

Our ref: FOI-2024-80046

28 January 2025

Robert Not Given

By email: foi+request-12420-c8b1cdba@righttoknow.org.au

Dear Robert,

Freedom of Information Request- Access Decision

1. I refer to your request of 30 November 2024 to this Office under the *Freedom of Information Act 1982* (FOI Act) for access to documents in the following terms:

"On 12 March 2024, in matter NSD 1076/2023 – Eli Turner v Commonwealth Ombudsman, Justice Perry of the Federal Court of Australia issued, by order:

- a) *a writ of certiorari quashing the decision of a delegate of the Commonwealth Ombudsman dated 31 August 2023; and*
- b) *a writ of mandamus directing the Commonwealth Ombudsman to determine Mr Turner's application according to law.*

<https://comcourts.gov.au/file/Federal/P/NSD1076/2023/3965406/event/31721986/document/2245763>

Prior to the issuance of the writs, the Commonwealth Ombudsman conceded that the decision dated 31 August 2023 is affected by jurisdictional error because the delegate erred in the exercise of their discretion by concluding that the "Office is limited to considering the reported conduct, rather than the impact of the abuse" and that this error was material.

Under the FOI Act 1982 (Cth), I request access to the decision notice (including the reasons in support of the decision), dated 31 August 2023, which was affected by jurisdictional error."

2. On 10 December 2024, our Office acknowledged your request and informed you that the document captured in the scope of your request refers to personal information of a third party and we had formed the view that this third party may wish to make exemption contentions in accordance to section 27A of the FOI Act.
3. As I determined that a consultation requirement applied, the time to provide you with a decision on your FOI request was extended by 30 days pursuant to section 15(6) of the FOI Act. This extended the due date to 29 January 2025.

Decision

4. I am authorised to make decisions on behalf of our Office under section 23 of the FOI Act.
5. This letter constitutes notice of my decision on your request for access.
6. Our Office has identified one document, totalling three pages, relevant to your request. I have decided to refuse access to this document in full under section 47F, and section 47E(d) of the FOI Act. I also consider section 45, documents containing material obtained in confidence, is a relevant exemption although as I have found the document to otherwise be exempt, I have not addressed that exemption below.
7. A schedule setting out the relevant document is at **Attachment A**.

Document searches

8. Our Office identified the documents by searching our electronic records management system and electronic documents saved on shared or network drives for any documents this Office may hold, that may fall within the scope of the request. I have also consulted with staff within the Office with specialised knowledge relating to the subject matter of your request, who would be best placed to identify where documents responsive to your request may be located.

Consultation

9. I note that I have consulted with a third-party individual under section 27A of the FOI Act because documents within scope of your request contained their personal information. I have taken their views into account in making this decision. This

individual objected to the release of the document containing their personal information to you.

Reasons for decision

Material taken into account

10. In making my decision I had regard to the following:

- the terms of your request
- the content of the documents to which you sought access
- consultations with relevant Ombudsman staff members
- the consultation response from a third party under s 27A of the FOI Act
- the outcome of relevant searches
- the relevant provisions of the FOI Act
- Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, available at www.oaic.gov.au (**FOI Guidelines**)

11. In considering whether all reasonable steps have been taken to locate documents within scope, I have considered:

- the subject matter of the documents requested
- the file management systems in place
- advice from individuals and line areas within the office who may be able to assist.

Conditional exemption– personal privacy: s 47F

12. Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

Personal information

13. 'Personal information' is defined in section 4 of the FOI Act as:

Information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information is true or not, and

(b) whether the information is recorded in a material form or not.

14. The document contains personal information of third parties in the form of their full names, place of employment, signature of an Ombudsman staff member, a summary of the abuse reported to our Office, and details of past service history in the Australian Defence Force.

Disclosure unreasonable

15. If information is personal information, it will be conditionally exempt if its disclosure would be 'unreasonable.' In considering whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act requires me to take into account:
- a. the extent to which the information is well known
 - b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
 - c. the availability of the information from publicly accessible sources
 - d. any other matter I consider relevant.
16. With regards to the content of the letter, the relevant information is not well known. Some of the individuals to whom the information relates are not generally known to be associated with the relevant information, and the relevant information is not readily available from public sources. Details about the contents of the letter were not publicly disclosed in *Eli Turner v Commonwealth Ombudsman*. Limited information about the decision and the court matter has been shared by our Office in our 2023-24 Annual Report. The delegate who signed the letter is not generally known to be associated with the relevant information, and the relevant information is not readily available from public sources.

17. The sensitive nature of some of the personal information, namely details of the abuse reported, is another matter I consider relevant in determining disclosure is unreasonable.
18. I find that release of personal information, including information about the abuse reported to our Office and the third party's prior service history would involve the unreasonable disclosure of personal information under section 47F(1) of the FOI Act.

