



'AA' and Bureau of Meteorology [2013] AICmr 46 (18 April 2013)

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

Applicant:	'AA'
Respondent:	Bureau of Meteorology
Other parties:	National Institute of Water & Atmospheric Research
Decision date:	18 April 2013
Application number:	MR11/00134
Catchwords:	Freedom of Information — International relations of the Commonwealth — Whether disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth — (CTH) <i>Freedom of Information Act 1982</i> ss 33(a)(iii)

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Summary

1. I affirm the decision of the Bureau of Meteorology (the **Bureau**) of 6 May 2011, including the addendum issued on 18 October 2011, to refuse access to

documents requested under the *Freedom of Information Act 1982* (the FOI Act).

Background

2. On 21 February 2011, the applicant applied to the Bureau for access to documents relating 'in any way' to a peer review conducted by the Bureau of the 'Seven-station' temperature series report prepared by the New Zealand National Institute of Water and Atmospheric Research Ltd (**NIWA**), including copies of all correspondence between the Bureau and NIWA and any other organisation in relation to the peer review and the completed peer review.
3. On 6 May 2011, the Bureau wrote to the applicant advising it had identified 161 documents within the scope of his request. The Bureau decided all but two of these documents were exempt documents under ss 33(a)(iii), 33(b) or 47C of the FOI Act. The two non-exempt documents were released in full.
4. By letter dated 31 May 2011, the applicant sought IC review of this decision under s 54L of the FOI Act.
5. On 18 October 2011, the Bureau issued an addendum to the schedule of documents attached to its decision of 6 May 2011, having identified a further 14 documents falling within the scope of the request. The Bureau decided that all 14 additional documents were exempt under ss 33(1)(iii), 33(b) or 47C of the FOI Act.

Decision under review

6. The decision under review is the decision of the Bureau of 6 May 2011, including the addendum issued on 18 October 2011, to refuse the applicant's request for documents.

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.
8. Section 55U(3) provides that if the Information Commissioner is not satisfied by evidence, on affidavit or otherwise, that the document is exempt 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 it is exempt under s 33, the Commissioner must request the Inspector-General of Intelligence and Security to give evidence about the document (s 55ZB).
9. The FOI Commissioner considered the submissions made by the Bureau and NIWA about the documents under review. On the basis of the information provided, the FOI Commissioner was not satisfied that 126 documents were

exempt under ss 33(1)(a)(iii) and requested that they be produced for inspection.

10. The documents were produced and I have examined them. For the reasons given below, I have formed the view that the documents under review are exempt under s 33(a)(iii). As a result, it has not been necessary to ask the Inspector-General of Intelligence and Security to give evidence about them.

International relations of the Commonwealth (s 33(a)(iii))

11. The Bureau decided all of the 173 documents under review were exempt in full under s 33(a)(iii) of the FOI Act. I have examined 126 documents, as provided to this office by the Bureau.

12. Section 33(a)(iii) 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;

13. 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. The Guidelines state:

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.¹ The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between government agencies.²

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.³ 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.⁴ There must also be real and substantial grounds for the conclusion that are supported by

¹ *Re McKnight and Australian Archives* [1992] AATA 225.

² *Re Haneef and Australian Federal Police* [2009] AATA 51.

³ *Re Maher and Attorney-General's Department* [1986] AATA 16 as applied in *Maksimovic and Attorney-General's Department* [2008] AATA 1089.

⁴ *Re Slater and Cox (Director-General of Australian Archives)* [1985] AATA 110.

evidence.⁵ These grounds are not fixed in advance, but vary according to the circumstances of each case.

5.32 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in the future.⁶ ...

14. The documents subject to this IC review relate to the Bureau's peer review of NIWA's 'Seven-station' temperature data series.
15. Since 1908, NIWA has collected temperature data from seven locations (or stations) in New Zealand. For each location, temperature records have been merged to form a long term series. When merging temperature records, NIWA has adjusted temperatures to account for climatic differences between different sites, as well as for changes in exposure and instrumentation. If no adjustments are made, inaccuracies in temperature data can arise.
16. In response to legal action initiated in New Zealand with respect to the accuracy of the 'Seven-station' temperature data series, NIWA asked the Bureau to undertake a peer review of the methodology and documentation of its report. This work commenced in August 2010 and was finalised at the end of November 2010.
17. NIWA is a research and consultancy company owned by the New Zealand Government and created under the *Crown Research Institutes Act 1992* (NZ). I am satisfied NIWA is a New Zealand government agency.
18. The Bureau states peer review provides for a recognised expert in a field of scientific endeavour to critique and provide feedback about a study or draft report. The Bureau says there is a long established practice in the scientific community that peer reviews are conducted anonymously and confidentially.
19. The Bureau states it received documents from NIWA on the understanding that the peer review would be undertaken confidentially and that the documents provided would not be disclosed further.
20. The applicant says the practice of confidentiality and anonymity relied upon by the Bureau in its decision of 6 May 2011 does not apply to the documents subject to IC review because NIWA chose the Bureau to conduct the review; there was no anonymity. Furthermore, the applicant argues that peer review, to which confidentiality and anonymity apply, occurs when an academic journal passes a paper submitted for publication to an independent expert for comment. In this case, NIWA did not submit, nor did it contemplate submitting, the 'Seven-station' temperature data series to an academic or

