



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ24/00047

Daniel M

By email: foi+request-11041-6015dd9f@righttoknow.org.au

Dear Daniel

Freedom of Information Request – FOIREQ24/00047

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 20 January 2024.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access, via 2 emails on 20 January 2024, to the following information:

I hereby submit a request under the FOI Act for the following document/s:

- 1. Data breach reports/notifications received by the OAIC for the period 1 October 2023 to 31 December 2023.*

...

I hereby amend my request under the FOI Act to include:

- 2. Copies of communications from and to the OAIC in relation to the aforementioned data breach reports/notifications for the same date period.*

The same agreement to redact/exclude information applies in the event where inclusion of the information would result in a refusal of the request.

Following consultation with you under s 24AB of the FOI Act, on 1 February 2024 you revised your request to be as follows:

I would be willing to revise my request to a random sample of 10 as per your suggestion, under the same requirements as my initial request (i.e. notifications submitted to the OAIC, and communications from/to the OAIC in relation to said notifications).

Request timeframe

Your request was made on 20 January 2024. This means that a decision on your request is due by 19 February 2024.

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.

I have identified 52 documents relevant to your request. Subject to the following provisions of the FOI Act, I have made a decision to:

- create and grant access in part to 1 document;
- grant access in part to 8 documents; and
- refuse access in full to 43 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 areas of the OAIC conducted reasonable searches for documents relevant to your request:

- Notifiable data breaches team.

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 area 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 20 January 2024 and subsequent revised scope dated 1 February 2024;
- the FOI Act, in particular, including sections 3, 11, 11A, 15, 24AB, 26, 47E(d) and 47G 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 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.

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

Creation of a document in response to your FOI request (section 17)

Pursuant to section 17 of the FOI Act, I have made a decision to create 1 document in response to your request. I have made a decision to grant partial access to this document.

Under section 17 of the FOI Act, if an FOI request is made for a document that could be produced by using a computer ordinarily available to the agency for retrieving or

collating stored information, an agency is required to deal with the request as if it was a request for written documents to which the FOI Act applies.

The FOI Guidelines [at 3.204] explain that section 17 may require an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded. The obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (section 17(1)(c)(i)), or making a transcript from a sound recording (section 17(1)(c)(ii)); and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (section 17(2)).

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

Part of your FOI request sought access to data breach reports. The Notifiable Data Breach team advised me that this material is not available in a discrete form but instead is able to be produced in a written document through the use of a computer. In light of this, a document has been created under section 17 in response to your request and is included in the schedule of documents attached.

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

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.

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).

The material that I have decided is subject to conditional exemption comprises of details of the affected organisation and data breaches (including communication between the OAIC and the organisation) that may allow the affected organisation and the particular breach to be identified.

Functions and Powers of the OAIC

In order to determine whether disclosure of the documents 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.

Due to the nature of the relevant documents and material, I have had regard to:

- the Australian Information Commissioner's investigative powers under the *Privacy Act 1988* (Cth) (Privacy Act); and
- the OAIC's Notifiable Data Breaches investigation processes.

The OAIC is an independent statutory agency within the Attorney-General's portfolio, established under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act). The OAIC comprises the Australian Information Commissioner and the Privacy Commissioner, the FOI Commissioner and the staff of the OAIC.

The OAIC is established under s 5 of the AIC Act. Section 5 also provides that the Information Commissioner is the Head of the OAIC for the purposes of the *Public Service Act 1999* (Cth). Section 5 further provides that for the purposes of the *Public Governance, Performance and Accountability Act 2019* (Cth) the Information Commissioner is the accountable authority of the OAIC.

Under the AIC Act and the Privacy Act, the Information Commissioner has a range of functions and powers under the Notifiable Data Breaches (NDB) scheme, including to:

- receive notifications of eligible data breaches;
- encourage compliance with the scheme, including by handling complaints, conducting investigations and taking other regulatory action;

- offer advice and guidance to regulated organisations; and
- provide information to the community about the operation of the NDB scheme.

