



Lisa Martin and Department of Home Affairs (Freedom of Information) [2019] AICmr 47 (27 June 2019)

Decision and reasons for decision of Australian Information Commissioner, Angelene Falk

Applicant	Lisa Martin
Respondent	Department of Home Affairs
Third party	Broadspectrum Pty Ltd
Decision date	27 June 2019
Application number	MR16/00269
Catchwords	Freedom of Information — Whether disclosure could cause damage to the international relations of the Commonwealth — Whether disclosure would have a substantial adverse effect on the management or assessment of personnel — Whether disclosure of personal information is unreasonable — Whether disclosure would unreasonably affect an organisation in respect of its lawful business affairs — Whether contrary to public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A(5), 33(a)(iii), 47E(c), 47F, 47G(1)(a) and 55D(1)

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I set aside the decision of the Department of Home Affairs¹ of 2 June 2016. I substitute my decision that:
 - the material that the Department no longer contends is exempt is not exempt

¹ The FOI request that is the subject of this review was made to the Department of Immigration and Border Protection. On 20 December 2017, pursuant to machinery of government changes, the Department of Home

- the material that the Department no longer contends is irrelevant to the request is relevant to the request
 - the material in document 4 that the Department has previously released to the applicant but now contends is irrelevant to the request is relevant to the request
 - the material in documents 1, 2 and 3 that the Department has previously released to the applicant but now contends is exempt under ss 33(a)(iii), 47E(c), 47F or 47G is not exempt
 - the applicant no longer seeks access to the names, signatures and contact details of staff from third party service providers involved in the administration of the investigation of the alleged incident and this material is therefore irrelevant to the request
 - the position titles of staff from third party service providers involved in the administration of the investigation of the alleged incident that the Department contends are exempt under ss 47E(c) or 47F are not exempt
 - the names, signatures and contact details of departmental staff that the Department contends are exempt under ss 47E(c) or 47F of the FOI Act are not exempt
 - the material in documents 1 and 2 comprising the names and other information about the alleged victim, other persons of interest in the investigation into the alleged incident and associated third parties that the Department contends is exempt under ss 33(a)(iii), 47E(c) or 47F is exempt under s 47F
 - the remaining material in documents 1-3 that the Department maintains is exempt under s 33(a)(iii) is exempt under this provision, and
 - the operational email address of a third party business that the Department contends is exempt under s 47G(1)(a) is not exempt.
2. The Department must now provide the applicant with copies of the documents edited only to the extent necessary to delete exempt or irrelevant material, within 28 days of this decision.

Background

3. On 27 July 2015, Ms Lisa Martin (the applicant), a journalist, applied to the Department for access to the following documents:

I'm seeking documents and correspondence about the removal of three Australian expat detention centre workers from Manus Island following allegations of a gang rape of a local woman on the island.

I'm also seeking incident reports and briefs about the alleged gang rape including documents and correspondence from service providers Transfield Services and Wilson Security.

Affairs commenced operation, transitioning from the Department of Immigration and Border Protection. For further information, see www.homeaffairs.gov.au.

4. On 10 September 2015, the Department undertook third party consultation with Broadspectrum (previously known as Transfield) under s 27 of the FOI Act in relation to documents identified within the scope of the request.²
5. On 29 October 2015, Broadspectrum responded to the Department submitting that it objected to disclosure of the documents.
6. On 17 December 2015, following a request consultation process under s 24AB of the FOI Act, the applicant revised the scope of the request to:

I'm seeking documents and correspondence about the removal of three Australian expat detention centre workers from Manus Island following allegations of a gang rape of a local woman on the island (These three men being 'Wilson Security guards accused of rape in a mid-July incident').

Timeframe: 1 July 2015 to 27 July 2015

I'm also seeking incident reports and briefs about the alleged gang rape including back and forth email correspondence between the Department and Wilson Security and the Department and Transfield about:

 - Alleged incident;
 - Decision to remove three staffers from Manus Island.
7. On 5 May 2016, the Department undertook further consultation with Broadspectrum under s 27 of the FOI Act. On 19 May 2016, Broadspectrum provided a response.
8. On 2 June 2016, the Department advised the applicant that it had identified four documents, comprising 68 pages, falling within the scope of the request.³ The Department gave the applicant access to the four documents in part. In making its decision, the Department relied on the damage to the international relations of the Commonwealth exemption (s 33(a)(iii)) and the personal privacy exemption (s 47F) of the FOI Act. The Department additionally found some material irrelevant to the request under s 22 of the FOI Act.
9. On 23 June 2016, the applicant sought IC review of the Department's decision under s 54L of the FOI Act.

Scope of IC review

10. During the course of this IC review, the Department has withdrawn its contentions in relation to certain material and provided further contentions in relation to other material. The Department has provided the Office of the Australian Information Commissioner (OAIC) with a marked up copy of the documents at issue to show the material it maintains is exempt or irrelevant to the request.⁴

² Under s 27 of the FOI Act, where it appears to the agency that the organisation concerned might wish to make an exemption contention that the document is exempt under s 47; or the document is conditionally exempt under s 47G and access to the document would, on balance, be contrary to the public interest, the agency must not decide to give access to the document without giving the organisation a reasonable opportunity to make submissions in support of the exemption contention, and without having regard to any submissions so made.

