GPO Box 2934, Adelaide SA 5001

Australian Government
Australian Taxation Office

James Smith

By email at Right to Know website

Reply to: GPO Box 2934
ADELAIDE SA 5001
Our reference: 1-BJZCB29
Contact officer: D Lux-Bridges
Phone: 13 28 69

25 August 2017

Decision regarding Freedom of Information (FOI) request 1-BJZCB29

Dear Mr Smith,

I refer to your application requesting copies of documents under the *Freedom of Information Act 1982* (FOI Act), which I received on 20 May 2017.

I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

Your request

By application dated 20 May 2017, you requested the following information:

> The scope of this request is limited to documents connected to decisions made in relation to enterprise bargaining ballots undertaken since 1 January 2014.
>
> I request all documents which:
>
> 1. Justify to the relevant decision maker the use of all, or particular, characteristics of the voting employees, including, but not limited to employee location, APS level, business area, gender, full-time/part-time, casual, etc.
>
> 2. Explain any benefits to you, as employer, in obtaining breakdowns of any of the characteristics.
>
> 3. Justify the reasons for using the particular voter characteristics used in ballots.
>
> 4. Are put to, or created by, the departmental Executive, or the SES responsible for bargaining, and make any reference to any breakdowns of particular voter characteristics, for any purpose.
>
> 5. Give notice to employees prior to the ballots to explain what information was to be used in the ballot process.
>
> I exclude from the scope of this request any documents that have already been released through FOI.

My decision in relation to your FOI application

I have located 20 documents, or bundles of documents, that meet the scope of your request. I have made the following decisions on these documents:

Decision on Documents	Exemption Provisions (FOI Act)						Total
	S 42	S 45	S 47	S 47D	S 47E(d)	S 47F	
Release in Full	-	-	-	-		-	**7**
Release in Part	0	0	3	0	6	6	**10***
Not Released	1	1	1	1	0	0	**3***
Total	1	1	4	1	6	6	**20***

* Note that a document, or part of a document, may be exempt under more than one provision of the FOI Act. The total column reflects the total number of documents containing exemptions, rather than the number of exemptions applied.

I have attached my decision and the *Statement of Reasons* for that decision to this letter. I have also included a *Schedule of Documents* setting out the documents found within the scope of your request and the exemptions that applied to each document.

In reaching my decision, I have relied on the following evidence and authorities:

- Contents of the documents requested
- The FOI Act
- Consultation with the relevant business and service line (BSL) within the ATO
- Consultation with ORIMA Research Pty Ltd (ORIMA)
- FOI Guidelines issued by the Australian Information Commissioner pursuant to section 93A of the FOI Act (the FOI guidelines)[1].

Your rights of review

If you are unhappy with my decision, you can either request an internal review or request an independent review by the Australian Information Commissioner. You can also apply to the Australian Information Commissioner after an internal review has been conducted.

A request for an internal review needs to:

- be in writing
- be sent to us within 30 days of being notified of my decision, and
- be sent, quoting the reference number 1-BJZCB29, via:
  - email at foi@ato.gov.au, or
  - mail to:

    Australian Taxation Office

    GPO Box 2934

    ADELAIDE SA 5001

[1] https://www.oaic.gov.au/freedom-of-information/foi-guidelines/

The internal review will be done by an officer who did not make the initial decision.

A request for an independent review by the Australian Information Commissioner needs to:

- be sent within 60 days of being notified of my decision
- include a copy of this notice
- include an address where notices can be sent (e.g. your email address), and
- be sent to:

  Email: enquiries@oaic.gov.au or,

  Mail: GPO Box 5218
  Sydney NSW 2001

For further details regarding the Australian Information Commissioner visit **www.oaic.gov.au**

You may also apply to the Australian Information Commissioner if you have not been informed of the outcome of an internal review within 30 days.

Complaints

Any complaint about the processing of your FOI request can be forwarded to the Information Commissioner. The complaint needs to be in writing and identify the agency against which the complaint is made. There is no particular form required to make a complaint, however using the online form is preferable.

online:	https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1
email:	enquiries@oaic.gov.au
post:	GPO Box 5218, Sydney NSW 2001
in person:	Level 3, 175 Pitt Street, Sydney NSW

The Information Commissioner can be contacted on 1300 363 992 for the cost of a local call.

Yours sincerely

D Lux-Bridges
Lawyer
General Counsel
Australian Taxation Office

Statement of Reasons

Applicant Details

James Smith

Request

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> I exclude from the scope of this request any documents that have already been released through FOI.

