Wake and Australian Broadcasting Corporation
[2013] AICmr 45 (15 April 2013)

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

Applicant: Alexandra Wake
Respondent: Australian Broadcasting Corporation
Decision date: 15 April 2013
Application number: MR11/00102

Catchwords: Freedom of Information — Documents affecting international relations — Whether disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth — (CTH) Freedom of Information Act 1982 s 33(a)(iii)

Freedom of Information — Refusal of access to documents — Whether reasonable steps taken to find documents — (CTH) Freedom of Information Act 1982 s 24A(1)

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Summary

1. I set aside the decision of the Australian Broadcasting Corporation (the ABC) of 5 April 2011 and substitute my decision, under s 55K of the Freedom of Information Act 1982 (the FOI Act), that the documents under review are not exempt documents under s 33(a)(iii) of the FOI Act.

Background

2. On 31 January 2011, Ms Alexandra Wake applied to the ABC for access to:

   1. Documentation about the SOLMAS\(^1\) project, specifically policy documents, reports etc about its aims, its place within RAMSI, and what it has done, I would like to read any material provided to government about the program’s overall effectiveness, the number of consultants used, the number of people trained any evaluation of its effectiveness. While I am specifically interested in journalism programs and media training, this FOI application covers the overarching reports that are provided to AusAID.

   2. ABC International is contracted by the Australian government to run journalism education courses in many countries around the world. I seek access to all policy documents, which explain how the ABC evaluations the effectiveness of these courses.

3. The ABC identified 17 documents falling within the scope of paragraph one of Ms Wake’s request. No documents were identified in relation to paragraph two.

4. On 5 April 2011, the ABC decided that 12 of the 17 documents were exempt documents under s 33(a)(iii) of the FOI Act because disclosure would, or could reasonably be expected to, cause damage to the Commonwealth’s international relations. Five documents were released to Ms Wake, with irrelevant material edited from three of them under s 22 of the FOI Act. The ABC also refused access to documents falling within paragraph two of Ms Wake’s request under s 24A of the FOI Act.

5. On 10 May 2011, Ms Wake sought IC review of this decision under s 54L of the FOI Act.

Decision under review

6. The decision under review is the ABC’s decision of 5 April 2011 to refuse Ms Wake access to all the documents she requested.

Production of exempt documents

7. 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.

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\(^1\) Solomon Islands Media Assistance Scheme.
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. If, after inspecting the document, the Information Commissioner is still not satisfied that the document is exempt under s 33, the Commissioner must request the Inspector-General of Intelligence and Security to give evidence about the document (s 55ZB).

8. The FOI Commissioner considered the submissions of both Ms Wake and the ABC about the documents under review. On the basis of the information provided, the FOI Commissioner was not satisfied that the documents were exempt under ss 33(1)(a)(iii).

9. In compliance with s 55ZB of the FOI Act, copies of the documents said to be exempt under s 33(a)(iii) were made available to the Inspector-General of Intelligence and Security. The Inspector-General advised this office that she is not qualified to give evidence in relation to these documents.2

Documents affecting the international relations of the Commonwealth (s 33(a)(iii))

10. Section 33 of the FOI Act states:

   33 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; ...

11. The Australian Information Commissioner has issued Guidelines under s 93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act.3 Part 5.31 of the Guidelines explain more about the exemption under s 33(a)(iii).

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. 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. There must also be real and substantial grounds for the conclusion that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

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2 Letter from Inspector-General of Intelligence and Security to the FOI Commissioner dated 21 September 2012.
12. The Guidelines also state that a decision maker is required to assess the likelihood of the event, effect or damage occurring after disclosure of the documents and that the use of the word ‘could’ means this requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause these consequences.4

13. The ABC consulted the Australian Agency for International Development (AusAID) before deciding the request. AusAID contended that seven documents contained comments about individuals which, if disclosed, would cause embarrassment to the Solomon Islands Broadcasting Commission (the SIBC) and, by extension, to the Government of the Solomon Islands.5AusAID said release of these documents would or could be capable of damaging Australia’s bilateral relationship with the Solomon Islands Government and they therefore recommended that the documents, or material in them, be exempt from release under s 33(a)(iii) of the FOI Act.

14. The ABC refused access to 12 documents under s 33(a)(iii) of the FOI Act.6

15. The ABC explained that SOLMAS is part of the civilian support provided by the Regional Assistance Mission to the Solomon Islands (RAMSI). RAMSI was established in 2003 as a partnership between the people and Government of the Solomon Islands and fifteen contributing countries from the Pacific region, including Australia. RAMSI aims to help the Solomon Islands lay the foundations for long-term stability, security and prosperity by supporting improved law, justice and security, by assisting in the development of more effective, accountable and democratic government and by providing for stronger economic growth and enhanced service delivery.7 The Solomon Islands Government is a key stakeholder in SOLMAS and the ABC submitted that public disclosure of the documents could adversely affect its relations with the SIBC and the Ministry of Communication and Aviation.