³ Identified in the schedule to the Department's reasons for decision as documents 1-4.

⁴ During the course of this IC review, the Department has provided the Office of the Australian Information Commissioner (OAIC) with four differently marked up versions of the documents at issue identifying the material that it contends is exempt or irrelevant to the request. In making my decision, I have had regard to the most recently provided version of the documents.

11. During the course of this IC review, the applicant has advised that she does not seek access to the names, signatures and contact details of individual staff from third party service providers who were involved in the administration of the investigation into the alleged incident. I am satisfied that this material is therefore irrelevant to the request and is no longer at issue in this IC review.

Material previously released to the applicant

12. Based on my examination of the marked up documents alongside the documents that were released to the applicant, it appears that the Department contends that certain material that has previously been released to the applicant in documents 1-3 is exempt under ss 33(a)(iii), 47E(c), 47F or 47G.⁵
13. It also appears that the Department contends that fourteen words in document 4 that have previously been released to the applicant are irrelevant to the request.⁶
14. In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified or that I should give a decision adverse to the IC review applicant (s 55D(1)). Based on the information before me, I am not satisfied that I should give a decision adverse to the applicant in relation to material that has been previously released to the applicant in response to the FOI request.

Irrelevant material

15. The Department no longer contends that material in the documents is irrelevant to the request, with the exception of certain material in document 4.
16. In relation to document 4, the Department submits:
 - ... information on page 67 (Hot Issues Brief) contains material that could reasonably be regarded as irrelevant to the FOI request. The material in question reveals information about other topics and issues for the awareness of senior executive officers of the Department.⁷
17. Based on my examination of the marked-up version of document 4, I am satisfied that the material that the Department contends is irrelevant to the request can reasonably be regarded as irrelevant to the request for access because it does not relate to the alleged incident that was the subject of the applicant's request, with the exception of the first fourteen words appearing under the heading 'Date and time of event'. In my view, those fourteen words provide context to the other information in document 4 relevant to the request and therefore cannot reasonably be regarded as irrelevant to the request.⁸ Further, as I discussed above at [13], it appears that these fourteen words have previously been disclosed to the applicant.
18. For these reasons, I am satisfied that the material in document 4 that the Department maintains is irrelevant to the request is irrelevant to the request, with the exception of the first fourteen words appearing under the heading 'Date and time of event'.

⁵ On pages 3, 7, 17, 34-37, 62, 63 and 65 of the documents. References to page numbers are consistent with the page numbers described in the schedule of documents attached to the Department's statement of reasons.

⁶ The first fourteen words under the heading 'Date and time of event'.

⁷ The Department no longer contends that the names of individuals appearing in this document are irrelevant to the request.

⁸ In relation to the consideration of irrelevant material generally, see Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (FOI Guidelines)* [3.54] – [3.56].

Material no longer contended to be exempt

19. Based on my examination of the marked up documents alongside the documents that were released to the applicant, it is apparent that the Department no longer contends that the following information that it found exempt under ss 33(a)(iii) or 47F is exempt under those provisions:
 - general information in email signature blocks (not including names, position titles and contact details)
 - the position title of a third party individual that completed an investigation report
 - general information in emails about the investigation into the incident
 - the description of attachments to an email sent on 20 July 2018
 - general information in an investigation report
 - general information in statements and other records of information provided by persons of interest
 - general information in an 'Incident or Information Report' form, and
 - general information in a document comprising a synopsis of closed circuit television footage.
20. In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified or that I should give a decision adverse to the IC review applicant (s 55D(1)). The Department no longer maintains its exemption contentions over the material I have discussed above at [19]. Accordingly, this material is no longer at issue and I will not give this material any further consideration in this IC review.

Exemption contentions

21. During the course of this IC review, the Department submitted that disclosure of the documents may prejudice the outcome of an investigation into the alleged incident discussed in the documents. The OAIC subsequently invited the Department to make submissions in relation to the documents affecting enforcement of law and protection of public safety exemption (s 37) of the FOI Act. However, the Department has not sought to rely on s 37 in its subsequent submissions and accordingly, I will not give this exemption consideration in this IC review.
22. The Department submits that the material it previously found was irrelevant to the request⁹ is instead exempt under s 33(a)(iii), the management of personnel exemption (s 47E(c)) or s 47F, with the exception of certain material in one document.¹⁰
23. The Department also contends that the operational email address of a third party that it decided is exempt under s 47F is instead exempt under the business affairs exemption (s 47G(1)(a)), and that certain material it decided is exempt under s 47F is instead exempt under the management of personnel exemption (s 47E(c)).¹¹
24. Based on my examination of the documents, I consider that certain material in documents 1 and 2 that the Department decided is exempt under s 47F but now

⁹ With the exception of the material that it maintains is irrelevant to the request in document 4.

