



Australian Government
Department of Finance

Reference: FOI 22-23/053
Contact: FOI Team
E-mail: foi@finance.gov.au

Me
via Right To Know website

By email only: foi+request-10222-33353106@righttoknow.org.au

Dear Sir,

Freedom of Information Request – FOI 22-23/053

On 5 May 2023, the Australian Securities and Investments Commission (ASIC) received your email, in which you sought access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to the following:

Please provide all documents in ASIC's possession that relate to ASIC receiving, considering, refusing or failing to consider, assessing, determining, accepting, rejecting, or otherwise dealing with, CDDA applications made to ASIC.

For the avoidance of doubt, this does not include individual CDDA applications themselves.

On 16 May 2023, you agreed to amend the scope of your request by the following:

The most final report/outcome documents in the possession of ASIC for any Act of Grace payments considered regarding ASIC since say 1 July 2021.

Would it be possible to revise my scope to the most final report/outcome documents in the possession of ASIC for any Act of Grace payments considered regarding ASIC since say 1 July 2021?

On 19 May 2023, ASIC transferred your request, in full, to the Department of Finance (Finance).

On 23 June 2023, following a teleconference discussion with the Department of Finance, you revised the scope of your request at **Attachment A**.

The purpose of this letter is to provide you with notice of my decision under the FOI Act in relation to your final amended scope as provided on 23 June 2023.

Additional information relevant to your request

During the meeting held on 23 June 2023 you explained that you are seeking information on the characteristics of circumstances in which a claim for an Act of Grace payment related to ASIC was deemed successful. As such, the following general information may be of assistance to you.

There is no situation which creates an automatic entitlement to an Act of Grace payment and the decisions made by a delegate are unique to the set of circumstances of each claim.

Your amended scope requests documents where the delegate has accepted the claim for an Act of Grace payment. Decision letters authorising a payment for an Act of Grace payment do not contain a consideration or decision summary as described in your request.

Apart from factual and personal information, a decision letter authorising an Act of Grace payment will typically contain standard wording as follows:

I am an authorised delegate for the purposes of section 65 of the Public Governance, Performance and Accountability Act 2013 (PGPA Act).

I have decided, under subsection 65(1) of the PGPA Act to authorise an act of grace payment of \$[amount] in this instance. Finance will liaise with [Non-corporate Commonwealth Entity Name] to give effect to this decision.

Further information is publicly available on the Department of Finance website at the following [link](#) (accessible on the Finance website at Home/ Individuals /Act Of Grace Payments, Waiver Of Debts To The Commonwealth, Compensation For Detriment Caused By Defective Administration (CDDA)/ Act of Grace Payments).

The Commonwealth Resource Management Guide 401 “Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013” provides guidance to Non-corporate Commonwealth Entities including in relation to Act of Grace payments and the CDDA scheme. This document may be of assistance to your understanding of the roles of Non-corporate Commonwealth Entities and general considerations relevant to Act of Grace payments. It is publicly available on the Department of Finance website at the following [link](#) (accessible on the Finance website at Home /Publications /List Of Resource Management Guides (RMGs) A Z /Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013 (RMG 401)).

Authorised decision-maker

I am authorised by the Secretary of Finance to grant or refuse access to documents.

Decision

I have identified five (5) documents as falling within scope of your request and I have decided to refuse to release all the five (5) documents under section 47F of the FOI Act.

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

- the terms of your FOI request;
- searches for documents held by Finance;
- the relevant provisions of the FOI Act; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Documents are conditionally exempt due to personal privacy

Section 47F of the FOI Act 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).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) 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;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

Section 47F is intended to protect the personal privacy of individuals. Personal information is defined 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.

The refusal to release the documents ensures there is no risk of personal information becoming disclosed inadvertently. The documents contain the personal details of individuals and the standard wording that is quoted in the section above. As such I consider that the documents are exempt under section 47F.

Public interest test

Having formed the view that the five documents are exempt under section 47F of the FOI Act, I am now required to consider the public interest test for the purposes of determining whether access to the conditionally exempt documents would, on balance, be contrary to the public interest.

Section 11A of the FOI Act provides:

5. The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Factors favouring disclosure

Section 11B of the FOI Act provides:

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

I consider that giving access to the documents would promote the objectives of the FOI Act by providing access to documents held by an agency. I attribute minimal weight to this factor as this objective applies to all documents, regardless of the effect of releasing the documents.

I note that your email of 23 June 2023 stated:

... I expanded (4) slightly [your request for a 'a table or similar that lists all ASIC-related Act of Grace payments'] ... If required, I would make the argument it's in the public interest, because (i) there is a surge in ASIC related applications, and (ii) such a table will assist Finance in improving public administration by identifying or helping to identify causes of this surge

The FOI Act applies to existing documents in the possession of an agency and does not obligate an agency to create a document.

Further, I do not consider that the release of the documents requested favours the public interest in relation to a “surge in ASIC related applications” or assists in identifying causes of such a surge.

Factors against disclosure

Paragraph 6.22 of the FOI Guidelines provides a non-exhaustive list of factors against disclosure, of which, I consider the following could reasonably be expected to apply:

- prejudice the protection of an individual’s right to privacy;
- harm the interests of an individual or group of individuals; and
- prejudice an agency’s ability to obtain similar information in the future.

As outlined above, I consider that the documents identified contain personal details and sensitive information related to an individual, and that the information outlined in the documents is not well known nor available from publicly accessible sources. In addition, the fact that an individual has applied for an Act of Grace payment is not well known or publicly available.

I consider that the release of these documents, even in a redacted form, may cause concern, distress or otherwise harm the interests of applicants who have made discretionary payment applications. I consider that the release of any further information in relation to these applications could reasonably be expected to impact the willingness of applicants to provide similar information in the future.

Irrelevant considerations

I have not taken into account any of the irrelevant factors listed under Section 11B of the FOI Act:

4. The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest;
 - a. access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - b. access to the document could result in any person misinterpreting or misunderstanding the document;
 - c. the author of the document was (or is) a high seniority in the agency to which the request for access to the document was made;
 - d. access to the document could result in confusion or unnecessary debate.

Balancing the public interest factors

The FOI Guidelines provide:

[6.25] The decision maker must determine whether access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against disclosure.

[6.27] To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

I consider that there is public interest in providing access to documents held by Finance. However, for the reasons listed above, I consider there is greater public interest in protecting personal information and sensitive personal information of applicants, as it is reasonably likely that the release of this information will prejudice those applicants’ right to privacy and harm their interests, and will prejudice Finance’s ability to obtain similar information in the future.

Approval of an Act of Grace claim is discretionary and the documents which are within scope of your request do not contain consideration or decision summaries. Given that I have provided to you in this letter, the wording that is typically included in decisions approving an Act of Grace claim, I consider that the release of any further information from these documents would contribute minimally towards factors favouring disclosure.

I consider that releasing five documents identified as within scope of your request would, on balance, be contrary to the public interest.

Review and appeal rights

You are entitled to request an internal review or an external review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and appeal rights is set out at **Attachment B**.

If you have any questions regarding this request, please contact the FOI Team on the above contact details.

Yours sincerely,



Jessica Wilson
A/g Assistant Secretary
Procurement & Discretionary Payments Branch
Commercial Group
24 July 2023



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 17 February 2023 it is \$1,011).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.