⁵ *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

⁶ *Re Maksimovic and Attorney-General's Department* [2008] AATA 1089.

scientific journal for pre-publication consideration. NIWA and the Bureau collaborated during the review, contrary to usual scientific practice.

21. I consider that the review undertaken by the Bureau of the 'Seven-station' temperature data series is a peer review and that its conduct involved an assumption of confidentiality from the outset. As the applicant conceded in his submissions, the term 'peer review' is capable of covering a range of circumstances and in my view the issues he raises do not detract from this classification or the assumptions of confidentiality and anonymity relied upon by the Bureau and NIWA.
22. The Bureau provided information which indicates that in the week beginning 20 September 2010, there was a meeting between NIWA and the Bureau to discuss NIWA's expectations with respect to the conduct of the review. During this meeting, NIWA made it clear that the material they provided to the Bureau was sensitive and confidential and also that the Bureau undertook to keep this information confidential. Furthermore, when processing the applicant's FOI request, the Bureau consulted NIWA which maintained its objection to the release of any information relating to the peer review.
23. Conducting research and reviewing the work of other scientists, including climate change research, is an integral part of the Bureau's work. This research is often done in collaboration with other international research agencies. The Bureau says it also uses peer review to test and audit its own scientific material.
24. The Bureau states that anonymity is an important characteristic of the peer review process. In agreeing to undertake a review of NIWA's 'Seven-station' temperature data series, the Bureau agreed to honour the long standing scientific convention that the review would be conducted in confidence and anonymously. The Bureau says that should the information sought by the applicant be released, this will damage the existing relationship between the Bureau and NIWA because NIWA will no longer trust the Bureau as the repository of confidential information. NIWA strongly objected to the release of this information when consulted by the Bureau in relation to this FOI request.
25. The Bureau states this loss of trust will affect its relationships with other international research agencies, resulting in a reduction in the information provided to the Bureau and reluctance on the part of other international research agencies to participate in research activities with it in the future. This will restrict the ability of the Bureau to undertake research and would impact on the quality of its research activity.
26. I accept there are scientific conventions of confidentiality and anonymity associated with peer review and that the Bureau's review of the 'Seven-station' series was a peer review, as understood in the scientific community. As

a result, I consider these conventions applied when information was received by NIWA from the Bureau and when the Bureau conducted the review.

Findings

27. I consider that damage to the relationship between the Bureau and NIWA, and between the Bureau and other international research organisations, is damage to the international relations of the Commonwealth. This view is consistent with Part 5.30 of the Guidelines.
28. I have considered the Bureau's and NIWA's submissions and have decided that if any information provided to the Bureau by NIWA, any information about the peer review, or any information revealing the identity of staff working on the peer review is disclosed, it could reasonably be expected to damage the relationship not only between the Bureau and NIWA, but also between the Bureau and other international research organisations. The damage that could reasonably be expected to result from disclosure is a loss of trust in the Bureau as the holder of confidential material which would have the effect of reducing the willingness of NIWA and other international organisations to consult with the Bureau.
29. There are however, small parts of some of the documents identified by the Bureau as being fully exempt under s 33(a)(iii) of the FOI Act that were not provided to the Bureau by NIWA, do not contain information about the peer review and do not reveal the identity of staff who worked on the peer review. These parts of the documents contain personal greetings and comments not related in any way to the Bureau's peer review of the 'Seven-station' series. I consider these parts of the documents are irrelevant to the applicant's FOI request and would be edited from the documents under s 22 of the FOI Act if they were not exempt from disclosure.

Other exemptions

30. The Bureau refused access to 117 of the 173 documents on the basis that they were also exempt in full under s 33(b) of the FOI Act.
31. The Bureau said that 'a number' of the documents were also exempt under s 47C of the FOI Act on the basis that they contain details of deliberations within the Bureau.
32. Because of the view I have come to on the application of s 33(a)(iii), it is not necessary for me to consider the possible application of ss 33(b) or 47C.

Decision

33. Under s 55K of the FOI Act, I affirm the Bureau's decision of 6 May 2011, including the addendum issued on 18 October 2011.

Toni Pirani
Acting Freedom of Information Commissioner
18 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.