



29 July 2019

Guido Orifice via the Right to Know Website: foi+request-5457-7f66760e@righttoknow.org.au

Dear Guido Orifice

Your Freedom of Information Request sent on 2 June 2019

I refer to your request of 2 June 2019 under the *Freedom of Information Act 1982* (the FOI Act) seeking access to ARPANSA's conflict of interest register and your email dated 13 June 2019 clarifying the scope of your 2 June FOI request from 2013 to present.

I am an officer authorised under section 23 of the FOI Act to make decisions with respect to applications for access to documents under the FOI Act and this letter sets out my decision on your request.

Decision

I have identified an excel spreadsheet titled conflict of interest register (5 pages) as relevant to your request.

I have decided to exempt this document in full.

My reasons for making this decision are set out in Attachment A to this letter.

I have enclosed extracts of the provisions of the FOI Act relevant to your request and my decision at Attachment B to this letter.

Review Rights

You are entitled to seek review of this decision. Your rights in this regard are set out at Attachment C to this letter. You may also complain to the Commonwealth Ombudsman about the way your request has been handled and Attachment C also sets out your rights of complaint and how to exercise them.

Contacts

If you require clarification of any of the matters set out in this letter please contact Gemma Larkins at foi@arpansa.gov.au.

Yours sincerely

Gemma Larkins

Legal Officer
Office of the General Counsel



ATTACHMENT 'A' – REASONS FOR DECISION – Guido Orifice

Material taken into account

In making my decision, I had regard to the following:

- The terms of your request;
- The content of the document to which you sought access;
- Advice from the ARPANSA officers with responsibility for the matters relating to the document to which you sought access;
- The relevant provisions of the Freedom of Information Act 1982 (FOI Act);
- ARPANSA's guidance material on the FOI Act;
- Internal Review decisions of the Office of the Australian Information Commissioner (OAIC); and
- Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act available on the OAIC website (FOI Guidelines).

Findings of fact and reasons for decision

I have decided to exempt the Conflict of Interest Register in full under section 45 of the FOI Act.

My findings of fact and reasons for deciding that section 45 applies are set out below.

Material obtained in confidence exemption (s 45)

Section 45(1) of the FOI Act provides that a document is exempt if its disclosure 'would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for a breach of confidence'.

The FOI Guidelines explain that, for s 45 to apply, the following five criteria must be satisfied:

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

Information must be specifically identified

The FOI Guidelines explain that it is not sufficient for the alleged confidential information to be identified in global terms: it must be identified specifically.

In this regard, the Conflict of Interest Register records the following confidential information: employee name, description of the conflict, decision maker, action and reason.

I have considered the Conflict of Interest Register and I am satisfied that the information is specifically identified.

Quality of confidentiality

The FOI Guidelines provide that for the information to have the quality of confidentiality, it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.

The Conflict of Interest Register is maintained by the General Counsel of ARPANSA and is stored on the legal drive. Access to the legal drive is restricted to employees in the Office of the General Counsel section in ARPANSA. If there is a particular conflict which is required to be managed it will be brought to the attention of a limited number of people with a need to know. Therefore, the conflict of interest register is only known to a limited group of people.

There is no statutory requirement to publish the information contained in the Conflict of Interest Register. Therefore the information is not common knowledge nor is it in the public domain.

Therefore, I am satisfied that the information contained within the Conflict of Interest Register has the necessary quality of confidentiality.

Mutual understanding of confidence

The FOI Guidelines relevantly provide:

The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency needs to have understood and accepted an obligation of confidence.....

It may be clear from an agency's actions whether the agency accepted an obligation of confidence and is maintaining that obligation. For example, an agency may mark a document as confidential, keep it separate from documents that are not confidential and ensure that the material is not disclosed to third parties without consent.

The APS Code of Conduct (the Code) requires APS employees including ARPANSA staff to take reasonable steps to avoid any conflict of interest, real or apparent, in connection with their employment. Where a material personal interest cannot be avoided, the employee must disclose that interest so that it can be managed. This obligation also arises under section 29 of the *Public Governance, Performance and Accountability Act 2013*.

As mentioned above, there is no statutory requirement to publish this information and it is provided directly to the General Counsel in the form of a conflict of interest declaration, ARPANSA employees provide this information on the basis of a mutual understanding of confidence. The General Counsel enters the information contained in the conflict of interest declaration into the Conflict of Interest Register and securely stores the register and completed declarations on the Legal drive. These measures ensure the information provided is kept secure and confidential.

