



# **‘CA’ and Australian Customs and Border Protection Service [2014] AICmr 62 (18 June 2014)**

Decision and reasons for decision of  
Privacy Commissioner, Timothy Pilgrim

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<b>Applicant:</b>	<b>‘CA’</b>
<b>Respondent:</b>	<b>Australian Customs and Border Protection Service</b>
<b>Decision date:</b>	<b>18 June 2014</b>
<b>Application number:</b>	<b>MR12/00431</b>
<b>Catchwords:</b>	<b>Freedom of Information — Whether agency exempt from operation of FOI Act in relation to document— Documents affecting national security, defence or international relations —Disclosure of confidential source of information — Prejudice to lawful methods or procedures — Deliberative processes — Certain operations of agencies — (CTH) <i>Freedom of Information Act 1982 ss 7(2A), 11A(5), 22, 33, 37, 47E</i></b>

## **Contents**

Summary .....	2
Background .....	2
Decision under review .....	2
Exemption of certain persons and bodies (s 7) .....	3
Findings .....	4
Documents affecting national security, defence or international relations (s 33).....	4
Documents affecting national security .....	4
Documents affecting international relations .....	5
Findings .....	6
Documents affecting enforcement of the law (s 37).....	6
Disclosure of confidential source (s 37(1)(b)) .....	7
Disclosure of law enforcement methods and procedures (s 37(2)(b)).....	7
Findings .....	8
Certain operations of agencies exemption (s 47E).....	8

Findings .....	9
The public interest test (s 11A(5)) .....	9
Decision.....	9

## Summary

1. I set aside the access refusal decision of the Australian Customs and Border Protection Service (**Customs**) of 4 September 2012 and substitute my decision, under ss 11A(5) and 22 of the *Freedom of Information Act 1982* (the **FOI Act**), granting access to the document, modified by deletions.

## Background

2. On 7 August 2012, the applicant applied to Customs for access to:
  - the report of the review commissioned by Customs and Border Protection on 1 November 2011 into Australian agencies management of information in safety of life at sea situations beyond Australia's SAR zone, referred to in Key Issues 14 in the following customs FOI release [http://www.customs.gov.au/webdata/resources/files/2012-008921\\_Documents\\_Released.pdf](http://www.customs.gov.au/webdata/resources/files/2012-008921_Documents_Released.pdf))
  - as follows:
    - Most recently, on 1 November 2011, Customs and Border Protection commissioned a review to examine Australian agencies management of information in *Safety Of Life At Sea situations beyond Australia's SAR Zone*.
3. On 4 September 2012, Customs advised the applicant that it had identified one document, a report, within the scope of his request. Customs released a copy of the report in part. In making its decision, Customs relied on the documents affecting international relations exemption (s 33(a)(iii)), the documents affecting law enforcement exemption (s 37), the operations of agencies exemption (s 47E). Customs also edited some information under s 7(2A) (exemption of certain persons or bodies).
4. On 24 October 2012, the applicant sought IC review of this decision under s 54L.
5. On 15 August 2013, in submissions to the Office of the Australian Information Commissioner (OAIC), Customs advised that it was also relying on ss 7(2A) and 33(a)(i) and (ii) in relation to material already exempted under other provisions.

## Decision under review

6. The decision under review is the decision of Customs on 4 September 2012 to refuse the applicant's request.

## Exemption of certain persons and bodies (s 7)

7. Section 7(2A) of the FOI Act provides:

An agency is exempt from the operation of this Act in relation to the following documents:

(a) a document (an **intelligence agency document**) that has originated with, or has been received from, any of the following:

- (i) the Australian Secret Intelligence Service;
- (ii) the Australian Security Intelligence Organisation;
- (iii) the Inspector-General of Intelligence and Security;
- (iv) the Office of National Assessments;
- (v) the Defence Imagery and Geospatial Organisation;
- (vi) the Defence Intelligence Organisation;
- (vii) the Defence Signals Directorate;

(b) a document that contains a summary of, or an extract or information from, an intelligence agency document, to the extent that it contains such a summary, extract or information.

8. 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 explain that:

All Australian Government agencies are exempt from the operation of the Act in relation to 'intelligence agency documents' (for example, a document that originated with or was received from ASIO or ONA) (s 7(2A)) ...The exemption extends to a part of a document that contains an extract from or a summary of an intelligence agency document or a defence intelligence document. The remainder of the document is not exempt on the same basis, and access may have to be given after deletion of the exempt material under s 22.<sup>1</sup>

9. In its decision and submissions to the OAIC, Customs advised that it was exempt from the operation of the FOI Act in relation to this information as it was information that originated with, or has been received from an intelligence agency or contains a summary of, or an extract or information from, an intelligence agency document.

