



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ24/0113

French P

By email: foi+request-11128-b65dc6ec@righttoknow.org.au

Freedom of Information Request – FOIREQ24/00113

Dear French P

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 22 February 2024, upon transfer from the Commonwealth Ombudsman under s 16(1) of the FOI Act of your request made on 18 February 2024.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

Access to any notice or direction issued to the Commonwealth Ombudsman/Office of the Commonwealth Ombudsman (OCO)/any person at the OCO, under ss. 55(2)(e)(ii), 55E(2), 55R(3), 55T(2), 55T(4), 75(1) and/or 79(3) of the FOI Act from 1 July 2022 onwards.

Request timeframe

Your request was made on 18 February 2024, and transferred to the OAIC under s 16(1) of the FOI Act on 22 February 2024.

This means that a decision on your request is due by 19 March 2024.

Decision

I am an officer authorised under s 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 8 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:

- Freedom of Information Branch

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

- the OAIC's case management system - Resolve

I am satisfied that all reasonable searches have been undertaken to identify documents relevant 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 18 February 2024 and subsequent transfer from the Commonwealth Ombudsman to the OAIC dated 22 February 2024
- the FOI Act, in particular sections 3, 11, 11A, 15, 22 and 47E(d) 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)
- consultation with the Commonwealth Ombudsman (Ombudsman)

- consultation with 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 s 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 the exempt material has been removed in accordance with s 47E(d) of the FOI Act.

Accordingly, I have made an edited copy of the documents which removes this material in accordance with s 47E(d) of the FOI Act and otherwise grants you **full access** to the material in scope of your request.

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

In accordance with s 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:

Surnames of Ombudsman staff members where their surnames are not published in association with their roles.

I note that the Ombudsman has established outgoing correspondence procedures with members of the public, under which complaint-handling staff are directed only to disclose their given name to complainants. I further understand the Ombudsman provides a general contact phone number and a general email address as the main point of contact for the Ombudsman. I also note that as you have requested the information using a 'right to know' email address, the information will be published on the 'right to know' website and will be generally available to the world at large.

In considering this material, I have had regard to the IC review decision of 'LY' and Commonwealth Ombudsman (Freedom of information) [2017] AICmr 68 (17 July 2017) the Commissioner accepted that 'giving the applicant access to the contact details would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations under the Ombudsman Act 1976'. Having considered the material in this case, I consider the reasoning in 'LY' is equally applicable to the material in this case.

The disclosure of the surnames of Ombudsman staff where their surnames are not published would or could reasonably be expected to have a substantial adverse impact on the operations of the Ombudsman. It would allow direct contact with specific Ombudsman staff that would lead to inefficiencies and circumvent existing contact arrangements. For example, it is common knowledge that email addresses for commonwealth employees is first name.last name@agency.gov.au. In this instance the disclosure of surnames also amounts to a disclosure of direct contact details. As such, the disclosure of surnames would allow direct contact with specific Ombudsman staff that would lead to inefficiency and circumvent existing contact arrangements.

Therefore, I am satisfied that the surnames of the Ombudsman's staff members are conditionally exempt from disclosure under s 47E(d) of the FOI Act.

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 – sections 11A and 11B

As provided above, I have considered that material within the documents is subject to conditional exemption under s 11A(5).

Section 11A(5) provides that where documents are considered to be conditionally exempt, an agency **must** give the person access to those document 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 fact that disclosure would promote the objects of the FOI Act is the only relevant factor supporting disclosure.

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 fact that disclosure would or could reasonably be expected to have an adverse effect on the operations of the Ombudsman by allowing individuals to circumvent existing contact arrangement is a factor against disclosure.

Whilst I acknowledge disclosure would promote the objects of the FOI Act, I have balanced this with the fact the Ombudsman has in place specific contact arrangements for members of the public to ensure the efficient operations of the agency. For this reason, I have given significant weight the fact disclosure would circumvent these arrangements and on balance I find the factors against disclosure outweigh the factors for disclosure.

I have decided that at this time, giving you full access to the documents, which I have found to be conditionally exempt under s 47E(d) of the FOI Act would, on balance, 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 documents subject to your request on the OAIC's disclosure log.

Release of document

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

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

Yours sincerely,

Emily Elliot

19 March 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 foi@oaic.gov.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 foi@oaic.gov.au. More information is available on the Access our information page on our website.