



OSI reference: FOI24/19; ACON24/48

28 October 2024

Mr James Smith
By email: foi+request-12090-fd517f4f@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request FOI24/19 – Decision letter

This letter provides a decision on your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Office of the Special Investigator (OSI).

Background

On 27 September 2024, you requested access to:

Copies of all communications (if any) with Kevin Jon Heller.

On 1 October 2024, the OSI acknowledged your request.

A decision in relation to your request is due on 28 October 2024.

My decision

I am authorised to make decisions on FOI requests made to the OSI.

In making my decision, I have considered:

- the terms of your request
- the content of any documents that are, or would be, within the scope of your request
- relevant provisions of the *Freedom of Information Act 1982* (FOI Act)
- the [FOI Guidelines](#) issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines).

I have decided to refuse your request pursuant to s 25 of the FOI Act. The reasons for my decision are below.

Statement of reasons

Section 25: Access to edited copies with exempt or irrelevant matter deleted

Section 25 of the FOI Act provides that:

- (1) *Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be:*
- (a) *an exempt document by virtue of section 33 or subsection 37(1) or 45A(1); or*
 - (b) *an exempt document to the extent referred to in subsection 45A(2) or (3).*

I have decided to neither confirm the existence or non-existence of the documents you have requested because they are, or would be, exempt under of ss 37(1) and 33(a)(iii) and 33(b) of the FOI Act.

Section 37: Documents affecting enforcement of law and protection of public safety

Section 37(1) of the FOI Act provides that a document is an exempt document if its disclosure would, or could reasonably be expected to:

- (a) *prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;*
- (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*
- (c) *endanger the life or physical safety of any person.*

The documents you have requested may contain information about evidence and resources available to the OSI. Disclosure of this information could jeopardise particular investigations relevant to the OSI's mandate¹.

Further, the requested documents may disclose, or enable a person to ascertain, information regarding the existence or identity of a confidential source of information. The identity of any individual and the information that they have, or may have, provided to the OSI, is received and managed on a strictly confidential basis, with access to and knowledge of that information known only to those who require it to fulfil the OSI's purpose.

Section 33: Documents affecting national security, defence or international relations

Under s 33 of the FOI Act, a document is an exempt document if disclosure:

- (a) *would, or could reasonably be expected to, cause damage to:*
 - (i) *the security of the Commonwealth;*
 - (ii) *the defence of the Commonwealth; or*

¹ Order to Establish the Office of the Special Investigator as an Executive Agency, 10 December 2020, <https://www.legislation.gov.au/C2020G01030/latest/text>

(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 organization 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.*

In applying this exemption, paragraph 5.43 of the FOI Guidelines provides:

When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document, but also the intelligence technique known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces of information, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.

The documents you have requested may contain information that would, or could reasonably be expected to:

- cause damage to the Commonwealth's international relations (s 33(a)(iii)). This is because the information sought may have originated from the International Criminal Court (ICC), specifically Professor Kevin Jon Heller², Special Adviser on War Crimes. Confirmation of the existence of this information would likely diminish confidence in the OSI's ability to maintain confidentiality over discussions and information exchanged with the ICC.
- divulge matter communicated in confidence by or on behalf of the ICC (an international organisation), to the OSI (s 33(b)). Information of this kind is, or would be, communicated in, and received under, an understanding of confidentiality. Confirmation of the existence of this information would also likely impede the future flow of information between the the ICC and the OSI.

Additionally, the documents sought may – as indicated above – disclose the evidence and resources available for investigations relevant to the OSI's mandate. In the circumstances, confirming the existence of the material sought would create a mosaic effect by enabling undue insight into the direction of OSI investigations and any legal or other issues which the OSI is, or may be, considering in this context.

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 Office of the Australian Information Commissioner website: <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints>.

² <https://www.icc-cpi.int/sites/default/files/2024-05/Bio-Kevin-Heller-eng.pdf>

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.

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

You can contact me by email to foiandprivacy@osi.gov.au.

Yours sincerely

[signed electronically]

Sarah

Authorised Decision Maker
Position number: 2508701
Office of the Special Investigator