



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00228

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ23/00228

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 request (FOI request) was received by the Office of the Australian Commissioner (OAIC) on 5 November 2023.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

- 1. Provide copies of documents regarding engagement of lawyers (internal or external) by commissioner Falk to draw up her submissions and providing her with any advice in the matter.*
- 2. Copies of tax invoices showing total amounts of legal fees/costs paid to the lawyers for advice and drafting Falk's submissions.*

This request was made after we provided you with a link to the OAIC's submissions to the Senate Inquiry into Commonwealth FOI laws (the Senate Inquiry) and accordingly we have interpreted your request to relate to these submissions.

Please note that the amounts referred to in document 2 include not only advice in relation to the Senate Committee but other matters as well.

Request timeframe

Your request was made on 5 November 2023. On 29 November 2023 we advised you that the period for processing your request had been extended by 30 days under s 15(6) of the FOI Act to allow us to consult with a third party regarding information concerning that party's business or professional affairs and third-party personal information contained within the documents.

This means that a decision on your request is due by 4 January 2024.

Consultation

I consulted with one third party in relation to your request. I do not agree with the views of the third party in relation to the personal information contained within the documents and I have decided to grant part access to the documents.

Subsection 27(7) of the FOI Act provides that access is not to be given to the documents until the third party's review or appeal opportunities have been exercised or expire.

As a result, the documents will not be released to you until all opportunities for review or appeal in relation to this decision have been exercised or expire. If the third party applies for internal review with the OAIC, or IC review, the OAIC cannot release the document until the review is concluded and the time for instituting a review or appeal has expired.

The attached schedule indicates the documents that are subject to third party review rights.

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 identified 15 documents relevant to your request. I have made a decision to:

- grant full access to 1 document, and
- grant access in part to 5 document(s), and/or
- refuse access in full to 9 document(s).

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:

- Executive
- Legal Services
- Regulation & Strategy

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

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 5 November 2023;
- the FOI Act, in particular sections 3, 11, 11A, 15, 22, 26, 42, 47F and 47G of the FOI Act; and
- 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).

Access to edited copies with exempt material 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.

Documents subject to legal professional privilege (section 42)

I have identified material contained within the documents which comprises legal advice and requests for legal advice associated with to the Commissioner's submissions to, and appearance before, the Senate Inquiry.

In accordance with section 42 of the FOI Act, I have made a decision to exempt material on the basis that it is subject to legal professional privilege.

Section 42(1) of the FOI Act provides that:

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

In determining whether or not these documents could be privileged from production in legal proceedings I have considered:

- whether there is a legal adviser-client relationship,
- whether the communication was for the purpose of giving or receiving,
- legal advice, or use in connection with actual or anticipated litigation,
- whether the advice given is independent, and
- whether the advice given is confidential.

In relation to the identified material, both internal and external lawyers, were engaged to provide legal advice. In relation to external lawyers, I am satisfied that a legal adviser-client relationship exists as the external lawyers were engaged for the purposes of providing legal advice.

In relation to the internal lawyers, I note that generally, privilege may be claimed in relation to advice sought from and given by an inhouse lawyer, where the professional relationship between the lawyer and the agency seeking advice has the necessary quality of independence, as per *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327 at [32].

The OAIC legal team is part of the corporate branch and is separate from the OAIC Executive. Requests for legal advice are settled by General Counsel or a principal lawyer within the legal team. Although not a determinative factor, all members of the legal team hold practising certificates and are subject to all professional obligations of legal practitioners.

I consider that the separation of the legal team from the OAIC Executive reinforces the independence of the legal advice and made the relationship a legal adviser – client relationship.

Whether privilege attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test, as per *Esso Australia Resources Ltd v Commissioner for Taxation* (1999) 201 CLR 49. I am satisfied that the relevant documents were created for the dominant purpose of providing legal advice.

Finally, I have turned my mind to whether the advice was given in confidence. In relation to the relevant documents, the legal advice was clearly marked legal in confidence, and it was only distributed to a limited number of OAIC employees who were involved in the matters. As outlined below, I have not been able to identify any express or implied waiver of the privilege and am satisfied that the advice was provided in confidence.

Waiver

Section 42(2) of the FOI Act provides that a document is not exempt under section 42(1) if 'the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim'. As such, I have also considered whether the privilege attached to the relevant documents has been waived. Waiver of privilege may be express or implied.

Generally, privilege can only be explicitly waived by the General Counsel of the OAIC. I understand that this has not occurred. I further understand that material contained within the documents has not otherwise been impliedly waived, by way of incidental disclosure outside of its intended audience.

For the reasons given above, I consider the relevant documents identified in the schedule are exempt under section 42 of the FOI Act.

Real Harm

The FOI Guidelines provide at paragraph 5.150 that:

Agencies are advised not to claim exemption for a document under s 42 unless it is considered that 'real harm' would result from releasing the document. A 'real harm' criterion is not an element of the common law doctrine of LPP, but has been acknowledged within government as a relevant discretionary test to apply in FOI administration. The phrase 'real harm' distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency.

I acknowledge that the Senate enquiry has now provided its final report to Government. The Commissioner's appearance and submissions to the Senate enquiry involved the examination of the processes and culture of the OAIC. It was important that the Commissioner was able to seek and receive legal advice clarifying issues to ensure that the information provided to the Senate enquiry was as forthright and accurate as possible without that information being made public. In my view, real harm would result from releasing the documents I have identified as exempt.

As section 42 is not a conditional exemption, I am not required to consider the application of a public interest test.

Personal privacy conditional exemption (section 47F)

In accordance with section 47F of the FOI Act, I have made a decision to exempt 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 the names and contact details of individuals associated with the provision of the legal advice. I am satisfied that this material meets the definition of personal information because disclosure of this material would reasonably identify the individuals.

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*
- *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 have also had regard to the submissions provided in response to consultation with the affected parties. I have decided to release names where those names are in the public domain and associated with the matters raised in the Senate enquiry. I have also decided to release the contact details for names that I have released where that information is readily available in the public domain.

I have decided to exempt names where those names are not necessarily in the public domain and where the names are not associated with the matters raised in the Senate enquiry. This is particularly the case where there is the potential of ongoing work associated with the outcomes of the Senate enquiry.

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 connection of the affected individuals to contested and sensitive matters involving people they have a professional relationship with, is likely to cause them a high level of stress. I also do not consider that the disclosure of this material would 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 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.

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.

Business information conditional exemption (section 47G)

I have made a decision to exempt material contained within the documents in accordance with section 47G of the FOI Act.