¹⁰ Material appearing in the first dot point under the heading 'Media Talking Points' in document 4.

¹¹ In documents 1-3.

contends is exempt under ss 33(a)(iii) and/or 47E(c) is more appropriately considered under s 47F. Specifically:

- the material in dot points 1-8, 10-13 and 18 in document 1, and
- material in document 2 comprising information provided by the alleged victim or persons of interest relevant to the investigation.¹²

Issues

25. Accordingly, the issues to be decided in this IC review are:

- whether the material that the Department maintains is exempt under s 33(a)(iii) of the FOI Act is exempt under this provision
- whether the material in dot points 10, 13 and 18 in document 1 and material in document 2 comprising information provided by the alleged victim or persons of interest relevant to the investigation is conditionally exempt under s 47F as the Department decided, and if so, whether giving the applicant access to the documents at this time would, on balance, be contrary to the public interest (s 11A(5)), and
- whether the other material that the Department maintains or contends is exempt under ss 47E(c), 47F and 47G of the FOI Act is conditionally exempt under these provisions, and if so, whether giving the applicant access to the documents at this time would, on balance, be contrary to the public interest (s 11A(5)).

26. In making my decision, I have had regard to the following:

- the Department's decision and reasons for decision
- the documents at issue
- the FOI Act, in particular ss 11A(5), 33(a)(iii), 47E(c), 47F, 47G(1)(a) and 55D
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act (FOI Guidelines), in particular paragraphs [5.24] – [5.28], [5.36] – [5.40], [5.54], [6.7] – [6.28], [6.95] – [6.103], [6.113] – [6.119], [6.124] – [6.173], [6.180] – [6.196], [6.202] – [6.203] and [10.13]
- relevant case law, and
- the parties' submissions.

Personal privacy exemption (s 47F)

27. As discussed in the FOI Guidelines and in IC review cases,¹³ the main requirements of this public interest conditional exemption are that a document contains 'personal information'; disclosure in response to the applicant's FOI request would be

¹² On pages 10-28, 39-47 and 55-61 of the documents.

¹³ Generally, see *FOI Guidelines* at [6.124]-[6.148]; *OE' and Australian Taxation Office (Freedom of information)* [2018] AICmr 29; *'OC' and Australian Building and Construction Commission (Freedom of information)* [2018] AICmr 26; *Australian Broadcasting Corporation and Department of Home Affairs (Freedom of information)* [2018] AICmr 25; *'OA' and Department of Home Affairs (Freedom of information)* [2018] AICmr 22 and *Andrew Leigh and Australian Federal Police (Freedom of information)* [2018] AICmr 7.

'unreasonable' (s 47F(1)); and it would be 'contrary to the public interest' to release the material at the time of the decision (s 11A(5)).

28. The Department contends that certain material in each of the documents is exempt under s 47F.
29. As discussed above at [6], the subject matter of the request relates to an alleged incident of sexual assault involving third party contractors of the Department (the alleged incident). Based on my examination of the documents, the material at issue that the Department maintains or contends is exempt under s 47F can be characterised as:
 - the position titles of staff from third party service providers involved in the administration of the investigation of the alleged incident
 - the names and position titles of departmental staff, and
 - the names and other information about the alleged victim, other persons of interest in the investigation into the alleged incident and associated third parties.
30. Personal information is defined in s 4 of the FOI Act by reference to s 6 of the *Privacy Act 1988* (Cth) and means information or an opinion, whether true or not, about an identified individual or an individual who is reasonably identifiable. The FOI Guidelines explain that personal information is information that conveys or says something about a person.¹⁴
31. In determining whether disclosure of information would involve an unreasonable disclosure of personal information, the FOI Act provides that a decision maker must have regard to:
 - the extent to which the information is well known
 - 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
 - the availability of the information from publicly accessible sources, and
 - any other matters that the agency or minister considers relevant.¹⁵
32. The FOI Guidelines explain that other relevant factors include:
 - the nature, age and current relevance of the information
 - whether the information is well known or available from other public sources
 - any detriment that disclosure may cause to the person to whom the information relates
 - any opposition to disclosure expressed or likely to be held by that person
 - the circumstances of an agency's collection and use of the information
 - whether disclosure of the information might advance the public interest in government transparency and integrity, and
 - the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.¹⁶

¹⁴ FOI Guidelines [6.129].

¹⁵ Subsection 47F(2) of the FOI Act.

¹⁶ FOI Guidelines [6.143].

