

Our ref: FOI-2021-10009

16 April 2021

Anonymous

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

Dear anonymous

Freedom of Information request – refuse access decision

1. I refer to your email dated 15 February 2021, in which you requested access to documents under the *Freedom of Information Act 1982 (FOI Act)*. Your request for documents was framed in the following way:
“...Additionally, under the FOI Act, I request access to any document(s) that sets out the key words, topics and other parameters that determine the contents of the regular media briefings provided to the Office of the Commonwealth Ombudsman pursuant to the agreement the Office of the Commonwealth Ombudsman has entered into with the media monitoring company referred to in the Office of the Commonwealth Ombudsman’s decision on my request...”
2. I am authorised to make decisions on behalf of the Office of the Commonwealth Ombudsman (**the Office**) under s 23 of the FOI Act.
3. I have identified 7 documents which I consider fall within the scope of your request. A schedule setting out the relevant documents and my decision on access is at **Attachment A** to this letter.
4. I have decided to refuse access to the documents as they are fully exempt. The reasons for my decision are set out below.

Material taken into account

5. 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
 - third party submissions under s 27 of the FOI Act
 - relevant provisions of the FOI Act, in particular s 47 and 47G of the FOI Act
 - Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act ([the FOI Guidelines](#))

Steps taken to identify documents within scope of request

6. The search described below was undertaken on 1 March 2021 and 16 March 2021 and took approximately 3 hours to complete. I am confident that this search was appropriate and all documents relevant to your request have been identified where possible.
7. To identify documents within the scope of your request, I searched the Office electronic case management system using the information you have provided in your FOI request. I identified one FOI record (FOI-2020-10085) in our case management system, where the FOI decision you

refer to in your email of 15 February 2021 is stored. Having manually examining the documents on this record I identified the relevant media monitoring company as Isentia.

8. I conducted further searches of the Office's electronic file management system and identified a current agreement between Isentia and this Office. I have examined this agreement and identified that Isentia delivers media monitoring services to our Office in accordance with the media brief.
9. I searched our file management system using the search terms 'Isentia', 'media brief', 'search terms' and 'keywords' and identified 7 documents. I also consulted this Office's Communications team, who also searched this Office's file management system and did not identify any further documents.
10. Documents 1 – 7 are titled 'brief compiles' which were developed and prepared by Isentia for the purpose of providing media monitoring services to this Office under a contractual agreement. The documents contain keywords, search terms and associated search operators which are developed and used by Isentia to identify relevant media content.

Reasons for decision to refuse access

11. I have decided this material is fully exempt under section 47(1)(b) of the FOI Act. In the alternative, the documents would be exempt under section 47G(1)(a) of the FOI Act.

Section 47(1)(b) of the FOI Act – Documents disclosing trade secrets or commercially valuable information

12. Under s 47(1)(b) of the FOI Act, a document must satisfy two criteria to be exempt from disclosure:
 - 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
13. I will deal with each of these criteria in turn.

Commercial value

14. To determine whether the documents contain information that has a commercial value to Isentia I have considered the following factors outlined in the FOI Guidelines¹:
 - whether the information was known only to the agency or person for whom it has value, if it is known to others, to what extent that detracts from its intrinsic commercial value
 - whether the information confers a competitive advantage on the agency or person to whom it relates
 - whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information
 - whether the information is still current or out of date
 - whether disclosing the information would reduce the value of a business operation or commercial activity.

¹ FOI Guidelines, [5.205].

Availability of the information / whether it is widely known

15. The documents were created by Isentia and provided to our Office under a contractual arrangement and disclosure was a necessary part of this transaction.
16. The information has been made available by Isentia to a limited number of officers within this Office for the purpose of providing media monitoring services. The information is securely stored on our electronic file management system and only accessible by officers with 'need to know' access.
17. Having regard to the fact that the information is only known to this agency and Isentia, I do not consider that the limited disclosure of the information to our Office detracts from its intrinsic commercial value. I am satisfied that the information contained in documents 1 -7 is not publicly available or widely known.

