

Our ref: FOI 2020-10087

9 December 2020

Mr Julian Graham
Commercial Manager
Operations
Customer Service Benchmarking Australia

Emailed to: s 47F s 47F

Dear Mr Graham and Ms s 47F

Freedom of Information request – Request for consultation comments

The Office of the Commonwealth Ombudsman has received a request under the *Freedom of Information Act 1982* (FOI Act) for access to documents held by this Office.

Why we are writing to you

I have identified four documents within the scope of this FOI request which contain information relating to you and Customer Service Benchmarking Australia (CSBA). Under section 27 and 27A of the FOI Act, I have decided to consult with you and CSBA about the possible disclosure of the personal and business information in the documents before deciding whether to provide access to the FOI applicant. A copy of the relevant documents are **attached** for your reference.

The FOI Act grants every person a legal right to request access to documents in the possession of Australian Government agencies. When a document is disclosed to someone under FOI, they can use or distribute the document as they wish, as long as it complies with Australian laws.

I write to provide you with an opportunity to make submissions in support of a contention that:

- The documents are exempt under section 47 of the FOI Act (trade secrets);
- The documents are conditionally exempt under section 47G of the FOI Act (business information) and access to the document would, on balance, be contrary to the public interest;
- The documents are conditional exempt under section 47F of the FOI Act and access to the document would, on balance, be contrary to the public interest

What information can you request be exempt from release?

There are various circumstances under the FOI Act, which allows documents or parts of documents to be exempt from disclosure. This is an opportunity to explain why you think this information is sensitive to you and your organisation and should not be released to the FOI applicant. The decision

maker from our Office will consider any comments you provide on whether or not to disclose the attached information to the FOI applicant. While you may contend that other exemptions apply, you do not have a right to seek review of the FOI decision on grounds other than those specified above.

Personal Information

The conditional exemption under s 47F of the FOI Act relates to personal information of a person (who is not the FOI applicant), where disclosure of such information would be unreasonable and, on balance, contrary to the public interest. In order to determine whether this provision applies to the attached document, our Office has to establish that disclosure to the FOI applicant would:

1. involve the disclosure of personal information¹;
2. be unreasonable in all the circumstances (having regard to the age of the information, its sensitivity and whether its disclosure would advance the public understanding of government workings); and
3. be contrary to the public interest.

Business and Professional Affairs

There are two different exemptions under sections 47 and 47G, for documents that contain information relating to the business affairs of a person or organisation. In order to determine whether either of these provisions apply to the attached documents concerning CSBA our agency has to establish that disclosure would either:

1. reveal trade secrets (s 47);
2. reveal commercially valuable information which could be or could reasonably be expected to be destroyed or diminished if disclosed (s 47);
3. have an unreasonable/adverse effect on the operation or activities of CSBA in circumstances where disclosure would be contrary to the public interest (s 47G); or
4. prejudice the future supply of information to government, in circumstances where disclosure would be contrary to the public interest (s 47G).

What you need to do

To enable our Office to give full consideration to this request, we are seeking your comments on whether the disclosure of the relevant document would disclose information relating to you and CSBA contrary to the exemption provisions outlined above.

If you consider that the information would be exempt information, please provide the following:

- Which document/part of the document you believe should be exempt, please provide enough information for us to easily identify the relevant information/document.
- Provide reasons for your request to exempt certain information/documents, so that our Office can adequately consider and/or explain to the FOI applicant with reasons for the exemptions.

¹ Section 6 of the Privacy Act 1988 defines 'personal information' as information or an opinion about an identified individual, or an individual who is reasonably identifiable; whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

- Please also provide reasons on why you believe that disclosure would not be in the public interest.²

Please note that the mere assertion that an exemption exists is not sufficient to sustain an exemption claim, evidence is needed to support any claim.

Further information and guidance for your response

More information about exemptions under the FOI Act is available in the Guidelines issued by the Office of the Australian Information Commissioner (the OAIC), under s 93A of the FOI Act (Part 5 Exemptions and Part 6 Conditional Exemptions), available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

Personal Information considerations

- Is there anything about the nature of the information which makes it particularly sensitive or private?
- Would any serious adverse consequences flow from disclosure?
- In what circumstances was the information provided to government? Was there any expectation or agreement that it would be kept confidential?
- Is the information out of date, inaccurate or misleading in any way?
- Is the information well-known, or publicly available from another source?

Business and Professional Affairs considerations

- Would it be possible for any of your competitors to use the relevant information to harm CSBA's business? If so, how?
- Is the information widely known or otherwise accessible to the public?
- In what way would the commercial value of the information be diminished if disclosed?
- Would disclosure negatively affect the business of CSBA? What would be the potential or likely consequences of disclosure?
- If the issue is relevant, why would disclosure affect CSBA's decision to provide the relevant information to government in the future?³

Section 22 of the FOI Act allows for information within a document to be deleted where it is exempt and for the rest of the document to be disclosed. In your response please address the question of whether deletion of particular information within the relevant document could eliminate, or substantially reduce, any objections you might have to the disclosure of the remainder of the document. Please note that strong supporting evidence is required to exempt a document in full.