33. The FOI Guidelines explain that the test of ‘unreasonableness’ in s 47F implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not amount to the public interest test of s 11A(5), which follows later in the decision making process.¹⁷

The position title of a staff member from a third party service provider involved in the administration of the investigation

34. The Department decided that the position title of a third party service provider involved in the administration of the investigation is exempt under s 47F. The position title appears in an email signature block in emails relating to the administration of the investigation into the alleged incident.
35. I have considered whether the position title, in isolation of the individual’s name or contact details, is personal information for the purposes of s 47F. The Department submits:

... the area in which the majority of individuals worked is a small team making the identification of individuals within that work environment relatively easy with limited information ...
36. In these circumstances, I accept that the position title comprises personal information because an individual could be reasonably identifiable by disclosure of the position title in this particular case.
37. In relation to whether disclosure would be unreasonable, I note that the Department’s submissions make general reference to s 47F(2) and the factors in the FOI Guidelines as listed above at [32]. However, the only factor that the Department has addressed in detail relates to the potential dissemination of the information following disclosure. In particular, the Department submits:

... the FOI Act does not control or restrict any subsequent use of [sic] dissemination of the information once released under the FOI Act, noting in particular that the applicant in this instance is a journalist, resulting in a high probability that the information disclosure will be disseminated beyond the FOI applicant alone.
38. Although I acknowledge the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act, I consider that disclosure of the position title in this particular case would result in the relevant individual being identifiable only to a limited group of people who already know that the individual is associated with the relevant position. I also note that the individual’s position title appears in the document in the context of the individual performing duties for a third party business that was contracted to provide services on behalf the Department. I consider that disclosure of the position title of the individual involved in the administration of the investigation into the alleged incident might advance the public interest in government transparency and integrity by providing information about the level of seniority of the officer that conducted the investigation into the alleged incident.
39. Based on the information before me, I am not satisfied that the Department has established that the disclosure of the position title of the staff member from a third party service provider would be an unreasonable disclosure of personal information in the circumstances.

¹⁷ FOI Guidelines [6.138].

The names and position titles of departmental staff

40. In its reasons for decision, the Department decided that material comprising the names and position titles of departmental staff is irrelevant to the request. During the course of this IC review, the Department has advised that it no longer claims that this material is irrelevant to the request, and instead submits that it is exempt under ss 47F or 47E(c).
41. Based on my examination of the relevant material, I am satisfied that it comprises the personal information of a departmental staff member.
42. In *Besser and Department of Families, Housing, Community Services and Indigenous Affairs* [2013] AICmr 65 (21 August 2013), the former Freedom of Information Commissioner, Dr James Popple, considered whether the names and contact details of departmental staff who conducted internal investigations were exempt under s 47F. Dr Popple found that the names and contact details were personal information but did not consider that disclosure of that information would be unreasonable. Dr Popple referred to the FOI Guidelines¹⁸ which relevantly explain:

Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.¹⁹

43. The Department made the following submissions:

The Department has considered the fact that some of the personal information contained in these documents consists of names of public servants. We note that the Information Commissioner is of the view that, where a public servant's personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances exist. However, the Department considers that the nature of the information contained within these documents goes beyond the public servants usual duties and responsibilities, and as such, disclosure would be unreasonable.

44. Based on my examination of the documents, the public servants whose personal information appears in the documents were responsible for being a contact officer, clearing media talking points and sending or receiving correspondence about the investigation into the alleged incident. In my view, the Department has not explained why I should be satisfied that such activities go beyond the usual duties and responsibilities of the relevant officers or that special circumstances exist such that disclosure would be unreasonable in the particular circumstances of this case.
45. Based on the information before me, I am not satisfied that the Department has discharged its onus of establishing that the names and position titles of departmental staff in documents 1-4 are exempt under s 47F as claimed.
46. The names and position titles of departmental staff that the Department decided are irrelevant to the request but now contends are exempt under s 47F of the FOI Act are not exempt under s 47F.

¹⁸ *Besser and Department of Families, Housing, Community Services and Indigenous Affairs* [2013] AICmr 65 (21 August 2013) at [33].

¹⁹ *FOI Guidelines* [6.153] (footnotes omitted).

The names and other information about the alleged victim, other persons of interest and associated third parties

47. The remaining material that the Department decided is exempt under s 47F comprises the names and other information about the alleged victim, other persons of interest and associated third parties relevant to the investigation.
48. As I discussed above at [24], I also consider that certain material in documents 1 and 2 about the persons of interest in the investigation that the Department decided is exempt under s 47F but now contends is exempt under ss 33(a)(iii) and/or 47E(c) is more appropriately considered under s 47F. Specifically:
 - the material in dot points 1-8, 10-13 and 18 in document 1, and
 - material in document 2 comprising information provided by the alleged victim or persons of interest relevant to the investigation.²⁰
49. The relevant information appears in documents 1 and 2 which comprise an email update on the investigation into the incident and an email attaching an initial investigation report and supporting documentation.
50. The information includes the names, employment details and information about the actions of third party individuals, as well as opinions expressed by or about those individuals. Based on my examination of the relevant material, I am satisfied that this information comprises personal information for the purposes of s 47F.
51. In its reasons for decision, the Department said:

The personal information in the documents is not well known and has not been officially released into the public domain by the Department, the relevant Service Providers or the PNG Department.

