

Our ref: FOI-2020-10085

17 March 2021

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

Dear Anonymous

Freedom of Information request – Internal review decision

I am writing to advise you of my decision following your request for internal review of Mr Gregory Parkhurst's decision of 14 January 2021, to provide partial access to certain documents you requested and to refuse access to other documents under the *Freedom of Information Act 1982 (FOI Act)*.

I am authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.

Decision

1. My decision is to affirm Mr Parkhurst's decision dated 14 January 2021. My reasons for this decision are outlined below.
2. For completeness, I have identified a minor error in the original decision which I have corrected in this decision. Whilst this does not change the documents released to you, or the deletions applied, it does require that I amend the number of documents that we have said we released to you in full and the document schedule.
3. I have amended the document schedule below on page 12 of this decision. For completeness, 1 document was provided to you in full and partial access was granted to you in relation to 18 documents. This does not affect the documents which were exempted in full.

Scope of Internal Review

4. On 14 November 2020, you requested access to '*...any documents contained within Michael Manthorpe's email account containing the word 'Knaus'...*'
5. On 14 January 2021, Mr Parkhurst advised you that he had identified 27 documents falling within the scope of your request. Mr Parkhurst advised that he had decided to:
 - Grant you full access to 2 of these documents
 - Grant partial access to 17 documents, and
 - Exempt 8 document from disclosure in full
6. On 15 February 2021, you requested a review of Mr Parkhurst's decision under s 54B of the FOI Act. In your request for review, you said, "*media monitoring companies... ream Australian taxpayers for millions of dollars each year by way of contracts entered into with government agencies*" and "*while particular government agencies may have a legitimate need to monitor events that relate to their particular policy portfolio... the Commonwealth Ombudsman has no policy responsibility for anything.*"

7. You also stated that the exemption applied under s 47F was incorrect as it did not consider 'special circumstances' and the exemption under s 47E relating to public interest disclosure (PID) information was applied incorrectly.

Steps taken to identify documents within scope of request

8. A copy of the documents within the scope of your request was identified through searching the Ombudsman's email account for any material relevant to your request.
9. I have reviewed the steps taking to conduct the search and I am confident that this search was appropriate and that all documents relevant to your request have been identified.

Reasons for decision

Material taken into account

10. I have taken the following material into account in making my review decision:
 - The scope of your FOI request made 14 November 2020
 - Mr Parkhurst's decision dated 14 January 2021
 - Your request for internal review dated 15 February 2021
 - The contents of the documents that fall within the scope of your request
 - The views of third parties consulted by the Ombudsman's Office under ss 27 and 27A of the FOI Act
 - Consultation responses from other relevant agencies
 - The FOI Act, in particular ss 11, 11A, 11B, 22, 27, 27A, 47, 47E, 47F, 47G
 - The Guidelines issued by the Office of Australian Information Commissioner (FOI Guidelines) under s 93A of the FOI Act.
11. The reasons for my decision to affirm the original decision are outlined below.

Section 47 – Trade secrets or commercially valuable information

12. Mr Parkhurst found that documents 13 to 20 inclusive were exempt in full from disclosure either under s 47 of the FOI Act, or in the alternative, under s 47G.
13. Under s 47(1)(b) of the FOI Act, a document is exempt if it would disclose commercially valuable information that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
14. To be exempt under this section, two criteria must apply:¹
 - the document must contain information that has a commercial value either to an agency or to another person or body, and
 - the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

