

Our ref: FOI-2020-10085

14 January 2021

Anonymous

Emailed to: foi+request-6894-e9353a90@righttoknow.org.au

Dear Anonymous

I refer to your email dated 14 November 2020 in which you requested access to documents under the *Freedom of Information Act 1982* (the **FOI Act**). Your request was framed in the following way:

‘...any documents contained within Michael Manthorpe’s email account containing the word ‘Knaus’...’

This letter constitutes notice of my decision on your request for access. I am authorised to make decisions on behalf of our Office under s 23 of the FOI Act.

Decision

Our Office identified 27 documents relevant to your request. I have decided to grant you full access to two of these documents and to provide you with partial access to 17 documents. I have decided to exempt eight documents in full from disclosure. My reasons for this decision are set out at **Attachment A** to this letter.

A schedule setting out the relevant documents is at **Attachment B**.

Our Office identified the documents by searching the Ombudsman’s email account for any material falling within the scope of your request.

Third party consultation

During the processing of your request we consulted certain third parties that would potentially be affected by the release of the documents. Those third parties have until 13 February 2021 to seek a review of my decision, after which time (subject to the outcome of any such review), we will provide the released documents to you.

Review rights

Internal review

Under s 54 of the FOI Act, you may apply in writing to our Office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.

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

Review by the Australian Information Commissioner

Under s 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 at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>
- via email to foidr@oaic.gov.au
- by overland mail to GPO Box 5218 SYDNEY NSW 2001

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

Complaints to the Information Commissioner

You may complain to the Information Commissioner about action taken by the Ombudsman in relation to your FOI request.

While there is no particular form required to make a complaint, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way in which your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

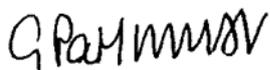
You may lodge your complaint in one of the following ways

- online at:
https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- by email to FOIDR@oaic.gov.au.

Contacts

If you require clarification of any of the matters discussed in this letter you should contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely



Gregory Parkhurst
Senior Legal Officer

ATTACHMENT A – Reasons for decision

Material taken into account

In making my decision I had regard to the following:

- the terms of your request
- the content of the documents to which you sought access
- consultation responses from third parties approached in accordance with the FOI Act
- consultation responses from other, relevant agencies
- advice from other, relevant Ombudsman officers
- relevant provisions of the FOI Act
- the Australian Information Commissioner's Guidelines on FOI, available at www.oaic.gov.au (**the Guidelines**).

Findings of fact and reasons for decision

Where the schedule of documents at **Attachment B** indicates that an exemption has been applied to a document, or part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document, or part of that document, are set out below.

I have formed the view that documents 13 to 20 inclusive in the Schedule of documents to this decision are exempt in full, either under s 47, or in the alternative, s 47G of the FOI Act.

Exemption – trade secrets or commercially valuable information – s 47

Under s 47 of the FOI Act, a document is an exempt document if its disclosure under the Act would disclose:

- (a) trade secrets; or
- (b) any other information having a commercial value that would be, or could reasonably be expected to, be destroyed or diminished if the information were disclosed.

I have decided to exempt in full documents 13 to 20 inclusive in the Schedule of documents to this decision. This exemption is made on the basis that the relevant documents contain commercially valuable information that would, or could reasonably be expected to be destroyed or diminished if the relevant information was disclosed.

The relevant documents contain briefings provided to the Ombudsman by a media monitoring organisation.

In considering whether the relevant documents contain material having a commercial value, I have taken into account that the information contained in the relevant documents is known only to the organisation which created them, and the particular clients which that organisation selected to receive them, which includes the Office of the Commonwealth Ombudsman. None of the relevant documents are publicly available. They were provided to this Office on the understanding that the Ombudsman would not distribute them more widely.

The method of preparation of the material set out in the relevant documents is unique to the organisation which created them. The creation of the relevant documents reflects the organisation's experience and expertise in their design. For these reasons, I am satisfied that there is intrinsic commercial value in the intellectual property of the relevant documents. In reaching this view, I have concluded that a genuine 'arms-length' buyer would be prepared to pay for the intellectual property contained within those documents.

