



Our Reference: 18/982

26 November 2018

Ben Fairless

By e-mail: foi+request-4988-c8d471cb@righttoknow.org.au

Dear Mr Fairless

Your Freedom of Information Request – Decision

I refer to your email of 23 November 2018, which as I understand seeks access under the *Freedom of Information Act 1982* (the FOI Act) to the following documents, should they exist:

The Australian Commission for Law Enforcement Integrity's current arrangements under section 23 of the FOI Act.

This letter sets out my decision on your request for access. I am an authorised decision-maker under section 23 of the FOI Act.

Charges

No charges will be applied to this request.

Decision

One document falls within the scope of this request. I have decided that special circumstances exist allowing the names of the Australian Commission for Law Enforcement Integrity staff members listed on the document to be redacted.

As such, the document sought is released to you with the exempt material redacted under section 22 of the FOI Act.

Reasons for my decision are outlined at **Attachment A**.

Review rights

You are entitled to seek review of this decision. Your rights are set out at **Attachment B** to this letter.

Relevant provisions

I have enclosed copies of the provisions of the FOI Act relevant to your request at **Attachment C** to this letter.

Contacts

If you require clarification of any of the matters discussed in this letter you should contact me at foi@aclei.gov.au.

Yours sincerely

FOI Officer

ATTACHMENT A – REASONS FOR DECISION

Under section 47F of the FOI Act, information may be conditionally exempt if that disclosure may result in the unreasonable disclosure of personal information about any person.

Section 6 of the *Privacy Act 1988* defines 'personal information' as being "information or an opinion [...] whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

The FOI guidelines provide that 'Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature'.

The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person's name or signature may, however, reveal personal information about them depending on the context.

In this context, the listing of a person's name reveals that they work for ACLEI. As discussed below, as a law enforcement agency, ACLEI's staff members' names are not readily known.

In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account the following matters:

- a) the extent to which the information is well known
- b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- c) the availability of the information from publicly accessible sources
- d) any other matter I consider relevant.

ACLEI's staff members' names are not well known. They are not listed on the website or in other publically available documents.

The decision of '*FG*' and *National Archives of Australia* [2015] AICmr 26, outlined other factors considered to be relevant:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

In light of these additional factors I note the following:

- The authorisation is the most recent made by the Integrity Commissioner, as such most of the names on the authorisation are current ACLEI staff, whose names are not listed publically anywhere else (including the website).
- ACLEI is a small agency. The names of the individuals listed in the document perform many roles in ACLEI, and whose sole work is not as FOI officers. The listed staff perform the duties of FOI officers when required, but not exclusively. Given these individuals are involved in often highly sensitive covert operations, it is not appropriate for their names to be publically known. It is not implausible that the release of these people's names could cause them detriment.
- While I have not consulted with the individuals listed, I consider most will object to the release of their names for the reasons outlined in this decision.
- The FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act and this is of concern given the reasons outlined in this decision.
- Disclosure of the names of FOI Officers will not advance the public interest in government transparency and integrity.

In *Colakovski v Australian Telecommunications Corp*, Heerey J considered that '... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable'.

I am of the view that releasing the ACLEI staff members' names will not promote transparency in government processes and activities and is of no relevance to the affairs of government.

However, I note that the guidelines provide that "where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website."

I am of the view that special circumstances do exist, such as:

- ACLEI is a small agency of less than 50 staff. The staff members that are listed in the document are not solely FOI Officers. The staff members are also involved in various aspects of covert and sensitive ACLEI investigations. Consequently, for operational security reasons, it is reasonable that the list of staff members is not made publically known.
- ACLEI receives frequent FOI requests and media interest, as well as interest by persons who have been, or are, the subject of ACLEI investigations. The release of these staff members' names has the potential to cause detriment to a staff member as they may be targeted with future enquires from such individuals.
- There are many channels for people to contact ACLEI, including the ACLEI FOI and ACLEI Contact email inboxes. As such, there is no need to contact a particular ACLEI staff member concerning a generic enquiry (*Re Bartucciotto and Commonwealth Ombudsman* [2005] AATA 1109).

The public interest test

Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest under section 11A(5) of the FOI Act. The OAIC Guidelines provide guidance on the applicable public interest test.