Section 47G 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.*

On review of the documents, I have identified the following business information:

- hourly rates;
- hours allocated to, or recorded to undertake certain work;
- sub-totals allocated to and recorded; and
- timekeeper codes and narrations adopted to describe work undertaken.

I consider that the above information is sensitive business information which details how an external legal provider has charged for a specific matter. This information is not publicly available and if disclosed could negatively impact the external legal provider both in relation to other clients and also provide competitors an unfair advantage in the market.

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

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.

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 47F and 47G 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 relevant public interest factors to be that disclosure would :

- promote the objects of the FOI Act by informing the community of the Government's operations; and
- inform debate on a matter of public importance
- promote effective oversight of public expenditure.

I have not identified any other factors for 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.

The FOI Guidelines set out at paragraph 6.22 factors against disclosure. In considering the documents subject to this request, I have considered the following factors against disclosure relevant:

- Disclosure of the business information contained in the documents could reasonably be expected to unreasonably reveal commercially sensitive information; and
- Disclosure of the personal information contained in the documents could reasonably be expected to unreasonably interfere with an individual's right to privacy.

Although I acknowledge the importance of allowing effective oversight of government expenditure and also better information debate on a matter of public importance, I note that I have released information about the total costs associated with the legal advice provided and only considered exempt the breakdown of the total cost. I consider that this adequately balances the importance of public oversight of public expenditure while also protecting commercially sensitive information.

In relation to the disclosure of names and contact details that are not already in the public domain, I have given limited weight to how the release would promote the object of the FOI Act or inform debate on a matter of public importance. I have given

significant weight to the fact the release would prejudice the privacy of individuals and cause unreasonable stress to these third parties.

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 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 not subject to third-party review rights are enclosed for release and are also identified in the **attached** schedule of documents. The schedule also identifies the documents which will be released to you pending the expiry of third-party review rights.

Documents which are exempt in full have been removed from the document bundle but are clearly identified on the schedule.

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

Yours sincerely

Emily Elliott

Senior Lawyer

4 January 2023

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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00247

By email: s 47F

By post: s 47F

Freedom of Information Request – FOIREQ23/00247

Dear s 47F

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 November 2023.

I am writing to inform you of my decision.

I have identified 8 documents within the scope of your request. I have made a decision to grant full access 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.

Background

Scope of your request

Your FOI request sought access to the following information:

s 47F

Request timeframe

Your request included documents which contain information concerning an organisation's business or professional affairs and third-party personal information. Accordingly, the OAIC was required to consult with those organisations under sections 27 and 27A of the FOI Act before making a decision on the release of those documents. For this reason, the period for processing your request was extended by

30 days under s 15(6) of the FOI Act to allow time for this consultation. This means that a decision on your request is due by 16 January 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 8 document(s).

Searches undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

In response to your request, the following line areas of the OAIC conducted reasonable searches for documents relevant to you request:

- Early Resolution

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

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 and that all relevant documents have been found.

Reasons for decision

Material taken into account

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

- your FOI request dated 17 November 2023
- the FOI Act, in particular sections 3, 11, 11A, 15 and 26 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)
- third party submissions in relation to the release of the documents dated 15 December 2023
- consultation with line area/s of the OAIC in relation to your request

Disclosure log decision

Section 11C of the FOI Act requires the OAIC to publish documents released under the FOI Act on the OAIC's disclosure log within 10 days of release, except if they contain personal or business information that would be unreasonable to publish.

As discussed above and identified in the attached documents schedule, 8 documents subject to your request contain personal and/or business information.

Accordingly, I have determined that it would be unreasonable to publish documents 1 to 8 on the disclosure log.

Release of document/s

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 Elliott

Senior Lawyer

9 January 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00226

Attention: s 47F

By email: s 47F

Freedom of Information Request – FOIREQ23/226

Dear s 47F

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 Information Commissioner (OAIC) on 2 November 2023.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

Any briefing documents, agendas, minutes and documents detailing meeting outcomes of the regulator heads meetings of the Digital Platform Regulators Forum (DP-Reg).

Any briefing documents, agendas, minutes and documents detailing meeting outcomes of the steering committee level meetings as part of the Digital Platform Regulators Forum (DP-Reg)

Any briefing documents, agendas, minutes and documents detailing meeting outcomes of working group(s) meetings as part of the Digital Platform Regulators Forum (DP-Reg)

I would like all correspondence and attachments contained in the correspondence and minutes between August 1, 2023, and October 30, 2023.

On 2 November 2023, we wrote to you stating that that OAIC had recently made an FOI decision for a similar FOI request, where the documents were released up to 31 August 2023, and provided a link to the OAIC's disclosure log, and the relevant reference number. Noting that the documents up to 31 August 2023 are already released, we requested that you revise the scope of your period from 1 September 2023 to 30 October 2023.

On 3 November 2023, you agreed to revise the scope of your request for the period from 1 September 2023 to 30 October 2023.

Request timeframe

Your request was made on 2 November 2023, meaning that it was originally due on 4 December 2023.

On 30 November 2023, we wrote to you to inform you that documents within the scope of your request contained organisation(s) business and personal information. We informed you that in order to consult with those organisation(s), the period for processing your request was extended by 30 days in accordance with section 15(6) of the FOI Act and would now end on 2 January 2024. On the 2 January 2024 you agreed to a 7 day extension of time under section 15AA of the FOI Act. Your request is now due on 9 January 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 39 documents within the scope of your request. I have made a decision to:

- grant full access to 5 documents,
- grant access in part to 31 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.

Reasons for decision

Material taken into account

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

- your FOI request dated 2 November 2023;
- the FOI Act, in particular sections 3, 11, 11A, 15, 22, 26, 37, 47C, 47E(c) 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); and
- consultation with relevant staff members of the OAIC in relation to your request

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

The following staff members of the OAIC conducted reasonable searches for documents relevant to your request:

- Deputy Commissioner;
- Policy adviser – Regulation and Strategy;
- Director – Regulation and Strategy;
- Assistant Director – Regulation and Strategy; and
- Assistant Commissioner – Regulation and Strategy.

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

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 and that all documents in scope of your FOI request has been identified and that that no additional documents exist.

Access to edited copies with exempt material 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.

Investigation of a possible breach of law (section 37 of the FOI Act)

Under s 37(1)(a), a document is exempt if its disclosure would, or could reasonably be expected to, prejudice the conduct of a current investigation or proper administration of the law in a particular instance.

Section 37(1)(a) of the FOI Act states:

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

The FOI Guidelines at [5.82] provide:

To be exempt under ss 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law... This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches.