I note that the alleged victim provided her account of what occurred to a media organisation, which published the account. This information was not disclosed by the Department and is not representative of the full range of information held by the Department.
52. The Department relevantly submits:

... Our strong preference is to respect the privacy of the individuals involved (including the alleged victim) and not release any information which divulges details of their behaviour.
53. As I discussed above at [37], the Department further submits:

... the FOI Act does not control or restrict any subsequent use of [sic] dissemination of the information once released under the FOI Act, noting in particular that the applicant in this instance is a journalist, resulting in a high probability that the information disclosure will be disseminated beyond the FOI applicant alone.
54. Based on my examination of the relevant material, I am satisfied that the personal information was recorded in the documents in the context of communications between officers at the Department, Broadspectrum or from the Government of Papua New Guinea relating to the administration of the investigation into the alleged incident, as well as information provided by the alleged victim or persons of interest during the investigation. The names and other information about other third party

²⁰ On pages 10-28, 39-47 and 55-61 of the documents.

individuals appears in the documents in the context of those third parties being associated with the alleged victim or persons of interest.

55. Although the documents were created over three years ago, I am satisfied that the material in the documents remains highly sensitive due to the nature of the alleged incident.
56. With regard to the context in which the documents were created, I consider it likely that the alleged victim, other persons of interest and associated third parties would oppose the release of their personal information to an unrelated third party under the FOI Act.
57. I am satisfied that the information in the documents is not well known or available from public sources. Although the alleged victim may have publicly discussed aspects of the alleged incident, in my view, this does not support the disclosure of the alleged victim's sensitive personal information to the applicant (or any other person seeking access to the personal information without the alleged victim's authority) under the FOI Act. I also note that the publicly available information does not identify the alleged victim or other persons of interest.
58. I also consider that disclosure could be detrimental to the individuals involved in the alleged incident because the information could reasonably be expected to lead to reignited interest in the alleged incident and lead to the alleged victim and the other persons of interest receiving unwanted contact about the incident.
59. Although I consider that disclosure of the information could advance the public interest in government transparency and integrity by providing an enhanced understanding of the Department's processes for handling incidents involving departmental contractors, I must balance the object of the FOI Act of promoting transparency in government processes and activities with the purpose of s 47F to protect personal privacy.²¹ On balance, I am satisfied that disclosure of the identities of the alleged victim, persons of interest and associated third parties and other information gathered about those individuals during the course of the investigation would be an unreasonable disclosure of personal information in the particular circumstances of this case.
60. Having regard to the factors under s 47F(2) and the FOI Guidelines, I am satisfied that the following material comprising the personal information of the alleged victim, other persons of interest in the investigation and associated third parties is conditionally exempt under s 47F:
 - the names of the alleged victim, other persons of interest and associated third parties in the documents
 - the material in dot points 1-8, 10-13 and 18 in document 1, comprising information about the alleged victim and associated third parties, and
 - material in document 2 comprising information provided by persons of interest relevant to the investigation.²²

²¹ FOI Guidelines [6.144].

²² On pages 10-28 and 39-47 and 55-61 of the documents.

Findings under s 47F

61. In summary, I am satisfied that the material I have discussed above at [60] is conditionally exempt under s 47F of the FOI Act.
62. The remaining material at issue that the Department contends is exempt under s 47F of the FOI Act is not conditionally exempt under this provision.

Public interest test (s 11A(5))

63. In finding that the relevant material at [60] is conditionally exempt, I am therefore required to consider whether it would be contrary to the public interest to give the applicant access to conditionally exempt documents at this time (s 11A(5)).
64. In its reasons for decision, the Department said:

I acknowledge that release of the personal information would promote the objects of facilitating and promoting public access to information, and informing debate on a matter of some public interest.

I do not consider that release of the personal information would promote effective oversight of public expenditure or allow a person to access his or her own personal information.

I consider that the protection of the individual's right to privacy should be given the upmost importance.
65. The Department submits:

Disclosure of the documents would not provide a person with sufficient information to assess the rigour and efficiencies of internal decision making processes within the Department, promote scrutiny of government decision making or reveal the reasoning for a government decision. These considerations are neutral.
66. The Department further submits:

... The Department is committed to complying with its obligations under the Privacy Act 1988, which sets out standards and obligations that regulate how the Department must handle and manage personal information. It is firmly in the public interest that the Department uphold the rights of individuals to their own privacy and meets its obligations under the Privacy Act. We consider that this factor weighs heavily against disclosure of the personal information within these documents.
67. In her IC review application, the applicant said:

There is overarching public interest in these documents being released in full. The fact that the documents have been blacked out smacks of a cover up. It is in the public interest and of interest of a substantial section of the public to know whether the three Australian workers were deliberately removed from PNG to circumvent a PNG policy investigation and to avoid potential death penalties if they were convicted. Australia is operating an offshore detention centre in PNG. It should be a given that staff act within PNG laws. The alleged rape has caused significant distress to Manus Island villagers. If a crime did occur the PNG victim deserves justice to be served. PNG is no longer an Australian colony. It's laws should be respected along with its justice system.
68. In this case, I consider that there are two public interest factors favouring disclosure that I consider relevant — disclosure would promote the objects of the FOI Act, and disclosure would inform debate on a matter of public importance.
69. The public interest factors favouring disclosure must be balanced against any public interest factors against disclosure.