Section 11B(3) of the FOI Act lists some public interest factors favouring access. In considering the public interest in this case, I have had regard to those factors and consider the following factor in favour of disclosure to be of particular relevance:

- promoting the objects of the Act – particularly through enhancing the scrutiny of government decision making.

The FOI Act does not list any factors which may be taken into account weighing against disclosure, however it lists factors which may not be taken into account in section 11B(4). None of the factors in subsection (4) have had a bearing on my decision.

The OAIC Guidelines provides a non-exhaustive list of factors against disclosure. I have considered the following factor against disclosure as relevant:

- could reasonably be expected to prejudice the protection of an individual's right to privacy.

In my view, the factor against disclosure outweighs the factor in favour of disclosure. The disclosure of the identifying information in the documents will not contribute to the enhancement of the scrutiny of government activities. By contrast the potential to interfere with the personal privacy of the law enforcement staff members named in the documents is, in my view, significant. Accordingly, I have concluded that disclosure would be contrary to the public interest.

Section 11A(5) provides that access to conditionally exempt information must be given unless it would be contrary to the public interest to do so. For the above reasons, taking into account section 11B, I am satisfied that this information is exempt.

Consultation

If I was to make a decision to give access to the document without redactions I note I would need to consult with a number of individuals and provide them the opportunity to comment (pursuant to s 27A).

ATTACHMENT B - REVIEW RIGHTS

You are entitled to seek review of this decision.

Internal Review

Firstly, under section 54 of the FOI Act, you may apply for an internal review of the decision. Your application must be made by whichever date is the later between:

- 30 days of you receiving this notice; or
- 15 days of you receiving the documents to which you have been granted access.

An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be addressed to:

ACLEI FOI
Australian Commission for Law Enforcement Integrity
GPO Box 605
CANBERRA ACT 2601
foi@aclei.gov.au

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

External review by the Australian Information Commissioner

Alternatively, under 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner without first going to internal review. Your application must be made within 60 days of you receiving this notice.

The Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Information Commissioner's website www.oaic.gov.au.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commissioner at:

GPO Box 5218
Sydney NSW 2000

Complaints to Ombudsman or Information Commissioner

You may complain to either the Commonwealth Ombudsman or the Information Commissioner about action taken by ACLEI in relation to the application. The Ombudsman will consult with the Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au

Your enquiries to the Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Ombudsman or the Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify ACLEI as the relevant agency.

ATTACHMENT C – RELEVANT FOI ACT PROVISIONS

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).
- (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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.
- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
 - (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of *exempt document* in subsection 4(1).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an *edited copy*) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and

- (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

47F Public interest conditional exemptions—personal privacy

General rule

- (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).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

- (4) Subsection (5) applies if:

- (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
 - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
- (a) carries on the same occupation, of a kind mentioned in the definition of *qualified person* in subsection (7), as the first-mentioned qualified person; and
 - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

27A Consultation—documents affecting personal privacy

Scope

- (1) This section applies if:
- (a) a request is made to an agency or Minister for access to a document containing personal information about a person (including a person who has died); and
 - (b) it appears to the agency or Minister that the person or the person's legal personal representative (the *person concerned*) might reasonably wish to make a contention (the *exemption contention*) that:
 - (i) the document is conditionally exempt under section 47F; and
 - (ii) access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (2) In determining, for the purposes of paragraph (1)(b), whether the person concerned might reasonably wish to make an exemption contention because of personal information in a document, the agency or Minister must have regard to the following matters:
- (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

Opportunity to make submissions

- (3) The agency or Minister must not decide to give the applicant access to the document unless:
- (a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
 - (b) the agency or the Minister has regard to any submissions so made.
- (4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

Decision to give access

- (5) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:
- (a) the person concerned;
 - (b) the applicant.

Access not to be given until review or appeal opportunities have run out

- (6) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have *run out*, see subsection 4(1).

Notice and stay of decision not to apply unless submission made in support of exemption contention

- (7) Subsections (5) and (6) do not apply unless the person concerned makes a submission in support of the exemption contention as allowed under paragraph (3)(a).

Edited copies and personal information

- (8) This section applies:
- (a) in relation to an edited copy of a document—in the same way as it applies to the document; and

(b) in relation to a document containing personal information—to the extent to which the document contains such information.

