



12/16558, 12/18700, 13/1897

13 February 2013

Mr Brendan Molloy  
Secretary  
Pirate Party of Australia

Sent by email only to: Brendan Molloy [foi+request-7-4b0782d7@righttoknow.org.au](mailto:foi+request-7-4b0782d7@righttoknow.org.au)

Dear Mr Molloy

## **FOI REQUEST**

I refer to your request under the *Freedom Of Information Act 1982 (Cth)* (“the Act”) made to the Attorney-General’s Office on 24 October 2012, revised on 30 October 2012 seeking:

- (a) *All documents submitted during 2010, for the purpose of consultation in relation to any data retention proposals, by the Attorney-General’s Department to Telstra, Optus, iiNet, Internode, Nextgen, Comms Alliance and any other members or representatives of the telecommunications industry;*
- (b) *All consultation responses received by the Department from those members or representatives of the telecommunications industry;*
- (c) *Final reports, or determinations in final form recorded by email or otherwise, made by the Department as a result of these consultations;*
- (d) *The meeting Agenda and Minutes of any meetings between the AGD and the telecommunications industry pertaining to any data retention proposals from 2009 to the date of this request; and*
- (e) *Final reports, or determinations in final form recorded by email or otherwise, made by the Department as a result of these meetings.*

I am authorised, pursuant to arrangements made by the Secretary of this Department under section 23 of the *Freedom of Information Act 1982* (the Act), to make decisions in relation to this matter.

In summary, the attached documents fall within parts (a) and (d) of the request. All documents within part (b) of the request were fully exempted under the Act. There were no documents within ambit of parts (c) and (e).

### Decision – Parts (a) and (d)

I have decided to release the attached documents to you. You will note, however, that I have made some deletions to certain documents.

Section 26 of the Act provides that where access to material has been denied to an applicant under the Act he or she shall be provided with a written statement setting out the findings on material questions of fact, the material on which those findings were based and the reasons for the decision. Such information, in relation to the material which has been exempted on this occasion, is set out below.

### Findings on Material Questions of Fact

My finding on material questions of fact is that the documents you have requested comprise material that relates to:

- the security of the Commonwealth;
- the international relations of the Commonwealth;
- law enforcement issues;
- information the release of which is prohibited by other legislation;
- information communicated to the Commonwealth in confidence;
- personal information about identified individuals; and
- information concerning the business affairs of identified organisations.

### Material on Which Those Findings are Based

The material on which those findings are based consists of the documents themselves.

### Reasons for Decision

The reasons for refusing you access to the documents are, in short, that they are exempt from disclosure under the Act. Different parts of the documents are exempt under different provisions of the Act. Some parts are exempt under more than one provision. The provisions of the Act under which the documents are exempt, and the reasons why I believe they are exempt, are set out below.

### Section 33

Some material is, in my view, exempt from disclosure under subsection 33(a)(i) of the Act which provides:

*'A document is an exempt document if disclosure of the document under this Act:*

*(a) would , or could reasonably be expected to, cause damage to:*

*(i) the security of the Commonwealth.'*

I have decided to exempt this material on the basis that its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

Some material is, in my view, exempt from disclosure under subsection 33(a)(iii) of the Act which provides:

*'A document is an exempt document if disclosure of the document under this Act:*

*(a) would, or could reasonably expected to, cause damage to:*

*..(iii) the international relations of the Commonwealth.'*

I have decided to exempt this material on the basis that its disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

### Section 37

Some of the material is, in my view, exempt from disclosure under section 37 of the Act. Subsection 37(2)(b) of the Act provides:

*'(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:*

*.....;*

*(b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;'*

The material which I have decided to exempt under this subsection contains information that would disclose methods and procedures used by law enforcement agencies in investigations of breaches of the law. Disclosure of this information would, in my view, be reasonably likely to prejudice the effectiveness of those methods and procedures.

### Section 38

Some material has been exempted under section 38(1) which provides:

*'38(1) Subject to subsection (1A), a document is an exempt document if:*

*(a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and*

*(b) either:*

*(i) that provision is specified in Schedule 3; or*

*(ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.'*

This material has been exempted because disclosure of the information in question is prohibited by a provision of another enactment – namely section 92(1) of the *Australian Security Intelligence Organisation Act 1979 (Cth)*, a provision which is specified in Schedule 3 of the FOI Act.

#### Sections 45 and 47G

Some of the material is, in my view, exempt in full under section 45 and conditionally exempt under subsections 47G(1)(a) and 47G(1)(b) of the Act. Subsection 45(1) provides:

*'(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.'*

Subsections 47G(1)(a) and 47G(1)(b) provide:

*'A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or*
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.'*

The exempted material relates to confidential business information volunteered by telecommunications corporations on a strict mutual understanding of confidentiality.