70. The FOI Guidelines contain non-exhaustive lists of factors against disclosure.²³ I consider that there are three factors against disclosure — disclosure could reasonably be expected to:
- prejudice the protection of an individual’s right to privacy
 - harm the interests of an individual or group of individuals, and
 - prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
71. With regard to the sensitive nature of the subject matter of the documents, I consider that significant weight should be given to the right to privacy of the alleged victim, other persons of interest and the associated third parties in this case.
72. In this case, I am satisfied that the public interest factors against disclosure outweigh the public interest factors in favour of disclosure. Giving access to the material that I have found conditionally exempt under s 47F, as discussed at [60] above, would, on balance, be contrary to the public interest.

Damage to the international relations of the Commonwealth exemption (s 33(a)(iii))

73. The Department decided that material in documents 1-3 is exempt under s 33(a)(iii) of the FOI Act.
74. Under s 55ZB of the FOI Act, before determining that a document is not an exempt document under s 33, the Information Commissioner must request that the Inspector-General of Intelligence and Security (IGIS) give evidence on the damage that would, or could reasonably be expected to, be caused by the release of the document.
75. On 6 December 2017, in accordance with s 55ZB, the former Australian Information Commissioner, Mr Timothy Pilgrim, wrote to the IGIS with respect to the documents that the Department claimed to be exempt under s 33(a)(iii). On 8 December 2017, the IGIS provided her response that the document did not come within the scope of the IGIS’ functions or expertise. In particular, the IGIS noted that her functions:
- ... are limited to the activities of the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Intelligence Organisation, the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation and the Office of National Assessments. Collectively these agencies are known as the Australian Intelligence Community (AIC). At the request of the Prime Minister I may inquire into an intelligence or security matter relating to any Commonwealth agency, and I also have specific statutory functions under other legislation. I do not believe these functions are relevant to the documents at issue in this case.
76. Accordingly, the IGIS declined the former Commissioner’s request to provide evidence, on the basis that the IGIS is not appropriately qualified to give evidence in relation to the documents (s 55ZC).

²³ FOI Guidelines [6.22].

77. As discussed above at [19], the Department no longer claims that certain material is exempt under s 33(a)(iii) and I am therefore not satisfied that this material is exempt under this provision.²⁴
78. As I discussed above at [48] and [60], I have found certain material that the Department submits is exempt under s 33(a)(iii) exempt under s 47F. It is therefore not necessary for me to separately consider whether that material is also exempt under s 33(a)(iii).
79. The remaining material that the Department contends is exempt under s 33(a)(iii) can be characterised as:
- material communicated between a third party service provider and the Department about steps taken and information gathered during the investigation process
 - material in an investigation report and supporting documentation
 - the name and contact details of an officer from the Government of Papua New Guinea and information communicated by that officer, and
 - material comprising reference numbers and descriptions regarding supporting documentation relevant to the initial investigation report.
80. As discussed in the FOI Guidelines and in IC review cases,²⁵ for a document to be exempt under s 33(a)(iii), it would need to be shown that disclosure would or could reasonably be expected to cause damage to the international relations of the Commonwealth. The phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.²⁶
81. The FOI Guidelines explain:
- The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.²⁷
82. In its reasons for decision, the Department said:
- The information exempted [under s 33(a)(iii)] comprises:
- details of investigations into the alleged sexual assault of a Papua New Guinea (PNG) national; and

²⁴ On pages 1-14, 16, 18-27, 29-32, 34-37 and 62-65.

²⁵ Generally, see *FOI Guidelines* [5.36] – [5.38]; *Reece Walters and Great Barrier Reef Marine Park Authority (Freedom of information)* [2019] AICmr 9; *Australian Associated Press Pty Ltd and Department of Home Affairs (Freedom of information)* [2018] AICmr 23; *Nick Xenophon and Department of Health (Freedom of information)* [2018] AICmr 20; *William Summers and Department of the Prime Minister and Cabinet (Freedom of information)* [2018] AICmr 9; and *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 6.

²⁶ *FOI Guidelines* [5.36].

²⁷ *FOI Guidelines* [5.37] (footnotes omitted).

- correspondence with an official of the PNG Government regarding the investigation, including comment by the PNG Government official regarding the impact of the incident on the Manus community.

Given the sensitivity and confidential nature of the material, I am satisfied that the Information is exempt from release under s.33(a)(iii) of the FOI Act, as such release could reasonably be expected to cause damage to Australia's relationship with PNG.

83. The applicant submits:

... I contend that it is Australia's decision to remove the workers from PNG that has damaged bilateral relations. I believe PNG would welcome more transparency. Therefore the documents should be released.

84. In support of her application for IC review, the applicant provided media articles that reported the reaction of the local community and the Government of Papua New Guinea to the allegations surrounding the alleged incident.

85. The Department submits:

The Department maintains that significant harm to the international relationship was caused in the immediate aftermath of the incident which forms the subject of the FOI request. This damage is clearly evident in several Australian and foreign media reports from July-September 2015, much of which included inaccurate information and speculation. This media attention adversely affected the Department's relationship with the Government of PNG and release of this material and any future media attention will further exacerbate the previous damage.

