



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ24/00042

CR

By email: [foi+request-11030-6e7dc801@righttoknow.org.au](mailto:foi+request-11030-6e7dc801@righttoknow.org.au)

Dear CR

Freedom of Information Request – FOIREQ24/00042

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act). Your Freedom of Information (FOI request) was received by the Office of the Australian Commissioner (OAIC) on 17 January 2024.

I am writing to inform you of my decision.

## Background

### Scope of your request

Your FOI request sought access to the following information:

*Applications from agencies under s 89K of the FOI Act seeking to have persons declared vexatious applicants, for the period from 1 January 2022 to the date of this request.*

### Request timeframe

Your request was made on 17 January 2024. On 13 February 2024, I requested an extension of time of 14 days due to the number of complex FOI requests the OAIC is currently managing. On 14 February 2024, you declined to agree to an extension of time.

This means that a decision on your request is due by 16 February 2024.

### Consultation

On 1 February 2024 I consulted with you under section 24AB of the FOI Act on the basis that a practical refusal reason existed under section 24AA of the FOI Act.

On 2 February 2024 you responded to my consultation notice with the following revised scope:

*Applications from agencies under s 89K of the FOI Act seeking to have persons declared vexatious applicants, for the period from 1 January 2022 to the date of this request, excluding any attachments. Personal information relating to the applicants is excluded from the scope of this request (except for applicants names).*

## Decision

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests on behalf of the OAIC.

Subject to the following provisions of the FOI Act, I have made a decision to:

- grant access in part to 13 documents; and
- refuse access in full to 3 documents.

In accordance with section 26(1)(a) of the FOI Act, the reasons for my decision and findings on material questions of fact are provided below.

### Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request. The following line area of the OAIC conducted reasonable searches for documents relevant to your request:

- Significant Decisions Team, Freedom of Information Branch

Searches were conducted across the OAIC's various document storage systems including:

- the OAIC's case management system - Resolve
- the OAIC's document holding system – Content Manager
- OAIC's email system
- general computer files
- paper files

Having consulted with the relevant line areas and undertaken a review of the records of the various search and retrieval efforts, I am satisfied that a reasonable search has been undertaken in response to your request.

## Reasons for decision

### Material taken into account

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

- your FOI request dated 17 January 2024 and subsequent revised scope dated 2 February 2024;
- the FOI Act, in particular sections 3, 11, 11A, 11B 15, 22, 24AB, 26, 47E(d), 47F, of the FOI Act;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act to which regard must be had in performing a function or exercising a power under the FOI Act (FOI Guidelines); and
- consultation with the relevant line area of the OAIC in relation to your FOI request.

### Access to edited copies with irrelevant and exempt matter deleted (section 22)

In accordance with section 22 of the FOI Act, an agency must consider whether it would be reasonably practicable to prepare an edited copy of documents subject to an FOI request where material has been identified as exempt or irrelevant to the request.

I have determined that FOI Act exemptions apply to this material. I also note that you have excluded personal information relating to the applicants from the scope of your FOI request (except for applicants' names).

Accordingly, I have made an edited copy of the documents which removes this irrelevant and conditionally exempt material and otherwise grants you **part access** to the material in scope of your request.

### Section 47E(d) – Proper and efficient conduct of the OAIC's operations

In accordance with section 47E(d) of the FOI Act, I have made a decision to exempt material on the basis that disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. The material I have determined is exempt is contained in documents relating to a vexatious declaration application that is currently open and ongoing. In relation to vexatious declaration applications that have been closed I have determined that material identifying either the agency that made the application or

individual/organisation that was subject to the application is also exempt. Paragraph 6.101 of the FOI Guidelines explains that:

*For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur. The term ‘could reasonably be expected’ is explained in greater detail in Part 5. There must be more than merely an assumption or allegation that damage may occur if the document were to be released.*

Additionally, at 6.103 the FOI Guidelines further explain:

*An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect should be identified during the decision making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker’s statement of reasons, if they can be included without disclosing exempt material (s 26, see Part 3).*

In undertaking an assessment of this conditional exemption, I have had regard to relevant and recent AAT and Information Commissioner decisions including *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66, *Paul Farrell and Department of Home Affairs (Freedom of information)* (No 2) [2022] AICmr 49 (8 April 2022) and *Knight v Commonwealth Ombudsman* [2021] AATA 2504.

In *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66, a document was found not to be conditionally exempt under section 47E(d) of the FOI Act in circumstances where the agency argued that disclosure of the relevant material would or could reasonably be expected to have result in stakeholders declining to work with the Australian Human Rights Commission. The decision found that there was not sufficient evidence to support the conclusion that such harm would occur.

Similarly in *Paul Farrell and Department of Home Affairs (Freedom of information)* (No 2) [2022] AICmr 49 (8 April 2022), whilst the material found within the documents related to the Department of Home Affairs’ operations, the Commissioner determined that the Department had failed to provide sufficient evidence as to why disclosure would have a substantial and adverse effect on its operations. These decisions further reinforce the position that this provision requires a high threshold as to the substantial and adverse effect that disclosure would have on an agency’s operations.