10. On 4 July 2013, a notice was issued to Customs under s 55R of the FOI Act requiring production of the parts of the report that had been edited by Customs under ss 37 and 47E. Information that Customs had edited under ss 7(2A) or 33 was not required to be provided. Customs complied with this request on 26 July 2013. However, because of Customs' submission on 15 August 2013 to also rely on ss 7(2A), 33(a)(i), (ii) and (iii) in relation to material

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982* [2.12].

that it had originally edited under ss 37 and 47E, I have examined some, but not all, of the information that Customs is now seeking to edit under s 7(2A).

11. I am satisfied that the information that Customs edited from the report under s 7(2A) in both its original decision and the additional information claimed in its submissions of 15 August 2013, originated with an intelligence agency, or contains a summary or extract of an intelligence agency document.

## **Findings**

12. Customs is exempt from the operation of the FOI Act in relation to the material it edited from the report under s 7(2A).

## **Documents affecting national security, defence or international relations (s 33)**

13. Section 33 of the FOI Act 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:
  - (i) the security of the Commonwealth;
  - (ii) the defence of the Commonwealth; or
  - (iii) the international relations of the Commonwealth; or
- (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 of the Commonwealth.

14. In relation to the concept of 'damage' the Guidelines explain that:

'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency.<sup>2</sup>

15. Customs edited parts of the report under ss 33(a)(i), (ii) and (iii).

## **Documents affecting national security**

16. The Guidelines explain in relation to s 33(a)(i) that:

The term 'security of the Commonwealth' broadly refers to:

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<sup>2</sup> *Guidelines* [5.25].

- (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests
- (b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations (see definition in s 4(5)).

A decision maker must be satisfied that damage to the security of the Commonwealth would be caused by disclosure of the information under consideration.<sup>3</sup>

17. Customs exempted parts of the report under s 33(a)(i). Customs did not rely on s 33(a)(i) in its original decision, however, it did provide confidential submissions to the OAIC detailing why it considered the disclosure of the information would, or could reasonably be expected to, cause damage to the security of the Commonwealth.
18. I have examined unedited copies of the parts of the report Customs edited under s 33(a)(i). Broadly, the information edited by Customs relates to the government's methodologies and procedures in relation to safety of life at sea situations. I am satisfied that the disclosure of the information could reasonably be expected to damage the security of the Commonwealth in relation to safety of life at sea situations.
19. Customs also edited this information under s 33(a)(ii) (documents affecting the defence of the Commonwealth). As I have found the information exempt under s 33(a)(i), it is not necessary for me to consider the application of s 33(a)(ii).

### **Documents affecting international relations**

20. The Guidelines explain in relation to s 33(a)(iii) that:

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...

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.<sup>4</sup>

21. Customs edited one paragraph on page 13 of the report. In its decision, Customs advised that release of this information could reasonably be expected to cause damage to the international relations of the Commonwealth because it may diminish a foreign government's perception of Australia as an ally in

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<sup>3</sup> *Guidelines* [5.26]-[5.27].

<sup>4</sup> *Guidelines* [5.30]-[5.31] (footnotes omitted).

matters of mutual concern. If the information were disclosed, Customs says that this may result in the foreign government's willingness to cooperate with Customs in the future.

22. Customs provided the OAIC with further submissions outlining its reasons for editing the paragraph under s 33(a)(iii). Because of the sensitivity of the information discussed in the submissions, Customs requested that the content of the submissions not be disclosed or quoted.
23. I have not examined the paragraph that Customs edited from page 13, however I am satisfied, based on the reasons for decision and submissions of Customs, that the disclosure of the information in that paragraph would, or could reasonably be expected to, cause damage to the relationship between Australia and the identified foreign government.

## **Findings**

24. The information identified by Customs as being exempt under s 33(a)(i) in the report is exempt under that provision.
25. The information identified by Customs as being exempt under s 33(a)(iii) on page 13 is exempt under that provision.

## **Documents affecting enforcement of the law (s 37)**

26. Customs edited parts of the report under ss 37(1)(b) and (2)(b). Where I have already found that the information is exempt under ss 7(2A) or 33(a)(i), I have not considered it further under s 37.
27. Sections 37 relevantly provides:

### **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:

...

- (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

...

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

- (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

...

## **Disclosure of confidential source (s 37(1)(b))**

28. The Guidelines explain that:

Section 37(1)(b) protects the identity of a person who has supplied information on the understanding that their identity would remain confidential. The scope of confidentiality depends on the facts of each case.

...