The FOI Guidelines at [5.86] further explain:

Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase 'in a particular instance', it is not sufficient that prejudice will occur to other or

future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.

Additionally, at [5.87] the FOI Guidelines state:

The exemption is concerned with the conduct of an investigation. For example, it would apply where disclosure would forewarn the applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body – putting the investigation in jeopardy. The section will not apply if the investigation is closed or if it is being conducted by an overseas agency.

In order to determine whether disclosure of the documents would, or could reasonably be expected to prejudice the conduct of current investigations, the FOI Guidelines at [5.16] - [5.17] note:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document. The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

I am satisfied that the material identified as exempt relates to ongoing investigations and matters before the Federal Court, and that release of such material prematurely could reasonably be expected to impact the conduct of these processes. In particular, the documents relate to the pertinent facts that are not currently within the public domain. The premature release of that information may impact on both the efficiency and impartiality of the current processes.

Accordingly, I have decided that the material at issue is exempt under s. 37(1)(a) of the FOI Act.

Public interest conditional exemption--deliberative processes (section 47C)

Section 47C of the FOI Act provides for the exemption of deliberative matter as follows:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) *an agency; or*
- (b) *a Minister; or*
- (c) *the Government of the Commonwealth.*

Exceptions

- (2) *Deliberative matter does not include either of the following:*
 - (a) *operational information (see section 8A);*
 - (b) *purely factual material.*

Paragraph [6.55] of the FOI Guidelines confirms that section 47C of the FOI Act is not a harm provision and that the only consideration is whether the document does or does not contain deliberative matter. As explained in the decision of *Parnell & Dreyfus and Attorney-General's Department* [2014] ALCmr 71 (30 July 2014) at [38], deliberative matter is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation'. I am satisfied that the material contains opinions, advice and recommendations in relation to government considerations of matters that are yet to be fully considered and determined.

Accordingly, I have determined that the material is conditionally exempt under s.47C of the FOI Act.

Section 47E(c) – Management or assessment of personnel

Section 47E(c) of the FOI Act provides that material is exempt if disclosure would or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency. Section 47E(c) of the FOI Act provides that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (c) *have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*

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.

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).

Paragraph 6.144 the FOI Guidelines confirms that for 47E(c) of the FOI Act to apply the documents must relate to either the management or assessment of personnel. Having considered the material within the document, I consider the relevant material relates to the management of personnel, including the broader human resources policies and activities, particularly occupational health and safety. The material relates to the staff names and contact details of non-SES staff (the Australian Communications and Media Authority and the eSafety Commissioner) and the location of meetings that have yet to occur.

As a Commonwealth employer the OAIC has duties and obligations under the *Work Health and Safety Act 2011*. This includes a duty to manage workplace health and safety by eliminating and minimising risks as much as is reasonably practicable. Psychosocial hazards are any occupational hazard that affects the psychological and physical wellbeing of employees and includes workplace violence including verbal threats.

Both Australian Communications and Media Authority and the eSafety Commissioner made submissions stating that release of information relating to non-SES staff members and location of meetings would have significant impact on their ability to manage their obligations under the *Work Health and Safety Act 2011*. These agencies, because of the nature of their work and the current environment, face challenges in providing secure working environment for their staff which minimises psychosocial hazards.

The public disclosure of information that is not otherwise in the public domain will increase the risk of psychosocial and physical hazards for staff. I am satisfied that the

disclosure of this material would or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency. Accordingly, I have decided that this material is conditionally exempt under s.47E(c) 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.

Certain operations of agencies exemption (s 47E(d))

Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Section 47E(d) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The FOI Guidelines at [6.101] provides:

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’.

In deciding whether disclosure would, or could reasonably be expected to, have a substantial adverse effect on the relevant agency operations, I have considered the functions and responsibilities of the agency, I have given significant consideration to the regulatory responsibilities of the relevant agency.

Consideration

Following consultation with the relevant agencies including ACCC, ACMA and the eSafety Commissioner, I am satisfied that the release of the document in full would be reasonably likely to disrupt or prejudice the agency’s ability to exercise its regulatory functions. I consider that full disclosure of the documents at issue could reasonably be expected to have an adverse substantial impact on the proper and efficient conduct of the agency’s operations, through the release of information (including draft policy and procedures) that sets out how the regulatory agencies operate.

In the AAT case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, Deputy President Forgie found documents concerned with ASIC’s investigation and surveillance functions to be exempt under s 47E(d). Deputy President Forgie found that the subject-matter of the documents was directed to the investigations associated with Utopia and that:

... disclosure would give insight into an aspect or aspects of the way in which ASIC goes about its task of investigating or conducting surveillance on those who come within its regulatory responsibilities. Utopia itself might have some idea of them as it has been the subject of such surveillance and examination of its affairs. Others would not. To disclose them under the FOI Act would, I find, have an adverse effect on the proper and efficient conduct of ASIC’s operations. I am also satisfied that the adverse effect would be substantial.¹

I find that this reasoning is also relevant in this matter. In particular, the release of this information would provide organisations the opportunity to circumvent regulatory processes and procedures.

¹ *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [103].

Accordingly, in this case, I am satisfied that giving you access in full to the documents at issue would, or could reasonably be expected to, substantially adversely affect the proper and efficient conduct of the operations of the agencies.

As section 47E(d) 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 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.47C and s.47E(c) of the FOI Act.

Section 11A(5) provides that where a document is considered to be conditionally exempt, an agency **must** give the person access to that 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, we consider the following to be relevant:

- promote the objects of the FOI Act,
- inform debate on a matter of public importance,

In addition to these factors favouring disclosure, I have also considered that access to this information would 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 factor against disclosure of the information is that it could reasonably be expected to prejudice the management function of an agency.

In relation to the information relating to non-SES staff and meeting locations, I acknowledge the importance of public oversight of government agencies and recognise the public interest in the regulation of digital platforms. However, I have balanced this with the need to manage psychosocial hazards of staff. I note that access to the content of most documents have been provided in full and only removed those parts of the documents necessary to ensure this balance. For the material I have decided is exempt I have put a significant weight on the management of psychosocial and physical safety of staff.

