



AFP
AUSTRALIAN FEDERAL POLICE

Our ref: CRM 2021/308

14 February 2021

Mr Steve McKenzie

By email: foi+request-6907-da55fe69@righttoknow.org.au

Dear Mr McKenzie

Freedom of Information request

I refer to your application dated 18 November 2020 under *the Freedom of Information Act 1982* (the Act).

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

Disclosure Log

It has been decided not to publish the documents in respect of your request.

Yours sincerely

Adam Raszewski
a/Deputy General Counsel
Freedom of Information and Information Law
Chief Counsel Portfolio

POLICING FOR A SAFER AUSTRALIA

**STATEMENT OF REASONS RELATING TO AN FOI REQUEST BY
STEVE McKENZIE, Right to Know**

I, Adam Raszewski, a/Deputy General Counsel, Freedom of Information and Information Law, am an officer authorised under section 23 of the Act to make decisions in relation to the Australian Federal Police.

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

BACKGROUND

On 18 November 2020, this office received your request, seeking access to:

1. *All documents created, accessed or held by the AFP and its staff that relate to, or are associated with, or an outcome of Mr David McBride's 2014 complaint to the AFP regarding his initial whistle-blower disclosure about the ADF.*
2. *All documents created, accessed or held by the AFP and its staff, relating to, associated with, or an outcome of the decision or advice as to whether or not to charge ABC journalist, Mr Dan Oakes.*

On 17 December 2020, following correspondence from the AFP FOI Team, you clarified the scope to the following:

1. *I am requesting the AFP provide documents, relating to Mr David McBride's initial complaint to the AFP in 2014, in which he blew the whistle on the ADF. The documents I am requesting are copies of any letters and minutes, briefing documents, case management system notes, copies of notes made in police diaries or notebooks, emails.*

Your understanding of this part of the request appears flawed when you advise that I "seek documents relating to the complaint only and not any subsequent investigative documents." This incorrect and this request may include investigative documents if they exist. I think the Australian people have a right to know whether Mr McBride's initial complaint was acted upon, and if not, why not.

2. *I am requesting the AFP provide documents relating to the decisions arrived at by the AFP to prosecute Mr Dan Oakes, and then not to. The documents I am requesting are letters and minutes, briefing documents, emails, electronic messaging (SMS/WhatsApp etc), and copies of notes made in police diaries or notebooks.*

I am only seeking documents related to the AFP's decisions to, and then not to prosecute Mr Oakes. This would include documents relating to the decision making.

On 18 December 2020, you were notified of the requirement to consult a third party pursuant to subsection 15(6) of the Act.

The due date for completion was 26 January 2021. I note that the statutory timeframe has expired and apologise for the delay and any inconvenience this may have caused in finalising your request.

SEARCHES

Searches for documents were undertaken by Counter Terrorism and Special Investigations Command.

WAIVER OF CHARGES

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

EVIDENCE/MATERIAL ON WHICH MY FINDINGS WERE BASED

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

- the scope of your request;
- the contents of the documents;
- consultation with third parties;
- advice from AFP officers with responsibility for matters relating to the documents to which you sought access;
- the Act; and
- the guidelines issued by the Office of the Australian Information Commissioner under section 93A of the Act.

DECISION

I have identified four (4) documents relevant to point 1 of your request. For completeness, no investigation documents exist in respect of point 1 of your request.

In respect to point 2 of your request, decision-making to prosecute matters rests with the Commonwealth Director of Public Prosecutions. Therefore, the AFP holds no documents responsive to this part of your request..

A Schedule of each document and details of my decision in relation to each document is at Annexure B.

I have decided that:

- one (1) document is released with deletions pursuant to subsections 22(1)(a)(ii), 37(2)(a) and 47F of the Act; and
- three (3) documents are exempt in full pursuant to subsections 37(2)(a) and 47F of the Act.

Folios to which subsection 22(1)(a)(ii) applies:

Subsection 22(1)(a)(ii) of the Act provides that:

- “(1) Where:
- (a) an agency or Minister decides:
 - (ii) that to grant a request for access to a document would disclose information that would reasonably be regarded as irrelevant to that request;”

Part of a document contains information which is considered irrelevant to your request. This information relates to matters recorded in diary notes that are not mentioned in your request.

Accordingly, I find part of the document would be reasonably regarded as irrelevant to your request under subsection 22(1)(a)(ii) of the Act.

Folios to which subsection 37(2)(a) applies:

Subsection 37(2)(a) of the Act provides that:

“(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
(a) prejudice the fair trial of a person or the impartial adjudication of a particular case.”

The documents identified as exempt under this section of the Act contain information relevant to ongoing proceedings. As the matter is before the courts, the release of the information prior to the proceedings being finalised would, or could, prejudice the fair trial or impartial adjudication of an identifiable individual.

Accordingly, I find these documents are exempt under subsection 37(2)(a) of the Act.

Folios to which section 47F applies:

Section 47F of the Act provides that:

“(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).”

The documents identified as exempt under this section of the Act contain the personal information of third parties. Personal information is information or an opinion about an individual whose identity is known or easily ascertainable. I find these documents contain the personal information of an individual, including their name, contact details, residential address, and details concerning their activities and employment.

I have taken into account the factors at section 47F(2), including:

- 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 documents;
- the availability of the information from publicly accessible sources;
- the current relevance of the information; and
- the circumstances in which the information was obtained and any expectation of confidentiality.

I find release of this personal information to be unreasonable on the basis that the AFP has not received consent to release the information, and to do so would be a breach of privacy.

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

In relation to the factors favouring disclosure, I believe the general public interest in access to documents as expressed in sections 3 and 11 of the Act is relevant.

In relation to the factors against disclosure, I have considered the following are relevant:

- (a) prejudice to the protection of an individual's right to privacy (including in consideration of whether their consent was provided);
- (b) the need for the agency to maintain the confidentiality with regard to the subject matter and the circumstances in which the information was obtained;
- (c) if such information was disclosed, it may discourage public cooperation in AFP investigations; and
- (d) the need for the agency to maintain the confidentiality with regard to the subject matter and the effect that disclosure of the information may have on third parties.

While there is a public interest in providing access to documents held by the AFP, I have given greater weight to factors against disclosure above and conclude that on balance, disclosure is not in the public interest.

Accordingly, I find that the documents are exempt under section 47F of the Act.

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

REVIEW AND COMPLAINT RIGHTS

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

For complaints about the AFP's actions in processing your request, you do not need to seek review by either the AFP or the IC in making your complaint.

Internal review by the AFP

Section 54 of the FOI Act gives you the right to apply for internal review of this decision. No particular form is required to make an application for internal review, however, an application needs to be made in writing within 30 days of this decision. It would assist the independent AFP decision-maker responsible for reviewing the file if you set out in the application, the grounds on which you consider the decision should be reviewed.

Section 54B of the FOI Act provides that the internal review submission must be made within 30 days. Applications may be sent by email (foi@afp.gov.au) or addressed to:

Freedom of Information
Australian Federal Police
GPO Box 401
Canberra ACT 2601

Review by the Information Commissioner

Alternatively, section 54L of the FOI Act gives you the right to apply directly to the IC for review of this decision. In making your application you will need to provide an address for notices to be sent (this can be an email address) and a copy of the AFP decision.

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

Applications for IC review may be lodged by email (foidr@oaic.gov.au) using the OAIC's online application form (available at www.oaic.gov.au), or addressed to:

Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

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

Complaint

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the IC. A complaint may be lodged using the same methods identified above. It would assist if you set out the action you consider should be investigated and your reasons or grounds for this.

More information about IC reviews and complaints is available on the OAIC's website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.