Disclosure not in the public interest

19. Section 11A(5) of the FOI Act provides that while an agency must give a person access to a document if it is conditionally exempt, access may be refused if the document's disclosure would, on balance, be contrary to the public interest.
20. In deciding whether or not access should be given to this information, on the basis that it is in the public interest to do so, I have taken into account the public interest factors for and against disclosure, section 11B(3) of the FOI Act, the FOI Guidelines at paragraphs [6.229 – 6.233], as well as matters specific to this agency's functions and operating environment.
21. Broadly, I am of the view that disclosure may promote the objects of the FOI Act by increasing scrutiny, discussion or comment around decision making or increase public participation in Government processes.
22. The following factors mitigate against disclosure:
 - the disclosure could reasonably be expected to prejudice the protection of a person's right to privacy;
 - the information is not on the public record or otherwise available from publicly accessible sources; and
 - disclosure does not give you access to your personal information.
23. Release of the information could reasonably be expected to prejudice the protection of a person's right to privacy, specifically the privacy of the affected third party. I have given considerable weight to the protection of an individual's right to privacy, and the sensitivity of the personal information captured by the request.

24. Pursuant to subsection 11A(5) of the FOI Act, I have concluded that this material is not required to be disclosed because disclosure at this time would be, on balance, contrary to the public interest.

Conditional exemption – certain agency operations: s 47E

25. Section 47E provides that:

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

...

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

26. The FOI Guidelines state at paragraph 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.

Would, or could reasonably be expected to, have a substantial adverse effect

27. Our Office receives and assesses reports of alleged abuse and makes recommendations to Defence under the Defence Abuse Reparation Scheme under Part IIA of the *Ombudsman Act 1976 (Cth)*. Members of the public can provide our Office with reports of abuse through our 'Reporting Abuse in Defence' form. The form assures applicants their personal information when they contact the Defence Force Ombudsman is treated as confidential and is managed in accordance with the *Privacy Act 1988 (Cth)*.

28. It is likely that if sensitive information about this Defence abuse matter was disclosed it would compromise trust that the Office will maintain confidentiality. This would mean that members of the public would be less willing to make reports of abuse and provide information to the Office. I am satisfied that public detriment could

reasonably be expected to arise if the Ombudsman is compromised in its' ability to obtain information from defence abuse reportees in future.

Disclosure not in the public interest

29. In deciding whether or not access should be given, on the basis that it is in the public interest to do so, I have taken a number of matters into account. These matters include the public interest factors as outlined in the Guidelines, as well as matters particular to our agency's functions and operating environment.

30. The following factors are in favour of disclosure:

- disclosure would promote the objects of the FOI Act, including to inform the community of the Government's operations.

31. The following factors are against disclosure:

- would reasonably be expected to prejudice the protection of an individual's right to privacy,
- would reasonably be expected to prejudice the proper and efficient conduct of investigations by the Ombudsman,
- would reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information, and
- would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

32. In considering whether the public interest would require the documents to be released, I am of the view that the factors against disclosure outweigh those in favour of disclosure.

Review rights

Internal review

33. You can request internal review within 30 days of you receiving this decision. An internal review will be conducted by a different officer from the original decision-maker.

34. No particular form is required to apply for review although it will assist your case to set out the grounds on which you believe that the original decision should be changed. Applications for internal review can be made:

- via email to information.access@ombudsman.gov.au
- by mail to Commonwealth Ombudsman GPO Box 442 Canberra ACT 2601

35. If you choose to seek an internal review, you will afterward have a right to apply for Information Commissioner review (IC review) of the internal review decision.

Information Commissioner review or complaint

36. You also have the right to seek IC review of this decision. For FOI applicants, an application for IC review must be made in writing within 60 days of the decision. For third parties who object to disclosure of their information, an application for IC review must be made in writing within 30 days of the decision.

37. If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

38. While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

39. You can make an IC review application or make an FOI complaint in one of the following ways:

- online at <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints/make-an-foi-complaint>
- via email to foidr@oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001, or
- by fax to 02 9284 9666.

40. More information about the Information Commissioner reviews and complaints is available at its website: www.oaic.gov.au/freedom-of-information/foi-review-process.

Contact

41. You may contact me via email at information.access@ombudsman.gov.au or via telephone on 1300 362 072.

Yours sincerely

A handwritten signature in black ink, consisting of stylized initials 'LM'.

Laura Mackenzie
Legal Officer
Legal Team

Schedule of documents- Freedom of Information Request FOI-2024-80046

Doc No.	Document Name	Description of Document	Decision of Access	Exempt or irrelevant material	Information redacted
1.	Final decision letter regarding reparation payment	Decision notice of decision not to recommend a reparation payment dated 31 August 2023	<i>Exempt in full</i>	<p>Section 47F – public interest conditional exemption – personal privacy</p> <p>Section 47E- public interest conditional exemption – certain operations of agencies</p>	<p>Personal information including, details of a third party's prior service history and a summary of the abuse reported to our Office.</p> <p>Reports of abuse our Office receives under the Defence Abuse Reparation Scheme are confidential.</p>