I have also taken into account that the method of preparation of the relevant documents continues to be used today by the organisation which created them. Accordingly, I am satisfied that the relevant documents continue to have commercial value which remains relevant to the organisation's ongoing commercial affairs.

In my view, disclosure of the information contained in documents 13 to 20 inclusive would disclose commercially valuable information to the organisation's competitors. The relevant organisation has expended significant resources and time to develop its product. If the relevant material was released publicly, it would disclose information provided to the Ombudsman's Office in confidence, which was not expected to be disclosed under the FOI Act. I have consulted the organisation which created the relevant documents about their possible disclosure. The relevant organisation does not agree with their disclosure in response to an FOI request. Release of the relevant documents would disclose information about techniques and ideas which the relevant organisation has developed over time.

In making this decision, I have taken into account that any released documents would be published at <https://www.righttoknow.org.au> where any individual, including representatives of competitor organisations, would be able to access them. I am satisfied that disclosure of the relevant documents, particularly to competitor organisations, would pose a risk to the business operations of the organisation which created them. Disclosure would destroy, or at least diminish the value of the intellectual property contained in the relevant documents. For these reasons, I have refused access to documents 13 to 20 inclusive under s 47(1)(b) of the FOI Act.

Conditional exemption - Public interest test – certain agency operations: s 47E

I have decided to exempt the direct email and telephone contact information of Ombudsman Office staff and Department of Home Affairs (Home Affairs) staff where they appear in the documents falling within the scope of your request. These exemptions are made on the basis that the s 47E conditional exemption applies to the information and release would be contrary to the public interest.

Section 47E relevantly provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to ...:

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

Section 11A(5) requires that access be given to a conditionally exempt document, 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.'

Ombudsman's office and Home Affairs staff contact details

I consider release of direct telephone and email contact details of individual Ombudsman Office and Home Affairs staff could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Ombudsman's Office and Home Affairs.

I have concluded that release would significantly adversely affect the ability of the Ombudsman's Office and Home Affairs to manage contact with members of the public in a manner that best supports the work of the Ombudsman's Office and Home Affairs as a whole and the efficient handling of the day to day responsibilities of individual officers. The Ombudsman's Office and Home Affairs have established certain arrangements so as to efficiently and effectively manage communication with members of the public.

In addition, there is a risk that publication of staff direct telephone and email contact details could result in unsolicited inappropriate approaches from members of the public, or personal attack and harassment. Noting that Commonwealth agencies are subject to the provisions of the *Work Health and Safety Act 2011*, unsolicited contacts from members of the public could expose affected staff to work health and safety issues by way of vexatious communications that could include threats to their health and safety. Under the Work Health and Safety Act, agencies are required to take reasonable action to eliminate or minimise the risks associated with aggression by members of the public.

Members of the public can contact Home Affairs using the contact information available at: <https://www.homeaffairs.gov.au/help-and-support/contact-us>.

Members of the public can contact this office on our public contact number, 1300 362 072, at the general email address, ombudsman@ombudsman.gov.au and on facsimile number 02 6276 0123, unless individual contact arrangements have been made. The release of alternative contact options would undermine efficient and effective engagement with the public, records management, and the ability of staff with other responsibilities to undertake their assigned tasks in an efficient manner.

Public interest test

In considering whether disclosure of direct telephone and email contact details of Ombudsman's Office and Home Affairs staff would be contrary to the public interest, I have considered whether there are any factors favouring disclosure, including the factors identified in s 11B(3) of the FOI Act.

While there is a public interest in promoting the objects of the FOI Act which include increased scrutiny and review of the Government's activities, I do not believe release of individual officer contact details would enhance or promote such scrutiny. Release of this information would not inform debate on any matter or promote oversight of public expenditure, and the deleted material is not your own personal information. In my view, disclosure of this information would be contrary to the public interest given the significant adverse impact I consider it could reasonably be expected to have on the proper and efficient operations of this Office and Home Affairs.

Conditional exemption - Public interest test – certain agency operations: s 47E

I have decided to exempt from Document 8 in the schedule of documents certain information concerning an investigation under the *Public Interest Disclosure Act 2013* (the PID Act). This exemption is made on the basis that the s 47E conditional exemption applies to the information and release would be contrary to the public interest.

