



Our reference: FOIREQ14/00054

Mr Ben Grubb

BY EMAIL: [foi+request-777-c862d7eb@righttoknow.org.au](mailto:foi+request-777-c862d7eb@righttoknow.org.au)

Dear Mr Grubb

## Outcome of your Freedom of Information request FOIREQ14/00054

The purpose of this letter is to give you a decision about your request for access to documents made to the Office of the Australian Information Commissioner (**OAIC**) under the *Freedom of Information Act 1982* (Cth)(**FOI Act**).

### Background

1. By email of 6 October 2014 you requested access to:
  - (a) a copy of the audio of the hearing recorded on Thursday October 2, 2014 between Ben Grubb and Telstra at the Office of the Australian Information Commissioner (OAIC) in Sydney before Privacy Commissioner Timothy Pilgrim (**the hearing audio**); and
  - (b) copies of the three submissions Telstra filed in the matter CP13/01119 to the OAIC and provided to you (**the submissions**).

### Decision

2. I am authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.
3. I have identified the three Telstra submissions you refer to in your request as follows:
  - Telstra letters dated 24 January 2014 and 14 February 2014, which were responses to the OAIC's initial investigation of your complaint

- Telstra’s response dated 25 July 2014 submitted to the OAIC following the opening of the determination
  - Telstra’s response to the OAIC dated 15 August 2014
4. I understand that you have already been provided with copies of these letters. I also note that a copy of the hearing audio was forwarded to you on 10 October 2014.
  5. In relation to the submissions and the hearing audio, I have decided to refuse you access in full with all material exempted from release under s 47E(d) of the FOI Act. This decision is made having regard to the objects of the Act in relation to otherwise accessible information or documents, specifically the intention of Parliament not to limit, prevent or discourage the exercise of the power to give access to information or documents, whether or not access to the information or documents has been requested under s 15 of the FOI Act. In other words, and as noted at s 11A(4) of the Act, access may be given to an exempt document apart from under the FOI Act, whether or not in response to a request.

**Reasons for Decision**

6. Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, relevantly here:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

7. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power under the FOI Act. The Guidelines explain the meaning of the term ‘would or could reasonably be expected’:

The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage

occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.<sup>1</sup>

8. The Guidelines also explain the meaning of the common term 'substantial adverse effect':

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'.<sup>2</sup>

9. Section 47E(d) substantively concerns the 'proper and efficient conduct' of agencies. It is concerned with the effect that the disclosure of the document will have on the manner in which an agency conducts its operations, and not the contents of the document per se.<sup>3</sup>

10. The Guidelines note at paragraph 6.111:

The exemption may also apply to documents that relate to a complaint made to an investigate body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.<sup>4</sup>

11. The Information Commissioner has a statutory function to investigate complaints of alleged interferences with an individual's privacy.<sup>5</sup> He has a range of powers relating to the conduct of investigations including powers to conciliate complaints and make

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [5.14] (footnote omitted).

<sup>2</sup> *Guidelines*, [5.17] (footnotes omitted).

<sup>3</sup> *Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143; (2004) 208 ALR 73, with the Federal Court citing as an example to illustrate this point, *Re Boehm and Commonwealth Ombudsman* (1985) 8 LAN N29.

<sup>4</sup> *Guidelines*, [6.111] (footnote omitted).

<sup>5</sup> *Privacy Act 1988* (Cth), s 27(1)(a), 36A (note: pre-March 2014 Act, s 27(1)(ab)). The Privacy Act was amended on 12 March 2014, however the applicant's complaint is being determined in accordance with the Privacy Act as it existed prior to the 2014 amendments, as this was the law in effect at the time the alleged breach occurred.

determinations in relation to investigations.<sup>6</sup> These processes involve parties to a complaint engaging in frank and open discussions about the dispute and prospects for resolution. It is obviously beneficial for this agency's management of the complaint process that the information it collects in its investigations of complaints is as frank as possible. Anyone providing that information would expect that, subject to applicable natural justice principles, details of that information will not be widely disclosed.

