



Our ref: 14/162861

9 September 2014

Mr Vito Guzzardi

By email: foi+request-719-4708db3e@righttoknow.org.au

Dear Sir

Freedom of Information Request 14-14

I refer to your request by email of 23 July 2014 under the *Freedom of Information Act 1982* (the FOI Act) for access to:

“all the documents (including correspondence, briefings file notes and telephone records of communications) made between 1 January 2013 and 23 July 2014 between the Department of Health (including Mr Richard Eccles and his staff) and the Australian Crime Commission in relation to the proposed or actual investigation by ACC / ASADA into the Essendon Football Club, including the joint press conference held on 7 February 2013, and the arrangements for the ACC / AFL / ASADA joint investigation.”

The terms of this request were clarified on 14 August, to include both correspondence with the Department of Health, and correspondence with Mr Richard Eccles and staff of Department of Regional Australia, Local Government, Arts and Sport (DRALGAS)

This is a decision made under the FOI Act in relation to documents within the scope of that request.

As you are aware, an agency is required by the FOI Act to respond within 30 days of a request. In the current request, this period was extended by a further 14 days to permit a response by 5 September 2014. The compliance date was extended again with your consent to Tuesday 9 September 2014.

Documents identified

I have identified 29 documents as falling within the scope of your request:

Authority and materials considered

I am authorised under section 23 of the FOI Act to make a decision concerning the information you have requested access to.

In reaching my decision I have taken into consideration:

- the relevant provisions of the FOI Act;
- the contents of the relevant documents;
- relevant guidelines issued by the Office of the Australian Information Commissioner; and
- relevant Tribunal and Federal Court decisions concerning the operation of the FOI Act.

Decision

I have decided to exempt some documents in full and some of the documents in part subject to redactions. Details of the application of exemption provisions in the FOI Act to the relevant documents are set out in the document schedule at **Annexure A** and on the documents themselves. Extracts of the relevant exemption provisions are at **Annexure B**. An explanation of the exemptions relied upon is set out below.

Section 22 – Deletion of documents which are not relevant or are exempt

Section 22(1)(a)(ii) of the FOI Act permits the deletion of information that would be reasonably regarded as irrelevant to the request.

Parts of the documents identified in the schedule contain information which is unrelated to your requests. I have determined that this information falls outside the terms of your request and have deleted this material under section 22 of the FOI Act.

Section 42 – legal professional privilege

Section 42 of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Some of the documents that fall within the ambit of your request contain information that is subject to legal professional privilege. It contains the substance of confidential legal advice that has been obtained by the ACC. To release this information would constitute waiver of privilege in the advice. As the ACC wishes to preserve that privilege, the relevant information has been redacted.

I have considered the matters set out in the OAIC Guidelines at paragraphs 5.114-5.134. In particular I have considered the 'real harm' test and am satisfied that the disclosure of the information would cause substantial prejudice to the ACC's affairs as it would reveal confidential material.

Section 47C – deliberative processes

Section 47C of the FOI Act provides that a document, or part of a document, is conditionally exempt if its disclosure would disclose matter relating to opinion, advice or recommendations made in the course of the deliberative processes of an agency.

It is my view that some of the documents and parts of other documents relevant to your request fall within this conditional exemption. The reason for this is that release of that material, such as draft documents or documents containing recommendations for future action or deliberation, would disclose deliberative matter in the nature of opinion, advice and recommendations expressed in the course of a deliberative process when staff are carrying out their ACC duties.

The functions of the ACC are set out in section 7A of the ACC Act. Section 7A(a) of the ACC Act states that one of the ACC's functions is 'to collect, correlate, analyse and disseminate criminal information and intelligence...'. Also, it is the function of the ACC to carry out investigations and to undertake intelligence operations (sections 7A(b) and (c) of the ACC Act) and to provide strategic criminal intelligence assessment to the Board (section 7A(e)). In performing its functions, the CEO may publish bulletins for the purposes of informing the public about its performance of ACC functions (Section 60(4) of the ACC Act).