In order to determine whether disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC, I have taken into consideration the functions and activities of the OAIC.

The OAIC is an independent statutory agency within the Attorney-General's portfolio, established under the *Australian Information Commissioner Act 2010* (Cth). The OAIC comprises the Australian Information Commissioner (IC) and the Privacy Commissioner (both offices currently held by Angelene Falk), the FOI Commissioner, and the staff of the OAIC. Relevant to this case, the OAIC is responsible for determining applications made by agencies under s 89K of the FOI Act. This forms part of the OAIC's regulatory functions.

The AAT has recognised that the conduct of an agency's regulatory functions can be adversely affected in a substantial way when there is a lack of confidence in the confidentiality of the investigation process *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) [24]. I further note that the importance of protecting information collected during an investigation process was upheld in the recent IC decision of 'YU' and *Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (YU). Whilst the decision of YU was in relation to an investigation of under the *Public Interest Disclosures Act 2013* (Cth), YU also highlighted other relevant case law that confirms the importance of agencies being able to undertake confidential investigative processes.

The determination of an application under s 89K of the FOI Act is an investigative process insofar as the OAIC is required to obtain facts from the relevant parties, consider submissions and make an assessment prior to determining an outcome. The FOI Guidelines set out the process for an agency in making an application for vexatious declaration. Detailed information about the FOI applicant and their applications is required. Paragraph 12.4 of the FOI Guidelines also provide that:

*12.4.....A broader pattern of contact between a person and an agency may nevertheless be relevant in deciding whether as a matter of discretion a declaration should be made under s 89K.*

As such, applications may include detailed information about patterns of behaviour an individual has with an agency. This information is provided to the OAIC in confidence in the initial consideration of the application and if the matter is withdrawn or the application declined, no information is publicly released about the application.

I have identified 7 relevant applications during the specified period. In one case, the application has yet to be determined and I have determined that the material is exempt in full. In relation to the other 6 applications, 1 was declined and 5 were withdrawn by the agency prior to a decision being made. No information has been made public regarding these applications.

In my view, the disclosure of this information may impact on the OAIC's ability to effectively assess future applications under s 89K of the FOI Act. Particularly, agencies may be reluctant to make applications and fully engage and provide all information relevant to the application if this information is to be released publicly, particularly in cases where the matter has been withdrawn or an application is unsuccessful. For these reasons, I consider the material to be conditional exempt under s 47E(d) of the FOI Act on the basis that it would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations.

As section 47E is a conditional exemption, I am also required to consider the application of a public interest test.

My consideration of the public interest test, in respect of all the material subject to conditional exemption in this document is discussed below.

#### Section 47F – personal privacy

In accordance with section 47F of the FOI Act, I have made a decision to redact material on the basis that disclosure would constitute an unreasonable disclosure of personal information.

A document is conditionally exempt under section 47F(1) of the FOI Act where disclosure would involve the unreasonable disclosure of personal information of any person, including a deceased person. This exemption is intended to protect the personal privacy of individuals.

Section 4 of the FOI Act provides that the definition of personal information in the *Privacy Act 1988* (Cth) also applies to the FOI Act. The term personal information is defined in section 6 of the Privacy Act to be:

*... information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) whether the information or opinion is true or not;*
- (b) whether the information or opinion is recorded in a material form or not.*

The documents contain personal information including names of third parties subject to the vexatious declarant application. I note that you have exempted personal information about those individuals apart from their name and this information has been removed under s 22 of the FOI Act.

I am satisfied that this material meets the definition of personal information because the material relates closely to the personal matters of an individual and disclosure of this information would reasonably identify that individual.

In determining whether disclosure of other personal information in the documents would involve an unreasonable disclosure of personal information, the FOI Guidelines provide the following considerations at paragraph 6.140:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be associated with the matters in the document
- the availability of the information from publicly accessible sources
- any other matters the agency or Minister considers relevant.

The FOI Guidelines further describes the key factors for determining whether disclosure is unreasonable at paragraph 6.143:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release.

The FOI Guidelines explain at paragraph 6.138 that the test of 'unreasonableness' in section 47F 'implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals'.

Consistent with *FG and National Archives of Australia [2015] AICmr 26*, the FOI Guidelines at paragraph 6.143 explain that other relevant factors include:

- the nature, age and current relevance of the information
- 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

- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity

I am satisfied that the relevant material is not public information and is not well known. I am also satisfied that the individuals to whom the information relates is reasonably not known to be associated with the matters dealt with in the document. If this information were disclosed publicly, it would unreasonably impact on the privacy of the individual.

The recent decision of *Knight v Commonwealth Ombudsman* [2021] AATA 2504 discusses personal information collected in the course of a complaint or investigation. At paragraph [32] the Tribunal found that:

*In the circumstances where the information is highly sensitive and has been disclosed on a confidential basis, it would be unreasonable to disclose that information to the applicant.*

I consider the collection of the material contained in this document to be of a similar nature, in that it was collected during the course of an OAIC decision-making process. I consider that the information is highly sensitive and that it would be unreasonable to disclose this information.

For the reasons given above, I consider the relevant documents identified in the schedule are conditionally exempt under section 47F of the FOI Act.