In relation to the deliberative material relating to government processes that are not yet in the public domain, I note that in some instances, the material relates to matters that may have been or may be considered by Cabinet. The FOI Guidelines provide at [6.86]:

In some cases, a document may contain deliberative matter that relates to Cabinet in some way but is not exempt under the Cabinet exemption in s 34. An example would be a document containing deliberative matter that is marked 'Cabinet-in-Confidence' but nonetheless does not satisfy any of the exemption criteria in s 34. Disclosing a document of this kind would not necessarily be contrary to the public interest only because of the connection to Cabinet deliberations. For example, disclosure is less likely to be contrary to the public interest if:

- *the document contains deliberative but otherwise non-sensitive matter about a policy development process that has been finalised, and*
- *the Government has announced its decision on the issue.*

Even if Government has not announced a decision on the issue, disclosure of such a document is less likely to be contrary to the public interest if it is public knowledge that the Government considered or is considering the issue. The key public interest consideration in both situations is to assess whether disclosure would inhibit the Government's future deliberation of the issue.

I have also considered the AAT decisions *Secretary, Dept of Prime Minister and Cabinet and Secretary, Dept of Infrastructure and Regional Development and Sanderson* [2015] AATA 361, and the recent Information Commissioner decisions of *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66 (10 November 2021) which discuss the application of this conditional exemption provision. In both decisions whilst the material itself was identified as deliberative, there was not sufficient evidence to prove that disclosure of the material would be contrary to the public interest, particularly in circumstances where a significant passage of time had passed since the material was the subject of active deliberation. I note that the material I have considered exempt at this time, is material that consists of draft documents still being developed and policy proposals that are under active consideration by the relevant agencies. I consider that the release of the material at this time would inhibit the Government's future deliberation of the issues and proposal raised.

Finally, in relation to material that would have a substantial and adverse impact on the proper and efficient conduct of an agency, I have given significant weight to the fact that the release of detailed information about the focus of regulators current activities and how they conduct their activities can undermine the efficiency of those processes and allow organisations to circumvent those processes.

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 to withhold 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 documents subject to your request on the OAIC's disclosure log.

Release of documents

The documents are enclosed for release and the exemptions applied are clearly identified in the schedule of documents.

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

Yours sincerely,

Emily Elliott
Senior Lawyer

9 January 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 5288
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 5288
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.



Our reference: FOIREQ23/00302

By email: s 47F [Redacted]

Freedom of Information Request – FOIREQ23/00302

Dear Applicant

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 15 December 2023.

I am writing to inform you of my decision.

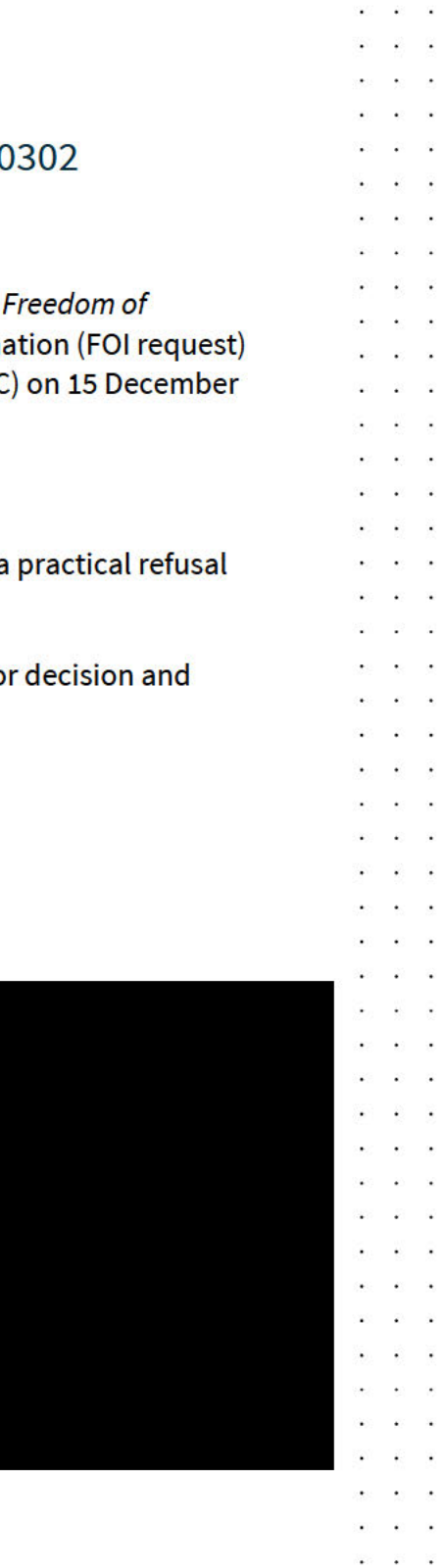
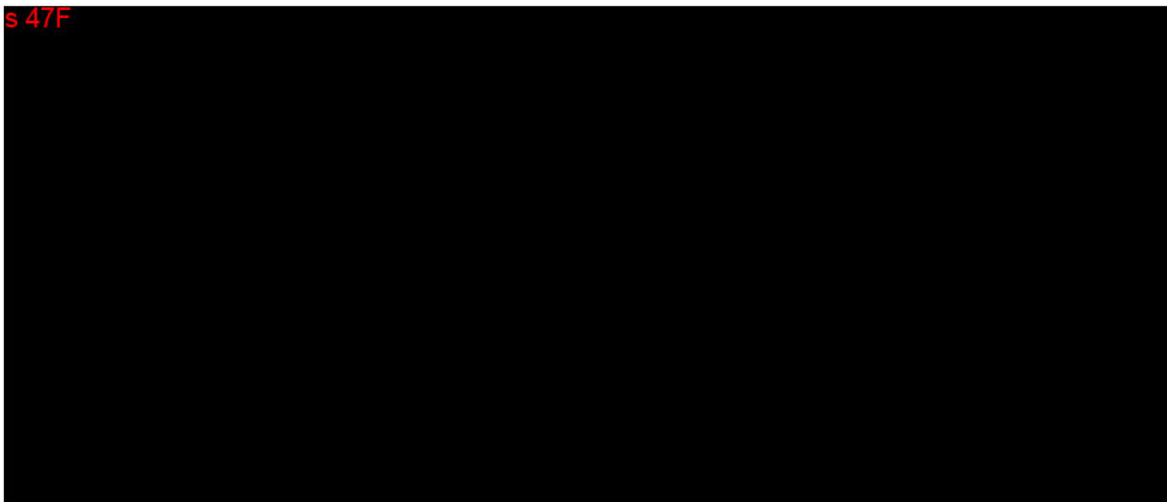
I have made a decision to refuse your request on the basis that a practical refusal reason exists.

