

Ref: **2019Q2R4**

11 January 2019

Richard Smith

BY EMAIL: [foi+request-5167-9cdeaaaa@righttoknow.org.au](mailto:foi+request-5167-9cdeaaaa@righttoknow.org.au)

Dear Mr Smith

### **Freedom of Information request – Notice of Decision**

1. The purpose of this letter is to provide you a decision about access to information you requested under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).
2. I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests made to the Australian Charities and Not-for-Profits Commission (**ACNC**).

### **Scope of request**

3. Your email to the ACNC dated 14 December 2018 stated:

"I request the following Government Information:

- a) Documents relating to the number of registered Religions in Australia as at 1 December 2018; and
- b) Documents relating to the number of registered Religious Orders (i.e. an order belonging to a "parent" Religion as identified above in a) but that is registered separately with ACNC) in Australia as at 1 December 2018; and
- c) Documents relating to the number of registered Religiously Affiliated Organisations in Australia as at 1 December 2018; and
- d) Documents relating to the tax exemption status of each of the separately registered entities identified in points a) through c) above.

To assist the ACNC with processing my request for Government Information, I am primarily interested in aggregate statistics for each of my queries, not a list of separate entities. I note that s17 of the FOI Act is particularly relevant to the processing of my request.

If this can be answered as informal request, please do so.

Otherwise, please proceed with this as a formal request under the Freedom of Information principles & framework, i.e. the Freedom of Information Act 1982 & other associated guidelines and regulations" (**your FOI request**).



4. On 17 December 2018, I formally acknowledged your request by reply email and noted that I would endeavour to provide a decision to you by 13 January 2019.
5. In that email I also:
  - requested that you call me to discuss your request over the phone; and
  - explained some of the information the ACNC does and does not collect in relation to your request.
6. I have interpreted your request to refer to documents containing information on cumulative figures or aggregate statistics about religions, or religious organisations. I have taken into account your reference to aggregate statistics in your FOI request, and have accordingly interpreted your request to exclude details about individual charities registered with the ACNC.
7. Further, I have interpreted part c) of your request to seek documents containing general figures on the number of entities registered with the ACNC whose registration details indicate the organisation has some affiliation with religion.

#### **Decision on access**

8. In relation to part a), b) and d) of your request, I have decided to refuse you access to the documents you seek because I have found, pursuant to sub-paragraph 24A(1)(b)(ii) of the FOI Act, that no documents exist.
9. I have identified five documents which fall within the scope of part c) of your request. I identified these documents by seeking guidance from relevant directorates of the ACNC (being Registration, IT and Reporting and Red Tape Reduction), and discussing what documents may be available in accordance with section 17 of the FOI Act.
10. As set out in the **enclosed** Schedule of Documents, I have decided to grant you access:
  - In full to two documents; and
  - In part to two documents.
11. These documents are also **enclosed**.
12. I have decided to refuse you access to one document falling within the scope of your FOI request that the ACNC holds. I have found that this document contains information that falls within the definition of 'protected ACNC information'.<sup>1</sup>
13. I have found that this document is therefore conditionally exempt from release under s 47E(d) of the FOI Act. I have also found that, on balance, granting you access to such information would be contrary to the public interest under s 11A(5) of the FOI Act.
14. In reaching this decision I have considered the following:
  - a) the terms of your FOI request;
  - b) the relevant provisions of the FOI Act, particularly:

---

<sup>1</sup> *Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 150-15 ('ACNC Act').*





- i) Section 3 (Objects);
  - ii) Section 11A (Access to documents on request);
  - iii) Section 11B (Public interest exemptions – factors);
  - iv) Section 22 (Documents include exempt or irrelevant content);
  - v) Section 24A (Requests may be refused if documents cannot be found, do not exist or have not been received);
  - vi) Paragraph 47E(d) (Public interest conditional exemptions – certain operations of agencies); and
  - vii) Section 47F (Public interest conditional exemptions – personal privacy).
- c) Division 150 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**)(**the secrecy provisions**);
  - d) Paragraph 11.3 of the *Australian Charities and Not-for-profits Commission Bill 2012 Revised Explanatory Memorandum*;<sup>2</sup> and
  - e) the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**Guidelines**) particularly:
    - i. Part 3 – Processing and deciding on requests for access; and
    - ii. Part 6 – Conditional exemptions.<sup>3</sup>

#### **Reasons for decision – parts a), b) and d)**

- 15. After acknowledging your FOI request on 17 December 2018, I asked the Registration and Reporting and Red Tape Reduction directorates of the ACNC to undertake searches for any relevant documents and provide copies of any such documents to me.
- 16. By 20 December 2018, the Registration and Reporting and Red Tape Reduction directorates had advised me that no documents relevant to parts a), b) and d) of your FOI request exist.
- 17. Subsection 24A(1) of the FOI Act provides that (emphasis added):

An agency or Minister may **refuse access** to a document if:

- (a) all reasonable steps have been taken to find the document; and
- (b) the agency or Minister is **satisfied** that the document:
  - (i) is in the agency's or Minister's possession but cannot be found; or
  - (ii) **does not exist**.