While organisations are required to report data breach incidents to the OAIC, the extent of information provided is voluntary. At a minimum, organisations must provide the following information:

- the organisation or agency's name and contact details;
- a description of the data breach;
- the kinds of information involved; and
- recommendations about the steps individuals should take in response to the data breach.

However, as noted on the OAIC's website,¹ the OAIC recommends reporting organisations provide the following information to assist the OAIC to fully investigate the breach:

- the circumstances of the data breach;
- what the organisation has done to contain the data breach; and
- whether any remedial action has been taken.

The OAIC website also advises reporting organisations that "...The more information you tell us about the circumstances of the data breach, what you've done to contain the data breach and any remedial action you've taken, will help us respond to your notification". The OAIC relies on the information provided by the organisations in order to consider whether further regulation action, if any, is required.

In these circumstances, I find it is likely that disclosure of the documents would decrease the willingness of organisations affected by data breaches to make full disclosure to the OAIC. If organisations reporting a data breach to the OAIC believe their sensitive business information may be publicly disclosed, they will be less likely to engage with the OAIC and provide the necessary information for the OAIC to conduct its NDB scheme functions. This will have a substantial adverse effect on the proper and efficient conduct of the OAIC as the body responsible for overseeing the NDB scheme.

¹ [Report a data breach - Home \(oaic.gov.au\)](https://www.oaic.gov.au/report-a-data-breach)

Accordingly, based on the information before me at this time, I am satisfied that the disclosure of the relevant documents in a notifiable data breach reported to the OAIC at this time, where the FOI applicant is not the reporting organisation, would, or could be reasonably expected to have a substantial adverse effect on the proper and efficient operations of the OAIC in investigating NDBs.

For these reasons, I am satisfied that the relevant documents and material are conditionally exempt.

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.

Business information conditional exemption (section 47G(1)(a))

In the alternative, I have made a decision to redact material contained within the documents in accordance with section 47G(1)(a) of the FOI Act.

Section 47G(1) of the FOI Act provides:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*
 - (a) *would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or*
 - (b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

In undertaking an assessment of this conditional exemption, I have had regard to relevant and recent AAT and Information Commissioner decisions including ‘ABH’ and *Australian Transport Safety Bureau (Freedom of information)* [2022] AICmr 27, *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 and ‘E’ and *National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

I also note the AAT case of *Re Secretary, Department of Employment and Besser and Others* (2017) 166 ALD 343 which discussed the exemption of material which identified businesses who were the subject of investigation. I consider this case relevant to my consideration of the business material identified in the documents subject to this request, which relate to investigations undertaken by the OAIC. I note at paragraph [28] the Tribunal found:

[28] *A hypothetical neutral reader of the documents might not ascribe any weight to those unsubstantiated allegations. But I think that disclosure of the documents could reasonably be expected to have an adverse effect on providers by naming them as having been the subject of allegations to, or investigations by, the Department. That effect would be a reduction in the number of employers or unemployed people seeking to use a provider's services, and a consequential reduction in the provider's access to funding under the program. The documents do not reveal whether the allegations have been substantiated.²⁹ In those circumstances, I think that the adverse effect, upon the providers, of disclosure would be unreasonable for the purposes of s 47G.*

Under s 47G(1)(a) of the FOI Act, a document is conditionally exempt from disclosure if its release would disclose information concerning the business, commercial or financial affairs of an organisation or undertaking, in circumstances where disclosure of such information would unreasonably affect an organisation in the undertaking of its lawful business or commercial affairs. As noted in *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66 [156-157]:

... the business information exemption is intended to protect the interests of third parties dealing with the government. The operation of s 47G depends on the effect of disclosure rather than the precise nature of the information itself. Notwithstanding this, the information must have some relevance to a person in respect of their business or professional affairs or to the business, commercial and financial affairs of the organisation... The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.

In this instance, the exempt documents contain information from several third-party organisations including software used within the organisation's internal systems and network environments, the cause of the data breach, and internal organisational emails sent to affected persons.