In accordance with section 26(1)(a) of the FOI Act, my reasons for 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:



On 3 January 2024 I consulted with you under s 24AB of the FOI Act on the basis that a practical refusal reason existed under s 24AA of the FOI Act. On 4 January 2024 you responded to my consultation notice advising that you did not want to revise the scope of your request.

You responded as follows:

s 47F

A large black rectangular redaction box covers the majority of the page content following the text 'You responded as follows:'. The only visible text within this redacted area is 's 47F' in red at the top left corner.

Request timeframe

On 3 January 2024, following my consultation notice under s 24AB of the FOI Act, the statutory period was paused. You responded on 4 January 2024 and a decision is due in relation to your request on 15 January 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.

Following consultation with you under s 24AB of the FOI Act, I have decided to refuse access to the documents you requested under s 24(1) of the FOI Act because a 'practical refusal reason' still exists under s 24AA of the FOI Act.

Reasons for decision

Request consultation process

On 3 January 2024, I wrote to you under s 24AB of the FOI Act to advise you of my intention to refuse your request under s 24(1) of the FOI Act on the basis that you request gave rise to the following practical refusal reason under s 24AA of the FOI Act) being:

- I cannot sufficiently identify the documents that you are requesting (s 24AA(1)(b)).

I gave you an opportunity to respond to my consultation notice and revise the scope of your request so as to remove the practical refusal reason. Specifically, I asked you to advise whether you wanted to:

- withdraw your request

- make a revised request
- tell us that you do not wish to revise your request.

On 4 January 2024, you responded to the consultation notice stating:

s 47F



Materials taken into account

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

- your freedom of information request of 15 December 2023;
- the reasons why a practical refusal reason exists, as provided to you in my consultation notice of 3 January 2024;
- your correspondence of 4 January 2024;
- the FOI Act, in particular s 15, 24, 24AA and 24AB; and
- the Guidelines issued by the Australian Information Commissioner under s 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).

Practical refusal reason

Under s 24(1) of the FOI Act, if an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request, the agency or Minister:

- (a) must undertake a request consultation process; and
- (b) If, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists- the agency or Minister may refuse to give access to the document in accordance with the request.

For the purposes of s 24, a practical refusal reason exists in relation to a request if:

- the work involved in processing the request will substantially and unreasonably divert the resources of the OAIC from its other operations (s 24AA(1)(a)(i)); and/or

- the request does not sufficiently identify the documents being sought (s 24AA(1)(b) and s 15(2)(b)).

Identification of request documents

For the purposes of s 24AA(1)(b), a practical refusal reason exists in relation to a request if the request does not provide such information concerning the document as is reasonably necessary for the OAIC to identify it as required by s 15(2)(b) of the FOI Act.

I have determined that your request does not sufficiently identify the documents sought.

In determining that your request does not sufficiently identify the documents sought for the purposes of section 15(2)(b) of the FOI Act, I have also had regard to the OAIC's guidance material on practical refusal notices and relevant decisions of the Australian Information Commissioner on the application of section 24AA(1)(b).¹

I have carefully ensured that I have reasonably read the terms of your request and have not taken a strict or pedantic approach to the interpretation of the scope of your request.²

I am satisfied that the terms of your request are unclear and do not enable an officer of the OAIC to sufficiently identify the documents being sought.

Conclusion

On the basis of the above considerations, I have found that:

- your request does not provide such information concerning the documents/s as is reasonably necessary to enable a responsible officer of the OAIC to identify it/them (s 24AA(1)(b) and s 15(2)(b)).

As such I have decided to refuse your request on the basis that a practical refusal reason exists in relation to your request for access to the documents. Accordingly, I have decided to refuse your request under s 24(1) of the FOI Act.

Your review rights are outlined on the following page.

¹ See Freedom of Information Guidelines, paragraphs 3.109-3.110 available at [FOI Guidelines \(oaic.gov.au\)](https://www.oaic.gov.au/foi-guidelines).

² 'BI' and Professional Services Review [2014] AICmr 20, applying Re Anderson and AFP [1986] AATA 79.

Yours sincerely,

Emily Elliot
Senior Lawyer
10 January 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.



Australian Government
Office of the Australian Information Commissioner



Our reference: FOIREQ23/00285

By email: s 47F

Freedom of Information Request – FOIREQ23/00285

Dear FOI Applicant,

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 13 December 2023.

I am writing to inform you of my decision.

I have made the decision to refuse your request on the basis that documents cannot be found or do not exist.

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

Background

Scope of your request

Your FOI request sought access to the following information:

s 47F

Following consultation with you on the scope of your request, on 19 December 2023 you revised your request as follows:

s 47F



Request timeframe

Your request was made on 13 December 2023.

This means that a decision on your request is due to be decided by 12 January 2024.

Decision and reasons for 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 made the decision to refuse your request on the basis that documents cannot be found or do not exist.

Material taken into account

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

- your FOI request dated 13 December 2023 and subsequent revised scope dated 19 December 2023
- the FOI Act, in particular including sections 3, 11, 11A, 15, 26, 24A 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 line area/s of the OAIC in relation to your request

Documents cannot be found, do not exist or have not been received – Section 24A of the FOI Act

Section 24A(1) of the FOI Act provides that an agency may refuse a request for access to documents requested under the FOI Act if all reasonable steps have been taken to find the document and the agency is satisfied that the document cannot be found or do not exist.

I have made the decision to refuse your request under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find the documents you have requested and no documents could be found/do not exist.

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

Searches Undertaken

In response to your request, the following line areas of the OAIC conducted reasonable searches for documents relevant to your request:

- Corporate
- Enquiries

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

- OAIC's email system

The line areas provided the following information as to why documents could not be found or do not exist.

Corporate consulted with the ICT provider who provided the following information:

Email messages from the oaic.gov.au domain do not actively track users outside of system administration. There is no method for IT to send tracking/cookie agents via email.

Enquiries also provided the following information:

s 47F

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Having consulted with the Corporate and Enquiries line areas, and having 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 and that no relevant documents could be found or do not exist.

Conclusion

Based on the terms of your request and searches undertaken, I am satisfied that all reasonable steps have been taken to find documents that fall within the scope of your request and am satisfied that the documents cannot be found or that no documents exist.

I have made the decision to refuse your request for access to documents under section 24A of the FOI Act, on the basis that documents cannot be found or no documents exist.

Please see the following page for information about your review rights in relation to this FOI request.

Yours sincerely,

Emily Elliott

10 January 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00238

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ23/00238

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 12 November 2023.

I am writing to inform you of my decision.

I have identified one document within the scope of your request. I have made a decision to grant access in part to this document.

