



AFP

AUSTRALIAN FEDERAL POLICE

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Our ref: CRM2015/23

3 November 2014

Mr Henare Degan

Foi+request-678-79f4e6e9@righttoknow.org.au

Dear Mr Degan,

Freedom of Information request re: new psychoactive substances

I refer to your application dated 13 July 2014, under the *Freedom of Information Act 1982* (the Act) seeking the following:

*"please provide the following senate file listed in your Harradine report:
2013/00010435 New Psychoactive Substances."*

Attached at Annexure A to this letter is my decision and statement of reasons for that decision. A "Schedule of Documents" identified as falling into the scope of your request is at Annexure B.

Yours sincerely,

Jacqueline Ellery
A/Coordinator
Information Access (Freedom of Information)
Policy and Governance

**STATEMENT OF REASONS RELATING TO AN FOI REQUEST BY
MR HENARE DEGAN**

I, Jacqueline Ellery, A/Coordinator, Freedom of Information Team, am an officer authorised under section 23 of the Act to make decisions in relation to the Australian Federal Police.

What follows is my decision and reasons for the decision in relation to your application.

BACKGROUND

On 13 July 2014, this office received your letter/application in which you requested:

"please provide the following senate file listed in your Harradine report: 2013/00010435 New Psychoactive Substances."

On 5 August 2014 a further extension of time was granted by the Office of the Australian Information Commissioner (OAIC) pursuant to section 15AB of the Act to notify you of a decision by 12 September 2014.

On 24 September 2014 a further extension of time was granted by the Office of the Australian Information Commissioner (OAIC) pursuant to section 15AC of the Act to notify you of a decision by 11 October 2014.

Due to a significant increase in the number and complexity of FOI requests received by the AFP, unfortunately your request has not been finalised within the required timeframe and I apologise for any inconvenience this may have caused you.

SEARCHES

In relation to this request, the following searches for documents have been undertaken:

- a) a search of all records held by the relevant line area within the AFP; being the Legislation Program.

DECISION

I have identified thirty-nine (39) documents relevant to your request. A schedule of each document and details of my decision in relation to each document is at Annexure B.

I have decided that some of the documents that relate to your request are released with deletions pursuant to subsections 47F, 47C, 47E(d) and 42(1) of the Act.

My reasons for this decision are set out below.

WAIVER OF CHARGES

Further, given that the request has exceeded all statutory timeframes as outlined at Section 15 of the Act, the AFP is not able to impose any fees or charges as outlined at Regulation 5(2)&(3) of the *Freedom of Information (Charges) Regulations 1982*.

REASONS FOR DECISION

I find that some of the documents relevant to your request are partially exempt under the provisions of the Act, as set out in the Schedule, for the reasons outlined below.

Folios to which subsection 42(1) apply:

Subsection 42(1) of the Act provides that:

"(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege."

The documents or parts of documents identified in the Schedule as exempt contain information brought into existence for the purpose of obtaining legal advice and for use in litigation. I am satisfied that these documents would be privileged from production in legal proceedings on the grounds of legal professional privilege. The AFP has not waived its right to hold privilege over these folios.

I find that release of the documents or parts of the documents would be an unreasonable disclosure under subsection 42(1) of the Act.

Folios to which section 47C apply:

Section 47C of the Act provides 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 an agency or Minister or of the Government of the Commonwealth."*

The documents or parts of documents identified in the Schedule as exempt under this section of the Act contain information, the release of which, is exempt on the grounds that it is an internal working document of the AFP. Provision of these folios would disclose matter in the nature of consultation and deliberation that has taken place for the purposes of the deliberative processes involving the operational functions of the Australian Federal Police.

Further, the document records advice, recommendations and opinion in material prepared by the AFP during which time members were required to communicate directly, freely and confidentially on issues which are considered to be sensitive.

There is also public interest in protecting the integrity of the decision-making process by separating the final decision-making policy or policy making steps and the reasons therefore from the opinions and advice of the officials who contributed to the consideration.

