



14/7459

12 August 2014

Mr Brendan Molloy

By email only: [foi+request-635-960b9b95@righttoknow.org.au](mailto:foi+request-635-960b9b95@righttoknow.org.au)

Dear Mr Molloy

**Freedom of Information Request no. FOI14/097**

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

**Summary**

I, Andrew Walter, Assistant Secretary, am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 29 May 2014, you requested access to documents relating to the working group responsible for considering reforms to copyright legislation. Specifically you sought access to:

*a) Documents by the working group responsible for considering reforming copyright legislation in response to the 'issue' of online copyright infringement, specifically in respect to:*

*i) any research into the efficacy of graduated response or website blocking; and*

*ii) any communication with industry or non-industry stakeholders.*

On 16 June 2014, the Department sent you a notice of estimated charges for processing your request, based upon the number of relevant documents and pages that fell within the scope of your request. On 27 June 2014, in response to your contention that charges be waived on the grounds of public interest, a 50% reduction was applied.

The statutory time for processing your request was suspended when we sent the notice of charges and began to run again when you paid the required deposit on 30 June 2014. As the Department was required to consult private third parties about the release of some of the documents a 30 day extension of time under section 27A of the FOI Act was applied. As a result, the due date for this request is **14 August 2014**.

I have identified 50 documents which fell within the scope of your request. I did this by arranging for Departmental officers to search the electronic document management systems of the

Department. They also consulted officers in relevant line areas of the Department who would have knowledge of the existence and whereabouts of documents falling within the scope of your request.

The attached schedule of documents provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

With regard to the documents you requested, I have decided to grant access to edited versions of 9 documents and to refuse access to the remaining 41 documents. More information, including my reasons for my decision, is set out below.

### **Decision and reasons for decision**

I have decided:

- to grant access in part to documents 3, 15, 22, 23, 24, 30, 32, 33 and 34 with irrelevant material deleted under section 22;
- to grant access in part to documents 15, 22, 24 and 32 with material exempt under section 47F (*Public interest conditional exemptions – personal privacy*);
- to grant access in part to documents 15 and 22 with material exempt under section 45 (documents containing material obtained in confidence); and,
- to refuse access to documents 1, 2, 4 – 14, 16, 17 – 21, 25 – 29, 31, 35 - 50 under section 47C (*Public interest conditional exemptions – deliberative processes*)

### **Material taken into account**

I have taken the following material into account in making my decision:

- the content of the documents that fall within the scope of your request
- the FOI Act (specifically sections 22, 34, 47C and 47F)
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act

The schedule indicates each document to which access is refused. My reasons for refusing access are given below.

### ***Irrelevant Material***

Under subsection 22(1) of the FOI Act, the Department may provide an edited copy of a document with information that would reasonably be regarded as irrelevant to a request deleted.

Documents 3, 15, 22, 23, 30, 32, 33 and 34 contain material that is not within the scope of your request. For example, these documents contain the contact details of public servants, which we advised would be treated as outside the scope of the request unless you indicated otherwise. Further, some of the documents contain discussions that do not fall within the scope of “research into the efficacy of graduated response or website blocking” or “communications with industry or non-industry stakeholders” and those discussions are therefore exempted from release.

I am satisfied that this information is not captured in the scope of your request, and is therefore irrelevant material under section 22 of the FOI Act. Accordingly, I have deleted this material from the documents and have given you access to the edited copy under section 11A of the FOI Act.

***Public Interest Conditional Exemptions – Personal Privacy***

Documents 15, 22 and 32 are partially exempt from release under subsection 47F(1) of the FOI Act, which relevantly states:

*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).*

Under the FOI Act, ‘personal information’ is defined as:

*...information or an opinion (including information forming part of a database), 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.*

These documents contain the names and/or contact details of private individuals. I consider that such information could be used to identify the individuals who have corresponded with the Department. Following consultation with those individuals about disclosure of documents 15, 22 and 32, I am satisfied that disclosure of these would be likely to harm their personal business interests and future willingness to provide consultative services to the Government. Accordingly, I am satisfied that the documents fall within the scope of the conditional exemption for personal privacy (section 47F).