I am therefore satisfied that this is information concerning the business affairs of the affected third-party organisations.

As section 47G 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.

Prejudice future supply of information (s 47G(1)(b))

Section 47G(1)(b) applies where disclosure could reasonably be expected to prejudice the future supply of information to the OAIC for the purpose of the administration of matters administered by the OAIC. The FOI Guidelines provide, at [6.198]:

This limb of the conditional exemption comprises two parts:

- *a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government*
- *the reduction will prejudice the operations of the agency*

The FOI Guidelines further provide, at [6.200] – [6.201]:

Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information in issue is routine or administrative (that is, generated as a matter of practice).

The agency will usually be best placed to identify, and be concerned about the circumstances where the disclosure of documents might reasonably be expected to prejudice the future supply of information to it.

The term ‘prejudice’ is not defined in the FOI Act. The FOI Guidelines provide the following definition, at [5.22] – [5.23]:

... The Macquarie Dictionary definition of ‘prejudice’ requires:

- a. disadvantage resulting from some judgement or action of another*
- b. resulting injury or detriment*

A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected outcome does not need to have an impact that is ‘substantial and adverse’.

As above, although reporting eligible data breaches is compulsory, the extent of information provided by an organisation is voluntary. The OAIC recommends the reporting organisation provide additional information relating to the circumstances of the data breach, what the organisation has done to contain the data breach and what, if any, remedial action has been taken to assist the OAIC to investigate the data breach.

As previously mentioned above, the documents contain details third-party organisations' software used to provide business services, the storage of data relating to business operations, and affected persons within the organisations' clientele. In my view, disclosure of the relevant documents in this case could reasonably be expected to prejudice the future supply of information to the OAIC if third-party organisations' sensitive business information which was provided to the OAIC for the purpose of assisting OAIC in assessing a NDB incident is disclosed. I also consider disclosure of such information could reduce the quantity or quality of information regarding the data breach provided to the OAIC by reporting organisations in the future and could hinder the ability of the OAIC to conduct a full investigation, which may lead to the disadvantageous outcome that an appropriate determination is not made.

For the above reasons, based on the information before me at this time, I am satisfied that disclosure of the documents at this time could reasonably be expected to prejudice the future supply of information to the OAIC for the purposes of reporting NDBs.

As section 47G is a conditional exemption, I am also required to consider the application of a public interest test. My consideration of the public interest test 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 s 47E(d) and s 47G(1) of the FOI Act.

Section 11A(5) provides that where a documents is 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 relevant factors to be that disclosure would:

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

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 of the affected third-party organisations' business information could reasonably be expected to have a substantial adverse effect on the investigative functions of the OAIC by discouraging organisations impacted by eligible data breaches from providing the OAIC all information relating to the breach.
- disclosure of the affected third-party organisations' business information could reasonably be expected to prejudice the future supply of confidential information to the OAIC for the purpose of the administration of matters administered by the OAIC.
- disclosure could reasonably be expected to reduce the quantity of information provided to the OAIC in the future by reporting organisations who have been affected by a data breach.

In particular, I have given significant weight to the fact that the documents in scope have been submitted by third-party businesses or information provided to the OAIC by third-party businesses, regarding their business information and affairs associated with a NDB which could impact on the future supply of this information and the cooperation of the organisations involved in future data breaches.

Whilst I acknowledge the public interest in informing the public about data breaches and their impact on both the individuals involved and the community as a whole, I consider that public interest is outweighed in this instance by the need to ensure the flow of information from organisations to the OAIC to allow the effective oversight of significant data breaches.

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 disclosing the conditionally exempt material would be contrary to the public interest.

Disclosure log decision

Section 11C of the FOI Act requires agencies to publish online document 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 version of the documents subject to your request on the OAIC's disclosure log.

Release of documents

The documents are enclosed for release and are identified in the attached schedule of documents.

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

Yours sincerely

Emily Elliott

Senior Lawyer

19 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, 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

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, 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. More information is available on the Access our information page on our website.