Please keep in mind, there may be circumstances in which any response you provide to our Office during this process, may have to be provided to the OAIC, the Administrative Appeals Tribunal and potentially the FOI applicant in the event that our agency's decision is reviewed or appealed.

² Information of the 'public interest test' may be obtained from the Office of the Australian Information Commissioner's website at <https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-fact-sheets/foi-fact-sheet-8-exemptions>.

³ Please note that where information is provided to the Australian Government under compulsion, or in support of a claim for a benefit from the Australian Government, it is unlikely that an agency would accept that the information would not be provided in the future.

What will the Ombudsman's Office do?

Although our Office will not be bound by any contentions you put forward, it will give careful consideration to any contentions made you during the decision-making process.

In the event that you request certain information/documents be exempt from release, but our agency decides to grant access to the relevant information/document, we will notify you of that decision in writing. In these circumstances you will be given an opportunity to dispute those aspects of our decision, before they are released to the FOI applicant.

Publication on our disclosure log

Under the FOI Act, if we decide to grant access to the attached documents to the FOI applicant, we may be obligated to publish the documents on our websites disclosure log. However, in some circumstances we will not publish information (such as personal or business information) where it would be unreasonable.

Timeframes and what will happen if you do not respond?

If you do not make a submission in support of an exemption contention, our Office is not required to provide written notice of the FOI decision or required to wait until your review rights have expired before providing access to the applicant.

Due to statutory timeframes, please provide your response to our Office by **23 December 2020**. Please contact us if you think you will have difficulty responding within this timeframe.

If you do not respond by this time our agency will be unable to take your views into account and may decide to disclose the documents to the applicant.

How can you contact us?

Please direct your consultation response to:

information.access@ombudsman.gov.au

or

Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

If you require clarification of any of the matters discussed in this letter please do not hesitate to contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely



Caitlin Christie
Paralegal
Legal Team

Influencing systemic improvement in public administration

Action Print - Telephone conversation with Caller

Action Report

Date Commenced	10-Dec-2020 11:34:39	Date Completed	10-Dec-2020 11:39:00	Contact
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Details

Case Number:

Officer:Caitlin Christie

Comments

I returned Mr Graham's call at 11:30am on 10 December 2020.

I stated my name and where I was calling from, Mr Graham explained he had previously provided submissions on behalf of CSBA and would do so again - however he queried whether he needed to provide further submissions. I explained that they have the opportunity to provide further submissions as this was a different FOI request, and while some documents were previously considered, we are consulting them again noting the new FOI request.

I explained that they may wish to content their names and email address are conditionally exempt as personal information, or to explain how disclosure of the contents of the emails to our Office would affect their business affairs. I explained it would be good to provide examples, or further information about how disclosure would affect their business affairs.

Mr Graham said he would read my letter again and provide a response by 24 December 2020. I said he is welcome to contact me should they require further clarification or time to provide submissions.

Caitlin Christie

From: s 47F <s 47F >
Sent: Tuesday, 19 January 2021 11:05 AM
To: Information Access
Subject: Automatic reply: Freedom of Information Consultation under s27/27A - Ombudsman reference FOI-2020-10087 [SEC=UNOFFICIAL]

Thank you for your email. I am no longer working with CSBA. Your email has been auto forwarded to the office manager and someone from CSBA will be in touch as soon as practicable. If you would like to contact CSBA directly please note some options below:

Email: info@csba.com.au
Tel: 03 9605 4900

Thank you once again and all the best.

Regards,
s 47F

Action Print - Telephone conversation with Caller

Action Report

Date Commenced	21-Jan-2021 15:25:17	Date Completed	21-Jan-2021 15:29:00	Contact
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Details

Case Number:

Officer:Caitlin Christie

Comments

I called Mr Graham of CSBA (third party consultation) to discuss their email received 21 January 2021.

I stated my name and where I was calling from, and that I was calling in relation to a FOI consultation. Mr Graham said just I've just responded to your email.

I explained that this is the second FOI involving CSBA documents, however the documents sought in this subsequent FOI request are not the same. I explained that the first FOI sought the CSBA report etc. and that this FOI sought our communications with CSBA about the third party consultation on the first FOI.

Mr Graham apologied for the confusion and now understood that the second FOI involves 4 CSBA documents. Mr Graham explained his name was publicly available and he would consider personal privacy exemption but its probably okay if its released. Mr Graham advised **s 47F** is leaving CSBA at the end of January. Mr Graham said he would send through another email shortly.

Caitlin Christie

From: Julian Graham s 47F
Sent: Thursday, 21 January 2021 3:32 PM
To: Information Access
Cc: s 47F Sam Monteath
Subject: Re: Freedom of Information Consultation under s27/27A - Ombudsman reference FOI-2020-10087 [SEC=UNOFFICIAL]

Dear Caitlin,

Apologies, I've just re-read my email and note that I referred to three documents, when in fact it should have been four.