Subsection 47C(2) provides that:

- “...
(2) *Deliberative matters does not include either of the following:*
(a) *operational information (see section 8A);*
(b) *purely factual material.*

As the opinion in this information involved analysis of the facts of the review to form a judgement, I am satisfied that this information is not purely factual material and therefore is not excluded under subsection 47C(2) of the Act.

I have considered the public interest factors both in favour and against disclosure of the information in these folios to determine whether disclosure would be contrary to the public interest.

In relation to the factors favouring disclosure, I believe the following are relevant:

- (a) the general public interest in access to documents as expressed in sections 3 and 11 of the FOI Act; and
- (b) the public interest in people being able to scrutinise the operations of a government agency and in promoting governmental accountability and transparency.

In relation to the factors against disclosure, I believe that the following are relevant:

- (c) if such information was disclosed, it would restrict the ability of AFP employees in future to record their opinions directly, freely and confidentially during an investigation process;
- (d) disclosure would prejudice the agency's ability to form an analysis and present its recommendations in relation to law enforcement investigations; and
- (e) that if information concerning the documents was revealed, it may compromise the AFP's operations and damage relations with external stakeholders.

I have considered the public interest factors both in favour and against disclosure and in my view, in relation to these documents, the factors at (c), (d) and (e) against disclosure outweigh the factors in favour of disclosure. I find that release of the documents or parts of the documents would be an unreasonable disclosure under section 47C of the Act.

Folios to which subsection 47E(d) apply:

Subsection 47E(d) of the Act provides that:

"A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- ...
- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency;...*"

The documents or parts of documents identified in the schedule as exempt under this section of the Act contain information, the release of which, would have a substantial adverse effect on the conduct of AFP operations, specifically its operational functions in ensuring public safety, as it reveals how information is obtained and actioned for the purposes of protecting the public.

I have considered the public interest factors both in favour and against disclosure of the information in these folios.

In relation to the factors favouring disclosure, I believe the following are relevant:

- (a) the general public interest in access to documents as expressed in sections 3 and 11 of the FOI Act; and
- (b) the public interest in people being able to scrutinise the operations of a government agency and in promoting governmental accountability and transparency.

In relation to the factors against disclosure, I believe that the following are relevant:

- (c) the need for the agency to maintain the confidentiality with regard to the subject matter and the circumstances in which the information was obtained and collated;
- (d) that if information concerning the operation was revealed, it may have a substantial adverse effect on the conduct of similar operations in the future; and
- (e) if such information was disclosed, it may prejudice security, law enforcement and public safety.

While there is a public interest in providing access to documents held by the AFP, I have given greater weight to factors (c), (d) and (e) above and conclude that on balance, disclosure is not in the public interest, given the need to ensure public safety during police operations and the effectiveness of current procedures. I find that release of the documents or parts of the documents would be an unreasonable disclosure under subsection 47E(d) of the Act.

Folios to which section 47F apply:

Section 47F of the Act provides that:

- "(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)."*

The documents or parts of documents identified in the Schedule as exempt under this section of the Act contain personal information of third parties. Personal information is information or an opinion about an individual whose identity is known or easily ascertainable. I find that these documents contain personal information.

I have considered the public interest factors both in favour and against disclosure of the information in these folios.

In relation to the factors favouring disclosure, I believe the following are relevant:

- (a) the general public interest in access to documents as expressed in sections 3 and 11 of the FOI Act;
- (b) the extent to which the information is well known;
- (c) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the documents;
- (d) the availability of the information from publicly accessible sources;
- (e) the current relevance of the information; and
- (f) the circumstances in which the information was obtained and any expectation of confidentiality.

In relation to the factors against disclosure, I believe that the following are relevant:

- (g) prejudice the protection of an individual's right to privacy;
- (h) impede the flow of information to the police;
- (i) the need for the agency to maintain the confidentiality with regard to the subject matter and the circumstances in which the information was obtained; and
- (j) if such information was disclosed, it may discourage public cooperation in AFP investigations.