86. I have also had regard to submissions that my office has agreed to accept in confidence which provide further particulars of why the Department believes that disclosure of the documents could reasonably be expected to damage the Department's international relations with the Government of Papua New Guinea.

87. Based on the information before me, I am satisfied that the alleged incident has previously caused harm to the bilateral relationship between the Australian Government and the Government of Papua New Guinea and that this bilateral relationship is of ongoing importance.

88. For these reasons, with regard to the subject matter of the documents, the circumstances in which the information in the documents was communicated and the nature and extent of the relationship between the Government of Papua New Guinea and the Australian Government, I am satisfied that there are real and substantial grounds to support a conclusion that disclosure of the material discussed above at [79] that the Department maintains is exempt under s 33(a)(iii) could reasonably be expected to cause damage to the international relations of the Commonwealth.

89. The application of s 33 of the FOI Act is not subject to public interest considerations and therefore whether disclosure of the documents would be contrary to the public interest is not a relevant consideration in deciding whether s 33 applies.

Findings under s 33(a)(iii)

90. The material that the Department no longer contends is exempt under s 33(a)(iii) is not exempt under this provision.

91. The material that the Department maintains is exempt under s 33(a)(iii), with the exception of the material I have found exempt under s 47F, is exempt under this provision.

Management of personnel exemption (s 47E(c))

92. As I discussed at [22] and [23], the Department submits that certain material it found exempt under ss 33(a)(iii) or 47F or irrelevant to the request is exempt under s 47E(c).
93. As I discussed above at [11], the applicant does not seek access to the names, signatures and contact details of individual staff from a third party service provider who were involved in the administration of the investigation into the alleged incident. I therefore do not need to consider whether that material is exempt under s 47E(c) as the Department claims.
94. Further, it is not necessary for me to consider whether material I have already found exempt under ss 33(a)(iii) or 47F is also exempt under s 47E(c). Accordingly, I need only consider whether the following material is exempt under s 47E(c):
- the position title of a staff member from a third party service provider involved in the administration of the investigation into the alleged incident, and
 - the names, position titles and contact details of departmental staff.
95. As I discussed above at [44], based on my examination of the documents, the departmental staff whose personal information appears in the documents were responsible for being a contact officer, clearing media talking points and sending or receiving correspondence about the alleged incident.
96. As discussed in the FOI Guidelines and in IC review cases,²⁸ the main requirement of this public interest conditional exemption is that disclosure of a document would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency.
97. The FOI Guidelines explain:
- For this exemption to apply, the documents must relate to either:
- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety
 - the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.²⁹
98. The FOI Guidelines also explain that for s 47E(c) to apply, the predicted effect needs to be reasonably expected to occur – there must be more than merely an assumption or allegation that damage may occur if the document were to be released.³⁰
99. The Department relevantly submits:
- The Department considers that the parts of the documents marked with the ‘s. 47E(c)’ redaction would, or could reasonably be expected to, have a substantial adverse effect on

²⁸ Generally, see *FOI Guidelines* at [6.95]–[6.103] and [6.113]–[6.119]; ‘OC’ and *Australian Building and Construction Commission (Freedom of information)* [2018] AICmr 26; *Virginia Plowman and Australian Securities and Investments Commission (Freedom of information)* [2018] AICmr 5; ‘KC’ and *Commonwealth Scientific and Industrial Research Organisation* [2016] AICmr 82; ‘HX’ and *Australian Federal Police* [2016] AICmr 1; ‘HJ’ and *Australian Federal Police* [2015] AICmr 71 and ‘GN’ and *Australian Taxation Office* [2015] AICmr 55.

²⁹ *FOI Guidelines* [6.114] (footnotes omitted).

³⁰ *FOI Guidelines* [6.101] and [6.103].

the management or assessment of personnel by the Department. More specifically, the Department contends that:

- the disclosure of the names of departmental officers and individuals employed by contractors would:
 - adversely impact the ability of the Department to comply with its health and safety obligations under the *Work Health and Safety Act 2011* (WHS Act)
 - adversely affect the Department's capacity to protect its workforce from criminal influence and to mitigate the potential for corruption ...

100. I am satisfied that these matters relate to the management of personnel for the purposes of s 47E(c) of the FOI Act.

101. In relation to its workplace health and safety contentions, the Department submits:

... The Department does not publish staff names and direct contact details outside the Department in order to protect staff against the risk of inappropriate unsolicited approaches, personal attack and harassment. The contractors in question also do not publish the names of staff, other than those in executive positions.

There have been documented cases of Department staff being harassed and receiving personal threats to their safety as a result of the public disclosure of their names. In addition, the Department's contracted detention service providers and their subcontractors have also been the targets of protests and other targeted activities that provide an indication that individuals employed by these organisations face an additional, specific risk of targeting should their identities be disclosed through FOI processes.

The Department is satisfied that the likelihood of a threat from unknown individuals to members of its staff is therefore not based on intangible or hypothetical threats.