As a result, the release of the relevant parts of the documents would disclose deliberative matter in the nature of opinion, advice and recommendations obtained in the course of a deliberative process relating to the performance of the ACC's statutory duties and functions. Accordingly, that information where appearing has been redacted. This exemption is subject to the public interest test, below.

Section 47F – Public interest conditional exemption – personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person.

The OAIC guidelines state at [6.139] that:

Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.

Due to the nature of work undertaken at the ACC, it is considered that special circumstances exist which make disclosure of personal information about ACC employees unreasonable. The role the ACC plays in disrupting serious and organised crime means that the publication of names of employees would place those employees at considerable risk to their personal safety. The recipients of ACC communications are placed in a similar risk category, therefore the special circumstances also extend to those receiving ACC information. In addition to names being considered personal information, any information that would allow for the person to be identified, such as phone numbers and email addresses, is also an unreasonable disclosure of personal information.

I have had regard to the factors in section 47F(2). In relation to the matters listed in that section, I consider that:

- a) the personal information is not well known;
- b) the persons to whom the information relates are not known to have been associated with the matters dealt with in the documents; and
- c) the information is not readily available from publicly accessible sources.

This exemption is subject to the public interest test, details of which are set out below.

Public Interest Considerations

Section 11A(5) of the FOI Act requires that the ACC must give access to documents that are conditionally exempt unless such access would, on balance, be contrary to the public interest. The public interest test for the conditional exemptions referred to above requires the ACC to weigh the competing public interests and decide where the balance lies.

There are a number of public interest factors favoring access. They are that disclosure would:

- a) Promote the objects of the FOI Act
- b) Inform debate on a matter of public importance
- c) Provide the Australian community with access to information held by the ACC;
- d) Increase the scrutiny, discussion, comment and review of the ACC's activities;
- e) Allow the public to scrutinise the ACC's operations and make its own judgment as to whether the agency is discharging its functions properly; and
- f) Enhance the accountability and scrutiny of ACC decision making.

There are a number of other factors that would render the release of this information as contrary to the public interest. These are:

- a) release could compromise the effectiveness of the ACC's law enforcement and intelligence gathering activities;
- b) release of the information could prejudice the ACC's ability to obtain confidential information;
- c) Could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- d) release could prejudice the ACC's ability to take part in similar procedures in future.

On balance, I consider that the public interest factors against the disclosure of the redacted portions of the documents outweigh the public interest factors in favor of disclosure. I have reached this conclusion because of the sensitivity of the information, the potential to prejudice investigations being conducted by stakeholder agencies and the importance of preserving the privacy of individuals.

Disclosure Log

Section 11C of the FOI Act provides that information about any documents released under that Act must be published on the ACC's website within 10 days of release, subject to the exemptions set out in section 11C(1)(a)-(d). In this instance, no information released under this application will be posted on the disclosure log.

Your review rights

If you are dissatisfied with this decision you can apply for internal review or review by the Information Commissioner. You do not have to apply for internal review before seeking the Information Commissioner's review.

Internal review

You may seek internal review by making an application in writing to the ACC within 30 days of being notified of this decision. A written application for a review should be sent to the FOI Coordinator at foi@crimecommission.gov.au, or by post to:

FOI Coordinator
Australian Crime Commission
GPO Box 1936
Canberra ACT 2601

Information Commissioner review

Alternatively, you may apply in writing for review by the Information Commissioner. In making your application you need to provide:

- an address for notices to be sent (this can be an email address)
- a copy of this decision.

It would also help if you set out the reasons for review in your application. Requests for review must be in writing and can be made via the website (www.oaic.gov.au), by email at enquiries@oaic.gov.au, or by post at:

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

If you are objecting to a decision to refuse access to documents you must apply to the Information Commissioner within 60 days of being given notice of the decision. You can contact the Information Commissioner by phone on 1300 363 992.

Right to complain

You may make a complaint to the Information Commissioner about action taken by the ACC in relation to your application. The complaint needs to be in writing and identify the agency against which the complaint is made.