¹ See *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

15. I will deal with each of these criteria in turn.

Commercial value to an agency

16. In determining whether this information is commercially valuable, I have had regard to the factors outlined in Part 5.205 of the FOI Guidelines.
17. The relevant documents contain briefings provided to the Ombudsman by a media monitoring organisation.
18. I note that these documents were prepared by the organisation for specific agencies selected to receive these briefings, including the Commonwealth Ombudsman, in relation to the COVID-19 pandemic. The information is only known to the organisation and these select agencies. It was provided to this Office on the understanding that the information would not be distributed more widely and is subject to copyright. The relevant organisation does not agree to this information being disclosed.
19. Information may confer a competitive advantage and therefore be commercially valuable, where it provides a benefit to an organisation's commercial operations over a competitor. The information contained in these briefings is unique to the organisation which prepared it and shows the methodology used by this agency to monitor, analyse and provide insights on media news to agencies for a fee. A specific team of analysts with the organisation compiled these briefings over time and expended significant time and resources to create these methodologies and the resultant product. The concept is unique to the organisation and was only made available to specific clients. In my view, this confers a competitive advantage on the organisation.
20. My understanding is that the methodology used in preparing these briefings is still used by the organisation and is relevant to their day to day work. It is therefore still relevant to their commercial activities and remains valuable.² The news articles contained in the briefings are not publicly available and are obtained from media organisations under a copyright agreement.
21. In my view, the commercial value here relates to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.³
22. Noting the considerations above, I am satisfied that a genuine arm's length buyer would pay to purchase this information.
23. I am therefore satisfied that this information is commercially valuable to the organisation given its current business model.

Disclosure would, or could reasonably, destroy or diminish commercial value

24. Turning to the second limb of s 47(1)(b) of the FOI Act, I note that in order for this limb to be satisfied, it must be proven that disclosure would diminish or destroy the commercial value of the information. Criticism or embarrassment will not be enough.⁴

² See FOI Guidelines Part 5.205 and *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

³ See *Re Mangan and The Treasury* [2005] AATA 898; *Re Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr 23.

⁴ FOI Guidelines Part 5.207.

25. In *'OS' and Department of Health*,⁵ it was held that as the documents in question contained confidential, technical and strategic information and, having accepted an arm's length buyer would be prepared to pay for the information, any commercial value would be destroyed or diminished if the documents were disclosed.
26. In my view, it is reasonable to conclude that as the information reveals the specific methodologies used by the organisation, is technical and uniquely developed by the organisation, and is current and not otherwise available, that disclosure would diminish its commercial value.
27. I have also taken into account that if this information were to be released, it would be published on the website <https://www.righttoknow.org.au> where any individual, including representatives of competitor organisations, would be able to access it. In my view, this would pose a risk to the business operations of the organisation which created them. This would further diminish or destroy the commercial value of this information.
28. For the reasons above, I have decided to affirm Mr Parkhurst's decision to exempt in full documents 13 to 20 from disclosure under s 47(1)(b).

Section 47G – Business information

29. In the event that the information is not exempt under s 47 of the FOI Act, Mr Parkhurst's contended that, in the alternative, it is conditionally exempt under s 47G of the FOI Act.
30. Under s 47G of the FOI Act, a document is exempt from disclosure where it would disclose information about a person's 'business or professional affairs' and it:
- 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 (s 47G(1)(a)); or
 - 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 (s 47G(1)(b)).
31. I will deal with both of these exemptions below.
32. The FOI Guidelines state that this exemption is intended to protect the interests of third parties dealing with the government and depends on the effect of disclosure rather than the precise nature of the information itself.⁶
33. The FOI Guidelines also state that: *'the term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.'*
34. I am satisfied that the relevant documents contain business information relevant to the organisation as they relate to its role in providing a service to agencies which is unique to it and which it profits from.

Unreasonable adverse effect on organisation's business affairs (s 47G(1)(a))

⁵ *'OS' and Department of Health (Freedom of Information)* [2018] AICmr 46 (22 March 2018), para [19].

⁶ FOI Guidelines Part 6.185.