Section 47E relevantly provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to ...:

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

Section 11A(5) requires that access be given to a conditionally exempt document, 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.'

I have formed the view that disclosure of the relevant information could reasonably be expected to have a substantial adverse effect on the ability of the Ombudsman to discharge applicable functions set out in the PID Act.

The Office of the Commonwealth Ombudsman performs a key role in overseeing and reporting on the operations of the Public Interest Disclosure Scheme. Under the Scheme, this office is authorised to receive disclosures about other government agencies, and to investigate complaints about agency handling of disclosures under the PID Scheme.

It is critical to the effective operation of the PID Scheme that information provided to the Ombudsman's Office is treated confidentially, so that the Ombudsman can properly assess disclosures and respond appropriately to complaints received. Confidentiality ensures that the Ombudsman can assess all relevant information concerning disclosable conduct and provide outcomes to individuals who contact this office, in accordance with relevant provisions of the *Ombudsman Act 1976*. Confidentiality also assists the Ombudsman to provide effective assistance to other agencies under s 62 of the PID Act. Disclosure of confidential information concerning matters under the PID Act risks compromising the integrity of the PID Scheme which relies on effective oversight by the Ombudsman for its effective operation.

The Ombudsman has established processes to maintain the security of PID related information, including need to know access and auditing of access to relevant records. If confidential information concerning investigations under the PID Act was disclosed, this could have the effect of discouraging applicants and witnesses from coming forward to make disclosures or provide witness statements, out of concern that it is not possible to keep their disclosures or evidence confidential. Such circumstances would also discourage agencies from seeking the Ombudsman's assistance in relation to the operation of the PID Act.

Public Interest test

In deciding whether or not access should be given to the relevant information on the basis of public interest, I have taken a number of matters into account, including the public interest factors for and against disclosure, as outlined in the Guidelines.

I have concluded that the public interest is best served by exempting this material from disclosure, on the grounds that:

- Disclosure could reasonably be expected to prejudice this agency's ability to obtain confidential information in the future.
- Disclosure would have a substantial adverse effect on the ability of the Ombudsman to discharge functions under the PID Act, which contains secrecy provisions creating an offence of disclosing information which would identify a discloser.

- Disclosure would prejudice the effective conduct of investigations, audits or reviews by the Ombudsman. This would arise where potential disclosers are unwilling to identify themselves, limiting the ability of the Ombudsman to assess complaints and provide outcomes concerning matters under the PID Scheme.

Public interest conditional exemption – personal privacy: section 47F

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

Section 11A of the FOI Act provides that while an agency must give a person access to a document if it is conditionally exempt, access may be refused if the document’s disclosure would, on balance, be contrary to the public interest.

Personal information

‘Personal information’ is defined in section 4 of the FOI Act 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...’

The elements of personal information are:

1. It relates only to a natural person (e.g. not a company),
2. It says something about the individual,
3. It may be in the form of an opinion, it may be true or untrue, and it may form part of a database, and
4. The individual’s identity is known or is reasonably ascertainable using the information in the document.

The documents contain personal information in the form of names of certain Ombudsman Office and Home Affairs staff. I am satisfied that the relevant information constitutes personal information under the definition set out in s 4 of the FOI Act. The identity of the relevant individuals is reasonably ascertainable from the relevant information.

Disclosure unreasonable

If information is personal information, it will be conditionally exempt if its disclosure would be ‘unreasonable’. In considering whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act requires me to take into account:

1. The extent to which the information is well known,
2. Whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document,
3. The availability of the information from publicly accessible sources, and
4. Any other matter I consider relevant.

The relevant information is not well known. The individuals to whom the information relates are not generally known to be associated with the information contained in the relevant documents. The relevant information is not available from public sources. I am satisfied that the relevant names are specific to the relevant individuals. I have not consulted the relevant individuals about the possible disclosure of their personal information. In my view it is reasonable to conclude that the relevant individuals would have an interest in the decision whether to disclose their personal information in response to a request under the FOI Act.