It is not essential that the confidential source provide the information under an express agreement. Often an implied undertaking of confidentiality can be made out from the circumstances of a particular case. For example, the source may have supplied the information under the reasonable expectation that his or her identity would be kept confidential. In some cases, confidentiality can be inferred from the practice of the agency to receive similar types of information in confidence. Two examples are a telephone hotline set up to receive certain types of information from members of the public and expressly promoted as confidential; or information received from a person who could reasonably expect that their identity will not be made known to anyone other than those involved in administering and enforcing the law.<sup>59</sup> Nevertheless, the understanding or representation that information will be received confidentially must not be vague or devoid of context.<sup>5</sup>

29. Customs says that the information in the report was given to it by confidential sources on the understanding that their identity would remain confidential. Customs made confidential submissions to the OAIC about who the confidential sources are, the circumstances in which the information is provided to Customs and the manner in which the information is used by Customs in its law enforcement functions.
30. Based on Customs' submissions and after considering the content of the exempt material, I do not accept that the people or organisations identified in the report are confidential sources of information in relation to Customs' functions. Many of the people or organisations identified by Customs as being confidential sources are in fact undertaking their usual duties and responsibilities and could reasonably be expected to be communicating with Customs in relation to safety of life at sea situations. Further, some of the information edited by Customs under s 37(1)(b) does not refer to or identify a confidential source of information, but rather contains general information or discussion in relation to the issue under investigation. This information is not exempt under s 37(1)(b).

## **Disclosure of law enforcement methods and procedures (s 37(2)(b))**

31. The Guidelines explain that:

This exemption [s 37(2)(b)] 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

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<sup>5</sup> *Guidelines* [5.87]-[5.89].

methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice.

The exemption will not apply to routine techniques and procedures that are already well known to the public or documents containing general information. For example, in *Re Russo* the AAT rejected a s 37(2)(b) claim about the (then) Australian Securities Commission's method of allocating priorities to matters, with the observation that disclosing such a method is on par with disclosing that the respondent uses pens, pencils, desks, chairs and filing cabinets in the investigation of possible breaches of the Corporations Law. On the other hand, the AAT has held that authoritative knowledge of the particular law enforcement methods used (as opposed to the applicant's suspicion or deduction) would assist endeavours to evade them.<sup>6</sup>

32. Customs made confidential submissions to the OAIC about the law enforcement capabilities and methodologies that it says are contained in the report and are relevant to safety of life at sea situations. Customs says that release of the parts of the report to which it has applied 37(2)(b) will disclose those capabilities and methodologies and prejudice their effectiveness.
33. I do not consider that the parts of the report that Customs edited under s 37(2)(b) reveal methods, capabilities or procedures the disclosure of which would prejudice their effectiveness; no methods or procedures are disclosed by these parts of the report. Rather, these parts of the report identify government agencies who participated in the review and such general information about the review itself that cannot be said to disclose methods or procedures that would prejudice Customs' or other agencies law enforcement functions or future reviews. This information is not exempt under s 37(2)(b).

## Findings

34. The information that customs exempted under s 37(1)(b) does not contain confidential sources of information and is not exempt under this provision.
35. The parts of the report that Customs edited under s 37(2)(b) are not exempt under that provision.

## Certain operations of agencies exemption (s 47E)

36. Section 47E of the FOI Act relevantly provides:

### **Public interest conditional exemptions — certain operations of agencies**

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

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<sup>6</sup> *Guidelines* [5.101]-[5.102].

37. I have examined the parts of the report that Customs edited under s 47E. I have not considered the application of s 47E where I have already found that part of the report exempt under ss 7(2A) or 33(a)(i).
38. In its decision, Customs said that the disclosure of the parts of the report that it edited under s 47E would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient operations of Customs. In confidential submissions to the OAIC, Customs advised that disclosure of the information may inhibit the quality and quantity of the future supply of information to Customs in relation to its law enforcement operations.
39. As the Guidelines explain:
- An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect and the reasons behind the identification of those particulars should be articulated during the decision making process. Those particulars should also indicate whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt material<sup>7</sup>
40. The information that Customs edited from the report under s 47E(d) includes section headings (without any further information), names and titles of government agencies and agency representatives that would reasonably be expected to be involved in the review, general information about the review process and a recommendation of the review. Given the general nature of this information, I do not think that disclosure of this information would, or could reasonably be expected to, have the substantial adverse effect on the proper and efficient conduct of Customs' operations that Customs claimed would occur.

## Findings

41. The information that Customs edited from the report under s 47E(d) is not conditionally exempt under that provision.

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

42. As I have found that the parts of the report Customs edited under s 47E(d) are not conditionally exempt, it is not necessary for me to consider whether disclosure of the document would be contrary to the public interest.

## Decision

43. Under s 55K of the FOI Act, I set aside Customs' decision of 4 September 2012 and decide, in substitution for that decision, that:
- Customs is exempt from the operation of the FOI Act in relation to the information it edited under s 7

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<sup>7</sup> *Guidelines* [6.94].

- the parts of the report that Customs edited under s 33(a)(i) are exempt under that provision
- the information edited by Customs under s 33(a)(iii) on page 13 is exempt under that provision
- the remainder of the report is not exempt and should be released to the applicant.

Timothy Pilgrim  
Privacy Commissioner

18 June 2014

#### **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](http://www.aat.gov.au)) or by telephoning 1300 366 700.