35. This exemption will require a balancing of public and private factors to determine whether disclosure would be unreasonable.⁷
36. The briefings in the relevant documents were prepared by a third-party organisation for government. In my view, their disclosure would affect the profitability of that organisation and would not show how public programmes are administered.⁸
37. This information is relevant to the organisation's money-making affairs⁹ as it is the primary purpose of the business to provide information to government agencies on recent media coverage. These professional services are offered for a fee. In my view, this information is relevant to the organisation's business affairs as distinct from their internal affairs.
38. Whilst I acknowledge that there may be some interest in members of the public seeing resources available to Commonwealth agencies to assist them to conduct their work, I consider that the adverse effect on the organisation's business affairs outweighs this interest in disclosure such that disclosure would be unreasonable.
39. The conditional exemption in s 47G(1)(a) of the FOI Act is also subject to the public interest test. I have dealt with this below at [44].

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

40. For this exception to apply, there must be:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.

41. In *Cornerstone Legal Pty Ltd and Australian Securities and Investments Commission*¹⁰ the former Information Commissioner said:

'The purpose of s 47G(1)(b) is to protect the workings of government, by maintaining the flow of a particular category of information to government from external sources. ...It is implicit in s 47G(1)(b) that it can apply broadly.'

42. In my view, if these briefings were disclosed, it is reasonably likely to expect that future organisations providing this type of service would be less willing to engage with the Ombudsman's Office, or other government agencies, due to the likelihood of future disclosures and impact on their business activities.
43. I consider that this reduction in services being available to the Office to enable it to monitor media coverage of relevance to its role and function would prejudice the operations of this Office in being alert to matters with a high degree of public interest and which may warrant further examination by the Ombudsman.

Public interest test

44. The conditional exemption in ss 47G(1)(a) and 47G(1)(b) of the FOI Act is subject to the public interest test.

⁷ FOI Guidelines Part 6.187.

⁸ See comments by Forgie DP in *Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 [68].

⁹ FOI Guidelines Part 6.192.

¹⁰ [2013] AICmr 71 at 14.

45. In deciding whether or not release of this information is in the public interest, I have taken into account the factors for and against disclosure outlined in the FOI Guidelines.
46. On the basis that your application is anonymous, I have assumed that disclosure of these documents will not allow you to access your personal information. Whilst disclosure may provide information on the resources available to the Ombudsman's Office to assist it perform its role, I have given minor weight to this factor as I consider that disclosure could reasonably be expected to reveal business information, which would adversely impact on the business affairs of the organisation.
47. Further, in my view, there is significant public interest in the ability of government agencies to enter into commercial arrangements with organisations to assist it to perform its functions.
48. On balance, I am satisfied that disclosure would be contrary to the public interest.
49. For the reasons above, I affirm Mr Parkhurst's decision that if the briefings provided in documents 13 to 20 are not exempt from disclosure under s 47, that they are exempt, in the alternative, under s 47G of the FOI Act.

Section 47E – Certain agency operations: staff member email and telephone details

50. Mr Parkhurst decided to exempt from disclosure the contact details of certain Ombudsman staff and Department of Home Affairs (Home Affairs) staff under s 47E(d) of the FOI Act.
51. Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure would, or could, be reasonably expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
52. Access must generally be given to a conditionally exempt document unless disclosure would be considered contrary to the public interest (see the requirements under s 11A of the FOI Act).
53. I will deal with each of these elements in turn.

Substantial adverse effect on conduct/operations of the Ombudsman

54. The FOI Guidelines state that the term 'substantial adverse effect' broadly means:

'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.¹¹

55. Where an exemption under s 47E(d) is claimed, the predicted effect of disclosing the document needs to be reasonably expected to occur.¹²
56. The documents relevant to this application contain the direct email and telephone contact information of Ombudsman staff and Home Affairs staff.
57. In my view, disclosure of this information would significantly affect the ability of this Office and Home Affairs to manage contact with members of the public at an agency level, and also an individual officer level, which would in turn affect their operations.

¹¹ FOI Guidelines [5.20].

¹² FOI Guidelines [6.101].