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:

s 47F



s 47F



Request timeframe

Your request was made on 12 November 2023.

On 1 December 2023, the OAIC wrote to you to advise that the period for processing your FOI request was extended by 30 days to allow time for the OAIC to consult with a third-party organisation regarding information contained in the documents concerning that organisation's business or professional affairs and third-party personal information.

This means that a decision on your FOI request is due by 11 January 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 access in part to one document.

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

The Early Resolution line area of the OAIC conducted reasonable searches for documents relevant to your request. Searches were conducted across the OAIC's various document storage systems including the OAIC's:

- case management system (Resolve); and
- email system.

The Resolve reference s 47F was used when undertaking electronic records searches.

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 12 November 2023;
- the FOI Act, in particular sections 3, 11, 11A, 15, 26 and 47F; and
- 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).

Access to edited copies with 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 an FOI Act exemption applies to the document as set out below.

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

Personal privacy conditional exemption (section 47F)

In accordance with section 47F of the FOI Act, I have made a decision to redact material in the document 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) (Privacy Act) 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 document contains the mobile phone number of a s 47F staff member.

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; 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
- 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 document, I am satisfied that the release of this personal information would be unreasonable because the information is not readily available from publicly accessible sources and could reasonably be expected to cause stress to the individual concerned if released.

I am also of the view that disclosure of this information does not advance the public interest in government transparency and integrity. s 47F

I am of the view that this mobile phone number is not related to your reasons for making this FOI request.

For the reasons given above, I consider this material to be 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 is discussed below.

Application of the public interest test (section 11A and 11B)

As provided above, I have considered that material within the document is subject to conditional exemption under section 47F.

Section 11A(5) provides that where a document is considered to be conditionally exempt, an agency **must** give the person access to that 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 relevant public interest factor to be that disclosure would promote the objects of the FOI Act generally by informing the community of the Government’s operations.

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 relevant factor against disclosure to be that disclosure of the personal information contained in the document could reasonably be expected to unreasonably interfere with an individual’s right to privacy.

In balancing these factors for and against, I have placed greater weight on the factor against disclosure.

I consider that there is little public interest in the disclosure of the mobile phone number of a § 47F staff member. Disclosing this information would add little material value to the overall context and insight provided into Government

activities achieved by the release of the documents but it would, however, cause unreasonable stress and prejudice to the privacy of an individual.

On balance, I consider the public interest factor against disclosure to be more persuasive than the public interest factor favouring disclosure. I am satisfied that the public interest is 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.

As discussed above, the document subject to this decision contains personal and business information. Accordingly, I have determined that it would be unreasonable to publish the document on the disclosure log.

Release of document

The document is enclosed for release.

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

Yours sincerely

Molly Cooke

Lawyer

10 January 2023

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

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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.



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ23/00239

By email: s 47F

Freedom of Information Request – FOIREQ23/00239

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 12 November 2023.

I am writing to inform you of my decision.

I have identified one document within the scope of your FOI request. I have made a decision to create and grant access in part to that document.

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:

The names of all those of whom had privacy complaint/s found by the O.A.I.C as to finding of a breach/es of the Australian privacy act.As per latest annual report

While processing your FOI request, the OAIC discovered an inaccuracy in the final paragraph of page 27 of the annual report. Of the 9 determinations made by the Commissioner during the reporting period, 6 resulted in adverse findings against the respondent (not 8, as was implied in the annual report).

The OAIC is taking steps to ensure that it is corrected in accordance with our usual procedures. For completeness, we have included within this FOI request all determinations made by the Information Commissioner during the 2022-23 reporting period, including those where no breach was ultimately found.

Request timeframe

Your request was made on 12 November 2023.

As we advised you on 29 November 2023, the document created in response to your FOI request included the information of a third party. We were of the view that this third party might reasonably wish to make a contention that the material at issue is conditionally exempt and that providing access to the document would be contrary to the public interest.

In light of this, we were required to undertake consultation with this third party under sections 27 and 27A of the FOI Act. This extended the due date of your request by 30 days, as per section 15(6) of the FOI Act.

This means that a decision on your request is due by 11 January 2024.

Consultation

As noted above, the OAIC consulted with one third party in relation to the document falling within scope of your request in relation to third-party personal and business information contained within the document.

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 create and grant access in part to one document.

Searches undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

The Privacy Determinations line area of the OAIC conducted reasonable searches for documents relevant to your request. Searches were conducted using the OAIC's case management system (Resolve).

Having 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 12 November 2023;
- the FOI Act, in particular sections 3, 11, 11A, 15, 17, 26, 27, 27A 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
- third party submissions in relation to the release of the document at issue.

Access to edited copies with 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 is practicable to provide you with such an edited copy.

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

Pursuant to section 17 of the FOI Act, I have created one document in response to your request. I have made a decision to grant part 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.

Your request seeks access to the names of the respondents in the determinations where allegations were substantiated, as referred to in the 2022 – 2023 OAIC annual report. The material sought 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.

Personal privacy conditional exemption (section 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) (Privacy Act) 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 document contains the name of a respondent to a privacy complaint that I am satisfied would be unreasonable to release in the circumstances.

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

In determining whether disclosure of other personal information in the document 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

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

- release of this personal information could expose the individual to which the information relates to unnecessary stress; and
- the individual to which the information relates has expressed opposition to the disclosure of this information.

The individual in question was a respondent to a privacy complaint, in which ultimately no breach of the Privacy Act was found. The publicly available

determination, in which the respondent was assigned a pseudonym, also refers to a notification made to another Government agency, which also ultimately lead to no adverse findings.

I am satisfied that the relevant material is not public information and is not well known. I am also satisfied that the individual to whom the information relates is 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 FOI Guidelines at paragraph 6.171 state:

An agency or minister must have regard for any submissions made before deciding whether to give access to the document (ss 27A(3) and 27A(4)). The third party does not, however, have the right to veto access and agencies should take care that the third party is not under such a misapprehension.

I have also had regard to the submissions of the relevant third party in respect of the release of the personal information contained within the document. As noted above, this third party raised concerns as to release of their name into the public domain.

For the reasons given above, I consider the document is 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.

Application of the public interest test (section 11A and 11B)

As provided above, I have considered that material within the document is subject to conditional exemption under section 47F.

Section 11A(5) provides that where a document is considered to be conditionally exempt, an agency **must** give the person access to that document unless the FOI decision maker finds that disclosure 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 Forge 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 that the relevant factor in this case is that disclosure would promote the objects of the FOI Act generally by providing access to government information.