While there is a public interest in providing access to documents held by the AFP, I have given greater weight to factors (g) to (j) above and conclude that on balance, disclosure is not in the public interest. The AFP has not received consent regarding the release of some personal information regarding this request, disclosure of that information would be contrary to an individuals' right to the protection of their personal privacy. I find that the release of these documents or parts of documents would be an unreasonable disclosure of personal information and are therefore exempt under section 47F of the Act.

EVIDENCE/MATERIAL ON WHICH MY FINDINGS WERE BASED

In reaching my decision, I have relied on the following documentary evidence:

- ❖ the scope of your application;
- ❖ the contents of the documents listed in the attached schedule;
- ❖ advice from AFP officers with responsibility for matters relating to the documents to which you sought access;
- ❖ consultation with relevant Commonwealth Agencies;
- ❖ *Freedom of Information Act 1982*;
- ❖ Guidelines issued by the Department of Prime Minister and Cabinet; and

- ❖ Guidelines issued by the Office of the Australian Information Commissioner.

**** YOU SHOULD READ THIS GENERAL ADVICE IN CONJUNCTION WITH THE LEGISLATIVE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT 1982.**

REVIEW AND COMPLAINT RIGHTS

If you are dissatisfied with a Freedom of Information decision made by the Australian Federal Police, you can apply for an internal or Information Commissioner (IC) Review. You do not have to apply for Internal Review before seeking an IC review.

You do not need to seek a review by either the AFP or the IC should you wish to complain about the AFP's actions in processing your request.

REVIEW RIGHTS under Part VI of the Act

Internal Review by the AFP

Section 53A of the Act gives you the right to apply for an internal review in writing to the Australian Federal Police (AFP) within 30 days of being notified of a decision. No particular form is required. It would assist the independent AFP decision-maker responsible for the internal review if you set out in the application, the grounds on which you consider that the decision should be reviewed.

Section 54B of the Act provides that the internal review submission must be made within 30 days. Applications for a review of the decision should be addressed to:

Government Relations
Information Access (FOI)
Australian Federal Police
GPO Box 401
Canberra ACT 2601

REVIEW RIGHTS under Part VII of the Act

Review by the Information Commissioner (IC)

Alternatively, Section 54L of the Act gives you the right to apply directly to the IC or following an internal review by the AFP. In making your application you will need to provide an address for notices to be sent (this can be an email address) and a copy of the AFP decision. It would also help if you set out the reasons for review in your application.

Section 54S of the Act provides for the timeframes for an IC review submission. For an *access refusal decision* covered by subsection 54L(2), the application must be made within 60 days. For an *access grant decision* covered by subsection 54M(2), the application must be made within 30 days.

Applications for a review of the decision should be addressed to:

Office of the Australian Information Commissioner
GPO Box 2999
Canberra ACT 2601

On 13 May 2014, as part of the 2014-15 Federal Budget, the Government announced that the OAIC would be abolished effective from 31 December 2014. For details on how this will affect the processing of IC review applications, visit www.oaic.gov.au/info-on-oaic-shut-down-and-foi-reviews-and-complaints.

The OAIC encourages parties to an IC review to resolve their dispute informally, and encourages agencies to consider possible compromises or alternative solutions to the dispute in this matter. The AFP would be pleased to assist you in this regard.

Further information about the process for IC review can be found in Part 10 of the Guidelines which are available on our website at <http://www.oaic.gov.au/publications/guidelines.html>.

RIGHT TO COMPLAIN under Part VIIB of the Act

Section 70 of the Act provides that a person may complain to the IC about action taken by the Australian Federal Police in relation to your application.

A complaint to the IC may be made in writing and identify the agency against which the complaint is made.

The IC may be contacted on 1300 363 992. There is no particular form required to make a complaint, but the complaint should set out the grounds on which you consider the action should be investigated.