Under subsection 11A(5), the Department must give you access to documents that are conditionally exempt from disclosure, unless disclosure would be contrary to the public interest. Subsection 11B(3) of the FOI Act lists factors in favour of disclosure and of these I consider the following to be relevant and applicable:

- disclosure would promote the objects of the FOI Act by providing the Australian community with access to information held by the Commonwealth Government.

The FOI Act does not list any factors against disclosure. With the assistance of the OAIC Guidelines I have identified the following as relevant factors against disclosure:

- disclosure could reasonably be expected to impede the provision of services from private individuals and the private sector to the Government; and,
- disclosure could reasonably be expected to inhibit the flow of public correspondence to the Government.

The personal information that has been exempted from disclosure under section 47F is contained within correspondence between this Department and third parties. That correspondence was received from stakeholders and has been used to inform briefings and policy options for the Attorney-General. Disclosure of such information could reasonably be expected to prejudice the future supply of information or assistance to the Government from private businesses and individuals. Further, I consider that disclosure of the identity of private individuals corresponding

with the Government is of limited use in promoting the objects of the FOI Act, promoting scrutiny of government processes or enhancing public debate.

Given the sensitive nature of personal information, I consider that the factors against disclosure outweigh the factors for disclosure. As a result, I am satisfied that material in these documents is exempt from disclosure under section 47F and that, under subsection 11A(4), access should not be granted.

### ***Exemptions – Documents containing material obtained in confidence***

I consider that material contained within some of the documents you have sought is exempt under section 45 of the FOI Act, which relevantly states:

- (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.*

Documents 15 and 21 contain communications made by private third parties to Departmental officers in emails, which were not intended for broader or public distribution. To found an action for breach of confidence, the OAIC Guidelines provide that the following criteria must be satisfied in relation to the information:

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

Documents 15 and 21 also contain the following disclaimer from the private sender:

*This electronic mail, including any attachments, is intended for the addressee only and may contain information that is either confidential or subject to legal professional privilege. Unauthorised reproduction, use or disclosure of the contents of this mail is prohibited....*

I am satisfied that this disclaimer demonstrates an intention on the part of the sender to maintain the confidentiality of information contained in the email between this Department and that private party. The necessary quality of confidentiality is maintained by the fact that the information has not been disseminated further to other agencies or parties and the disclaimer specifies that 'unauthorised reproduction, use or disclosure' is prohibited. The OAIC Guidelines state that 'it may be clear from an agency's actions whether the agency accepted an obligation of confidence and is maintaining that obligation'<sup>1</sup>. The intention of both this Department and the sender to maintain confidentiality is demonstrated by this Department's own disclaimer, which states:

*This email and any attachments may contain confidential or legally privileged information. You should not read, copy, use or disclose them without authorisation from the sender. If you think it was sent to you by mistake, please delete all copies and advise the sender.*

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<sup>1</sup> OAIC Guidelines p 27 at [at 5.145]

Disclosure of the information contained within documents 15 and 21 would prejudice the sender's private business activities and cause potential financial losses on the basis of public exposure. As such, I am satisfied that documents 15 and 21 meet the criteria required to found an action for breach of confidence under the common law, and are therefore exempt from disclosure under section 45 of the FOI Act.

### ***Public Interest Conditional Exemptions – Deliberative Processes***

I consider that material contained within some of the documents you have sought is exempt under section 47C of the FOI Act, which states that:

*(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

*(a) an agency; ...*

Documents 1, 2, 4 – 14, 17 – 21, 25 – 29, 31 and 35 – 50 contain deliberative material related to the functions of this agency in advising the Attorney-General on potential policy directions with respect to the reform of copyright legislation. These internal documents are drafts which disclose the “weighing up or evaluation of ... competing arguments or considerations that may have a bearing upon [the Government's] course of action”<sup>2</sup> with respect to legislative and policy directions. Any analysis of the Government's options regarding policy development and discussions with other Departmental officials with respect to policy or legislative options is intended to provide support to the Attorney-General in the formation of policy. These internal drafts are not intended to represent the final position or opinions of the Attorney-General or the Government. For example, some of the documents contain speculative options derived from research and materials submitted by non-government third parties. As such, I am satisfied that these documents contain opinions and advice created for deliberative purposes involved in the function of the Department, specifically providing support to the Attorney-General in the development of policy, and are therefore deliberative material that is conditionally exempt under section 47C of the FOI Act.