Competitive advantage

18. Information may confer a competitive advantage where it provides a benefit to an organisations' commercial operations over a competitor. I have consulted Isentia under s 27 of the FOI Act and I have had regard to their submissions in support of an exemption contention. I have also manually examined the documents at issue.
19. The documents contain information about how changes to Isentia briefs are made, the selection of search operators and the search methodology (including search terms and keywords) used in relation to the provision of media monitoring services to this Office.
20. In my view, the nature of this information is technical, current, and unique to Isentia's media monitoring service delivery. The information has been created by an expert Isentia search team to ensure they can provide accurate, relevant services for their clients. The media monitoring services offered by Isentia are custom to each of their clients depending on the services required. The way in which Isentia prepares and presents media content for clients is central to its commercial operations, business viability and profitability.
21. For this reason, the information confers a commercial advantage on Isentia that a competitor in this market would be required to invest additional resources to be able to reproduce the information in the documents to provide media monitoring services.

Whether the information is still current or out of date

22. Having regard to my examination of the documents, and the agreement between Isentia and this Office I am satisfied that the information in the documents is current and has been provided to our Office in accordance with an ongoing commercial arrangement.
23. The information is currently being relied on by Isentia to perform media monitoring services to our Office, for this reason the information is relevant, and the commercial value of the information has not been impacted.

Whether disclosure would reduce the value of a business operation or commercial activity

24. Given the nature of the information in the documents, I consider disclosure would reveal technical information relating to Isentia's development of its commercial service offerings.
25. I am satisfied that disclosure would allow competitors to understand the methods used by Isentia to conduct their business operations and stay competitive amongst other service providers. Allowing competitors to replicate or build on the technical media search methodology of Isentia could reduce the availability of customers; or be commercially disadvantageous to Isentia in future tenders. For this reason, disclosure of the information would impact on the value of Isentia's media monitoring services.

26. For the reasons set out above I am satisfied that documents 1 – 7 contain information that has a commercial value to Isentia.

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

27. If the information in documents 1-7 was disclosed the commercial value of the information would, or could reasonably be expected to, destroy, or diminish the commercial value of that information.

28. In my view, it is reasonable to conclude that information which reveals the technical and unique search methodology used by Isentia to provide media monitoring services would diminish or destroy the commercial value of the information. The contents of the brief compiles include keywords and search terms created by Isentia to identify media content for its client, our Office.

29. I have decided that the exemption under s 47 of the FOI Act applies to the remaining parts of documents 1 – 7 and for this reason I refuse access to these parts of the documents.

30. If documents 1-7 are not exempt under s 47, for the reasons below, I consider they are conditionally exempt in full under s 47G(1)(a).

Section 47G(1)(a) – Public interest conditional exemptions – business

31. Section 47G(1)(a) of the FOI Act conditionally exempts documents where disclosure 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 (business information), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the 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.

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.²

33. The FOI Guidelines at [6.192] also explain that:

“...The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or private affairs and an organisation’s internal affairs. 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. Having regard to the contents of documents 1 – 7, I am satisfied that the relevant material comprises Isentia’s business information for the purpose of 47G. The information relates to Isentia’s business affairs, specifically, its engagement in a commercial arrangement with this Office to provide media monitoring services.

Unreasonable adverse effect on organisation’s business affairs

35. To apply this exemption, 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).

36. In *Bell and Secretary, Department of Health (Freedom of information)*³ Deputy President Forgie explained:

“...The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is

² FOI Guidelines, [6.184].

³ *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 (9 July 2015), para [48].

unreasonable. It will be balanced against factors that may not be regarded as aspects of the public interest but as aspects relevant only to the interests of the person whose interests might be affected by disclosure...”

37. I have considered Isentia’s submissions in support of their exemption contention. In my view, there is a private interest in preserving the ability of private organisations to assert their rights over their proprietary information. Another private interest is the interest in preserving the profitability of a private organisation.
38. I acknowledge that there is some public interest in providing transparency about the nature of media information reviewed by the Office. However, I do not consider this is a substantial public interest. The requested documents do not reveal how the Ombudsman or the office perform regulatory functions or actions in relation to any particular issue. Neither do they shed light on whether the services represented ‘value for money’ or provide any additional insight regarding compliance with the Commonwealth Procurement Rules.
39. On balance, I consider that the adverse effect of disclosure on Isentia’s business viability outweighs the public interest in viewing the documents. For this reason, I consider that disclosure would have an unreasonable effect on Isentia’s business affairs and the conditional exemption under s 47G(1)(a) applies to documents 1 – 7.