Section 11B(4) of the FOI Act provides factors which are not to be taken into account in, which I confirm I have not had regard to. Section 11B does not further prescribe the factors against disclosure to be considered but does contain a non-exhaustive list of factors against disclosure at [6.22].

In light of this, I consider that the relevant factors to be that disclosure of the material could reasonably be expected to:

- interfere with an individual’s right to privacy;

- prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct; and
- could reasonably be expected to harm the interests of an individual or group of individuals.

In balancing these factors for and against, I have placed greater weight on factors in relation to an individual's right to privacy.

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 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 edited document subject to your request on the OAIC's disclosure log.

Release of document

The document is enclosed for release.

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

Yours sincerely

Molly Cooke

Lawyer

10 January 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.

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SYDNEY NSW 2001

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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>
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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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00244

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ23/00244

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 14 November 2023.

I am writing to inform you of my decision.

I have identified 3 documents within the scope of your request. I have made a decision to:

- grant full access to 2 documents; and
- grant access in part to 1 document.

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:

Under the freedom of information Act, please email to s 47F a copy of this advice to OAIC from HWLE:

"On Saturday 10 June, HWL Ebsworth advised the OAIC that a document or documents relating to a limited number of OAIC files were included in the breach experienced by HWL Ebsworth."

I'm not interested in anybody's personal information.

I note that on 29 November 2023, you amended the scope of your FOI request as follows:

Seeing as your agency is availing itself of the additional processing time under s27/27A, please take my request to also seek any and all personal information that is caught in the advice and is deemed reasonable to disclose by the respective third parties.

Request timeframe

Your request was made on 14 November 2023.

On 29 November 2023, the OAIC wrote to you to advise that the period for processing your FOI request was extended by 30 days to allow time for the OAIC to consult with a third-party organisation regarding information contained in the documents concerning that organisation's business or professional affairs and third-party personal information.

This means that a decision on your request is due by 15 January 2023.

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; and
- grant access in part to one document.

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

The Legal Services line area of the OAIC conducted reasonable searches for documents relevant to your request. Searches were conducted using the OAIC's case management system (Resolve), and the Resolve reference number associated with the HWL Ebsworth letter referred to in your FOI request.

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 14 November 2023 and subsequent revised scope dated 29 November 2023;
- the FOI Act, in particular sections 3, 11, 11A, 15, 26, 47F 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
- third party submissions in relation to the release of the documents.

Access to edited copies with 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 as set out below.

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

Personal privacy conditional exemption (section 47F)

In accordance with section 47F of the FOI Act, I have made a decision to redact material in one document 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 document lists matters where HWL Ebsworth is acting for the OAIC which were affected by the cyber incident experienced by HWL Ebsworth in 2023 (the cyber incident). This includes the names of individuals who are parties to proceedings involving the OAIC, as well as HWL Ebsworth client and matter codes linked to these matters.

I am satisfied that this material meets the definition of personal information because disclosure of this material would reasonably identify the individuals.

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
- 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

The material contained in the documents does not only identify individuals as parties to proceedings, but also identifies that information concerning these individuals and proceedings was accessed as part of the cyber incident, and exfiltrated by a threat actor. Disclosure of this information may therefore make it easier for that exfiltrated information to be linked to these individuals and for further unauthorised access and disclosure to occur. I therefore consider that there is a high risk of detriment being caused to the individuals by the disclosure of this material.

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 connection of the affected individuals to the cyber incident would be likely to cause them a high level of stress. I also do not consider that the disclosure of this material would advance the public interest in government transparency and integrity.

I am also satisfied that the relevant material, in connection with the cyber incident, is not public information and is not well known. If this information were disclosed publicly it would unreasonably impact on the privacy of the individuals.

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.

Business information conditional exemption (section 47G)

I have made a decision to redact material contained within the documents in accordance with section 47G of the FOI Act.

Section 47G 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.

As noted above, the document lists matters where HWL Ebsworth is acting for the OAIC which were affected by the cyber incident experienced by HWL Ebsworth in 2023 (the cyber incident). This includes the name of a company which is the party to proceedings involving the OAIC as well as HWL Ebsworth client and matter codes linked to the matter.

As with the individual parties to proceedings discussed above, the material identifies that information concerning this organisation and the proceedings was accessed as part of the cyber incident, and exfiltrated by a threat actor.

I consider that the disclosure of this material could reasonably be expected to adversely impact this organisation as it could facilitate the exfiltrated information to be linked to the organisation and for further unauthorised access and disclosure to occur. This would negatively impact the business operations of this organisation.

For the reasons given above, I consider the relevant material is conditionally exempt under section 47G of the FOI Act.

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.

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 47F and 47G.

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 relevant public interest factor to be that disclosure would promote the objects of the FOI Act generally by informing the community of the Government's operations.

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 business information contained in the documents could reasonably be expected to unreasonably reveal commercially sensitive information; and
- Disclosure of the personal information contained in the documents could reasonably be expected to unreasonably interfere with an individual's right to privacy.

In balancing these factors for and against, I have placed greater weight on the factors against disclosure.

I consider that there is little public interest in the disclosure of the personal and business information because disclosing this information would add little material value to the overall context and insight provided into Government activities achieved by the release of the documents. I consider that the disclosure of this material would, however, cause unreasonable stress and prejudice to the privacy of individuals, and also reveal sensitive information that could cause harm to the commercial interests of a third party.

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 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 edited 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

Molly Cooke

Lawyer

10 January 2023

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.



Our reference: FOIREQ23/00300

By email: s 47F

Freedom of Information Request – FOIREQ23/00300

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 15 December 2023

I am writing to inform you of my decision.

I have identified 313 documents within the scope of your request. I have made a decision to:

- grant full access to 309 documents; and
- grant part access to 4 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:

s 47F

Request timeframe

Your request was made on 15 December 2023.

This means that a decision on your request is due by 15 January 2023.

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 309 documents;
- grant part access to 4 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:

- Privacy Complaints

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

- the OAIC's case management system - Resolve
- OAIC's email and messaging systems
- general computer 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 15 December 2023
- the FOI Act, in particular sections 3, 11, 11A, 15, 26 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).

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

I have found four documents exempt in part under section 47E(d) of the FOI Act.

The type of material I have found to be exempt in part is material that relates to:

- user IDs of OAIC staff members.

Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Section 47E(d) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The FOI Guidelines at [6.101] provides:

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’ 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'.

OAIC IT system codes

Contained in the four documents are user IDs for the OAIC's IT system. The OAIC assigns user IDs for staff to access the inhouse IT systems. I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC. The impact of any compromise to the safety and security of the OAIC's information systems would result in a serious adverse impact on the functions and responsibilities of the OAIC.