In my view, it is reasonable to expect that disclosure of staff members' names could subject the relevant staff to the possibility of inappropriate contact from complainants or other individuals dissatisfied by their dealings with this Office and Home Affairs. This, in turn, could reasonably be expected to have a substantial adverse effect on the relevant personnel and to the management of those personnel within the Ombudsman's Office and Home Affairs.

For the reasons set out in this decision, I have formed the view that the names of the relevant individuals are conditionally exempt under s 47F(1) of the FOI Act. In my view, release of such information would involve the unreasonable disclosure of personal information.

Disclosure not in the public interest

In deciding whether or not access should be given to this information on the basis of public interest I have taken a number of matters into account. These matters include the public interest factors for and against disclosure as outlined in the Guidelines, as well as matters specific to the functions and operating environment of Home Affairs and the Ombudsman's Office.

In my opinion, the public interest is best served by withholding this information on the ground that:

- Release of this information could reasonably be expected to prejudice the protection of a person's right to privacy.
- Disclosure of the relevant material could reasonably be expected to result in certain inefficiencies in this Office and Home Affairs.

Pursuant to subsection 11A(5) of the FOI Act, I have concluded that the relevant material is not required to be disclosed because disclosure at this time would be, on balance, contrary to the public interest.

Further, I am of the view that disclosure of the relevant information would not achieve any of the following outcomes provided for by the FOI Act:

- Promote the objects of the FOI Act,
- Inform debate on a matter of public importance,
- Promote effective oversight of public expenditure, or
- Allow you access to your own personal information.

Public interest conditional exemption – business information: section 47G

Under s 47G(1) of the FOI Act a document is conditionally exempt if its disclosure would involve releasing information about the business, commercial or financial affairs of a person/an organisation in circumstances which:

- (a) would, or could reasonably be expected to, adversely affect the relevant person/organisation, in an unreasonable way, with regard to its business, commercial or financial affairs; or

- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of administration of a law of the Commonwealth or a Territory or the administration of matters administered by an agency.

Section 11A of the FOI Act provides that while an agency must give a person access to a document if it is conditionally exempt, access may be refused if the document's disclosure would, on balance, be contrary to the public interest.

Under s 47G(1)(a) and s 47G(1)(b) of the FOI Act, I have exempted in full from disclosure documents 13 to 20 inclusive in the Schedule of Documents at **Attachment B**.

Information in respect of business affairs (s 47G(1)(a))

The Australian Information Commissioner's FOI Guidelines explain that the business information exemption is intended to protect the interests of third parties dealing with the Government. The operation of s 47G of the FOI Act depends on the effect of disclosure, rather than the precise nature of the information itself. However, the information must have some relevance to a person in respect of their business or professional affairs, or the business, commercial and financial affairs of an organisation.

I have carefully considered documents 13 to 20 inclusive in the schedule of documents. The relevant documents were created by a commercial organisation as part of a business activity performed under a contract to provide services for certain other organisations including the Commonwealth Ombudsman. I am satisfied that the relevant documents can be categorised as business information for the purposes of s 47G, as they relate to the business affairs of the organisation which created them in its dealings with other organisations including the Commonwealth Ombudsman.

Unreasonable adverse effect

In deciding whether disclosure of a document containing business information would be unreasonable for the purposes of s 47G(1) of the FOI Act, I am required to balance the public interest and the private interests of the relevant business. Relevantly, paragraph 6.187 of the Guidelines provides that a decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a) but this does not amount to the public interest test of s 11A(5) which follows later in the decision process.

Paragraph 6.188 of the FOI Guidelines further explain that the test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect.

In assessing whether disclosure would have an unreasonable adverse effect on the business affairs of the organisation which created them, I have taken into account that the information contained in the relevant documents is commercially sensitive and was provided to certain other organisations including the Commonwealth Ombudsman on a confidential basis. The relevant information is not publicly available. The relevant information contains the intellectual property of the organisation which created them. The relevant organisation produced the relevant documents for its clients, including the Commonwealth Ombudsman, under an agreement that the contents of the relevant documents would not be publicly disclosed. Disclosure of the information contained in the relevant documents would disclose the intellectual property contained in the relevant documents to competitor organisations.

The intellectual property contained in the relevant documents reflects the techniques and ideas which its creator organisation has developed over an extended period of time. Disclosure would enable competitor organisations to adopt the techniques and ideas implemented in the relevant documents. Under these circumstances, the commercial value of the relevant documents would be lost.