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

Yours sincerely,

Amy Dyde
FOI Delegate

| Annexure A- Schedule of documents | | | | | |
|--|-------------|------------|-----------------------|------------------|-----------------------------|
| No. | Date | Pag | Document | Decision | Exemption(s) claimed |
| 1 | 11/1/2013 | 4 | Email | Partially exempt | S47C & 47F |
| 2 | 11/1/2013 | 2 | Email | Partially exempt | S47C & 47F |
| 3 | 24/1/2013 | 3 | Email | Partially exempt | S47F |
| 4 | 25/1/2013 | 2 | Email | Partially exempt | S47F |
| 5 | 25/1/2013 | 3 | Email | Partially exempt | S47F |
| 6 | 25/1/2013 | 2 | Email | Partially exempt | S47F |
| 7 | 31/1/2013 | 1 | Email | Partially exempt | S42 & 47F |
| 8 | 1/2/2013 | 1 | Email | Partially exempt | S42 & 47F |
| 9 | 4/2/2013 | 1 | Email | Partially exempt | S42 & 47F |
| 10 | 4/2/2013 | 1 | Email | Partially exempt | S42 & 47F |
| 11 | Undated | 33 | Talking points & QA's | Partially exempt | S47C |
| 12 | 6/2/2013 | 1 | Email | Partially exempt | S47F |
| 13 | 6/2/2013 | 1 | Email | Partially exempt | S47F |
| 14 | 6/2/2013 | 1 | Email | Partially exempt | S47F |
| 15 | 14/2/2013 | 2 | Email | Partially exempt | S22, 47F |
| 16 | 18/1/2013 | 3 | Letter | Partially | S47C |

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|----|---------|----|--|--------|-------|
| | | | | exempt | |
| 17 | Undated | 3 | Media protocols - draft | Exempt | S 47C |
| 18 | 7/2/13 | 2 | Media conference Statement – draft | Exempt | S 47C |
| 19 | 7/2/13 | 3 | Media Release – Draft | Exempt | S 47C |
| 20 | Undated | 17 | Talking points and Q&As - draft | Exempt | S 47C |
| 21 | 7/2/13 | 4 | Media release - draft | Exempt | S 47C |
| 22 | Undated | 2 | Media statement – draft | Exempt | S 47C |
| 23 | Undated | 2 | Media strategy – draft | Exempt | S 47C |
| 24 | Undated | 1 | Media release – draft | Exempt | S 47C |
| 25 | Undated | 1 | Media statement – draft | Exempt | S 47C |
| 26 | Undated | 17 | Media protocols Consolidated talking Points and Q&As – draft | Exempt | S 47C |
| 27 | Undated | 1 | Contingency Talking points - draft | Exempt | S 47C |
| 28 | 7/2/13 | 4 | Media release – Draft | Exempt | S 47C |
| 29 | 02,2013 | 2 | Media release – Draft | Exempt | S 47C |

Annexure B – Extracts of the FOI Act

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.

42 Documents subject to legal professional privilege

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

(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

(3) A document is not an exempt document under subsection (1) by reason only that:

(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and

(b) the information is operational information of an agency.

Note: For **operational information**, see section 8A.

47C Public interest conditional exemptions—deliberative processes

General rule

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

(a) an agency; or

(b) a Minister; or

(c) the Government of the Commonwealth; or

(d) the Government of Norfolk Island.

Exceptions

(2) Deliberative matter does not include either of the following:

(a) operational information (see section 8A);

(b) purely factual material.

Note: An agency must publish its operational information (see section 8).

(3) This section does not apply to any of the following:

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

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.

Access given to qualified person instead

(4) Subsection (5) applies if:

(a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and

(b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.

(5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:

(a) carries on the same occupation, of a kind mentioned in the definition of **qualified person** in subsection (7), as the first-mentioned qualified person; and

(b) is to be nominated by the applicant.

(6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.

(7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

(a) a medical practitioner;

(b) a psychiatrist;

(c) a psychologist;

(d) a counsellor;

(e) a social worker.

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