

Our ref: FOI-2022-10013

14 February 2022

Not Given

Emailed to: foi+request-8323-76883a68@righttoknow.org.au

Dear Anonymous

I refer to your email dated 17 January 2022 in which you requested access to certain documents under the *Freedom of Information Act 1982* (the **FOI Act**). Your request was framed in the following way:

Other than the Work Practice Manual for complaint management (January 2019) or the Agency Guide to the PID Act (Version 2), I request access to any operational or administrative documents that set out how approaches about inadequately investigated internal disclosures under the Public Interest Disclosure Act 2013 are handled by the Office of the Commonwealth Ombudsman.

This letter constitutes notice of my decision on your request for access. I am authorised to make decisions on behalf of our Office under s 23 of the FOI Act.

Decision

Our Office identified one document relevant to your request. I have decided to exempt this document in full from disclosure. My reasons for this decision are set out at **Attachment A** to this letter.

Our Office identified the documents by searching the Ombudsman's electronic records.

Review rights

Internal review

Under s 54 of the FOI Act, you may apply in writing to our Office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.

Where possible, please attach reasons for why you believe review of the decision is necessary. The internal review will be carried out by another Ombudsman officer within 30 days.

Review by the Australian Information Commissioner

Under s 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

- online at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>
- via email to foidr@oaic.gov.au
- by overland mail to GPO Box 5218 SYDNEY NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

Complaints to the Information Commissioner

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

While there is no particular form required to make a complaint, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way in which 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 in one of the following ways

- online at:
https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- by email to FOIDR@oaic.gov.au.

Contacts

If you require clarification of any of the matters discussed in this letter you should contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely



Gregory Parkhurst
Senior Legal Officer

ATTACHMENT A – Reasons for decision

Material taken into account

In making my decision I had regard to the following:

- the terms of your request
- the content of the material falling within the scope of your request
- consultation responses from third parties approached in accordance with the FOI Act
- relevant provisions of the FOI Act
- the Australian Information Commissioner’s Guidelines on FOI, available at www.oaic.gov.au (the Guidelines).

Findings of fact and reasons for decision

My findings of fact and reasons for deciding that exemption provisions apply to a requested document, or part of that document, are set out below.

Exemption – documents disclosing trade secrets or commercially valuable information: s 47

Under s 47 of the FOI Act, a document is an exempt document if its disclosure under the Act would disclose:

- (a) trade secrets; or
- (b) any other information having a commercial value that would be, or could reasonably be expected to, be destroyed or diminished if the information were disclosed.

The document which falls within the scope of your request is the Commonwealth Ombudsman’s PID Standard Operating Procedures. I have exempted this document in full from disclosure under s 47 of the FOI Act.

The requested document contains highly detailed information about the use of certain record keeping and case management computer system software operated by the Commonwealth Ombudsman. It contains numerous images showing the use of the relevant computer system at certain stages in the handling of certain matters under the *Public Interest Disclosure Act 2013* and the *Ombudsman Act 1976*.

I am satisfied that the relevant document contains commercially valuable information, and that the value of this information could reasonably be expected to be destroyed or diminished if the relevant document was disclosed.

In making my decision, I have taken into account that the information contained in the relevant document is known only to the Commonwealth Ombudsman and a provider of certain information technology products and services to the Ombudsman’s Office. The relevant document is not publicly available.

The relevant document contains material describing in detail the use of a computer system designed by the relevant provider of information technology products and services for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman. I am satisfied that the design of the relevant computer system is information which has a commercial value for the purposes of s 47(1)(b) of the FOI Act.

The relevant provider of information technology products and services to the Ombudsman has drawn on its extensive expertise and experience to design and develop the computer system described and depicted in the requested document. There is intrinsic commercial value in the intellectual property of the design of the relevant computer system. I am satisfied that the material contained in the requested document is commercially valuable.

I have also taken into account the age of the information contained in the requested document. The Commonwealth Ombudsman is currently using the relevant computer system for a range of purposes, including the assessment and investigation of complaints. I understand that the Ombudsman intends to continue using the relevant computer system for the same purposes in the future. For these reasons, I am satisfied that the requested document continues to have commercial value and that this information remains relevant to the ongoing commercial affairs of the relevant provider of information technology products and services.

I am of the view that disclosure of the information contained in the requested document would disclose commercially valuable information to the competitors of the relevant provider of information technology products and services. The relevant provider of information technology products and services has expended considerable resources and time to develop its product. If the relevant material was released publicly, it would disclose information provided to the Commonwealth in confidence which the relevant provider of information technology products and services did not expect to be released under the FOI Act.

I have consulted the relevant provider of information technology products and services about the possible disclosure of the requested document. The relevant provider of information technology products and services does not agree with the disclosure of information detailing the use of its product. The relevant provider of information technology products and services has contributed significant effort and resources to develop the computer system used by the Commonwealth Ombudsman. Release of the requested document would disclose information which the relevant provider of information technology products and services has developed over an extended period of time.

I am satisfied that disclosure of the requested document to others outside of the relevant provider of information technology products and services, particularly its competitors, poses a risk to the value of the business operations of the relevant provider of information technology products and services. Disclosure would destroy or at least diminish the value of the intellectual property contained in the relevant document. For these reasons, I have refused access to the requested document under s 47(1)(b) of the FOI Act.

11A Access to documents on request

Scope

- (1) This section applies if:
- (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

47 Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this Act would disclose:
 - (a) trade secrets; or
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

- (2) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.

- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.