



Australian Government
Attorney-General's Department

14/7459

23 September 2014

Mr Brendan Molloy
By email only: foi+request-635-960b9b95@righttoknow.org.au

Dear Mr Molloy

Internal Review Outcome - Freedom of Information Request no. FOI14/097

The purpose of this letter is to advise you of my decision following your request for internal review of the Attorney-General's Department's decision to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Matthew Minogue, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

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.*

You were advised on 13 August 2014 of the decision to refuse access to 41 documents and grant access to edited versions of 9 documents out of the 50 documents identified as falling within the scope of your request. You asked for internal review of that decision on 25 August 2014.

In your request for review, you identified the following grounds for review:

- i) your request is '*entirely for factual information*' and therefore deliberative material should not be included within the scope of the request;
- ii) the public interest arguments for disclosure of the documents strongly outweigh the arguments provided against disclosure and for conditional exemption under section 47C; and,

iii) the Department's characterisation of some communications from stakeholders as deliberative is unreasonable.

I will consider these arguments in my reasons below.

In reviewing the Department's earlier decision, I identified 50 documents which fell within the scope of your request. With regard to those documents (set out in the schedule attached), I have decided to affirm the original decision to grant access to edited versions of 9 documents and to refuse access to the remaining 41 documents. 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.

Decision and reasons for decision

With regard to the documents identified in the attached schedule, 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*) and section 22 (*irrelevant material*).

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 submissions made in your request for internal review dated 25 August 2014;
- the FOI Act (specifically sections 22, 45, 47C and 47F); and,
- 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 the FOI Act, section 22 provides that the Department may release edited versions of documents with information that would reasonably be regarded as irrelevant to the scope of the request deleted.

I consider that documents 3, 15, 22, 23, 30, 32, 33 and 34 contain material that is not within the scope of your request. I affirm the original decision that the contact details of public servants and discussions of issues that are outside of scope should be deleted from these documents under

section 22 of the FOI Act. Accordingly, I affirm the decision that you should be provided with access to the edited copy under section 11A of the FOI Act.

In your request for internal review, you stated that your request is

“a request entirely for factual information that one might expect to be gathered during a deliberative effort, but in itself would not be deliberative in nature, as it is, hopefully, the factual basis for the deliberation” [Emphasis added].

On this basis that the above statement is a clarification of the scope of your request, I additionally consider that documents 1, 2, 4 – 14, 16, 17 – 21, 25 – 29, 31, 35 – 50 contain material that does not fall within the scope of your request. As discussed later in these reasons for my decision, these documents contain drafts, options papers and other deliberative material created for the purpose of advising the Attorney-General on potential policy directions. To the extent that these documents contain references to factual research materials not prepared by Departmental employees, those references cannot meaningfully be separated from the deliberative material surrounding it. This is consistent with the OAIC Guidelines, which state:

Where an agency ...is considering release of a document with a significant number of deletions, such that the document would be of little or no value to the applicant; the agency...should take a common sense approach in considering the value of preparing and releasing such a document instead of refusing access to the whole document.¹

As such, I am satisfied that these documents, in addition to being exempt from release under section 47C as discussed below, are also outside the scope of your request under section 22 of the FOI Act, given that they do not contain ‘*entirely factual information.*’ Given that any factual information is inextricably linked to deliberative material, I consider that this department should take a common sense approach in not releasing edited versions of these documents.

Public interest conditional exemptions – deliberative processes

I have decided to affirm the original decision that some of the documents you have sought access to are 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;*

I consider that documents 1, 2, 4 – 14, 16, 17 – 21, 25 – 29, 31, 35 – 50 contain an evaluation of competing options for reforming Australian copyright legislation, intended to inform the decision making process of the Government².

¹ OAIC Guidelines at [8.38]

² Consistently with the Administrative Appeals Tribunal’s definition of ‘deliberative processes’: see *Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588 at [60]*.

You submit in your request for review that:

It is the underlying factual basis that we are interested in, not the deliberative processes layered on top. We want to be able to see the information that these views were derived from so we can better understand Government positions on these matters when they come to fruition.

