



Australian Government
Department of Communications

FOI REQUEST NO.: 07-1415

David Cooper, The Right To Know Organisation

ACCESS DECISION

STATEMENT OF REASONS

I, Trudi Bean, Deputy General Counsel, Office of General Counsel, the Department of Communications (**Department**):

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982* (**FOI Act**) to make decisions about access to documents under the FOI Act, and
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision,

make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based and giving the reasons for my decision.

A. DECISION

1. I hereby decide that the document covered by Mr David Cooper's (**Applicant's**) FOI request, and that is held by the Department, being the document with the title of 'Appendix 3 NBN Public Policy Process Audit – Information Gathering' (**Document**), is wholly exempt from disclosure, as:
 - it is exempt under section 45 of the FOI Act; or
 - in the alternative, it is conditionally exempt under section 47C of the FOI Act, and access to it, on balance, would be contrary to the public interest.

B. BACKGROUND

2. On 5 August 2014, the Department received an email from the Applicant seeking access to the documents specified in the extract below (**FOI request**) under section 15 of the FOI Act. The Applicant FOI request specifically states:

'I wish to obtain the document outlining the list of Information Sources that were requested and utilized as part of the "NBN Public Policy Processes" Audit Report, prepared by Bill Scales AO Independent Auditor and released to the public on the 5th August, 2014. The Information Sources are referenced in Appendix 3. This document should contain 1) List of Witnesses requested for discussion, and acceptance/decline 2) List the Departments/Bodies/Individuals who provided documents to the audit'.

C. FINDINGS ON MATERIAL QUESTIONS OF FACTS

3. On 7 March 2014, the Australian Government announced that Mr Bill Scales AO is to conduct the Independent Audit of the NBN public policy process that led to the establishment of the NBN.
4. On 25 July 2014, Mr Scales provided the audit report to the Minister for Communications the Hon Malcolm Turnbull MP (**Minister**). On 4 August 2014, this audit report was tabled with the Parliament of Australia.
5. The bibliography to the audit report publicly released and tabled with the Parliament of Australia satisfies the second part of the Applicant's FOI request.

D. MATERIAL ON WHICH MY DECISION IS BASED

6. I based my decision on the following material:
 - the Applicant's FOI request;
 - the content of the documents falling within the scope of the Applicant's FOI request;
 - relevant provisions of the FOI Act; and
 - advice from Departmental officers with responsibility for matters relating to the documents which the Applicant's FOI request sought to access;

E. REASONS FOR DECISION

7. In considering the application of the exemptions discussed below, I have had regard to the relevant provisions of the FOI Act and the following relevant guidelines:
 - the Freedom of Information Guidelines made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (**OAIC Guidelines**); and
 - the Department's Guidelines for Processing Freedom of Information Requests (as approved by the Secretary on 13 July 2011).
8. In making my decision, I have also had regard to section 22 of the FOI Act in order to determine whether a copy of the document, modified by deletions, may be prepared and access given to that modified copy (see paragraphs 32 and 33 of the SORs).

Section 45 – Exemption – Documents containing material obtained in confidence

9. Section 45 of the FOI Act relevantly provides:

'(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence'.
10. Paragraph 5.139 of the OAIC Guidelines explains that the exemption under section 45 of the FOI Act is available where the person who provided the confidential information would be able to bring an action under the general law for breach of

confidence to prevent disclosure, or to seek compensation for loss or damage arising from the disclosure.

11. Paragraph 5.141 of the OAIC Guidelines explain that to found an action for breach of confidence at general law for the purposes of section 45 of the FOI Act, the following five criteria must be satisfied:

- the information must be specifically identified;
- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.

12. The Document has the title of 'Appendix 3 NBN Public Policy Process Audit – Information Gathering'. The document was included in a draft version of the Independent Audit of the NBN public policy process conducted by Mr Bill Scales AO. The Document contains the marking of 'Draft Audit In-Confidence'. The Document was omitted from the final report that was tabled by the Minister to the Parliament of Australia on 4 August 2014. The Document contains the names of individuals who were invited, had discussion, or both (including the date and type of discussion) with Mr Bill Scales or the Audit Secretariat related to the Independent Audit of the NBN public policy process. Thus, I conclude that the information in the Document is specifically identified.

13. For information to have a quality of confidentiality, it must be secret or only known to a limited group; information that is common knowledge or in the public domain will not have the quality of confidentiality.¹ I am satisfied that the information in the Document in question is not common knowledge or in the public domain.

14. The information must have been communicated and received on the basis of a mutual understanding of confidence, in that the Department and the individuals needed to have understood and accepted an obligation of confidence. In my view, it is clear from both the conduct of Department and the individuals that they had a mutual understanding of the sensitive and confidential nature of the individual's discussion or participation in respect of the Independent Audit of the NBN public policy process, and that the disclosure of such information would be unauthorised.

15. The final issue is whether the unauthorised disclosure of the information contained in the Document would cause detriment to the identified individuals. In relation to detriment, the Administrative Appeals Tribunal has opined that 'the detriment may be the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified and that disclosure may be accompanied by embarrassment, distress or the like or by tangible loss or it may simply be unconscionable.'² Further, the High Court of Australia has said that 'it may be a sufficient detriment to the citizen

¹ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

² *Callejo and Department of Immigration and Citizenship* [2010] AATA 244, per Deputy President Forgie (at para [174]).

that disclosure of information relating to his affairs will expose his actions to public discussion and criticism'.³ I accept that the disclosure of the Document will cause detriment to the identified individuals and the Department.

16. Therefore, I find that the Document is exempt from disclosure under section 45 of the FOI Act as its disclosure would found an action by the relevant individuals against the Department for a breach of confidence at or under general law.