As section 47F is a conditional exemption, I am also required to consider the application of a public interest test.

My consideration of the public interest test, in respect of all the material subject to conditional exemption in this document is discussed below.

Application of the public interest test – section 11A and 11B

As provided above, I have considered that material within the documents is subject to conditional exemption under sections 47E(d) and 47F of the FOI Act.



Section 11A(5) provides that where documents are considered to be conditionally exempt, an agency **must** give the person access to those documents unless the FOI decision maker would, on balance, would be contrary to the public interest.

This means that I must balance factors for and against disclosure in light of the public interest.

In Chapter 6, the FOI Guidelines provide the following guidance:

6.4 *There is a **single public interest test to apply to each of the conditional exemptions**. This public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account.*

6.5 *The public interest test is considered to be:*

- *something that is of serious concern or benefit to the public, **not merely of individual interest***
- ***not something of interest to the public, but in the public interest***
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

6.6 *It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of public interest or benefit to an individual or small group of people may also be a matter of general public interest.*

In the AAT case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, at paragraph 133 of the Decision Deputy President Forgie explained that:

*... the time at which I make my decision for section 11A(5) requires access to be given to a conditionally exempt document “at a particular time” unless doing so is, on balance, contrary to the public interest. Where the balance lies may vary from time to time for it is affected not only by factors peculiar to the particular information in the documents but by factors external to them.*

The FOI Act sets out four factors favouring access which must be considered if relevant. Of these factors, I consider the following to be relevant:

- disclosure would promote the objects of the FOI Act; and
- disclosure would inform debate on a matter of public importance.

In addition to these factors favouring disclosure, I have also considered that the following factors in favour of disclosure apply:

- disclosure would reveal the reason for a decision of government and/or provide further information surrounding that decision; and
- disclosure would enhance scrutiny around government decision making.

Section 11B(4) of the FOI Act provides factors which are not to be taken into account in , which I have had regard to. Section 11B does not further prescribe the factors against disclosure to be considered. In considering the documents subject to this request, I consider that the follow factors do not favour disclosure:

- disclosure would have an adverse effect on the OAIC's proper and efficient operations relating to its decision-making processes under s 89K of the FOI Act, and the FOI Act more broadly; and
- disclosure of the personal information contained in the documents could reasonably be expected to interfere with an individual's right to privacy.

I have given significant weight to the sensitive nature of the personal information provided in an application under s 89K of the FOI Act and the fact that this information is not disclosed publicly unless a declaration is made under s 89K of the FOI Act. I note that in each of the relevant applications the application is either open, declined or withdrawn and the sensitive information is not publicly available.

I have balanced this with the importance of allowing publicly scrutiny of government decision making. I consider that by removing material that identifies either the agency/organisation or individual but allowing access to information about the reasons for the application strikes the correct balance in weighing up these factors. In relation to the matter that is still open, I do not consider release of information about the reasons for the application is appropriate at this time.

On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is in withholding the exempt material.

### **Disclosure log decision**

Section 11C of the FOI Act requires agencies to publish online documents released to members of the public within 10 days of release, except if they contain personal or business information that would be unreasonable to publish.

I have made a decision to publish the redacted documents subject to your request on the OAIC's disclosure log.

#### Release of documents

The documents are being prepared for release. The schedule of documents is attached and the documents will be released on Monday 19 February 2024.

Please see the following page for information about your review rights.

Yours sincerely

**Emily Elliott**

Senior Lawyer

16 February 2024

## **If you disagree with my decision**

### Internal review

You have the right to apply for an internal review of my decision under Part VI of the FOI Act. An internal review will be conducted, to the extent possible, by an officer of the OAIC who was not involved in or consulted in the making of my decision. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

If you wish to apply for an internal review, please mark your application for the attention of the FOI Coordinator and state the grounds on which you consider that my decision should be reviewed.

Applications for internal reviews can be submitted to:

Office of the Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001

Alternatively, you can submit your application by email to [fox@xxxx.xxv.au](mailto:fox@xxxx.xxv.au), or by fax on 02 9284 9666.

### Further review

You have the right to seek review of this decision by the Information Commissioner and the Administrative Appeals Tribunal (AAT).

You may apply to the Information Commissioner for a review of my decision (IC review). If you wish to apply for IC review, you must do so in writing within 60 days. Your application must provide an address (which can be an email address or fax number) that we can send notices to, and include a copy of this letter. A request for IC review can be made in relation to my decision, or an internal review decision.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC. For this reason, if you make an application for IC review of my decision, and the Information Commissioner is satisfied that in the interests of administration of the Act it is desirable that my decision be considered by the AAT, the Information Commissioner may decide not to undertake an IC review.

Section 57A of the FOI Act provides that, before you can apply to the AAT for review of an FOI decision, you must first have applied for IC review.

Applications for IC review can be submitted online at:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

Alternatively, you can submit your application to:

Office of the Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001

Or by email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au), or by fax on 02 9284 9666.

Accessing your information

If you would like access to the information that we hold about you, please contact [fox@xxxx.xxv.au](mailto:fox@xxxx.xxv.au). More information is available on the Access our information page on our website.