58. The Office centrally manages contact with the public by using generic contacts details to improve the efficiency and effectiveness of complaint handling and investigation within the Office.
59. We have found that this has assisted the Office to manage its overall resources, such as by allowing investigation officers to focus on more complex complaints. We understand similar considerations are made by Home Affairs.
60. I consider that there is a significant risk that disclosure of this information could result in unsolicited contact from members of the public directed at specific individuals. Whilst this will affect the operation of both agencies, I also note that our Office may also be at risk of not appropriately managing the workplace health and safety of our employees in line with our obligations under the *Work Health and Safety Act 2011*.¹³ In the past, members of the public have used this information to threaten or engage in unreasonable contact with members of staff, including through social media.
61. In my view, the release of personal contact numbers and email addresses of staff members in both agencies would undermine these public contact arrangements and would significantly affect the operations of both agencies.

Public interest test

62. The conditional exemption in s 47E of the FOI Act is also subject to the public interest test.
63. Section 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.
64. I have considered the factors for and against disclosure outlined in the FOI Guidelines.
65. In my view, the disclosure of the telephone and email details of relevant staff would arguably:
- promote the objects of the FOI Act, including informing the public in relation to the operations of the Ombudsman's office, and
 - provide access to information regarding the consideration and handling of complaints.
66. However, I have given minor weight to these factors as members of the public are not prevented from directing correspondence to a particular staff member by reason of not knowing their direct contact details.
67. Further, to disclose this information would undermine the processes put in place by this Office and Home Affairs to efficiently and effectively manage contact with members of the public.
68. In my view, members of the public do not experience any material disadvantage by not being provided with the direct contact details of individual officers as they are still able to contact these officers through the dedicated channels outlined above.
69. Release of this information would not inform debate on any matter or promote oversight of public expenditure, and I have assumed that the deleted material is not your own personal information as your application is made anonymously.
70. On balance, I am satisfied that disclosure would be contrary to the public interest. Therefore, I affirm the decision to exempt staff members direct contact details from disclosure under s 47E

¹³ See *Warren; Chief Executive Officer, Services Australia* [2020] AATA 4557.

of the FOI Act.

Section 47E – Certain agency operations: PID investigation information

71. Document 8 contains certain information relevant to an investigation under the *Public Interest Disclosure Act 2013* (the PID Act). Mr Parkhurst found this information exempt from disclosure under s 47E of the FOI Act.
72. As noted above, under s 47E of the FOI Act, a document is conditionally exempt if disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (see s 47E(d)).
73. 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.'

Substantial adverse effect on conduct/operations of the Ombudsman

74. In my view, disclosure of this information would have a substantial effect on this Office's operations in terms of its functions in relation to the public interest disclosure scheme.
75. Under the PID Act and the *Ombudsman Act 1976* (Ombudsman Act), the Office is authorised to receive and investigate disclosures, and to investigate complaints about agency handling of disclosures under the PID Scheme (PID handling complaints). We also have a role in overseeing the PID scheme as a whole.
76. The Ombudsman investigates in private (s 8 of the Ombudsman Act) and is subject to confidentiality provisions set out in s 35 of the Ombudsman Act. These provisions reflect the importance of information held by this Office remaining confidential. The importance of confidentiality in the performance of the Ombudsman's PID functions is underscored by the secrecy provisions in the PID Act (see ss 20 and 65) which make it an offence for a person (such as an officer of the Ombudsman's Office) to disclose the identity of a discloser, or to disclose information obtained as a result of performing a function or exercising a power under the PID Act. I note that PID information is specifically locked down to authorised members of the Ombudsman's Office and is kept confidential from other members of staff.
77. If this information were disclosed, it would reasonably undermine the confidence in this Office's performance of its functions and responsibilities under the PID scheme, including in overseeing the scheme and would hinder the ability of this Office to effectively perform its function.
78. In my view, the effect of disclosing this information would be twofold on the Ombudsman's operations. Firstly, this could discourage further public interest disclosures from being made to us by disclosers, or complaints being made to our Office about other disclosure investigations by agencies, if their identity or details of their disclosures were to be revealed. Second, it would discourage agencies from providing our Office with information in response to an investigation if they knew the information would be made public.
79. For these reasons, I agree that this information should be exempt from disclosure under s 47E.