---

<sup>2</sup> Revised Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012, Australian Charities and Not-for Profits Commission (Consequential and Transitional) Bill 2012, (Cth) para 11.3.

<sup>3</sup> The Australian Information Commissioner, *OAIC Guidelines* (13 November 2017), Office of the Australian Information Commissioner <<https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>>.



18. Paragraph 3.80 of the Guidelines states that '[a]n agency or minister may refuse a request if it has taken 'all reasonable steps' to find the document requested, and is satisfied that the document cannot be found or does not exist (s 24A(1)).'
19. Paragraph 3.81 of the Guidelines states '[t]he (FOI) Act is silent on what constitutes "all reasonable steps". Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment.'
20. Based on my understanding of the scope of parts a), b) and d) of your request, and the responses from the ACNC directorates likely to hold any relevant documents, I am satisfied that I have taken reasonable steps to find the requested documents, and that no such documents exist.

### **Reason for decision – document 3**

21. Document 3 in the Schedule of Documents have been redacted to remove 'personal information'.<sup>4</sup> Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person.
22. In my view, the personal information of ACNC staff contained in the document is irrelevant to the FOI request and the document can be edited to redact the personal information to enable release under section 22(1)(a)(ii) of the FOI Act.
23. I am satisfied that section 22(1)(a)(ii) of the FOI Act applies insofar as the personal information of ACNC staff members is irrelevant to the FOI request. I am also satisfied that access to an edited copy of the document would be required under section 11A, and that the edited copy does not disclose any information irrelevant to the FOI request. I am satisfied that it is reasonably practicable for the ACNC to prepare the edited copy of the document.

### **Reason for decision – documents 4 and 5**

24. Paragraph 47E(d) of the FOI Act provides that a document is conditionally exempt if 'its disclosure would, or could reasonably be expected to ... have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.'
25. In order to properly and efficiently carry out many of its powers and functions under the ACNC Act, the ACNC relies on charities to provide it with information of a confidential and sometimes personal nature. For example, a charity:
  - a) must provide extensive information to enable the ACNC to make an assessment of the charity's entitlement to be registered under the ACNC Act;

---

<sup>4</sup> Section 4 of the FOI Act defines 'personal information' as having the same meaning as in the *Privacy Act 1988 (Cth)* (**Privacy Act**). Section 6 of the Privacy Act defines 'personal information' as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable':

- a) Whether the information or opinion is true or not; and
- b) Whether the information or opinion is recorded in a material form or not.'





- b) must provide up to date details of its responsible persons; and
  - c) may be required to provide potentially highly sensitive information, if the ACNC is investigating a charity's compliance with its obligations in order to remain registered.
26. If the ACNC is unable to assure charities that information provided to the ACNC will be treated confidentially, it may impede the flow of information required by the ACNC to effectively administer the ACNC Act.
27. Paragraph 11.3 of the *Australian Charities and Not-for-profits Commission Bill 2012 Revised Explanatory Memorandum* states: '[e]ngagement with and the trust of the not-for-profit (NFP) sector could be at risk if responsible entities and registered entities do not have confidence that their information is being handled appropriately, which would, in turn obstruct the ACNC in undertaking its powers and functions under the Bill.'
28. Under s 150-15 of the ACNC Act, '**protected ACNC information**' means information that:
- a) was disclosed or obtained under for the purposes of the ACNC Act; and
  - b) relates to the affairs of an entity; and
  - c) identifies, or is reasonably capable of being used to identify, the entity.
29. Subsection 150-25(2) of the ACNC Act prohibits the disclosure of **protected ACNC information** to anyone but:
- a) the entity to whom the information relates;
  - b) if the entity to whom the information relates has an agent in relation to the information – the agent;
  - c) if the entity to whom the information relates is a registered entity – a responsible entity of that registered entity.
30. Subdivision 150-C sets out a number of exceptions to the general prohibition on disclosure. It is an offence for an ACNC officer to use or disclose protected ACNC information to anyone other than the relevant charity, its responsible persons or agents, unless an exemption applies.<sup>5</sup>
31. Two of the documents you seek contain information about a number of registered entities that falls within the definition of protected ACNC information. I find that no exception under the ACNC Act applies that would authorise the release of this information to you.
32. It would severely undermine the ACNC's ability to comply with its obligations to administer the ACNC Act in accordance with the requirements of that Act, if information protected by the secrecy provisions were to be released under the FOI Act.

---

<sup>5</sup> ACNC Act s 150-15.