I have not identified any public interest grounds which would make it reasonable to disclose Documents 13 to 20 inclusive. There is no evidence, for example, that disclosure of the relevant documents would reveal that the relevant organisation's business activities pose a threat to public safety or that activities of the relevant organisation would damage the natural environment, or that the documents contain evidence of unlawful conduct.

Accordingly, having considered the public and private interests of the relevant business organisation in relation to the contents of Documents 13 to 20 inclusive, I am satisfied that disclosure of those documents would have an unreasonable adverse effect on the business affairs of that organisation.

Disclosure not in the public interest

In deciding whether or not, on the basis of public interest, access should be given to the information contained in Documents 13 to 20 inclusive, I have taken a number of matters into account. These matters include the public interest factors for and against disclosure as outlined in the Guidelines.

I acknowledge that there is a public interest in ensuring that commercial arrangements entered into by the Commonwealth are meaningful, properly administered and a reasonable expenditure of public money. I accept that disclosure of the relevant documents would, to a limited extent, promote transparency of the work of the government, and accountability in relation to public administration.

However, I give greater weight to the fact that disclosure of Documents 13 to 20 inclusive would deny the protection of the intellectual property contained in the relevant documents. I give greater weight to the fact that under the terms of engagement with the Commonwealth Ombudsman, the work of the contractor organisation was received on a confidential basis. Release of the relevant documents would disclose commercially valuable information to the relevant organisation's competitors, which would have a negative effect on the business affairs of that organisation in circumstances where the relevant material was intended to remain confidential. In reaching this view, I have taken into account that the relevant organisation has applied considerable expertise, developed over a long standing period to design and implement a tailored product for its clients, including the Commonwealth Ombudsman. In my view, the unreasonable adverse effect of disclosure of the relevant documents outweighs the public interest in disclosure of the relevant documents.

Accordingly, I am satisfied that Documents 13 to 20 inclusive are conditionally exempt under subparagraph 47G(1)(a) of the FOI Act, and further, that they should not be disclosed.

Prejudice the future supply of information (s 47G(1)(b))

In relation to s 47G(1)(b) of the FOI Act, the Guidelines explain that there must be a reasonable likelihood that disclosure would result in a reduction in both the quality and quantity of business information flowing to the government.

Upon examination of Documents 13 to 20 inclusive, I am satisfied that their disclosure could reasonably be expected to prejudice the future supply of information to the government.

In the circumstances of this matter, I have taken into account that the information provided to the Ombudsman could not be obtained compulsorily, nor was it required for the payment of a particular benefit or grant. In reaching my conclusion, I have taken into account that under the terms of its engagement with the Commonwealth Ombudsman, the work of the relevant organisation is expected to remain confidential.

I have consulted the relevant organisation about the possible disclosure of the information contained in the relevant documents. In response, the relevant organisation advised, among other things, that the relevant documents are curated reports provided only to its clients.

In my view, business organisations should have the confidence to engage with government on the understanding that agencies will follow and fulfil their obligations under the terms of their engagement. Further, where business organisations provide services on the basis that they will remain confidential, I am of the view that if such confidential information was disclosed, the willingness of business organisations to provide services based on the application of commercially valuable methodologies or other similar intellectual property, could reasonably be expected to be reduced.

Disclosure not in the public interest

There is a strong public interest in the willingness of business organisations to provide services for government. In many circumstances, business organisations outside government are better placed to provide specialist expertise, particularly where the government has adopted a policy position of not participating in certain sectors of the economy. Private organisations will be better placed than the government to undertake work in areas where the government has minimal resources or may lack the necessary expertise. In the circumstances of this matter, the work performed by the relevant organisation is considered valuable for this Office.

In my view, the public interest in the willingness of independent organisations to provide services to the government is essential to the effective operation of public administration. The inability of the government to effectively perform a range of functions set out under legislation and to administer government programs would be contrary to the public interest. If business organisations were unwilling to provide their services to government, this would result in government uncertainty about the appropriate ways to manage and administer certain functions, resulting in delays and errors to the detriment of the public. Further, it would likely result in additional public expenditure, which is also contrary to the public interest. The willingness of business organisations outside government to contribute to the public good is, in my view, a factor strongly in the public interest.