Public interest test

80. The conditional exemption in s 47E of the FOI Act is also subject to the public interest test.
81. Section 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

82. I have considered the factors for and against disclosure outlined in the FOI Guidelines.
83. In my view, on balance, disclosure of this information would be contrary to the public interest.
84. This is because disclosure would affect the willingness of agencies to co-operate with future investigations and potentially discourage disclosers from coming forward with allegations of disclosable conduct.
85. On the basis that your application is anonymous, I have assumed that this information is not your personal information. Disclosure would also not promote oversight of public expenditure.
86. Further, in my view, disclosure would be inconsistent with the provisions of the Ombudsman Act around confidentiality and the secrecy provisions outlined in the PID Act which make it an offence to identify a discloser or reveal information obtained as a result of an investigation or the performance of a function or exercise of a power under the PID Act (see ss 20 and 65).
87. For these reasons, I affirm Mr Parkhurst's decision to exempt this information from disclosure.

Section 47F – Personal privacy: names of staff members

88. The documents relevant to this application contain personal information in the form of full names of certain Ombudsman officers and Home Affairs staff.
89. Under s 47F of the FOI Act, documents may be exempt from disclosure where it would involve an unreasonable disclosure of a person's personal information.
90. The FOI Guidelines outline at Part 6.124 that this exemption exists to protect the personal privacy of individuals.

Personal information

91. Under s 4 of the FOI Act,¹⁴ personal information is defined as information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether in material form or not.
92. I consider that the relevant information constitutes personal information under the definition set out in s 4 of the FOI Act and that the identity of the relevant individuals is reasonably ascertainable from the relevant information.
93. On the basis that your application is anonymous, I have assumed that the exemptions applied do not relate to your personal information.

Unreasonable to disclose

94. Under s 47F(2) of the FOI Act, in determining whether disclosure of personal information would be unreasonable, I must have regard to the following:
- the extent to which the information is well known
 - 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
 - the availability of the information from publicly accessible sources
 - any other matters that are relevant.

¹⁴ As defined in s 6 of the *Privacy Act 1988*.

95. The information here is not well known and is not generally known to be associated with these individuals. It is not publicly available or otherwise widely known. I have not consulted these individuals about the release of their personal information.
96. In my view, it would be unreasonable to disclose this personal information.
97. In *Warren; Chief Executive Officer, Services Australia* [2020] AATA 4557 the Deputy President Forgie considered the 'special circumstances' test set out at Part 6.153 of the FOI Guidelines, but determined that this test was not necessarily relevant to the application of the exemption in s 47F of the FOI Act.

Public interest test

98. 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.
99. I have not identified any relevant public interest factors favouring disclosure, particularly as I have assumed the personal information is not your own and it does not relate to public expenditure.
100. In relation to the public interest factors against disclosure, I consider that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy. I have given significant weight to this factor given the submissions made by Home Affairs. In my view, disclosing this information could also be reasonably expected to result in certain inefficiencies for both agencies in managing contact from members of the public which would affect their operations.
101. On balance, I am satisfied that disclosure would be contrary to the public interest.
102. Therefore, I have decided to affirm the decision to exempt this information from the relevant documents on the basis of s 47F of the FOI Act.

Section 22 – Deletion of exempt / irrelevant matter

103. 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.
104. As I have found that parts of the documents falling within the scope of your request contain information which is conditionally exempt, I agree with the decision to delete that information accordingly.

Review rights

105. If you are dissatisfied with my internal review decision, you may apply to the Office of the Australian Information Commissioner (OAIC) for review.
106. An application for review by the OAIC 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://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10
 - via email to foidr@oaic.gov.au
 - by mail to GPO Box 5218 Sydney NSW 2001
 - via fax to 02 9284 9666

107. More information about the OAIC review is available on its website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>
108. If you have any questions about this letter, you may contact via email at information.access@ombudsman.gov.au or via telephone on 1300 362 072.
109. I have enclosed with this letter a documents schedule in relation to this decision (**Attachment A**) and relevant sections of the FOI Act (**Attachment B**).