33. Placing the ACNC in direct conflict with its obligations under the ACNC Act, and potentially impeding the supply of information required to effectively administer that Act would, in my opinion, have a substantial adverse effect on the proper and efficient conduct of the operations of the ACNC.
34. I therefore find that the information you seek is conditionally exempt from release pursuant to s 47E(d) of the FOI Act.
35. I must also consider if providing you access to the conditionally exempt information would, on balance, be contrary to the public interest under s 11A(5) of the FOI Act.
36. Subsection 11B(3) of the FOI Act lists four factors that favour access when applying the public interest test. The only factor I find to be relevant to your request is that allowing access to the information would promote the objects of the FOI Act by recognising that information held by the Government is a national resource managed for public purposes.<sup>6</sup>
37. Paragraph 6.19 of the Guidelines provide a non-exhaustive list of public interest factors that favour disclosure. I find that the only factor that may potentially be relevant in this instance is that disclosure may:
- a) promote the objects of the FOI Act, particularly:
    - i. to increase recognition that information held by the Government is to be managed for public purposes and is a national resource; and
    - ii. to facilitate and promote public access to information, promptly and at the lowest reasonable cost.<sup>7</sup>
38. Paragraph 6.22 of Part 6 of the Guidelines provides a non-exhaustive list of factors against disclosure. I find the following factors to be relevant:
- a) disclosure could reasonably be expected to impede the flow of information to the ACNC;
  - b) disclosure could reasonably be expected to prejudice the ACNC's ability to obtain confidential information; and
  - c) disclosure could reasonably be expected to prejudice the ACNC's ability to obtain similar information in the future.
39. In balancing these factors, I am satisfied that disclosure of the requested information to you would be contrary to the public interest. In particular, I consider that the legitimate interests of the charitable sector in keeping information confidential would be unfairly and unreasonably prejudiced if disclosure of such information were to be made under the FOI Act.

<sup>6</sup> *Freedom of Information Act 1982* (Cth) ss 11B(3)(a) and 3(3) ('FOI Act').

<sup>7</sup> FOI Act ss 3(3)-(4).





40. I have not taken into account any of the irrelevant factors listed in s 11B(4) of the FOI Act in reaching this decision.

### **Section 22 – edited copies**

41. I have found that would it is reasonably practicable to prepare an edited copy of one of the two documents that are exempt under section 47E(d), with the exempt matter deleted, as contemplated in section 22 of the FOI Act. I have also found that access would be required to be given to the edited copy under section 11A. This document has been provided in part, as listed at document four in the Schedule of Documents.

42. I have found that it is not reasonably practicable to provide an edited copy of document five, having regard to the nature and extent of the necessary modifications, and the resources available to modify the document.

### **Review Rights**

43. In accordance with paragraph 26(1)(c) of the FOI Act, a statement setting out your rights of review under the FOI Act is **enclosed**.

Yours sincerely

**Thomas Abourizk**

Legal and Policy Officer and authorised FOI Officer  
Australian Charities and Not-for-profits Commission

*Enc: as listed*



## Your review rights

If you are dissatisfied with my decision, you may apply to the ACNC for an internal review or to the Australian Information Commissioner for an external review.

### Internal review

Under section 54 of the FOI Act, you may apply to the ACNC for an internal review of my decision by:

email: [advice@acnc.gov.au](mailto:advice@acnc.gov.au)  
post: Freedom of Information Contact Officer  
Australian Charities and Not-for-profits Commission  
GPO Box 5108, Melbourne VIC 3001

An application for internal review must be made in writing within 30 days of the date of this letter. Where possible, please include reasons why you believe review of the decision is necessary. The internal review decision will be made by another ACNC officer within 30 days of receiving your application for internal review. Please quote **2019Q2R4** when lodging your application.

### Australian 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 Australian Information Commissioner must be made in writing within 60 days of the date of this letter by:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 5218, Sydney NSW 2001  
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Australian Information Commissioner review is available on the Office of the Australian Information Commissioner website: [www.oaic.gov.au/freedom-of-information/foi-reviews](http://www.oaic.gov.au/freedom-of-information/foi-reviews).

### Complaints

Any complaint about the processing of your FOI request can be directed to either the Australian Information Commissioner or the Commonwealth Ombudsman. The complaint should set out the grounds on which you consider the action should be investigated. Complaints can be made in writing, by phone, or by using an online form available from their respective websites.

Australian Information Commissioner contact details:

- [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
- GPO Box 5218, Sydney NSW 2001
- 1300 363 992
- [https://forms.business.gov.au/aba/landing.htm?formCode=ICCA\\_1](https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1)

Commonwealth Ombudsman contact details:

- [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)
- GPO Box 442, Canberra ACT 2601
- 1300 362 072
- [www.ombudsman.gov.au/pages/making-a-complaint/](http://www.ombudsman.gov.au/pages/making-a-complaint/)