tim Singleton Norton

Email: foi+request-4729-292fe7ba@righttoknow.org.au

Dear Mr Norton

Freedom of Information request – Notice of Internal Review decision (CRM2019/82)

I refer to your email dated 10 September 2018 seeking internal review of the decision made by the AFP under *the Freedom of Information Act 1982* (the Act) in relation to your FOI request concerning International Mobile Subscriber Identity (IMSI) catchers.

Attached at Annexure A to this letter is my decision and statement of reasons for that decision.

Yours sincerely

Shelley Miller
Principal Lawyer
FOI and Information Law
Chief Counsel Portfolio

STATEMENT OF REASONS RELATING TO AN INTERNAL REVIEW OF AN FOI REQUEST BY TIM SINGLETON NORTON

I, Shelley Miller, Principal Lawyer, FOI and Information Law, am an officer authorised under section 23 of the Act to make decisions in relation to the Australian Federal Police.

What follows is my decision and reasons for the decision in relation to your application.

BACKGROUND

On 7 August 2018, this office received your application in the following terms:

"I am writing under the provisions of the Freedom of Information Act to request the documents relating directly to the use of IMSI catchers owned and operated by the AFP as of August 2018.

An "International Mobile Subscriber Identity" catcher (IMSI Catcher) may go by the following brand names including Stingray, SimSucker, Kingfish, Harpoon, Amberjack, or Hailstorm.

In particular I request the following information:

- Current number of IMSI catchers owned and/or operated by the AFP;*
 - Purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records regarding the acquisition of IMSI catchers;*
 - Marketing or promotional materials received by the AFP relating to IMSI catchers;*
 - All requests made by to the AFP by companies or government agencies to keep confidential any aspect of the possession and use of IMSI catchers, including any non-disclosure agreements;*
 - Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the use of IMSI catchers, including restrictions on when, where, how and against whom they may be used; limitations on retention and use of collected data; guidance on when a warrant or other legal process must be obtained; and rules governing when the existence and use of IMSI catchers may be revealed to the public, criminal defendants, or judges."*
- This request is limited to the 2016/17 financial year."*

On 22 August 2018, the AFP made a decision in relation to your request. The decision was to refuse access to your request under section 25 of the Act.

On 10 September 2018, you sought an internal review of the decision made by the AFP.

DECISION

I have decided to affirm the decision made on 22 August 2018 to refuse access to this request under section 25 of the Act. That is, the AFP neither confirms nor denies the existence of documents in relation to your request.

My reasons for this decision are set out below.

REASONS FOR DECISION

Section 25 of the Act provides that:

- (1) *Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be:*
 - (a) *an exempt document by virtue of section 33 or subsection 37(1) or 45A(1); or*
 - (b) *an exempt document to the extent referred to in subsection 45A(2) or (3).*

- (2) *If a request relates to a document that is, or if it existed would be, of a kind referred to in subsection (1), the agency or Minister dealing with the request may give notice in writing to the applicant that the agency or the Minister (as the case may be) neither confirms nor denies the existence, as a document of the agency or an official document of the Minister, of such a document but that, assuming the existence of such a document, it would be:*
 - (a) *an exempt document by virtue of section 33 or subsection 37(1) or 45A(1); or*
 - (b) *an exempt document to the extent referred to in subsection 45A(2) or (3).*

- (3) *If a notice is given under subsection (2) of this section:*
 - (a) *section 26 applies as if the decision to give the notice were a decision referred to in that section; and*
 - (b) *the decision is taken, for the purposes of Part VI, to be a decision refusing to grant access to the document in accordance with the request referred to in subsection (2) of this section, for the reason that the document would, if it existed, be:*
 - (i) *an exempt document by virtue of section 33 or subsection 37(1) or 45A(1);*
or
 - (ii) *an exempt document to the extent referred to in subsection 45A(2) or (3).*

In my view, a document falling within the scope of the request, if it exists, would be an exempt document pursuant to subsection 37(1) of the Act. I also consider that to inform you of the existence or non-existence of the document(s) you have requested would cause this decision notice itself to be an exempt document pursuant to subsection 37(1) of the Act.

As provided at paragraph 3.103 of the Guidelines issued by the Office of the Australian Information Commissioner (OAIC) under section 93A of the Act:

"The act of confirming or denying the existence of a document can sometimes cause damage similar to disclosing the document itself."

I consider the release of any information confirming or denying the existence of any document(s) would identify a capability, or a limitation in capability, of the AFP. I am satisfied this would have implications for law enforcement.

EVIDENCE/MATERIAL ON WHICH MY FINDINGS WERE BASED

In reaching my decision, I have relied on the following documentary evidence:

- ❖ the scope of your application;

- ❖ advice from AFP officers with responsibility for matters relating to the documents to which you sought access;
- ❖ *Freedom of Information Act 1982*; and
- ❖ Guidelines issued by the Office of the Australian Information Commissioner.

**** YOU SHOULD READ THIS GENERAL ADVICE IN CONJUNCTION WITH THE LEGISLATIVE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT 1982.**

REVIEW AND COMPLAINT RIGHTS

If you are dissatisfied with a Freedom of Information decision made by the Australian Federal Police, you can apply for an Information Commissioner (IC) Review.

You do not need to seek a review by the IC should you wish to complain about the AFP's actions in processing your request.

REVIEW RIGHTS under Part VII of the Act

Review by the Information Commissioner (IC)

Section 54L of the Act gives you the right to apply directly to the IC or following an internal review by the AFP. In making your application you will need to provide an address for notices to be sent (this can be an email address) and a copy of the AFP decision. It would also help if you set out the reasons for review in your application.

Section 54S of the Act provides for the timeframes for an IC review submission. For an *access refusal decision* covered by subsection 54L(2), the application must be made within 60 days. For an *access grant decision* covered by subsection 54M(2), the application must be made within 30 days.

Applications for a review of the decision should be addressed to:

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

Further, the OAIC encourages parties to an IC review to resolve their dispute informally, and encourages agencies to consider possible compromises or alternative solutions to the dispute in this matter. The AFP would be pleased to assist you in this regard.

Information about the IC review process can be found in Part 10 of the Guidelines which are available on our website at <http://www.oaic.gov.au/publications/guidelines.html>.

RIGHT TO COMPLAIN under Part VIIB of the Act

Section 70 of the Act provides that a person may complain to the IC about action taken by the Australian Federal Police 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 investigated.