Decision

A total of 20 documents, or bundles of documents, are within the scope of your request. Of these, seven documents have been released to you in full, and ten documents have been released to you in part. Three bundles of documents have not been released to you, on the grounds that they are fully exempt from production.

Subsection 26(1) of the FOI Act provides that, where a decision is made to refuse to grant access to a document, I am required to provide you with reasons for that decision.

Reasons for Decision

Section 11 of the FOI Act provides that you have a legally enforceable right to obtain access to a document of the ATO. Under section 11A of the FOI Act, the ATO must give you access to a document upon your request.

However, access to a document or part of a document cannot be provided where:

- The document, or part of it, is an exempt document, where the document, or information contained within it:
  - Is subject to legal professional privilege (section 42 of the FOI Act);
  - Contains material that was obtained in confidence (section 45 of the FOI Act); and
  - Contains trade secrets or commercially valuable information (section 47 of the FOI Act);

- The document, or part of it, is conditionally exempt from production and, in the circumstances, access to the document would be contrary to public interest, including where provision of the document would:
  - Have a substantial adverse effect on the financial interests of the Commonwealth (section 47D of the FOI Act);
  - Have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (paragraph 47E(d) of the FOI Act); and
  - Unreasonably disclose personal information about any person (section 47F of the FOI Act).

Section 22 of the FOI Act allows an edited document to be provided, where deletions can be made such that the edited copy would not be an exempt document, and therefore must be provided under section 11A of the FOI Act.

In your case, I have made deletions to ten of the documents identified as being within the scope of your request. A further three bundles cannot have deletions made such that an edited copy would not be an exempt document, and thus these documents cannot be released to you. The reasons for the deletions and exemptions are set out below.

Section 42 of the FOI Act – Legal Professional Privilege

Section 42 of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

At common law, a communication is considered to be privileged where:

- There is a legal adviser – client relationship;
- The communication was given for the purpose of legal advice, or for use in connection with litigation;
- The advice given was independent and confidential[2].

Privilege may be waived where a client has, expressly or impliedly, disclosed the advice where such a disclosure is inconsistent with the maintenance of privilege.

In this case, I have located one bundle of documents that exclusively contain communications between the enterprise bargaining team and/or the relevant SES, and both internal and external legal advisers.

In respect of this bundle of documents, there exists a legal adviser – client relationship, where the professional services of the external and in-house lawyers have been obtained for the purposes of receiving legal advice. As noted at paragraph 5.134 of the FOI guidelines, communications and information between an agency and its qualified legal advisers may be privileged, even where those advisers are internal to the agency, as long as the communications arise within a lawyer – client relationship.

The communications were further given for the purpose of obtaining legal advice on a specific matter, and resulted in advice that was both independent and confidential.

I have found no evidence that privilege has been waived over any of the documents by actions taken by the Commissioner that are inconsistent with privilege, and nor does the Commissioner intend to waive privilege at this time.

As such, I consider that one bundle of documents is exempt in full, on the grounds that legal professional privilege applies to those documents.

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[2] See, for further reference, paragraphs 5.126 to 5.154 of the FOI Guidelines

Section 45 of the FOI Act – material obtained in confidence

Section 45 of the FOI Act provides that a document is exempt from production where its disclosure under the FOI Act would found an action by a person for breach of confidence.

Paragraph 5.148 of the FOI guidelines provides that '*a breach of confidence is the failure of a recipient to keep information, which has been communicated in circumstances giving rise to the obligation of confidence, confidential.*'

At paragraph 5.159, the FOI guidelines provide a list of criteria that the courts would take into account in determining whether a breach of confidence is actionable at law. These provide that the information:

- Must be specifically identified;
- Must have the necessary quality of confidentiality;
- Must have been communicated and received on the basis of a mutual understanding of confidence;
- Must have been disclosed or threatened to be disclosed without authority; and
- Has or will cause detriment if disclosed without authority.

I have identified one bundle of documents which contain or refer to information obtained by the ATO in confidence from ORIMA[3]. The information is not identified in global terms, but rather can be discretely identified.

I consider that the information has the quality of confidentiality, and was received under a mutual understanding of confidence. The FOI guidelines provide that, for information to have the quality of confidentiality, it must be secret or only known to a limited group. There must be a mutually understood and communicated obligation of confidence which exists at the time the information was communicated.

In your case, the ATO understood at the time that the information was communicated that it was only to be disclosed to specific officers. The information is only known to a limited group, and is not more widely known within the ATO specifically or within the public domain more generally.

As such, any disclosure of the information, particularly into the public domain under the FOI Act, would be unauthorised. For the reasons given in my response to section 47 below, I consider that detriment would occur if the information were released publicly.