And for sake of completeness, I would like to say that, as well as not having the CSBA work product released for the reasons already given, CSBA does not wish for the correspondence outlining the commercial reasons for not releasing the documents to be released.

We feel that this would also put us at a commercial disadvantage. The release would also reveal the names and contact details of CSBA staff involved in the project. Their contact details are either not available publicly, or if they are available publicly, could not be connected to the project in question other than via the release of this information.

Regards

Julian Graham
Commercial Manager

+s 47F | m. s 47F s 47F



www.csba.com.au PO Box 375, Collins St West VIC 8007 | +613 9605 4900

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From: Julian Graham s 47F
Sent: 21 January 2021 14:41
To: Information Access <Information.Access@ombudsman.gov.au>
Cc: s 47F s 47F; Sam Monteath s 47F
Subject: Re: Freedom of Information Consultation under s27/27A - Ombudsman reference FOI-2020-10087 [SEC=UNOFFICIAL]

Dear Caitlin,

I have reviewed the information you provided, and our business is of the opinion that we would not want this information, in this format released.

All three documents contain CSBA Pty Ltd proprietary information.

This includes how we construct questionnaires, build, and collate data, and the way we then analyse and present data. This is our work product that gives us our point of difference in the market and is the result of 20 years of IP.

Release of these documents allows others to see our methods and could possibly cause material financial harm to the business.

I also note that the last page of our report contains the following wording: "This report has been prepared exclusively for The Commonwealth Ombudsman, and may not be released to other parties without the approval of CSBA".

I also note that the release of the documentation would provide the names of staff at CSBA who have worked on the project and have dealt with this request. We do not feel that this is reasonable, particularly given the nature of the project.

Thank-you for your notification and should you require further explanation, or the reply in a different medium please do not hesitate to contact me.

Julian Graham

Commercial Manager

+s 47F | m. s 47F s 47F



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From: Information Access <Information.Access@ombudsman.gov.au>

Sent: 19 January 2021 11:04

To: Julian Graham [REDACTED]; Information Access <Information.Access@ombudsman.gov.au>
Cc: [REDACTED]
Subject: RE: Freedom of Information Consultation under s27/27A - Ombudsman reference FOI-2020-10087
[SEC=UNOFFICIAL]

Dear Mr Graham

In relation to the attached email, if possible are you able to provide a response by COB **22 January 2021**. Alternatively, should you not object to the disclosure of the information I would appreciate your prompt response.

As discussed, our Office would appreciate your views on the possible disclosure of documents 1-4 under the *Freedom of Information Act 1982* (FOI Act) (documents are included in attached email).

I note that the documents contain your contact information, and Ms [REDACTED] contact information. For this reason, you may wish to make a contention that this information where it appears in the documents is conditionally exempt under section 47F (personal privacy).

Sincerely,

Caitlin Christie

[she/her]

Paralegal | Legal Team

Commonwealth Ombudsman

Ph: 1300 362 072 | Fax: 02 6276 0123

Email: ombudsman@ombudsman.gov.au



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The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

From: Julian Graham [REDACTED]
Sent: Wednesday, 9 December 2020 5:00 PM
To: Information Access <Information.Access@ombudsman.gov.au>
Cc: [REDACTED]
Subject: Re: Freedom of Information Consultation under s27/27A - Ombudsman reference FOI-2020-10087

Hi Caitlin, I'll call tomorrow to discuss, thanks.

Julian Graham
Commercial Manager

+s 47F | m. s 47F | s 47F



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From: Information Access <Information.Access@ombudsman.gov.au>

Sent: 09 December 2020 12:39

To: Julian Graham s 47F

Subject: Freedom of Information Consultation under s27/27A - Ombudsman reference FOI-2020-10087

Dear Mr Graham and s 47F

Our Office has received a request under the *Freedom of Information Act 1982* (the FOI Act) for access to certain documents containing information which closely concerns the business of Customer Service Benchmarking Australia (CSBA).

I am writing to consult you about the possible disclosure under the FOI Act of the documents to which access has been requested.

I have attached a letter containing information about the consultation process and have also attached a copy of the documents which are:

1. 4 August 2020 - Email from Ombudsman to CSBA at 9:56 AM with two attachments
2. 11 August 2020 - Email from CSBA to Ombudsman at 4:33 PM
3. 22 September 2020 - Email from Ombudsman to CSBA at 3:27 PM with two attachments
4. 22 September 2020 - Email from CSBA to Ombudsman at 5:34PM

The attached letter requests a response by **23 December 2020**. If you need more time, I would be grateful if you could contact me ASAP to arrange an extension.

If you have any inquiries about this matter, and the processing of requests under the FOI Act, you may contact me using the contact information set out in my signature block below.

Thank you in advance for your assistance with this matter.

Sincerely,

Caitlin Christie

[she/her]

Paralegal | Legal Team

Commonwealth Ombudsman

Ph: 1300 362 072 | Fax: 02 6276 0123

Email: ombudsman@ombudsman.gov.au



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