In accordance with the decision in *Secretary, Department of Employment, Workplace Relations and Small Business and Staff Development Centre* (2001) 114 FCR 301, I have not exempted or redacted information that is purely factual or operational. As explained in the OAIC guidelines at part 6.72 “the exclusion of purely factual material under s 47C(2)(b) is intended to allow disclosure of material used by the person who made the conclusion or decision following the deliberative process.” As a result, I have decided to grant access to factual material and publicly available material contained, for example, within documents 3, 15, 23, 24, 30, 33 and 34.

### ***Public interest considerations***

<sup>2</sup> *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at 606:

As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. 'Deliberation' means 'The action of deliberating; careful consideration with a view of decision': see *The Shorter Oxford English Dictionary*. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action . . . ."

As previously outlined, under the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest. Subsection 11B(3) of the FOI Act lists factors in favour of disclosure and of these I consider the following to be relevant and applicable:

- disclosure would promote the objects of the FOI Act by providing the Australian community with access to information held by the Commonwealth Government;
- disclosure would promote and inform debate on the reform of copyright legislation; and,
- disclosure would enhance the scrutiny of Government decision making.

While I consider that disclosure of the material in the documents would provide access to some information held by the Government and may provide some insight into policy making processes, because the documents are deliberative, the insight offered would be limited. As the information consists of drafts and incomplete briefings, the extent to which it could enhance scrutiny of government decision making is limited.

The FOI Act does not list any factors against disclosure. With the assistance of the OAIC Guidelines I have identified the following as relevant factors against disclosure:

- disclosure could reasonably be expected to impede the provision of full and frank advice to government as part of the policy development process; and
- disclosure could reasonably be expected to have an adverse effect on the ability of the Department to provide support to the Attorney-General, particularly in relation to government policy deliberation and presentation of material to the parliament.

I consider that the release of the documents could reasonably be expected to have an adverse effect on the future development of government policy. Disclosing advice prepared in confidence for the Attorney-General is likely to inhibit the future flow of information between the Minister and this Department. The ability and willingness of officers to provide robust advice and opinion on a wide range of policy options during the development of legislative proposals would be adversely affected if the deliberative material created as part of these processes could be prematurely disclosed to the public. For example, some of the documents contain the discussion of options for reforming the law which may not have been implemented. These documents are used to inform the final decision-making processes of the Minister. I consider that it is reasonably foreseeable that allowing public access to these deliberative documents would undermine the genuine official functions and decision-making process of the Government.

I have weighed the factors for and against releasing the documents, and I am satisfied that the factors against outweigh the factors in favour. While scrutiny of public decision making is encouraged, it is an integral function of this Department to provide the Attorney-General with candid and thorough advice, which would be inhibited by the disclosure of deliberative material in relation to decisions that are yet to be made. As a result, I am satisfied that material in these documents is exempt from disclosure under section 47C and that, under subsection 11A(4), access should not be granted.

In accordance with subsection 11B(4) of the FOI Act, I have not taken any irrelevant factors into account.

### **Outstanding charges**

We advised you that the revised estimated charge for processing your request was \$186.67. You agreed to that charge and we received your deposit of \$46.67 on 30 June 2014.

The actual amount for processing was calculated to be \$186.67.

Following payment of the outstanding amount of \$140, this Department will provide you with the documents to which I have decided to grant access by email, as discussed. Third parties consulted during the processing of your FOI request also have rights to seek a review of my decision.

### **Your review rights**

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner Review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### **Internal review**

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

email:      foi@ag.gov.au  
post:        Freedom of Information and Privacy Section  
              Office of Corporate Counsel,  
              Attorney-General's Department,  
              3-5 National Circuit  
              Barton, ACT 2600

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

### **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 Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online:      <https://forms.business.gov.au/aba/oaic/foi-review/>  
email:        enquiries@oaic.gov.au  
post:         GPO Box 2999, Canberra ACT 2601  
in person:   Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

**Questions about this decision**

If you wish to discuss this decision, please contact the Department by email at [foi@ag.gov.au](mailto:foi@ag.gov.au) or by telephone on (02) 6141 6666.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Walter', with a horizontal line underneath it.

Andrew Walter  
Assistant Secretary  
Commercial and Administrative Law Branch

**Attachments**

- A. Schedule of documents
- B. Invoice of costs