16. The ABC provided this office with details of the tangible and intangible damage to Australia’s international relations that the ABC considers could be caused by the release of the documents under review.

17. The ABC assessed the likelihood of this damage occurring as ‘significant’ based on its understanding of the politics and culture of the Solomon Islands. The ABC said there are individuals and groups in the Solomon Islands who are opposed to RAMSI’s presence and who may use material in the documents to destabilise or undermine SOLMAS or RAMSI.

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4 Guidelines [5.13]–[5.14].
5 Email from AusAID to the ABC dated 4 April 2011. AusAID did not object to release of seven documents and was unable to comment on three documents because it did not have access to them.
6 The ABC released two documents in full and three with irrelevant material edited under s 22 of the FOI Act. The applicant did not seek IC review of the ABC’s decision to edit material from the three documents.
7 See http://www.ramsi.org/about/what-is-ramsi.html.
Findings

18. I have read the twelve documents subject to this IC review. I do not consider that disclosure of these documents would, or could reasonably be expected to, damage the relationship between Australian and the Solomon Islands. The documents report on the activities and effectiveness of SOLMAS in strengthening the media sector in the Solomon Islands and cover the period from October 2008 until December 2010. The documents contain candid assessments of the strengths and weaknesses of individuals and media organisations in the Solomon Islands. Given the nature of the material, the aims of SOLMAS, and the collaborative nature of RAMSI, I do not consider that release of these documents would, or could, reasonably be expected to damage Australia’s relationship with the Solomon Islands Government.

19. I note that AusAID raised no objection to disclosure of two of the twelve documents the ABC says are exempt under s 33(a)(iii).

20. I do not consider that disclosure of the twelve documents under review would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. As a result, I do not consider these documents are exempt documents under s 33(a)(iii) of the FOI Act.

Other exemptions

21. Some of the documents contain comments critical of identified individuals. To the extent that these documents contain personal information which would be unreasonable to disclose and the release of which would be contrary to the public interest, I consider it is appropriate for this material to be edited before the documents are released to Ms Wake.

Whether reasonable steps taken to find a document (s 24A)

22. The ABC said it could find no documents falling within paragraph two of Ms Wake’s request, that is, ‘policy documents which explain how the ABC evaluates the effectiveness of these courses’. As a result, the ABC refused access to documents meeting the description in paragraph two under s 24A of the FOI Act.

23. The ABC advised this office that any documents relating to the ABC’s evaluation of the effectiveness of SOLMAS training courses were captured by paragraph one of the request, but that in any event, there are no ‘policy’ documents relating to the assessment of training programs run by SOLMAS.

24. To find documents falling within the scope of the request, the ABC’s FOI area wrote to the Head of International Development, her Executive Assistant and the International Development Project Manager to ask for all documents relevant to the SOLMAS project. The request specifically referred to:

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8 The FOI request is extracted in full at [2].
- All internal reports regarding the SOLMAS project
- All reports to AusAID regarding the project
- Project design documents, including the monitoring and assessment framework
- ROU for independent assessment
- All independent evaluations of the project
- Any other documents relating to the aims, achievements, performance and/or effectiveness of the project.

25. In deciding there was no need to conduct further searches, regard was had to the ABC’s record management practices, the role of the individuals consulted, the reporting structures within International Development (including the in-country team based in the Solomon Islands) and the nature and subject matter of the documents.

Findings

26. I have considered the terms of Ms Wake’s request, which includes, at paragraph 1, a request for ‘documentation about the SOLMAS project, specifically policy documents …’ [emphasis added]. I have read the documents falling within the scope of paragraph one of the request. I have also considered the actions taken by the ABC to locate documents relating to the request.

27. For the purposes of s 24A(1), I am satisfied that the ABC has taken all reasonable steps to find documents meeting the description in paragraph two of Ms Wake’s request.

Decision

28. Under s 55K of the FOI Act, I set aside the ABC’s decision of 5 April 2011 and decide, in substitution for that decision, that the documents under review are not exempt documents under s 33 of the FOI Act.

29. To the extent that these documents contain personal information which would be unreasonable to disclose, and the release of which would be contrary to the public interest, edited copies of these documents should be released to Ms Wake.

30. Under s 55K of the FOI Act, I affirm the ABC’s decision of 5 April 2011 to refuse access to the documents sought by the applicant in paragraph two of her request under s 24A of the FOI Act on the basis that such documents cannot be found or do not exist.

Toni Pirani
Acting Freedom of Information Commissioner
15 April 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.