Section 47F – Public interest conditional exemption – Personal Privacy

17. Section 47F of the FOI Act relevantly provides:

- '(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 matter that the agency or Minister considers relevant.'*

18. 'Personal information' is defined under section 4 of the FOI Act as having the same meaning as the *Privacy Act 1988 (Privacy Act)*. In subsection 6(1) of the Privacy Act, 'personal information' means:

'information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) *whether the information or opinion is true or not; and*
- (b) *whether the information or opinion is recorded in material form or not.'*

19. The Document contains the names of individuals who were invited, had discussion, or both (including the date and type of discussion) with Mr Bill Scales or the Audit Secretariat related to the Independent Audit of the NBN public policy process. This information is 'personal information' for the purposes of subsection 47F (1) of the FOI Act, and is not publicly available.

Conditionally exempt material

20. In determining whether disclosure of the above information would involve the unreasonable disclosure of personal information, I have considered the following matters, consistent with subsection 47F(2) of the FOI Act:

³ *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39, per Mason J (at para [27]).

- some individuals are not public figures and are not known to be associated with the matters dealt with in the Document;
 - the information contained in the Document is not widely known or publicly available;
 - disclosure would not shed light on the workings of government.
21. In my view, the disclosure of the personal information contained in the Document would be unreasonable. The fact that information released under FOI is not subject to any confidentiality conditions further supports the fact that release of the documents would be an unreasonable disclosure of personal information. This is because disclosure of information under FOI is effectively disclosure to the world at large.
22. I therefore find that the Document, which contains personal privacy materials, is conditionally exempt under section 47F of the FOI Act.

Application of the public interest test

23. Subsection 11A(5) of the FOI Act requires that access to a conditionally exempt document must be given to the Applicant unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. In these circumstances, the concept of public interest requires that the public interest factors for and against disclosure be weighed and a decision made whether, on balance, disclosure is in the public interest.

Public interest considerations in favour of disclosure

24. In applying the public interest test, I am required to have regard to subsection 11B(3) of the FOI Act, which sets out factors favouring access in the public interest, including where access would:
- promote the objects of the FOI Act;
 - inform debate on a matter of public importance;
 - promote effective oversight of public expenditure; and
 - allow a person to access his or her own personal information (not relevant in this instance).
25. Another additional public interest factors in favour of granting access is, facilitating and promoting public access to government held information generally.

Public interest considerations against disclosure

26. Notwithstanding the public interest considerations in favour of disclosure that may apply in relation to a document, it is important that the public interest not be inadvertently damaged through the release of information or documents without proper assessment of the possible consequences. As such, it is important to consider public interest considerations against disclosure of documents.
27. Having regard to the nature of the Document in that it contains personal information under section 47F of the FOI Act, I consider the public interest considerations against disclosure of such information in those documents to include:

- the protection of an individual's right to privacy;
- the likelihood of causing harm or stress to the person concerned; and
- there is a public interest in the appropriate protection of personal information of Departmental officers.

Irrelevant considerations in application of public interest test

28. Under subsection 11B(4) of the FOI Act, I am not allowed to take into account the following irrelevant factors in applying the public interest test to the various conditional exemptions relating to the applicant's FOI request:

- access to the document could result in embarrassment to the Commonwealth Government or cause a loss of confidence in the Commonwealth Government;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- the author of the document was (or is) of high seniority in the Department to which the request for access to the document was made;
- access to the document could result in confusion or unnecessary debate.

29. Accordingly, I have not considered the irrelevant factors listed above as they relate to the Document and section 47F of the FOI Act, in reaching my decision in relation to the Applicant's FOI request.

Balancing public interest considerations

30. Some of the factors in favour of disclosure that are set out above apply to documents and information generally. That is not to take away from their strength or relevance, as the information access regime established by the FOI Act recognises the strong public interest in public access to government-held information.

31. Bearing in mind the nature of the document in question, I consider that some of the public interest factors in favour of disclosure are only tangibly applicable in that it would generally be likely to promote the broad objects of the FOI Act. The release of the Document is unlikely to add or inform debate on a matter of general public interest. On the other hand, I consider that the relative strengths against the disclosure of the Document to be stronger and more persuasive because of the individuals' (identified in the Document) right to privacy and the potential detriment or harm to these individuals flowing from the disclosure of the personal information contained in the Document.

32. I therefore find for the purposes of subsection 11A(5), it would be contrary to the public interest to release parts of the document, which contain conditionally exempt material under section 47F of the FOI Act.

Section 22 – Deletion of Exempt or Irrelevant Material

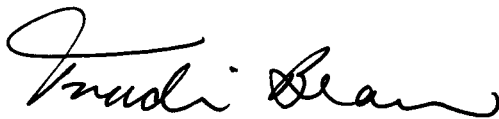
33. Section 22 of the FOI Act provides that if the Department decides that granting access to a document would disclose information that would be exempt or reasonably regarded as irrelevant to the request, then, where it is reasonably practicable to prepare

a copy with deletions of the exempt or irrelevant material, then such a copy should be prepared.

34. The majority of the material contained in the document that falls within the scope of the Applicant's FOI request is exempt from disclosure under section 45 of the FOI Act, or alternatively, under section 47F of the FOI Act. It would therefore not be reasonably practicable for the department to prepare copies of the document with deletions so that the remaining parts of the document could be released. If the Department were to redact the exempt material, it would not be possible to retain a meaningful non-exempt edited copy of the document to provide to the Applicant. Consequently, I find that the document is exempt in full from disclosure.

F. REVIEW RIGHTS

35. This decision is subject to review under either sections 54 or 54L of the FOI Act. Attached to my reply letter to the Applicant is the OAIC's FOI Fact Sheet 12 – Your review rights, for his information.



Trudi Bean
Deputy General Counsel
Office of General Counsel

3 September 2014