Yours sincerely



Fiona Annetts

Lawyer
Legal Team
Commonwealth Ombudsman
Phone: 1300 362 072
Email: ombudsman@ombudsman.gov.au
Website: ombudsman.gov.au

Influencing systemic improvement in public administration

Attachment A – Schedule of documents

Schedule of documents for: Anonymous, Ombudsman's reference: FOI-2020-10085				
Item no.	Description	Date	Original decision	Decision on review
1.	Ombudsman's internal email	27/11/2017	Deletions ss 47F, 47E	Affirmed
2.	Ombudsman's internal email	26/06/2019	Deletions ss 47E, 22	Affirmed
3.	Ombudsman's internal email	1/07/2019	Deletions ss 47E, 22	Affirmed
4.	Ombudsman's internal email	5/07/2019	Deletions ss 47F, 47E, 22	Affirmed
5.	Ombudsman's internal email	9/07/2019	Deletions ss 47F, 47E, 22	Affirmed
6.	Ombudsman's internal email	29/11/2019	Deletions ss 47F, 47E	Affirmed
7.	Ombudsman's internal email	17/08/2020	Deletions under s 22	Affirmed
8.	Ombudsman's internal email	17/08/2020	Deletions ss 47F, 47E, 22	Affirmed
9.	Ombudsman's internal email	11/08/2020	Deletions ss 47F, 47E, 22	Affirmed
10.	Ombudsman's internal email	27/06/2020	Deletions ss 47F, 47E, 22	Affirmed
11.	Ombudsman's internal email	29/11/2019	Deletions ss 47F, 47E, 22	Affirmed
12.	Email received by Ombudsman on 28 October 2020 (contains article by A.J Brown)	28/10/2020	Deletions under s 22	Affirmed
13.	Ombudsman's morning briefing	29/05/2020	Exempt s 47 or s 47G	Affirmed
14.	Ombudsman's morning briefing	21/08/2020	Exempt s 47 or s 47G	Affirmed
15.	Ombudsman's daily briefing	24/03/2020	Exempt s 47 or s 47G	Affirmed
16.	Ombudsman's daily briefing	25/05/2020	Exempt s 47 or s 47G	Affirmed
17.	Ombudsman's morning briefing	5/05/2020	Exempt s 47 or s 47G	Affirmed
18.	Ombudsman's morning briefing	7/04/2020	Exempt s 47 or s 47G	Affirmed

19.	Ombudsman's morning briefing	9/04/2020	Exempt s 47 or s 47G	Affirmed
20.	Ombudsman's morning briefing	27/03/2020	Exempt s 47 or s 47G	Affirmed
21.	Email received by Ombudsman 5 August 2020 (contains NGO submission)	5/08/2020	Deletions under s 22	Affirmed
22.	Ombudsman's internal email	26/06/2019	Deletions under s 22	Affirmed
23.	Ombudsman's internal email	29/11/2019	Deletions ss 47F, 47E	Affirmed
24.	Ombudsman's internal email	27/06/2020	Deletions under s 47F	Affirmed
25.	Ombudsman's internal email	5/12/2019	Deletions ss 47F, 47E, 22	Affirmed
26.	Email from Ombudsman to Mr Knaus	29/11/2019	Deletions under s 47E	Affirmed
27.	Email from Ombudsman to Mr Knaus	1/07/2019	Disclosed under FOI	Affirmed

Attachment B – relevant FOI Act provisions

11A Access to documents on request

Scope

(1) This section applies if:

(a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:

- (i) a document of the agency; or
- (ii) an official document of the Minister; and

(b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

(3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

(4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

(6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:

(a) a conditionally exempt document; and

(b) an exempt document:

- (i) under Division 2 of Part IV (exemptions); or
- (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

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).