



Mr Stephen Palethorpe
Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
PO Box 6100, Parliament House
Canberra ACT 2600

via email: rrat.sen@aph.gov.au

Dear Mr Palethorpe

Inquiry into Aviation Accident Investigations – privacy and FOI considerations

Thank you for your letters of 25 September 2012 and 31 October 2012 and your invitation to make a submission to the inquiry of the Standing Committee on Rural and Regional Affairs and Transport into Aviation Accident Investigations.

I will briefly address the two issues raised in your letters, about the application of the *Freedom of Information Act 1982* (FOI Act) to documents held by the Australian Transport Safety Bureau (ATSB) and the impact of privacy principles on the disclosure of information.

Application of the FOI Act to ATSB documents

The FOI Act provides a framework for public access to documents held by Australian government agencies and ministers. Under the Act, members of the public may request access to documents held by government, and agencies and ministers must give access to those documents unless an exemption applies.

You asked whether the contents of draft reports prepared by the ATSB would be obtainable under the FOI Act. The decision on the right of access to the particular documents in this case in response to an FOI request is rightfully one for the agency to make, with reference to the documents and relevant facts in this situation. It would not be appropriate for me to pre-empt the outcome that would result from an Information Commissioner review that could result from such an access request.

However, I will discuss in general terms the issues that an FOI decision-maker would need to take into consideration. In assessing an FOI request of this type, the ATSB would need to consider the exemptions in the FOI Act, in particular the exemption under s 38 relating to secrecy provisions in other enactments. Section 38 states that a document is exempt if its disclosure is prohibited under a provision of another Act and that provision is specified in Schedule 3 of the FOI Act. Schedule 3 specifies subsections 53(1) and (2) and 60(1), (2) and (3) of the *Transport Safety Investigation Act 2003* (TSI Act). Therefore, the ATSB would need to determine whether those provisions apply to its draft reports when deciding whether to give access under the FOI Act.

Other provisions in the FOI Act that may have a bearing on an FOI request to the ATSB include ss 47C and 47E. These are conditional exemptions, meaning that access must be given unless it would be contrary to the public interest. Section 47C states that a document is conditionally exempt if it includes deliberative matter (deliberative matter does not include operational information or purely factual material). Section 47E exempts documents where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain agency operations (including the conduct of tests, examinations or audits).

Further information about how exemptions apply in practice is given in the Guidelines issued under section 93A of the FOI Act. Part 5 of the Guidelines deals with the application of exemptions. Part 6 deals with the application of conditional exemptions.

Balancing privacy and openness

The open government principles enshrined in the FOI Act must be balanced with appropriate protection of personal information. This is reflected in the conditional exemption for personal privacy in the FOI Act (s 47F) and, more broadly, in the privacy principles in the *Privacy Act 1988*.

While the right to privacy is not an absolute one, any incursion on that right should be carefully assessed and proportional to the problem it is seeking to address. For example, rights to privacy must be balanced with the desirability that agencies discharge their functions efficiently and effectively. For proposals or activities involving a privacy impact on individuals, a careful assessment may identify alternatives that achieve the same outcome without any, or minimal, privacy impact.¹ The FOI Act also allows for the protection of personal privacy while facilitating government transparency. For example, a document containing personal information may be released with personal information deleted.

I do not intend to comment on the appropriateness of secrecy provisions in the TSI Act restricting disclosure of information. However, I note that the Australian Law Reform Commission (ALRC) has addressed in detail the operation of secrecy provisions in Commonwealth enactments in its 2010 report, *Secrecy Laws and Open Government in Australia*.² In that report, the ALRC recommended 'a new and principled framework striking a fair balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential.'³ While secrecy provisions may be established to protect personal information, the ALRC pointed out that they can serve a number of different purposes including protection of commercial information, confidential information and information relating to an investigation.⁴

¹ See OAIC, *Privacy Impact Assessment Guide*, May 2010, www.privacy.gov.au/materials/types/guidelines/view/6590.

² Australian Law Reform Commission (2010) *Secrecy Laws and Open Government in Australian*, ALRC Report 112, www.alrc.gov.au/publications/report-112.

³ ALRC Report 112, Executive Summary.

⁴ ALRC Report 112, paragraph 3.28.

It is my view that the privacy principles in the Privacy Act provide a good baseline for determining what is appropriate when it comes to personal information handling. For new proposals or existing agency operations that impact privacy (and which fall outside the operation of the Privacy Act), it is for the government to decide where the appropriate balance lies between the competing public interests of protecting individual privacy and advancing agency outcomes. In determining that balance, it would be necessary to clarify the different objectives of protection of personal information and protection of the integrity of accident investigations and auditing operations.

Thank you for the opportunity to comment on these issues. I hope this submission will be of assistance to the Inquiry.

Yours sincerely

Prof John McMillan
Australian Information Commissioner

3 November 2012