The Department is therefore of the view that the disclosure of the names of officers contained within the documents could impact on the ability of the Department to comply with its health and safety obligations under the WHS Act.

102. In relation to the Department's contentions that disclosure would adversely effect the Department's capacity to protect its workforce from criminal influence and mitigate potential for corruption, the Department submits:

The Department is responsible for protecting Australia's border and managing the movement of people and goods across it. As such, the Department operates in a position of trust with the border environment. In return, the community, the Australian Government and our business partners expect a strong system of integrity, a workplace culture resistant to corruption and professional standards of the highest order.

The Department's Professional Standards Framework promotes the high standards of professional conduct expected of the Department's workforce. Contained within the professional standards framework is the integrity framework, which includes measures designed to protect our workforce from criminal influence and to mitigate the potential for corruption risk. The Professional Standards Framework applies generally to all Department employees (including the Senior Executive), secondees, contractors, subcontractors and consultants.

The Department contends that the disclosure of staff names and direct contact details outside the Department could expose those members of staff to unsolicited approaches by individuals with criminal affiliations and may result in serious risks to the security and integrity of the Department's lawful activities. Given the role of contracted service providers in managing the detention network, including the detention of individuals with criminal histories, the Department considers this risk to extend to staff employed by contracted detention service providers and subcontractors.

The Department considers, therefore, that disclosure would, or could reasonably be expected to, also have a substantial adverse effect on the management of personnel by the Department on these grounds.

103. I consider the Department's submissions in this case to be framed in general terms and the Department appears to contend that disclosure of the names, position titles and contact details of departmental staff and contracted services providers undertaking work relating to the management of the Department's detention network under the FOI Act would, or could reasonably be expected to have a substantial adverse effect on the management of personnel by the Department in all circumstances. However, the FOI Guidelines explain that an agency cannot rely on a class claim contention when withholding a document under a conditional exemption, and must administer each request individually with regard to the contents of a document and apply the public interest test to the particular document to decide whether an exemption claim should be upheld at that time.³¹
104. As I discussed above at [98], there must be more than merely an assumption or allegation that damage may occur if the information were to be released.
105. Although I acknowledge the importance of workplace health and safety and the desire to minimise the risk of departmental staff and individuals contracted to work on behalf of the Department being exposed to unsolicited approaches by individuals with criminal affiliations, I am not satisfied that the Department has sufficiently explained why disclosure of the particular names, position titles and contact details at issue in this IC review could reasonably be expected to cause any of the adverse effects predicted by the Department. In particular, the Department's submissions in this IC review do not provide particulars of the circumstances surrounding any previous incidences in which disclosure of names, position titles and contact details has led to the adverse effects described in its submissions, and why I should be satisfied that there are comparable circumstances in this particular case.
106. For these reasons, based on the information before me, I am not satisfied that the Department has discharged its onus under s 55D(1) of the FOI Act of establishing that the position title of a staff member from a third party service provider involved in the administration of the investigation of the alleged incident, and the names, position titles and contact details of departmental staff, in the documents that the Department contends are exempt under s 47E(c) are exempt under this provision.
107. As I am not satisfied that this material is conditionally exempt under s 47E(c), it is unnecessary for me to consider whether giving access to conditionally exempt material would be contrary to the public interest for the purposes of s 11A(5).

Business affairs exemption (s 47G)

108. As I discussed at [23], the Department contends that an operational email address that it decided is exempt under s 47F is exempt under s 47G(1)(a).
109. As discussed in the FOI Guidelines and in IC review cases,³² a document is conditionally exempt under s 47G(1)(a), if it would disclose information (business information)

³² Generally, see FOI Guidelines at [6.180] — [6.213]; *'PL' and Department of Home Affairs (Freedom of Information)* [2018] AICmr 67; *Paul Farrell and Department of Home Affairs (No 3) (Freedom of Information)* [2018] AICmr 39; and *'OG' and Australian Securities and Investments Commission (Freedom of Information)* [2018] AICmr 31.

concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of the information would, or could reasonably be expected to, unreasonably affect that organisation or undertaking adversely in respect of its lawful business, commercial or financial affairs.

110. The operational email address appears in correspondence sent by Broadspectrum staff to the Department. The Department submits:

The information in question contains operational email addresses used by a former contractor of the Department. These email addresses are not otherwise publicly available, and the disclosure of this information could reasonably be expected to result in potential vexatious communication and public inquiries which the contractor is no longer resourced to manage, this would adversely affect the operation of their business.

111. During the course of this IC review, an officer of the OAIC contacted Broadspectrum to provide Broadspectrum the opportunity to comment on the Department's contention that s 47G applies to the operational email address. Broadspectrum responded to advise that it had no objection to the disclosure of the email address.

112. Based on the information before me, and with particular regard to the fact that Broadspectrum does not object to the disclosure of the operational email address, I am not satisfied that the Department has established that disclosure of the operational email address would, or could reasonably be expected to, unreasonably affect a business organisation adversely such that s 47G applies.

113. The operational email address is not exempt under s 47G.

Angelene Falk

Australian Information Commissioner

27 June 2019

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#) page on our website.