Public interest assessment

40. 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.
41. In deciding whether or not access should be given to the business information contained in documents 1-7, I have taken a number of matters into account, including the factors favouring access in s 11B of the FOI Act and the factors listed in paragraphs [6.19]-[6.22] of the FOI Guidelines.

Public interest factors favouring disclosure

42. On the basis that your application is anonymous, there is no basis to consider that disclosure of these documents would allow you to access your own personal information.
43. I have identified that disclosure could promote the objects of the FOI Act, including informing the community of the Government’s operations by providing transparency about the nature and topics of focus under media monitoring information.
44. For the reasons discussed at [37] above, I have given minor weight to factors favouring disclosure.

Public interest factors against disclosure

45. I have identified that disclosure could reasonably be expected to harm the interests of a private organisation in respect of the viability of its commercial operations. I give greater weight to this factor considering the adverse impact I consider disclosure would have on the commercial value of the information.

Disclosure not in the public interest

46. On balance, I am satisfied that disclosure of documents 1-7 would be contrary to the public interest. For these reasons, I am of the view that in the alternative documents 1 – 7 are conditionally exempt in full under s 47G(1)(a) of the FOI Act.

Review rights

47. If you are dissatisfied with this decision, you are entitled to seek internal review or Information Commissioner review of this decision.

Internal review

48. Under s 54 of the FOI Act, you may apply for an internal review of the decision within 30 days of you receiving this notice. An internal review will be conducted by a different officer from the original decision-maker.

49. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be changed. An application for a review of the decision should be made:

- via email to information.access@ombudsman.gov.au
- by mail to Commonwealth Ombudsman GPO Box 442 Canberra ACT 2601

50. If you remain dissatisfied after the internal review, you have a right to apply to the Office of the Australian Information Commissioner (OAIC) for a review of the internal review decision. You do not need to seek internal review before applying to the Information Commissioner for review of the original FOI decision.

Review by the Office of the Australian Information Commissioner

51. Under s 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by the OAIC must be made in writing within 60 days of the decision date, either from the date of this letter or the date of our internal review decision letter. Your request can 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 overland mail to GPO Box 5218 Sydney NSW 2001
- via fax to 02 9284 9666

52. More information about the OAIC review process is available at its website:

<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

Complaints to the Office of the Australian Information Commissioner

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

54. While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way 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 either:

- online at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>
- by mail to GPO Box 5218 Sydney NSW 2001
- by email to foidr@oaic.gov.au

Contacts

You may contact me via email at information.access@ombudsman.gov.au or via telephone on 1300 362 072.

Yours sincerely



Caitlin Christie

Paralegal

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

Freedom of Information Request FOI-2021-10009

Doc No.	Date	Pages	Description of Document	Decision on access	Exemption
1.	5 January 2021	24	Brief Compile – Social Services, Indigenous, Disability Services, Home Affairs	Fully exempt	Section 47(1)(b), 47G(1)(a)
2.	19 February 2021	8	Brief Compile – Defence General	Fully exempt	Section 47(1)(b), 47G(1)(a)
3.	12 February 2021	5	Brief Compile – Defence Abuse	Fully exempt	Section 47(1)(b), 47G(1)(a)
4.	27 October 2019	69	Isentia Brief Compile – Office of the Commonwealth Ombudsman	Fully exempt	Section 47(1)(b), 47G(1)(a)
5.	27 October 2019	70	iSentia search terms – Brief Compile – Office of the Commonwealth Ombudsman	Fully exempt	Section 47(1)(b), 47G(1)(a)
6.	27 October 2019	71	Brief Compile – Office of the Commonwealth Ombudsman	Fully exempt	Section 47(1)(b), 47G(1)(a)
7.	27 October 2019	70	Brief Compile – Office of the Commonwealth Ombudsman – RC Update	Fully exempt	Section 47(1)(b), 47G(1)(a)