ARPANSA has accepted the obligation of confidence by treating the material contained within the Conflict of Interest Register as confidential and restricting access to only a limited number of people with a need to know.

I am satisfied that the information contained within the Conflict of Interest Register was communicated and received on the basis of a mutual understanding of confidence.

Unauthorised disclosure or threatened disclosure

The FOI Guidelines explain that the scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised.

I have considered the Conflict of Interest Declaration and the material on the ARPANSA Intranet in relation to conflict interests and cannot find anything to suggest that the employees providing the information contained in the Conflict of Interest gave consent for the information to be released to parties other than ARPANSA's General Counsel and a limited number of people within ARPANSA who are responsible for ensuring the Conflicts of Interests are appropriately managed.

Therefore, I am satisfied that disclosure to the applicant would be an unauthorised disclosure.

Detriment

The final element is whether unauthorised disclosure of the information in the documents sought would cause detriment.

In my view the disclosure of the information would cause a detriment to the employee's ability to protect the release of their personal information.

The disclosure of the information would cause a detriment to ARPANSA's ability to appropriately manage any conflicts of interest as staff would be less willing to provide full and frank disclosure of conflicts of interests.

Conclusion

Considering the above, I am satisfied that the information contained in the Conflict of Interest register meets the requirements of section 45 of the FOI Act.



ATTACHMENT B – 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).

11C Publication of information in accessed documents

Scope

- (1) This section applies to information if an agency or Minister gives a person access to a document under section 11A containing the information, except in the case of any of the following:
 - (a) personal information about any person, if it would be unreasonable to publish the information;
 - (b) information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information;
 - (c) other information of a kind determined by the Information Commissioner under subsection (2), if it would be unreasonable to publish the information;
 - (d) any information, if it is not reasonably practicable to publish the information under this section because of the extent of any modifications to a document (or documents) necessary to delete information mentioned in paragraphs (a) to (c).
- (2) The Information Commissioner may, by legislative instrument, make a determination for the purposes of paragraph (1)(c).

Publication

- (3) The agency, or the Minister, must publish the information to members of the public generally on a website by:
 - (a) making the information available for downloading from the website; or
 - (b) publishing on the website a link to another website, from which the information can be downloaded; or
 - (c) publishing on the website other details of how the information may be obtained.

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.



ATTACHMENT C – REVIEW RIGHTS
Internal Review by ARPANSA

You have the right to apply for an internal review of this decision in accordance with Part VI of the *Freedom of Information Act 1982* (FOI Act). If you make an application for review, the CEO of ARPANSA will appoint an officer of ARPANSA to conduct a review and make a completely fresh decision on the merits of the case.

If you wish to exercise this review right, you must apply in writing for a review of the decision within 30 days of receipt of this letter. You do not have to pay any fees or proceeding charges for internal the review. No particular form is required to apply for review although it is desirable to set out in the application the grounds on which you consider that the decision should be changed.

The application for review of the decision should be sent to foi@arpansa.gov.au or:
FOI & Privacy Officer
ARPANSA
619 Lower Plenty Road
YALLAMBIE VIC 3085

If you make an application for internal review and a decision is not made by us within 30 days of receiving the application, the original decision will be deemed to be affirmed in accordance with section 54D of the FOI Act and you will be entitled to make an application to the Information Commissioner in accordance with sections 54L and 54M of the FOI Act. Similarly, if you are dissatisfied with ARPANSA’s decision on internal review, you may also apply for review of this decision to the Information Commissioner.

Review of Decision by the Australian Information Commissioner (AIC)

You do not have to seek an internal review of the decision directly from ARPANSA. You may wish to seek a review of the decision from the AIC. If so, you must apply in writing and you can lodge your application in a number of ways. More information is available on the AIC’s website at: <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

Complaints to the AIC or the Commonwealth Ombudsman

You may complain to the Commonwealth Ombudsman or the AIC concerning action taken by an agency in the exercise of the powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Ombudsman or the AIC will conduct a completely independent investigation of your complaint.

You may complain to the Ombudsman either orally, in person, on-line or in writing and to the AIC in writing or by completing the on-line form. Relevant addresses are:

Commonwealth Ombudsman GPO Box 442 CANBERRA ACT 2601. Web: www.ombudsman.gov.au	The Australian Information Commissioner GPO Box 2999 OR GPO Box 5218 Canberra ACT 2601 Sydney NSW 2001 Web: https://www.oaic.gov.au/freedom-of-information/foi-complaints
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