As discussed in 'Irrelevant Material' above, to the extent that these documents contain any factual research material, these materials are inextricably linked to deliberations regarding the potential policy directions of the Government.

In your request for internal review you raised the following contention:

It is also an unreasonable suggestion to claim that an email from a stakeholder regarding something the working group was discussing would be considered deliberative, yet if the same stakeholder were to forward your internal working group a press release purporting a certain position on the matter that it would not be considered deliberative.

I consider that communications with stakeholders may reasonably be separated into a number of categories. For example, document 7 is a stakeholder proposal which informs the options presented to the Attorney-General and thereby forms part of the deliberative material from which policy decisions may be made, rather than the final position or opinions of the Attorney-General or the Government. In contrast, document 32 contains purely administrative and factual communications between this Department and a stakeholder, and, as is consistent with the scope of your request for 'entirely factual material,' that information has not been exempted from release. The content of communications with stakeholders, like that of any communications, must be evaluated on an individual basis. Whether or not a communication contains deliberative content is a material question of fact³. As such, I do not agree that stakeholder communications should be 'consistently' categorised as only deliberative or not deliberative without regard to the nature of each communication.

As such, I am satisfied that documents 1, 2, 4 – 14, 16, 17 – 21, 25 – 29, 31, 35 – 50 contain opinions and advice created for deliberative purposes involved in the development of policy, and are therefore deliberative material that is conditionally exempt under section 47C of the FOI Act.

Public interest consideration

Under subsection 11A(5) of the FOI Act, the Department must give you access to documents that are conditionally exempt from disclosure, unless disclosure would be contrary to the public interest.

³ OAIC Guidelines:

[8.20]: *An administrative decision must be based on facts. A central obligation of a decision maker is therefore to identify and separate the 'material questions of fact'; gather and assess information or evidence to support each finding of fact; and explain how each finding of fact was reached. ...*

[8.22] *The obligation rests on a decision maker to be reasonably satisfied that a finding of fact can or cannot be made on the available evidence. Unless legislation states otherwise, there is no onus or burden on a party to prove that a fact does or does not exist. In discharging the obligation to be reasonably satisfied, the decision maker may have to draw inferences from the available evidence or information known to the decision maker. The evidence should be logically capable of supporting the decision maker's findings of fact.*

In your request for review you raised the following issues with regard to the public interest in disclosure:

"The AGD has already demonstrated there is a fairly strong public interest argument for disclosure given the 50% discount on the fees."

In the Revised Notice of Charges sent to you by this Department on 16 June 2014, it was noted that the decision maker's *"position with respect to the assessment of charges will not bear upon any final decision of this Department in relation to the disclosure of the documents requested"*.

You also relevantly submit that:

"Even in the case where one would argue my assertion is not the case, s 47C only allows exemption on the basis that the public interest arguments are not strongly outweighed by factors against disclosure. The public interest arguments I and even yourself have provided strongly outweigh the arguments you have provided against. The arguments you have provided against disclosure are not public interest arguments at all; they are arguments for the protection of AGD bureaucratic procedure against the public interest that would be derived from disclosure."

Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider that the following are relevant to your request:

- promoting the objects of the FOI Act by providing the Australian community with access to information held by the Commonwealth Government;
- promoting and informing debate on the reform of copyright legislation; and,
- enhancing the scrutiny of government decision making.

However, I am not convinced that these factors outweigh the reasons weighing against disclosure of these documents. I consider that, given the nature of these documents are being drafts, proposals and incomplete representations of internal opinion, not the settled policy position of Government, they will not be instrumental in informing public debate accurately. While these documents are used to inform the decision-making process of Government, they are not demonstrative of the actual decision making process and therefore the extent to which they could enhance scrutiny of government decision making is limited.

I also consider that it is reasonably foreseeable that allowing public access to deliberative documents will undermine the genuine exercise of official functions of this Department in informing the decision-making processes of the Government. I am satisfied that the public interest in disclosure is outweighed by the adverse impact upon the future flows of information from this Department to the Attorney-General. As a result, I affirm the original decision and find that the material in these documents is exempt from disclosure under section 47C and, 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.

