



Besser and Attorney-General’s Department **[2013] AICmr 12 (25 February 2013)**

Decision and reasons for decision of
Privacy Commissioner, Timothy Pilgrim

Applicant: Linton Besser

Respondent: Attorney-General’s Department

Decision date: 25 February 2013

Application number: MR11/00237

Catchwords: Freedom of information — Whether documents affect the enforcement of the law — Whether disclosure of personal information unreasonable — Whether edited copy of document can be provided (CTH) — *Freedom of Information Act 1982* ss 37, 47F, 22

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Summary

1. I affirm the decision of the Attorney-General's Department (the **Department**) of 15 July 2011 to refuse access to a document requested under the *Freedom of Information Act 1982* (the **FOI Act**).

Background

2. Mr Ian Harrison QC, was commissioned by the then Attorney-General, the Hon Daryl Williams QC, to conduct an inquiry into allegations of corruption within the Australian Federal Police (the **AFP**). Mr Harrison's final report, dated 18 April 1997, was not publicly released.
3. On 16 June 2011, Mr Linton Besser, a journalist with *The Sydney Morning Herald*, applied to the AFP for access to the final report of the Harrison Inquiry conducted in 1996–1997. The request was transferred to the Department.
4. On 15 July 2011, the Department partially released the document requested by Mr Besser, advising that it was an exempt document under the law enforcement and public safety exemption (ss 37(1)(b) and 37(2)(b)) and the personal privacy exemption (s 47F).
5. On 18 August 2011, Mr Besser sought IC review of this decision under s 54L of the FOI Act.

Decision under review

6. The decision under review is the decision of the Department on 15 July 2011 to refuse Mr Besser's request.

Documents affecting the enforcement of law and protection of public safety (s 37)

7. Section 37 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) ...
 - (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) ...
- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
 - (a) ...

(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) ...

8. In its decision, the Department stated that the document is exempt because 'its disclosure would disclose the existence or identity of a confidential source of information'.
9. 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 provide that s 37(1)(b) 'is intended to protect the identity of a confidential source of information connected with the administration or the enforcement of the law'.¹
10. I have examined an unedited copy of the document. It is clear that a considerable amount of the material contained in the document was provided either by persons who clearly stated that they wished to remain anonymous or in circumstances where it can be implied that the information was provided to the Inquiry in confidence. The Department did not claim that the document was exempt under s 45 (material obtained in confidence).
11. The Guidelines relevantly provide that the exemption applies where 'the person who supplies that information wishes his or her identity to be known only to those who need to know it for the purpose of enforcing or administering the law'² and where 'the information was supplied on the understanding, express or implied, that the source's identity would remain confidential'.³ The Guidelines further provide that there must be a reasonable expectation that the contents of the documents in question will disclose the identity of a confidential source.⁴
12. It is important to add that the exemption does not require that a person's expectation of confidentiality is weighed against other considerations. Notably, the exemption applies independently of whether it was objectively reasonable or in the public interest for the person to supply information to law enforcement authorities on a confidential basis. It is sufficient, for the exemption to apply, that the person supplying the information did so on the basis that their identity would be confidential.
13. I understand that many of the allegations investigated during the Inquiry were made on national television by a former AFP member. However, throughout the Inquiry's investigation of those, and other, allegations, information was

¹ Guidelines, [5.82].

² Guidelines, [5.83] and *Department of Health v Jephcott* (1985) 8 FCR 85.

³ Guidelines, [5.83].

⁴ Guidelines, [5.91], and *Re Rees and Australian Federal Police* [1999] AATA 252.

provided in confidence to the Inquiry by persons whom I believe wished to remain anonymous.

14. Mr Besser argued in his application for IC review that '[t]here has been no consideration of the fact that the report is now 15 years old and information that may have been sensitive in the mid-1990s may no longer be sensitive today'. However, in submissions to the IC review, the Department correctly stated that '[t]he [FOI] Act makes no provision for information given in confidential circumstances to lose that quality of confidentiality simply with the effluxion of time'.
15. I am satisfied that the document contains material obtained from people who wished their identity to be known only to those who needed to know it for the purposes of enforcing or administering the law, and/or on the understanding, express or implied, that the source's identity would remain confidential. The document is exempt under s 37(1)(b).
16. In reaching this conclusion I have also borne in mind that, what is referred to in the Guidelines as the 'mosaic theory' can be relevant in applying the law enforcement exemption. That is, the disclosure of a particular item of information may lead to its being linked to already available information and thus disclose the identity of a confidential source.⁵
17. The Department also claimed that the document was exempt under s 37(2)(b) as disclosure would or could reveal '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'.
18. The Guidelines provide that:

[t]his exemption requires satisfaction of two factors. There must be a reasonable expectation that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure. If the only result of disclosing the methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice.⁶
19. Mr Besser argued that the Inquiry 'did not rely on secretive investigation methods in conducting its inquiry and that its procedures were relatively routine and otherwise known to the public'. I agree with Mr Besser on this point. However, the Inquiry did obtain significant information in relation to particular AFP operations and investigations and I believe that the document provides sufficient detail about the methods and procedures employed by the AFP (and in some cases, another jurisdiction's police force) that disclosure

⁵ *Guidelines*, [5.85] and *Re Petroulias and Others v Commissioner of Taxation* [2006] AATA 333.