Accordingly, I am satisfied Documents 13 to 20 inclusive in the schedule of documents are conditionally exempt under subparagraph 47G(1)(b) and, further, that they should not be disclosed.

Deletion of exempt or irrelevant matter: section 22

Section 22 of the FOI Act allows an agency to delete exempt or irrelevant matter from a document which is otherwise relevant to an applicant's FOI request, and to provide an applicant with access to an edited copy.

As I have found that parts of the documents falling within the scope of your request contain information which is conditionally exempt, I have deleted that information accordingly. I have provided you with access to an appropriately edited version of the relevant documents.

Attachment B – Schedule of documents

Schedule of documents for: Anonymous FOI request				
Ombudsman's reference: FOI 2020-10085				
Item no.	File	Description	Date	Decision
1		Ombudsman's internal email	27-Nov-17	Deletions s 47E, s 47F
2		Ombudsman's internal email	26-Jun-19	Deletions s 22, s 47E
3		Ombudsman's internal email	1-Jul-19	Deletions s 22, s 47E
4		Ombudsman's internal email	5-Jul-19	Deletions s 47E, s 47F
5		Ombudsman's internal email	9-Jul-19	Deletions s 22, s 47E, s 47F
6		Ombudsman's internal email	29-Nov-19	Deletions s 47F
7		Ombudsman's internal email	17-Aug-20	Deletions s 22
8		Ombudsman's internal email	17-Aug-20	Deletions s 22, s 47E, s 47F
9		Ombudsman's internal email	11-Nov-20	Deletions s 22, s 47E, s 47F
10		Ombudsman's internal email	27-Jun-20	Deletions s 22, s 47E, s 47F
11		Ombudsman's internal email	29-Nov-19	Deletions s 22, s 47F

12		Email received by Ombudsman on 28 October 2020		Deletions s 22
13		Ombudsman's morning briefing	29-May-20	Exempt s 47 or s 47G
14		Ombudsman's morning briefing	21-Aug-20	Exempt s 47 or s 47G
15		Ombudsman's daily briefing	24-Mar-20	Exempt s 47 or s 47G
16		Ombudsman's daily briefing	25-Mar-20	Exempt s 47 or s 47G
17		Ombudsman's morning briefing	5-May-20	Exempt s 47 or s 47G
18		Ombudsman's morning briefing	7-Apr-20	Exempt s 47 or s 47G
19		Ombudsman's morning briefing	9-Apr-20	Exempt s 47 or s 47G
20		Ombudsman's morning briefing	27-Mar-20	Exempt s 47 or s 47G
21		Email received by Ombudsman on 5 August 2020		Deletions s 22
22		Ombudsman's internal email	26-Jun-19	Deletions s 22
23		Ombudsman's internal email	29-Nov-19	Deletions s 47F
24		Ombudsman's internal email	27-Jun-20	Deletions s 47F
25		Ombudsman's internal email	5-Dec-19	Deletions s 22, s 47E, s 47F
26		Email from Ombudsman to Mr Knaus	29-Nov-19	Disclosed under FOI
27		Email from Ombudsman to Mr Knaus	1-Jul-19	Disclosed under FOI

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).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:

- (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
- (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.
document unless it would be contrary to the public interest (see section 11A).

47 Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this Act would disclose:
 - (a) trade secrets; or
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
- (2) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by:

- (a) the Commonwealth or a State; or
- (b) an authority of the Commonwealth or of a State; or
- (c) a Norfolk Island authority; or (d) a local government authority.

47E Public interest conditional exemptions—certain operations of agencies

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

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47F Public interest conditional exemptions—personal privacy

General rule

- (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).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

47G Public interest conditional exemptions—business

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

(b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

(2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.

(3) Subsection (1) does not have effect in relation to a request by a person for access to a document:

(a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or

(b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or

(c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.

(4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by:

(a) the Commonwealth or a State; or

(b) an authority of the Commonwealth or of a State; or

(c) a Norfolk Island authority; or

(d) a local government authority.

(5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).