As such, I consider that the information contained within the bundle of documents is material that was obtained in confidence, and that disclosure of the documents would found an action by ORIMA for breach of confidence.

I therefore consider that one bundle of documents is exempt in full pursuant to section 45 of the FOI Act.

Section 47 of the FOI Act – trade secrets or commercially valuable information

Section 47 of the FOI Act states that a document may be exempt where it contains information that, if released, would disclose trade secrets or commercially valuable information.

Further, where I consider that the release of a document may disclose a trade secret or commercially valuable information, and that an entity might reasonably wish to make a

[3] I note that each of the documents within this bundle also contain trade secrets and as such are also exempt from production in accordance with section 47 of the FOI Act, as set out below.

submission that the document should be exempt from disclosure, then I am required, pursuant to section 27 of the FOI Act, to consult with that agency.

The FOI guidelines provide, at paragraphs 5.194 to 5.206, guidance as to the appropriate interpretation of the terms 'trade secrets' and 'commercially valuable information'.

At paragraph 5.198, the FOI guidelines refer to the Federal Court test in considering whether information amounts to a trade secret. Factors to consider are:

- The information is used in a trade or business;
- The owner of the information must limit its dissemination or at least not encourage or permit its widespread publication; and
- If disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the information.

At paragraph 5.199, the FOI guidelines further provide factors that a decision-maker might consider to be relevant to the question of whether information is a trade secret. These include:

- The extent to which the information is known outside the business of the owner of the information;
- Measures taken by the owner to guard the secrecy of the information; and
- The ease or difficultly with which others might acquire or duplicate the information.

In this case, I identified three documents which, in part, contained information that could be considered trade secrets or commercially valuable information of ORIMA. I further identified a bundle of documents which, in their entirety, contain information that could be considered trade secrets or commercially valuable information of ORIMA. In accordance with section 27 of the FOI Act, I therefore consulted with ORIMA as to their views on the release of the information.

ORIMA have advised me as follows:

- The documents upon which I consulted contain information that they consider to be trade secrets, being ORIMA's unique methodology for conducting staff ballots. This methodology provides them with a significant competitive advantage in their trade.
- ORIMA have taken many steps to limit the dissemination of the information, including:
  - Providing descriptions of the information on a commercial in confidence basis;
  - Requiring their employees and subcontractors to sign confidentiality agreements; and
  - Ensuring that any publication of their research approach is restricted to high level information that would not enable their competitors to replicate their trade secrets.
- If the information were disclosed publicly, or to their competitors specifically, ORIMA's competitive advantage would be significantly reduced. This would result in ORIMA winning fewer contracts, with a consequential considerable financial cost to their business.

I have considered the FOI Act, the FOI guidelines, and the submissions made by ORIMA. In this case, I accept the submissions of ORIMA that the information contained within the documents is confidential, that ORIMA have taken steps to limit its dissemination, and that any disclosure of the information could have a significant harm to ORIMA's business.

I am therefore satisfied that information contained in three documents in part, and information contained in a further bundle of documents, constitutes trade secrets of ORIMA. As such, the information is exempt from production pursuant to section 47 of the FOI Act.

Section 47D of the FOI Act – financial or property interests of the ATO

Section 47D of the FOI Act provides that a document is conditionally exempt if its disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

I have identified one bundle of documents, the disclosure of which, in my view, would have a substantial adverse effect on the financial interests of the ATO. As per the steps in part 6 of the FOI guidelines, I therefore must consider whether disclosure of this bundle of documents is in the public interest.

Is the document conditionally exempt?

Paragraphs 6.89 to 6.94 of the FOI guidelines provide further guidance to agencies when applying section 47D.

Paragraph 6.90 states that the financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities. As per the decision in the decision of *Secretary, Department of Employment, Workplace Relations and Small Business v. Staff Development & Training Centre Pty Ltd* (2001) 114 FCR 301 (*Staff Development & Training Centre*), where documents provide the criteria by which an agency is to assess tenders, the agency's financial interest in seeking to obtain the best value for money through a competitive tendering process may be compromised.

In this case, I have identified a bundle of documents that contains information relating to the request for quotation of ballot management services, including the criteria by which the ATO would assess the comparative merits of tenders. As per the reasoning in the *Staff Development & Training Centre* case, I consider that release of this information would be detrimental to the financial interests of the ATO, in that the ATO's interest in obtaining the best value for money through a competitive tendering process may be compromised.

As such, I consider that the bundle of documents is conditionally exempt under section 47D of the FOI Act.

Is disclosure in the public interest?