⁶ *Guidelines*, [5.100] and *Re Anderson and Australian Federal Police* [1986] AATA 78.

would be reasonably likely to prejudice the effectiveness of those methods or procedures.

20. I accept the Department's contention that the investigation methods and police operations detailed in the document 'may very well be used in similar police investigations in the future'.

Findings

21. I find that the document is exempt under s 37.

Personal Privacy (s 47F)

22. Section 47F(1) of the FOI Act provides:

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).
23. Section 4 of the FOI Act provides that personal information means 'information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.
 24. The document is replete with personal information – it names and identifies a number of individuals.
 25. The Department noted in submissions to this IC review that 'the disclosure of names and personal details of the AFP officers against whom serious accusations had been made (most of which were found to be unsubstantiated) would be a serious and significant invasion of their privacy which would cause unnecessary harm and detriment to them and their families – and, as such, would be clearly contrary to the public interest'. For this reason, I am satisfied that disclosure of this information would be unreasonable.

Findings

26. I find that the documents the applicant seeks are conditionally exempt under s 47F of the FOI Act.

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

27. I have found that the document the subject of this IC review is conditionally exempt under s 47F of the FOI Act. Section 11A(5) 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'.

28. Of the factors favouring disclosure set out in s 11B(3), two are relevant to this IC review: promoting the objects of the FOI Act and informing debate on a matter of public importance.
29. Against this factor must be balanced the factors against disclosure. The FOI Act does not specify any factors against disclosure, but the Guidelines include a non-exhaustive list of such factors.⁷ Of those factors listed in the Guidelines, the ones relevant to this IC review are that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy and the fair treatment of individuals, as much of the information is about unsubstantiated allegations of misconduct.
30. It is obvious that police corruption and other forms of inappropriate behaviour within the AFP is certainly a matter of public interest. However, in balancing the factors for and against disclosure, I give the greatest weight in this IC review to the factors against disclosure, particularly as a significant proportion of the accusations against the AFP officers named in the report were unsubstantiated.

Findings

31. It is my view that giving Mr Besser access to the document that I have found to be conditionally exempt under s 47F would, on balance, be contrary to the public interest for the purposes of s 11A(5).

Other exemptions

32. In submissions to the IC review, the Department claimed that the document is also exempt under s 42 (legal professional privilege) and s 47C (deliberative processes).
33. I note that the document may also be exempt under s 45 of the FOI Act as it contains material obtained in confidence. However, as noted above, the Department did not raise this exemption in its decision or in submissions to the IC review.
34. Because of the view I have come to on the application of ss 37 and 47F, it is not necessary for me to consider the possible application of ss 42, 45 or 47C.

Access to edited copies with exempt or irrelevant matter deleted (s 22)

35. I have found that the document is exempt under ss 37 and 47F.⁸ However, normally when a document contains exempt material, it is open to the agency

⁷ *Guidelines*, [6.29].

⁸ As I have decided that all exempt parts of the report are covered by one or more exemption claims, it has not been necessary to indicate precisely the application of each exemption.

to prepare an edited version of the document with exempt material deleted under s 22.

36. In this particular case, the document raises difficulties given the age of the report and the format in which it is written. The document consists of over 600 pages and contains a significant amount of exempt material on each page. It lists individual allegations and names alphabetically and contains repeat numbered paragraphs with many cross references to other parts of the report to prevent repetition.
37. I consider that, given the significant amount of material that is exempt in the document, release of the document in redacted format would result in the applicant receiving a meaningless and potentially misleading document of little value.
38. Further, the amount of resources required to prepare an edited version of the document would be extensive and in my view, unreasonable, particularly as the report was not created in an electronic format.
39. Given the significant amount of exempt material and the structure of the report, in my view, preparing an edited version of the document removing exempt material would not be reasonably practicable.

Decision

40. Under s 55K of the FOI Act, I affirm the Department's decision of 15 July 2011.

Timothy Pilgrim
Privacy Commissioner

25 February 2013

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.