

FOI-2023-10088

7 June 2024

Sarveshcika Yuvaraj

FOI Branch

Office of the Australian Information Commissioner

Dear Sarveshcika,

[MR23/01358 – Submissions](#)

Thank you for the opportunity to provide information in this matter. I have enclosed the material requested in [10.100] of the Information Commissioner's Guidelines. Our view is that the information requested by the applicant in this matter was appropriately refused.

We rely on the reasons for decision provided to the complainant in the initial decision, and subsequent internal review. We would also like to add a few short submissions in on the application of the s 47E(d) *Freedom of Information Act 1982*. (**FOI Act**) exemption and in response to two issues raised by the applicant.

Application of Section 47E(d)

1. The six relevant documents are correspondence in relation to the investigation of a Public Interest Disclosure (**PID**) under the *Public Interest Disclosure Act 2013*. Our view is that it is conditionally exempt pursuant to s 47E(d) of the FOI Act.
2. The Guidelines state at [6.122] in relation to s 47E(d):

"The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations."

3. Members of the public approaching the Ombudsman have an expectation that their complaints will be held in confidence and investigated in private. These expectations are set by the *Ombudsman Act 1976* (Ombudsman Act). Which requires that investigations should be conducted in private, and that information gathered in the course of our investigations be held in confidence.
4. The Information Commissioner has recognised in several published decisions that the disclosure of information obtained during our investigations could adversely affect the proper conduct of the operations of the Ombudsman. See for example: *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11 at [28]; and *Australian Skeptics Inc and Commonwealth Ombudsman* [2021] AICmr 61. These decisions recognise that there would be a substantial adverse effect on the willingness of the public to approach our Office with complaints, if there is concern investigations may be disclosed through FOI.
5. This concern is even stronger considering this complaint concerned the handling of a disclosure under the PID scheme. The protection of those who make disclosures is central to that scheme. The importance of protecting information collected during a PID investigation has been recognised by the Information Commissioner in *'YU' and Bureau of Meteorology* [2021] AICmr 75 at [31]:

"The PID Act provides public officials who make a disclosure under that Act with legislative protection from reprisals. I agree with BOM's submission that certain operations of the agency may be undermined if the confidentiality established under the PID Act was circumvented by a request for information under the FOI Act. I am also satisfied disclosure may result in employees losing confidence in BOM's ability to maintain confidentiality during a PID or other investigation into allegations of misconduct, which may have a substantial adverse effect on the Bureau's ability to manage its staff."

6. In the current case, the Office was exercising powers under the Ombudsman Act, not the PID Act. However, the information sought by the applicant is related to a

disclosure under the PID scheme, and the same adverse effects would flow from disclosure.

7. The release of any information concerning a PID reduces the likelihood that public officials will use the PID scheme in the future. Significant public detriment would result if our ability to obtain confidential information in future PID or Ombudsman Act investigations is compromised.

Response to applicant's submissions

8. We acknowledge the applicant's submission that there is publicly available information about related events. However, we submit that the publicly available information is general in nature, and that a release of specific documents from the investigation would include a large amount of detail that is not in the public record. This is relevant to both conditional exemptions claimed by the Office.
9. In our view the source of the information is also relevant: the release of information by the Office itself would cause a more serious loss of public faith in the integrity of the PID scheme, in a way that similar information circulated from other sources would not.
10. The applicant has also submitted that s47E(d) is not applicable to documents that 'reveal inefficiencies'. Paragraph [6.115] of the Guidelines states that s47E(d) can only be used to protect the proper and efficient operations of an agency. That is, the provision cannot be used to support an argument that disclosing some maladministration would cause an 'adverse effect' to an agency.
11. Respectfully, the concerns raised by our Office are not inconsistent with this part of the Guidelines. The substantial adverse effect which caused us to apply the s47E(d) conditional exemption is that the PID scheme cannot operate as intended unless disclosers have confidence that information shared with us will be held in strict confidence. This position does not seek to protect inefficiency or maladministration, and so [6.115] has no application. For the avoidance of any doubt, we also do not agree that the documents within scope show any lack of procedural fairness or other inefficiency.

We hope these submissions assist you. Please don't hesitate to contact me if you have any other questions.

Kind regards,

Matt Jackson
a/g Director - Legal
Office of the Commonwealth Ombudsman