Under section 11B of the FOI Act, there are four factors favouring disclosure of documents, which must be considered if relevant. These include where disclosure would:

- Promote the objects of the FOI Act;
- Inform debate on a matter of public importance
- Promote effective oversight of public expenditure
- Allow a person to access his or her own personal information.

The FOI Act does not provide any factors that weigh against disclosure of a document. However, at paragraph 6.22, the FOI guidelines provide a non-exhaustive list of factors that may be taken into account. These include where disclosure could:

- Reasonably be expected to prejudice an agency's ability to obtain confidential information;
- Reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and
- Reasonably be expected to prejudice the competitive commercial activities of an agency.

In this case, I consider that release of the information contained in the documents would promote effective oversight of public expenditure, and also would promote the objects of the FOI Act, being to increase scrutiny, discussion, comment and review of the ATO's activities.

However, on the other hand, I consider that release of the information would prejudice the competitive commercial activities of the ATO, as it would prejudice the ATO's ability to offer, consider and decide on competitive tender application on commercial terms. It further would prejudice the ability of the ATO to obtain information, including confidential information, in the future, where the business community may be less inclined to submit an application under a tender process where they are aware that the tender documents, including the criteria upon which they are assessed, could be released under the FOI Act.

On balance, I consider that the disclosure of the documents would be contrary to the public interest. As such, I consider that the bundle of documents is exempt pursuant to section 47D of the FOI Act.

Section 47E of the FOI Act – operations of the ATO

Section 47E of the FOI Act permits a decision-maker to exempt or partially exempt documents containing information which could have an adverse effect on the operations of an agency. It states:

> **47E 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.

Section 47E of the FOI Act provides a conditional exemption. Under subsection 11A(5) of the FOI Act, documents subject to a conditional exemption must be released unless, in the circumstances, access to the document at this time would, on balance, be contrary to public interest.

There is no definition of 'public interest' in the FOI Act. However, section 11B of the FOI Act sets out a number of factors which favour disclosure of the document, as well as factors that are irrelevant and must not be taken into account when determining whether disclosure is in the public interest. The factors favouring disclosure in subsection 11B(3) of the FOI Act include:

> (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
>
> (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
>
> (b) inform debate on a matter of public importance;
>
> (c) promote effective oversight of public expenditure;
>
> (d) allow a person to access his or her own personal information.

In this case, I have decided to exempt the mobile phone numbers of ATO senior executive officers under subsection 47E(d) of the FOI Act.

ATO senior executive officers carry work-issued mobile phones so that they are able to be contacted at any time in the event of a work-related emergency or other serious work-related issue. It would substantially adversely affect the proper operations of the ATO if the phone numbers of these mobile phones were to be publicly released, as it would mean that the senior officers could receive unwanted and non-urgent phone calls from members of the public during their leisure time. This could also affect the ability of the senior officers to immediately respond to urgent matters, should their phone lines be otherwise tied up by non-urgent phone calls.

I do not consider that releasing these phone numbers would promote the objects of the FOI Act, or contribute in any way to the factors in subsection 11B(3) of the FOI Act. However, I consider that the effect on operations of the ATO could be significant.

As such, I consider that these mobile phone numbers are exempt pursuant to subsection 47E(d) of the FOI Act. I have therefore decided to partially exempt six documents from production.

Section 47F of the FOI Act – Personal Privacy

Section 47F of the FOI Act relevantly provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person.

Subsection 47F(2) of the FOI Act provides considerations that I must take into account when determining whether the disclosure would involve the unreasonable disclosure of personal information. These include the extent to which the information is well known or publicly available, and whether the person to whom the information relates is known to be associated with the matters dealt with in the document.

In this case, I have identified six documents that contain personal information about other people, being in one instance a person from ORIMA, and in five instances a person who has previously enquired about the voting process. The information relates solely to that person, and is not in any way relevant to the substantive matters contained within the documents. The information is not well known or publicly available. As such, I consider it would be unreasonable to disclose this information.

In my view, disclosure of the personal information would not contribute to the factors favouring disclosure in the public interest, as outlined in subsection 11B(3) of the FOI Act.

- The information has no public importance, and has had no effect on public expenditure. On the other hand, it is personal to the individual concerned.
- The objects of the FOI Act include increasing public scrutiny, discussion, comment and review of the Government's activities, and facilitating access to information by individuals which would allow them to be satisfied that proper procedures have been followed. The personal information has no relevance to the regular operations of the ATO.
- In fact, I consider that disclosure would actually have a negative effect on the objects of the FOI Act, because applicants may be dissuaded from seeking to review the Government's activities or from accessing information to assure them that proper procedures have been followed if they know that their information may be released under the FOI Act.

As such, I have decided to partially exempt six documents under section 47F of the FOI Act.