



Our reference: FOIREQ24/00134

L

By email: foi+request-11184-68ee62df@righttoknow.org.au

Dear L

Freedom of Information Request – FOIREQ24/00134

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 1 March 2024.

I am writing to inform you of my decision.

I have identified 29 documents within the scope of your request. I have made a decision to:

- grant full access to 2 documents;
- grant access in part to 25 documents; and
- refuse access to 2 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.

Background

Scope of your request

Your FOI request sought access to the following information:

I request all final Statement of Reasons for all FOI requests and FOI Internal Review requests completed by the Office of the Australian Information Commissioner between 1 January 2024 - 29 February 2024.

Request timeframe

Your request was made on 1 March 2024.

This means that you are required to be notified of a decision on your request by 2 April 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.

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

- grant full access to 2 documents;
- grant access in part to 25 documents; and
- refuse access to 2 documents.

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:

- Legal Services Team within the Corporate Branch.

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

- the OAIC's case management system – Resolve;
- OAIC's email system; and
- general computer files.

Having consulted within 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 1 March 2024;
- the FOI Act, in particular sections 3, 11, 11A, 15, 22, 26, 47E(d) and 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 within the 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 and that it would be reasonably practicable to prepare an edited copy of the documents.

Accordingly, I have made an edited copy of the documents which removes this exempt material and otherwise grants you 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 redact 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 term 'substantial adverse effect' is explained in the Guidelines (at [5.20]) and it broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

The material that I have decided is subject to the conditional exemption comprises of two decisions which relate to an ongoing and open Administrative Appeals Tribunal (AAT) matter in which the OAIC is the respondent.

Given that these decisions relate to ongoing merits review proceedings before the AAT, I consider that the disclosure of this material outside of the parties to those proceedings, could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC in responding to and managing its involvement in those proceedings. This is because, as the matters are currently being considered by the Tribunal, only parties to the proceeding have access to the relevant documents of that proceeding including the two FOI decisions. The release of those decisions whilst there is an open and ongoing related proceeding on foot, to an individual who is not a party to these proceedings, could impede the OAIC's ability to respond to and manage its involvement in those merits review proceedings before the AAT.

For these reasons, I am of the view that disclosing the material comprising of two decisions which were the subject of orders made by the AAT, would, or could reasonably be expected to substantially and adversely affect the proper and efficient conduct of the OAIC in responding to and managing its involvement in ongoing merits review proceedings. As such, I consider this material is conditionally exempt under s 47E(d) of the FOI Act.

As section 47E of the FOI Act 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 the material subject to conditional exemption in the documents is discussed below.

Personal privacy exemption (s 47F)

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.*

Whether the material is personal information

The material contains the names and email addresses of various individual FOI applicants; material relating to requests for information about personal matters of those individuals; and other material that could reasonably identify those individuals.

I am satisfied that this material meets the definition of personal information because the material either identifies the individuals or relates closely to the personal matters of the individuals or contains other material such that its disclosure would reasonably identify those individuals.

I have otherwise made a decision to release the names and contact information of persons that I understand are known to you or are otherwise publicly available.

Whether the disclosure of personal information would be unreasonable

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; and
- 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; and
- 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.

In consideration of these factors and the material contained within the documents, I am satisfied that the release of this personal information would be unreasonable because:

- the material is not public information and is not well known;
- the individuals to whom the information relates is not known to be associated with the matters dealt with in the material;
- the material is not available from publicly accessible sources;
- no public purpose would be achieved through release of the material; and

- the individuals to which the personal information in the material relates would not reasonably expect their personal information to be released by the OAIC and would likely be distressed by the release of the material.

I am also mindful that this FOI request has been made through the Right to Know Website and that the documents released will be automatically published upon release to the Right to Know Website. As DP Forgie noted in the AAT decision *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at paragraph [118], the FOI Act does not limit those to whom, or the platforms on which, a person might choose to publish the documents to which they are given access. Nevertheless, in this case, disclosure of the personal information in the material will indeed be disclosure to the world at large. If the material were disclosed publicly it would unreasonably impact on the privacy of the individual.

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.

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 access to the documents, 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:

- 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 deciding whether access to the documents, would, on balance, be contrary to the public interest. I confirm I have not had regard to these factors.

Section 11B of the FOI Act does not further prescribe the factors against disclosure to be considered. However, in considering the documents subject to this request, I consider that the following factors do not favour disclosure:

- disclosure could adversely affect the ability of the OAIC to respond to and manage its involvement in ongoing merits review proceedings; and

- disclosure of the personal information in the material could interfere with and impact on individuals' right to privacy.

In balancing the factors for and against disclosure of the material, I have placed greater weight on the factors concerning the predicted adverse effect on the OAIC's ability to respond and manage its involvement in ongoing merits review proceedings as well as the interference with and impact on individuals' right to privacy by the disclosure of the material.

On balance, and at this time, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am therefore satisfied that it is in the public interest to withhold the exempt material.

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 documents

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,

Ben Wilson

Lawyer

2 April 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.