

Our ref: FOI-2022-40001

16 March 2022

J Roskim

Emailed to: foi+request-8430-177c15d0@righttoknow.org.au

Dear Roskim

I refer to your email dated 14 February 2022, in which you requested access to certain documents under the *Freedom of Information Act 1982 (FOI Act)*. Your request was framed in the following way:

'...Under the FOI Act, I seek a copy of any document that is an email or that is attached to an email, created from 1 January 2019 onwards, that constitutes a public interest disclosure lodged with the Office of the Commonwealth Ombudsman in respect of conduct engaged, or alleged to have been engaged, in, by Phil Gaetjens. I also seek a copy of any document that is an email or that is attached to an email, created from 1 January 2019 onwards, that relates to conduct engaged in by Phil Gaetjens and that has been provided to the Office of the Commonwealth Ombudsman pursuant s.50A(1) of the Public Interest Disclosure Act 2013...'

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

The nature of the documents falling within the scope of your request are documents that, if they did exist, would be exempt under s 37(1)(a) of the FOI Act, because their disclosure could reasonably be expected to prejudice the proper administration of the *Public Interest Disclosure Act 2013* (the PID Act).

Therefore, in accordance with s 25 of the FOI Act, I can neither confirm nor deny the existence of any documents falling within the scope of your request.

Reasons for decision

The existence of documents falling within the scope of your request is neither confirmed nor denied, but if such documents existed, they would be exempt from disclosure under s 37(1)(a) of the FOI Act.

Section 37(1)(a) of the FOI Act relevantly provides:

37 Documents affecting enforcement of law and protection of public safety

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
 - (a) Prejudice the conduct of an investigation of a breach, or possible breach of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.

I am satisfied that the disclosure of any documents falling within the scope of your request, if they existed, would seriously prejudice the proper administration of the PID Act.

A fundamental principle of the PID scheme is confidentiality. This is reflected in relevant PID Act provisions preventing the identity of disclosers and persons alleged to have engaged in disclosable conduct from being revealed. Section 20 of the PID Act provides that it is an offence to disclose the identity of a person who makes a disclosure. The PID Act provides a penalty of 6 months imprisonment or 30 penalty units, or both for this offence. Under s 65 of the PID Act, it is also an offence to disclose or use protected information obtained in the course of a PID investigation. The PID Act provides a penalty of 2 years imprisonment or 120 penalty units, or both for this offence.

The strict confidentiality requirements of the PID Act are critical to the effective operation of the PID scheme. There is a serious concern that the release of documents containing a PID disclosure would breach the confidentiality of disclosers.

Without the trust of disclosers, public officials would not be inclined to come forward and provide information about potentially disclosable conduct. This would in turn seriously prejudice the ability of the Ombudsman, and other public sector agencies, to properly administer the functions of the PID Scheme or facilitate appropriate action under the PID Act.

The Ombudsman treats the confidentiality of disclosers, witnesses and other persons connected with allegations in a disclosure, as essential for the protection of their interests. The disclosure of their information in response to an FOI request would likely have significant and serious adverse consequences for disclosers, including but not limited to, reprisal or other reputational harm or damage.

For the reasons set out in this decision, the disclosure of any documents relevant to your request, if they existed, would potentially deter public officials from reporting allegations of disclosable conduct. Disclosure of documents falling within the scope of your request, if they existed, would have the consequence of seriously undermining the credibility of the Ombudsman and the general public's confidence in the ability of the Ombudsman to protect the personal information of persons making disclosures under the PID scheme. The resulting damage to the integrity of the PID scheme would prejudice significantly the ongoing ability of the Ombudsman and other public sector bodies to effectively administer the functions of the PID scheme, as set out in the PID Act. In addition, any disclosure of documents by the Ombudsman would contravene s 20 and s 65 of the PID Act.

For the reasons set out in this letter, under s 25 of the FOI Act, I neither confirm nor deny the existence of documents which fall within the scope of your request, but if any documents existed, they would be exempt from disclosure under s 37(1)(a) of the FOI Act.

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.

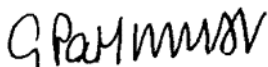
You may lodge your complaint in one of the following ways

- 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 – Relevant FOI Act provisions

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).

25 Information as to existence of certain documents

(1) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be:

- (a) an exempt document by virtue of section 33 or subsection 37(1) or 45A(1); or
- (b) an exempt document to the extent referred to in subsection 45A(2) or (3).

(2) If a request relates to a document that is, or if it existed would be, of a kind referred to in subsection (1), the agency or Minister dealing with the request may give notice in writing to the applicant that the agency or the Minister (as the case may be) neither confirms nor denies the existence, as a document of the agency or an official document of the Minister, of such a document but that, assuming the existence of such a document, it would be:

- (a) an exempt document by virtue of section 33 or subsection 37(1) or 45A(1); or
- (b) an exempt document to the extent referred to in subsection 45A(2) or (3).

(3) If a notice is given under subsection (2) of this section:

- (a) section 26 applies as if the decision to give the notice were a decision referred to in that section; and
- (b) the decision is taken, for the purposes of Part VI, to be a decision refusing to grant access to the document in accordance with the request referred to in subsection (2) of this section, for the reason that the document would, if it existed, be:
 - (i) an exempt document by virtue of section 33 or subsection 37(1) or 45A(1); or
 - (ii) an exempt document to the extent referred to in subsection 45A(2) or (3).

37 Documents affecting enforcement of law and protection of public safety

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
- (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or
- (c) endanger the life or physical safety of any person.

(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;
- (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

(2A) For the purposes of paragraph (1)(b), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:

- (a) witnesses; or
- (b) people who, because of their relationship to, or association with, a witness need, or may need, such protection; or
- (c) any other people who, for any other reason, need or may need, such protection.

(3) In this section, *law* means law of the Commonwealth or of a State or Territory.

54 Internal review—access refusal decision

- (1) This section applies if an access refusal decision is made in relation to a request to an agency for access to a document, other than a decision made personally by the principal officer of the agency or the responsible Minister.
- (2) The applicant in relation to the request may apply under this Part for the review (the ***internal review***) of the access refusal decision.

54L IC reviewable decisions—access refusal decisions

- (1) An application may be made to the Information Commissioner for a review of a decision covered by subsection (2).
- (2) This subsection covers the following decisions:
 - (a) an access refusal decision;
 - (b) a decision made by an agency on internal review of an access refusal decision (see section 54C);
 - (c) a decision refusing to allow a further period for making an application for internal review of an access refusal decision (under section 54B).

Note 1: An application for the review of an access refusal decision made for the purposes of paragraph (a) may be made regardless of whether the decision was the subject of internal review.

Note 2: If no decision is made on internal review within 30 days, a decision to affirm the original access refusal decision is taken to have been made (see section 54D).

- (3) The IC review application may be made by, or on behalf of, the person who made the request to which the decision relates.