



OSI reference: FOI24/13; ACON24/28

19 September 2024

Mr James Smith  
By email: [foi+request-11648-7beda262@righttoknow.org.au](mailto:foi+request-11648-7beda262@righttoknow.org.au)

Dear Mr Smith

### **Freedom of Information Request FOI24/13 – Decision letter**

The purpose of this letter is to provide you a decision in relation to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

#### **Background**

On 8 July 2024, you submitted your request to the OSI. You requested to access:

1. *A paper titled: "The investigation into alleged war crimes in Afghanistan – Some legal issues" by The Hon Mark Weinberg AO QC*
2. *An audit report dated December 2021 authored by "Synergy".*

On 16 July 2024, the OSI acknowledged your request and advised you that the processing period had been extended by an additional 30 days due to a requirement to consult affected third parties.

On 6 September 2024, the OSI requested your agreement to extend the processing period for your request by 10 calendar days. However, no response was received.

On 10 September 2024, the OSI submitted an application to the Office of the Australian Information Commissioner (OAIC) requesting an extension of time to process your request. The OAIC granted the OSI's request the following day, providing the OSI and you with a notice of their decision. The OAIC decided to grant the OSI a further 10 calendar days to process your request.

A decision in relation to your request is due on 19 September 2024.

#### **My decision**

I am authorised to make decisions in relation to freedom of information requests received by the OSI.

I have identified 2 documents that fall within the scope of your request. I did this by arranging for relevant staff to identify the documents within the OSI's records management system.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request
- the content of the documents identified as within scope of your request
- relevant provisions of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines)
- the views of a third party consulted by the OSI under s 27 of the FOI Act, as well as views of Australian Government agencies and departments who were also consulted.

I have decided to grant access in part to each of the 2 documents.

The reasons for my decision have been set out below under the Statement of reasons heading.

The schedule of documents at **Attachment A** sets out brief information about each document within the scope of your request and my decision on access in relation to each document. The documents I have decided to grant full or partial access to under the FOI Act are at **Attachment B**.

## Statement of reasons

### *Section 22: Access to edited copies with exempt or irrelevant matter deleted*

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

In deciding to delete material which would reasonably be regarded as irrelevant to a request, the Guidelines provide at paragraph 3.95 that:

*It is important for agencies to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant*

When the OSI acknowledged your request on 16 July 2024, you were advised that the following information would be regarded as irrelevant to your request:

- Personal information of junior officers of the OSI and other government authorities (e.g. names, direct telephone numbers, flexible working and leave arrangement information).
- Duplicates and incomplete email chains within the scope of the FOI request.

As there is no record available to me to suggest that you disagreed with this approach, I have decided to regard the above categories of information as irrelevant to your request and have deleted them under s 22 of the FOI Act.

### *Section 47: Documents disclosing trade secrets or commercially valuable information*

Section 47(1) of the FOI Act provides that a document is an exempt document if its disclosure under this Act would disclose:

- (a) trade secrets; or*
- (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

I have decided to apply ss 47(1)(a) and 47(1)(b) to document 1.

### Section 47(1)(a-b)

In applying these exemptions, paragraph 5.229 and 5.234 of the Guidelines provide that:

*The term 'trade secret' is not defined in the FOI Act. The Federal Court has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.*

....

*To be exempt under s 47(1)(b) a document must satisfy two criteria:*

- *the document must contain information that has a commercial value either to an agency or to another person or body, and*
- *the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

I consider that disclosure of the relevant information would disclose information that constitutes trade secrets and other information having commercial value.

In response to consultation, the organisation to which the information relates advised the OSI that, in their view, that the information constitutes both trade secrets and has commercial value because it:

- Outlines the organisations' methodology for conducting audits and how the organisation undertakes its work.
- The methodology gives the organisation a market advantage over its competitors.
- Is not known outside of the organisation and, in relation to the particular audit to which document 1 relates, the methodology was agreed to and is only known to it and the OSI.

For the reasons given above, I am satisfied that the relevant information is exempt from disclosure pursuant to sections 47(1)(a) and 47(1)(b) of the FOI Act.

These exemptions are not subject to an overriding public interest test. Accordingly, I have not turned my mind to whether disclosure of the information would be contrary to the public interest.

### **Section 47C: Public interest conditional exemption – deliberative processes**

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency; or a Minister; or the Government of the Commonwealth.

In applying this exemption, paragraphs 6.46 and 6.76 of the Guidelines, relevantly, provide:

*This conditional exemption is characterised by a 3-stage decision making process reflecting the statutory requirements. Firstly, the decision maker must be satisfied that information within the scope of the request includes deliberative matter. Secondly, if the decision maker is satisfied, they are then required to be satisfied that the deliberative matter was obtained, prepared or recorded in the course of, or for the purposes of, deliberative processes. Thirdly, the decision maker must be satisfied that the deliberative processes were involved in the functions exercised by or intended to be exercised by an Australian Government agency or minister. The decision maker must be satisfied that of each of these requirements is met.*

...

*In some cases, a document may contain deliberative matter that relates to Cabinet in some way but is not exempt under the Cabinet documents exemption in s 34. An example would be a document containing deliberative matter that is marked 'Cabinet-in-Confidence' but nonetheless does not satisfy any of the exemption criteria in s 34. Disclosing a document of this kind will not necessarily be contrary to the public interest only because of the connection to Cabinet deliberations. For example, disclosure is less likely to be contrary to the public interest if:*

- *the document contains deliberative but otherwise non-sensitive matter about a policy development process that has been finalised and*
- *the Government has announced its decision on the issue.*

Based on advice provided to me, I am satisfied that the relevant material is not purely factual or operational information within the meaning of s 8A of the FOI Act<sup>1</sup>. I am also satisfied that the material is deliberative matter within the meaning of section 47C(1). The deliberative matter is 'Cabinet-in-Confidence'; it has not been announced by Government, nor does it appear to be otherwise publicly known, and pertains to deliberative processes involved in the functions of the Government of the Commonwealth.