Public Interest Conditional Exemptions – Personal Privacy

I am satisfied that documents 15, 22 and 32 contain information about individuals which, if disclosed, would reasonably be expected to reveal the identity of those individuals. Based upon the original consultation with those individuals, I consider that disclosure of the personal details of these people would be likely to harm their personal business interests and willingness to consult with Government agencies in the future. As such, I affirm the original decision that these documents should be partially exempt from release under subsection 47F(1) of the FOI Act.

Public interest considerations

Whilst under section 11B(3), disclosure of documents 15, 22 and 32 would promote the objects of the FOI Act by providing public access to documents held by the Commonwealth Government, I do not consider that this factor outweighs the adverse impact of disclosing these documents. Disclosure of these documents could reasonably be expected to inhibit the future flow of public correspondence to the government, adversely affect future Government consultations and impede the provision of services from private individuals and the private sector to the Government. I am accordingly satisfied that the public interest for disclosure does not outweigh the factors against disclosure, and these documents should be 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 affirm the original decision that documents 15 and 21 contain information that was provided to this Department in confidence. Given the intention of this Department and the senders is clearly demonstrated by disclaimers stating that the content of these documents is ‘confidential or legally privileged information,’ I am satisfied that disclosure of these documents could prejudice the sender’s private business activities and cause potential financial losses on the basis of public exposure, and give rise to a cause of action against this Department. As such, I consider that documents 15 and 21 should be exempt from release under section 45 of the FOI Act.

Outstanding charges

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. 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.

On 13 August 2014, you were advised that in order to receive the documents being released to you as part of the Department’s decision, you were required to pay the outstanding amount of charges, being \$140.00.

In your request for review you stated that:

“The AGD has already demonstrated there is a fairly strong public interest argument for disclosure given the 50% discount on the fees”...

And further:

"You may also note that my request does not state that I am looking for publicly accessible information, so much of the information provided in the schedule of documents that is marked "exempt in part", if not all, seems to be out of scope for my request, and I find it an offensive suggestion to attempt to charge me a further \$140 for publicly accessible press releases."

Whilst this decision is not an internal review of the decision to impose nor reduce charges, I note that it is open to this Department to impose a charge even though the public interest purpose for disclosure has been established because of the weight of factors against reducing the cost⁴. In *Baljurda Comprehensive Consulting Pty Ltd and Australian Agency for International Development*⁵, the Information Commissioner outlined the following reasons why a decision maker might decide to continue to impose a charge, even where giving access to documents would be in the public interest:

- *the applicant can be expected to derive a commercial or personal benefit or advantage from being given access and it is reasonable to expect the applicant to meet all or part of the FOI charge;*
- *the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public;*
- *the information in the documents has already been published by an agency and the documents do not add to the public record; or,*
- *the applicant has requested access to a substantial volume of documents and significant work would be required to process the request.*

Charges are not imposed for the amount or nature of documents released. Consistently with the OAIC Guidelines⁶, charges are imposed to reflect the cost of processing your request, which includes searching for, locating and retrieving documents, giving the documents consideration, applying exemptions and writing reasons for the Department's decision.

As previously outlined, 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.

Information Commissioner Review

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. 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

⁴ OAIC FOI Guidelines [4.50] and see also *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8 (*Baljurda*).

⁵ *Baljurda*, n2 above at [24]-[25]

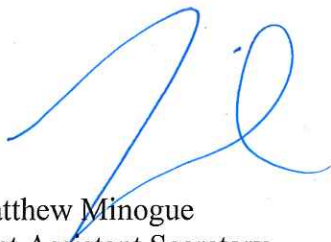
⁶ OAIC Guidelines [4.31] – [4.45]

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 email foi@ag.gov.au or telephone (02) 6141 6666.

Yours sincerely



Matthew Minogue
First Assistant Secretary
Civil Law Division

Attachments

1. Schedule of documents