



Watson and the Australian Federal Police **[2013] AICmr 32 (27 March 2013)**

Decision and reasons for decision of
Acting Freedom of Information Commissioner, Toni Pirani

Applicant: Paul Watson

Respondent: Australian Federal Police

Decision date: 27 March 2013

Application number: MR11/00150

Catchwords: Freedom of information — Documents affecting international relations — Whether disclosure of documents would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth — Whether disclosure of documents would divulge any information communicated in confidence by an authority of a foreign government — (CTH) *Freedom of Information Act 1982* ss 22, 33, 54U, 55ZB

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Summary

1. I affirm the decision of the Australian Federal Police (the **AFP**) of 16 May 2011, as varied on 2 May 2012, to refuse access to documents requested under the *Freedom of Information Act 1982* (the **FOI Act**).

Background

2. On 11 March 2011, Mr Paul Watson applied to the AFP for access to:
... copies of documents containing information which constitutes a complaint to the Australian Federal Police in relation to the charges the subject of the warrant. I look forward to your response.

The documents sought have been described above. I will refer to this as the 'matters of complaint'.

The circumstances giving rise to the matters of complaint surround the ship of which [Mr Watson] is captain, the *Steve Irwin*, and the *Bob Barker*.
3. The AFP identified 24 documents within the scope of Mr Watson's request, consisting of 196 folios. On 16 May 2011, the AFP made a decision in which it:
 - released one folio in full (folio 108)
 - released 22 folios in part, with material edited under ss 22(1)(a)(ii), 33(a)(iii), 33(b), 37(1)(a), 37(2)(b) and 47F of the FOI Act
 - refused to grant access to 173 folios on the basis that they were exempt in full under ss 33(a)(iii), 33(b) and 37(1)(a), or irrelevant to the request under s 22(1)(a)(ii) of the FOI Act.
4. On 31 May 2011, Mr Watson sought IC review of this decision under s 54L of the FOI Act.¹
5. On 2 May 2012, the AFP varied its decision of 16 May 2011 by granting access to further information from folio 136 (which it had previously decided was exempt under s 37(2)(b)).

Decision under review

6. The decision under review is the decision of the AFP on 16 May 2011 to refuse access to 195 of the folios, as varied by its decision on 2 May 2012.

¹ The applicant's application for IC review was received by the Office of the Australian Information Commissioner on 6 June 2011.

The documents under review

7. The documents under review are:
 - **AFP Correspondence Log** (folios 1–34) – recording discussions between the AFP and foreign authorities
 - **CD and DVD footage, and photographs** (folios 35, 36, 61–74, 82, 83–86 and 156–160)—provided to the AFP by a foreign authority
 - **Chronological reports, damage lists and other referral documents** (folios 37–60, 75–81, 87–99, 161–176, 179–181 and 182–191)—provided to the AFP by a foreign authority
 - **Commentary and explanatory notes** (folios 100, 101, 102-3 and 104–105) —provided to the AFP by a foreign authority in relation to the information in the immediately preceding two categories
 - **Emails and letters** (folios 106, 107, 141–155 and 177-178)—correspondence between AFP and officers of a foreign authority
 - **Diary entries** (folios 109–140)—entries by AFP officers
 - **Case notes** (folios 192–198)—prepared by AFP officers regarding the investigation and action taken, as well as information provided by a foreign authority.
8. The AFP decided that some of the folios were either wholly or partly irrelevant to the request. It refused access to the wholly irrelevant folios. In accordance with s 22 of the FOI Act, the AFP provided edited versions of partly relevant folios, unless it considered that the rest of the folio was exempt on other grounds.
9. Mr Watson has not contested the AFP’s finding that folios are wholly or partly irrelevant to the request. The decision to refuse access on this basis is therefore not at issue in this IC review.
10. All the other folios were said to be exempt under either ss 33(a)(iii) or 33(b) of the FOI Act. Some folios were also found to be exempt on other grounds. For the reasons that follow, I consider that all the folios are exempt under either ss 33(a)(iii) or 33(b) of the FOI Act. Therefore it is not necessary for me to consider whether other exemptions in the FOI Act also apply.

Production of exempt documents

11. Section 55U of the FOI Act requires the Information Commissioner to follow the procedure in s 55U if a document is claimed to be exempt under s 33. Section 55U(3) provides that if the Information Commissioner is not satisfied by evidence, on affidavit or otherwise, that the document is an exempt document under s 33, the Information Commissioner may require the document to be produced for inspection.

12. The effect of s 55U is that if I am not satisfied on the basis of the evidence provided that a document is exempt, I may require it to be produced so that I can inspect it and decide whether I think it is exempt. If, after inspecting the document, I am still not satisfied the document is exempt, I must request the Inspector-General of Intelligence and Security to give evidence about the document (s 55ZB).
13. I have considered the submissions of both Mr Watson and the AFP in relation to the documents under review. On the basis of the evidence provided, I have formed the view, for the reasons which follow, that the documents are exempt documents under ss 33(1)(a)(iii) and s 33(b). As a result I have not required the documents to be produced for inspection.

Documents affecting international relations (s 33(a)(iii))

14. Section 33 of the FOI Act relevantly provides:

Documents affecting national security, defence or international relations

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:

...

- (iii) the international relations of the Commonwealth; ...

15. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purpose of performing a function, or exercising a power, under the FOI Act.² The Guidelines provide that:

5.30 The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.³

...

5.31 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government or one of its agencies.⁴ The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship.⁵ There must also be real and substantial grounds for the conclusion that are supported by evidence.⁶ These grounds are not fixed in advance, but vary according to the circumstances of each case.

² Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*.

³ *Re McKnight and Australian Archives* [1992] AATA 225.

⁴ *Re Maher and Attorney-General's Department* [1986] AATA 16 as applied in *Maksimovic and Attorney-General's Department* [2008] AATA 1089.

⁵ *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

⁶ *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

16. Mr Watson says the documents are not exempt under s 33(a)(iii) because:
 - the AFP has not established that disclosure of the documents would, or could reasonably be expected to, damage the international relations of the Commonwealth
 - the relationship between Australia and the foreign government is already under strain and disclosure could not reasonably be expected to further damage the relationship
 - if a prosecution was initiated in reliance on the documents they would be discoverable and the prosecution would be required to provide them.
17. The AFP states that disclosure of the documents is reasonably likely to undermine the good working relationship the AFP has with its counterpart agency in the foreign country and may result in other foreign governments and agencies being reluctant to share information with the AFP in the future.
18. The AFP says there are several channels through which information is provided by foreign authorities. Material can be provided under a formal Mutual Assistance Request (**MAR**), in which case the foreign authority provides information in the knowledge it may be disclosed in legal proceedings. Alternatively, material can be provided on an informal basis on the understanding that it is to be kept confidential and used for investigative purposes only. Such material cannot be used as evidence in legal proceedings unless it is later requested and provided through the formal MAR channels.
19. The material the subject of this IC review was provided informally by the foreign authority on the basis that it would be used for investigative purposes, unless its use in legal proceedings was later approved in the formal MAR process. This understanding was set out in a document headed 'Explanatory Notes' from the foreign authority which was part of the material provided to the AFP. With the agreement of the foreign authority, a copy of the Explanatory Notes was provided to me.
20. The Office of the Australian Information Commissioner (the **OAIC**) gave Mr Watson a copy of the AFP's submissions which refer to the Explanatory Notes. The AFP's submissions summarise the contents of it and explain how it relates to the exemptions applied. Because the Explanatory Notes were provided to the OAIC in confidence, a copy was not given to Mr Watson.

Findings

21. Having read the Explanatory Notes, I am satisfied that the foreign authority provided the information on the basis that it would not be used as evidence in legal proceedings unless the foreign authority's approval was obtained through the formal MAR channels.

22. While the activities of the foreign government may be a source of tension between the two countries, it does not follow that disclosure of the documents would be incapable of damaging the relationship. Australia has a close and wide-ranging relationship with the foreign government. More specifically, there is a cooperative relationship between the AFP and the foreign authority. The documents themselves are evidence of this cooperation.
23. The Guidelines state that damage to international relations can include inhibiting the future flow of confidential information from a foreign government or agency⁷ or the loss of trust or confidence in the Australian Government or one of its agencies.⁸ The AFP provided this office with evidence that disclosure of the documents would be regarded as a breach of trust and would affect the willingness of its law enforcement agencies to share investigative materials with the AFP in the future. The AFP also provided evidence that disclosure of the documents would damage the AFP's relationship with international law enforcement agencies. Considering the nature of the documents, this is not unlikely or implausible.
24. Taking into account the circumstances of confidentiality in which the documents were given to the AFP, the nature of the documents, and the nature of the relationship between Australia and the foreign government, I conclude that release of the documents could reasonably be expected to damage the Commonwealth's relationship with the foreign government, in particular, the AFP's relationship with law enforcement agencies in that country.
25. I consider the documents are exempt documents under s 33(a)(iii) of the FOI Act.

Information communicated in confidence (s 33(b))

26. Section 33(b) of the FOI Act provides:

A document is an exempt document if disclosure of the document under this Act:

...

- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or of an authority on behalf of the Commonwealth.

⁷ Guidelines [5.25].

⁸ Guidelines [5.31].

27. The Guidelines state:

5.36 The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made—it is not a matter of determining whether the information is of itself confidential in nature.⁹

...

5.38 An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated.¹⁰

28. The applicant says s 33(b) does not apply because the information in the documents was not communicated in confidence. He says it was intended to be used as evidence in criminal proceedings, which would have resulted in its disclosure to the prospective defendant. He also says there is no documentary evidence to show there was a mutual understanding that the information was communicated in confidence.
29. The Guidelines make it clear that an agreement to treat documents as confidential does not need not be formally set out in a document.¹¹
30. As noted above, the information provided to the AFP by the foreign authority was provided informally, for investigative purposes only. It was provided on the basis that it not be disseminated further unless its use in legal proceedings was later approved in the formal MAR process.

Findings

31. I am satisfied that the material was given to the AFP for the purpose of conducting a criminal investigation and that at the time it was given, there was an understanding the information would not be shared, except potentially with other Australian law enforcement agencies.
32. I consider there was an agreement between the AFP and the foreign authority to treat the documents as confidential when they were given to the AFP. It would be surprising if there were not such an understanding. Material provided for investigative purposes will often be sensitive in nature. Often, disclosure will have the potential to negatively affect investigations or other law enforcement activities of the authority providing the information. Because of this, a general understanding of confidentiality is necessary to facilitate the sharing of such information.

⁹ *Secretary, Department of Prime Minister and Cabinet v Haneef* (2010) 52 AAR 360.

¹⁰ *Re Maher and Attorney-General's Department* [1986] AATA 16.

¹¹ *Guidelines* [5.38].

33. I find that the documents the AFP claimed to be exempt under s 33(b) are exempt documents under that section.

Decision

34. Under s 55K of the FOI Act, I affirm the AFP's decision of 16 May 2011, as varied on 2 May 2012.

Toni Pirani
Acting Freedom of Information Commissioner

27 March 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.