Accordingly, I have decided that the relevant material is conditionally exempt under section 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the header '*Section 11A(5): Public interest test*'.

### **Section 47E: Public interest conditional exemption – certain operations of agencies**

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The categories of information to which I have conditionally applied this exemption comprises:

- Location information of OSI office premises and staff – this information is used only for internal purposes.
- Strategic information, including details of methods by which the OSI and its key partners may obtain information relevant to Operation Emerald investigations.

#### Location information

I am satisfied that disclosure of the location information, which is maintained only for internal operational purposes, would or could reasonably be expected to result in individuals attending, or attempting to attend, OSI premises or attempting to contact certain kinds of staff if widely known. The location of OSI premises and staff locations are not published or otherwise made publicly available to ensure the integrity of investigations and to support the OSI manage identified personnel and physical security risks.

I also consider disclosure would increase the likelihood of targeted attacks on OSI premises and staff, and I note the OSI is required to provide a safe and secure physical environment for its people, information and assets under the Protective Security Policy Framework<sup>2</sup>, and to ensure, so far as is reasonably practicable, the health and safety of workers<sup>3</sup>. I further note the OSI has established channels through which members of

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<sup>1</sup> An agency's **operational information** is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities). Example: The agency's rules, guidelines, practices and precedents relating to those decisions and recommendations.

<sup>2</sup> <https://www.protectivesecurity.gov.au/policies/physical-security>

<sup>3</sup> *Work Health and Safety Act 2011*, s 19 – Primary duty of care

the public can contact the agency<sup>4</sup> and, for this reason, I consider there is little or no public interest in disclosure of this information.

### Strategic information

I am satisfied disclosure of the information concerned would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the OSI. Specifically, the OSI's ability to fulfil its investigative functions in the manner expected by the Government. Disclosure would reveal methods by which the OSI and its key partners may undertake investigate work and obtain information in this regard. Were this information to be disclosed, it would, or could reasonably be expected to, undermine the integrity of the joint OSI-AFP investigations and any subsequent prosecutions. It would also require the OSI to substantially change its current operational and strategic approach to its work, which would come at substantial reputation, financial and temporal cost to the OSI.

### **Section 11A(5): Public interest test**

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.5 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in section 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under section 11B(4) of the FOI Act, which are whether:

- *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;*
- *access to the document could result in any person misinterpreting or misunderstanding the document;*
- *author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;*
- *access to the document could result in confusion or unnecessary debate.*

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, including by:

- promoting the objects of the FOI Act, including by informing the community of the Government's operations and enhancing the scrutiny of government decision making
- informing debate on a matter of public importance.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances

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<sup>4</sup> For example, <https://www.osi.gov.au/contact-us>

relevant to the conditionally exempt material. I consider the release of the conditionally exempt material could, as the case may be, reasonably be expected to prejudice:

- the Government's future deliberation of a topic identified in document one.
- the OSI's ability to fulfil its core investigative functions in the manner expected by the Government and, consequently, the administration of justice generally
- the OSI 's to appropriately manage approaches and inquiries from external parties, and to take reasonable steps to mitigate the likelihood of identified personnel and physical security risks.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.

### Your rights

If you are unhappy with the way we have handled this FOI request, you can make an FOI complaint to the Information Commissioner.

More information about making an FOI complaint is available on the OAIC website:

<https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints>.

### Your review rights

If you are unhappy with this decision, you can apply for an internal review or Information Commissioner review. You should ask the OSI for an internal review as a first step.

#### *Internal review*

Applications for internal review must be made:

- within 30 days of the date of this letter, and
- in writing to: [foiandprivacy@osi.gov.au](mailto:foiandprivacy@osi.gov.au).

You should also explain why you believe the internal review is needed.

#### *Information Commissioner review*

You can apply to the Information Commissioner for review of this decision. An application for review by the Information Commissioner must be made to the OAIC:

- Within 60 days of the date of this decision letter.
- Be made in writing – For further information, access:
  - [Apply for an Information Commissioner review](#)
  - [Your freedom of information rights](#)

## Questions about this decision

If you want to talk about this decision, contact the OSI's Information Access and Records Manager by email to [foiandprivacy@osi.gov.au](mailto:foiandprivacy@osi.gov.au).

Yours sincerely

*[Signed electronically]*

### **Caroline**

Position number 2508699

Authorised Decision Maker

Office of the Special Investigator

### **Attachments**

Attachment A: Schedule of documents

Attachment B: Documents released in response to FOI24/13



**Attachment A: Freedom of Information Request FOI24/13 – Schedule of documents**

<b>Document number</b>	<b>Document date</b>	<b>No. of pages</b>	<b>Description/title</b>	<b>Decision on access</b>	<b>Exemptions/deletions</b>
1	16/12/2021	34	Internal Audit Report on the Establishment of the OSI	Grant access in part	22(1), 47(1)(a), 47(1)(b), 47C(1), 47E(d)
2	19/07/2021	22	Paper based on the Special Investigator's remarks at a legal conference in June 2021	Grant access in part	22(1)