12. It is my view, that disclosure of such information while the complaint is still before the Commissioner could reasonably be expected to affect the willingness of people to provide that information. If this kind of disclosure is made, I consider that parties will be less likely to be forthcoming with information. This could reasonably be expected to prejudice the OAIC's ability to obtain similar information in the future, and this will have a substantial adverse effect on its ability to conduct its operations, potentially giving rise to the protracting of disputes, the inhibition of success and effectiveness of resolution attempts between the parties, and an inability for the agency to make informed decisions.<sup>7</sup>

13. The OAIC needs to ensure that it continues to receive information necessary to the discharging of the Commissioner's functions. I am of the view that disclosure of Telstra's submissions and the hearing audio while the matter is still before the Commissioner could reasonably be expected to diminish the nature of the information provided by parties during the investigation of complaints and any subsequent determination of matters. This fundamentally undermines the proper and efficient conduct of the OAIC's investigative operations which are essentially designed to be an informal, confidential and conciliation focused process.

14. The Commissioner is able to rely on his formal powers pursuant to s 44 of the *Privacy Act 1988* (Cth) to require a person to provide information during a complaint investigation. However, this process will likely be made more difficult, and an affected organisation's response will be more fettered and their cooperation more cautious, if the organisation is concerned that their information, including comments or opinions, may be later publically disclosed in response to an FOI request. The value of that

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<sup>6</sup> *Privacy Act 1988* (Cth), s 36A.

<sup>7</sup> *'R' and Department of Veterans' Affairs* [2013] AI Cmr 30 (22 March 2013)

information could therefore be diminished, even though there is a statutory power available to obtain information.

15. Accordingly, I am satisfied that disclosure of the submissions and the hearing audio would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of this agency's operations. The documents therefore fall within the scope of the conditional exemption for certain operations of agencies (s 47E(d)).

***The public interest test (s 11A(5))***

16. 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'.

17. Section 11B(3) lists factors that favour access when applying the public interest test including, relevantly here, promoting the objects of the FOI Act, which includes 'providing a right of access to documents' (s 3(1)(b)), and allowing a person to access their own personal information.

18. It is also necessary to consider public interest factors against disclosure. The FOI Act does not specify any factors against disclosure, but the Guidelines include a non-exhaustive list of such factors<sup>8</sup>. Of those factors listed in the Guidelines, the ones relevant to consideration of the s 47E(d) exemption are that disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information and reasonably be expected to prejudice an agency's ability to obtain similar information in the future. Disclosure could also reasonably be expected, in this instance, to prejudice the conduct of an investigation.

19. The Commissioner relies on information from complainants, respondents and other third parties to facilitate his investigations of privacy complaints, and any subsequent conciliation, determination and/or resolution of disputes. This information plays a central part in the OAIC's regulatory operations including its dispute resolution function.

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<sup>8</sup> *Guidelines*, [6.29].

There is a public interest in having disputes handled by agencies resolved as quickly and effectively as possible.

20. I accept that the disclosure of the submissions made by Telstra during the investigation process, and disclosure of the determination hearing audio could prejudice the future supply of information to the OAIC from parties to a dispute, which in turn, could adversely affect the OAIC's administration of the Privacy Act. That result would, on balance, be contrary to the public interest.

21. Accordingly I have decided to refuse access in full to the submissions and the hearing audio that I have found constitute conditionally exempt material under s 47E(d).

### **Your review rights**

#### **Internal review**

22. If you disagree with my decision, you have the right to apply for an internal review of the decision. An internal review will be conducted by another member of our staff who did not make the original decision.

23. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

#### **Information Commissioner review of OAIC decisions**

24. If you disagree with our decision on your FOI request to the OAIC, you may request a review of the decision by the Australian Information Commissioner (Information Commissioner), even if you have not applied for internal review. However, where it is in the interest of the administration of the FOI Act to do so, the Information Commissioner can refer requests for review directly to the [Administrative Appeals Tribunal](#) (AAT).

25. The Information Commissioner considers that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision made by his own agency. For this reason, if you apply for IC review of an OAIC decision, the Information

Commissioner may decide not to undertake an IC review on the basis that it is desirable that the decision be reviewed by the AAT.

26. Once the Information Commissioner has made that decision, you will be able to apply to the AAT. Please be aware that you cannot go directly to the AAT after receiving notice of an OAIC decision on your FOI request: you must first make an application for IC review.

27. Further information concerning your rights of review or how to make a complaint to the OAIC or the Ombudsman is available on the OAIC website and I attach a [link](#) for your reference.

Yours sincerely

[By email]

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