The exemption under section 45 is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure. To found an action for breach of confidence (which means s. 45 would apply), the following five criteria must be satisfied in relation to the information:

- The information must be specifically identified;
- The information must have the necessary quality of confidentiality;

- The information must have been communicated and received on the basis of a mutual understanding of confidence;
- The information must have been disclosed, or threatened to be disclosed, without authority; and
- Unauthorised disclosure of the information has or will cause detriment.

In this instance, I find that all the information satisfies these criteria and I have decided, therefore, that it is exempt from disclosure. Further, if confidential information of this nature were to be disclosed and this disclosure became publically known, it would reasonably be expected that industry bodies would be more reluctant in the future to assist the Government with information of this nature.

With respect to the secondary ground of exemption under subsections 47G(1)(a) and 47G(1)(b), I have decided that disclosure of this information would reasonably be expected damage the business affairs of identified organisations and, for that reason, prejudice the future supply of information to the Commonwealth.

Subsection 11A(5) of the Act provides that a conditionally exempt document must nevertheless be disclosed to the applicant unless its release would, on balance, be contrary to the public interest. As a conditionally exempt document under section 47G, I have considered the public interest factors both in favour and against disclosure of the information.

In relation to the factors favouring disclosure, I believe the following are relevant:

- (a) the general public interest in access to documents as expressed in sections 3 and 11 of the FOI Act; and
- (b) the public interest in people being able to scrutinise the operations of a government agency and in promoting governmental accountability and transparency.

In relation to the factors against disclosure, I believe that the following are relevant:

- (c) the need for the Commonwealth and industry bodies to maintain the confidentiality with regard to the subject matter and the circumstances in which the information was obtained; and
- (d) that if this information was revealed, it may have a substantial adverse effect on the business affairs of certain industry bodies as well as the free and candid flow of information between the Commonwealth and industry in future.

While there is a public interest in providing access to the information, I have given greater weight to factors (c) and (d) above and conclude that on balance, disclosure is not in the public interest, given the need to ensure the effectiveness of current procedures and systems and the importance of Government being able to give and receive information to and from industry bodies on a candid

basis in the course of the deliberative processes of Government business. As such, I find that the information is exempt under this section of the Act as well as section 45.

#### Section 47F

Some of the material is conditionally exempt under subsection 47F(1) of the Act which provides:

*“(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). “*

The material which I have deleted under this provision is, in my view, conditionally exempt because it contains personal information about identifiable individuals (telecommunications industry representatives) – the disclosure of which I have decided would be unreasonable.

As stated above, subsection 11A(5) of the Act provides that a conditionally exempt document must be released to an applicant unless its disclosure would, on balance, be contrary to the public interest. I have decided that disclosure of the material I have deleted would, on balance, be contrary to the public interest. That is because, in my view, the factors in favour of disclosure (for instance, the public’s right to view Government-held documents) is outweighed on this occasion by the factors against disclosure, such as the individual’s right to privacy.

#### Material Outside the Ambit of the Request

You will note that some material deleted from the documents has been marked ‘*Material Outside Scope of Request*’. This is simply material which concerns other matters not connected to the subject matter of your request.

#### Decision – Part (b)

I have examined the documents you have requested. I have decided, however, not to release them to you as all of these documents are, in my view, exempt under sections 45(1), 47G(1)(a) and 47G(1)(b) of the Act. The reasons for my decision are the same as those outlined above concerning other material which is exempt under these sections.

#### Decision – Parts (c) and (e)

After having made appropriate searches and enquiries within the Department, I must advise that the Department is not in possession of any documents of the type you have requested. I must therefore refuse your request under section 24A of the Act. That section allows an agency to refuse a request if all reasonable steps have been taken to locate the documents sought and it is satisfied that the documents do not exist or cannot be found. For the above reason, I am satisfied on this occasion that documents of the type you have requested do not exist.

#### Rights of Review

Should you wish to seek a review of my decision in this matter you have two options. You may seek an internal review by a senior officer of the Department. If you wish to pursue this course of

action, you should forward an application to me within 30 days of the date of this letter.

Alternatively you may seek a review of the decision by writing to the Office of the Australian Information Commissioner (OAIC). The OIAC also investigates complaints should you wish to complain about any aspect of the way in which your request has been handled. Applications for review by the OAIC should be sent to GPO Box 2999 Canberra ACT 2601 or to [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au). Further information can also be found at [www.oaic.gov.au](http://www.oaic.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stuart Plowman', with a long horizontal flourish extending to the right.

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