In *'AW' and Australian Taxation Office (Freedom of information) [2014] AICmr 1*, the then FOI Commissioner considered the decision by the Australian Taxation Office (ATO) to exempt user IDs under section 47E(d) of the FOI Act. The user IDs are used by ATO staff to access the ATO's IT system. The Commissioner found that disclosing the user IDs 'would have an adverse effect on the security of the ATO's IT systems and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ATO'. In a series of subsequent IC review decisions, the former Australian Information Commissioner agreed with the reasoning given by the Commissioner in 'AW' to find that user IDs used by ATO staff to access the ATO's IT system are exempt under section 47E(d) of the FOI Act.

I consider that the disclosure of the user IDs of the OAIC's computer system could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. I have decided that these User IDs from the OAIC's IT system are conditionally exempt from disclosure under section 47E(d) of the FOI Act.

The public interest test – (section 11A and 11B)

An agency cannot refuse access to conditionally exempt documents unless giving access would, on balance, be contrary to the public interest (s 11A(5)). The FOI Guidelines explain that disclosure of conditionally exempt documents is required unless the particular circumstances at the time of decision reveal countervailing harm which overrides the public interest in giving access. In this case, I must consider whether disclosure of the 4 documents at this time would be contrary to the public interest.

Subsection 11B(3) of the FOI Act provides a list of public interest factors favouring disclosure. The FOI Guidelines at paragraph [6.19] also provide a non-exhaustive list of public interest factors favouring disclosure, as well as public interest factors

against disclosure. The relevant public interest factor in favour of disclosure in this case is that disclosure would promote the objects of the FOI Act and provide you access to your personal information.

The public interest factors favouring disclosure must be balanced against any public interest factors against disclosure. The FOI Guidelines at paragraph [6.22] contain a non-exhaustive list of factors against disclosure. In my view, the following relevant public interest factors against disclosure in this case is that disclosure:

- could reasonably be expected to prejudice the proper and efficient operations of the OAIC.

I am satisfied that the public interest factors against disclosure outweigh the public interest factor in favour of disclosure.

Accordingly, I have redacted the material from 4 of the 313 documents relevant to your FOI request. As such I have made the decision to:

- grant **full access** to 309 documents; and
- grant **part access** to 4 documents with the conditionally exempt material removed from the document.

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.

The documents subject to this decision contain personal information.

Accordingly, I have determined that it would be unreasonable to publish the documents on the disclosure log.

Release of documents

The documents are enclosed for release.

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

Yours sincerely,

Emily Elliott
Senior Lawyer
15 January 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00299

By email: **s 47F**

Freedom of Information Request – FOIREQ23/00299

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 request (FOI request) was received by the Office of the Australian Commissioner (OAIC) on 15 December 2023.

I am writing to inform you of my decision.

I have identified 44 documents within the scope of your request. I have made a decision to:

- grant access in full to 44 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:

s 47F



s 47F



Request timeframe

Your request was made on 15 December 2023.

This means that a decision on your request is due by 15 January 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 access in full to 44 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:

- Early Resolution
- Enquiries

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

- the OAIC's case management system - Resolve
- OAIC's email system

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.

Release of documents

The documents are enclosed for release.

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.

The documents I have decided to release to you contains personal information. As a result, the documents will not be published on the disclosure log.

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

Yours sincerely,

Emily Elliott
Senior Lawyer
15 January 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00298

By email: s 47F

Freedom of Information Request – FOIREQ23/00298

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 21 December 2023.

I am writing to inform you of my decision.

I have identified 7 documents within the scope of your request. I have made a decision to refuse access in full to 7 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:

s 47F

Request timeframe

Your request was made on 21 December 2023.

This means that a decision on your request is due by 22 January 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 refuse access in full to 7 documents.

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

The Privacy Dispute Resolution branch of the OAIC conducted reasonable searches for documents relevant to your request. 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
- the OAIC's email system
- general computer files
- MS Teams

The following search terms were used when undertaking electronic records searches:

s 47F

A large black rectangular redaction box covers the majority of the text in this section. The only visible text is "s 47F" in red at the top left corner of the redaction.

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 21 December 2023;

- the FOI Act, in particular sections 3, 11, 11A, 15, 26 and 47F of the FOI Act; and
- 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).

Personal privacy conditional exemption (section 47F)

In accordance with section 47F of the FOI Act, I have made a decision to refuse access to 7 documents 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 at issue contain the names, email addresses, contact details, and other personal information relating to a privacy complaint made by a third party individual. I note that, as per your request, you do not appear to have any involvement with the matters the subject of your request.

I am satisfied that this material meets the definition of personal information because the material relates to the personal matters of individuals, and disclosure of the material would reasonably identify these individuals.

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

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:

- none of the personal information within the documents at issue is publicly known, or appears to be available from publicly available sources;
- the personal information was collected and used by the OAIC to respond to a privacy complaint made by that individual;

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

I am satisfied that the individual to whom the information relates is not known to be associated with the matters dealt with in the documents at issue. If this information was disclosed publicly it would unreasonably impact on the privacy of the affected 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 privacy complaint. I consider 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.

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 section 47F.

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 is satisfied that disclosure would, on balance, 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 factor to be that disclosure would generally promote the objects of the FOI Act.

Section 11B(4) of the FOI Act provides factors which are not to be taken into account, which I have not 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 management of privacy complaints, through a loss of public confidence that the OAIC will keep personal information of individuals that is disclosed in the course of privacy complaints private.

- disclosure of the personal information contained in the documents could reasonably be expected to interfere with an individual's right to privacy.

In balancing these factors for and against, I have placed greater weight on the factors relating to the proper and efficient functioning of the OAIC's operations, and also on the importance of protecting an individual's right to privacy, particularly in the context of a privacy complaint made by that individual.

In this case, I am satisfied that the public interest factor against disclosure outweighs the public interest factor in favour of disclosure.

I have decided that at this time, giving you access to the documents which I have found to be conditionally exempt under s 47F of the FOI Act, would, on balance, be contrary to the public interest.

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

Yours sincerely

Molly Cooke

Lawyer

22 January 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00008

Mr Alan Ashmore

By email: s 47F

Freedom of Information Request – FOIREQ24/00008

Dear Mr Ashmore

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 request (FOI request) was received by the Office of the Australian Commissioner (OAIC) on 28 December 2023.

I am writing to inform you of my decision.

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

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:

Seeking the numbers of reviews by agency name that are open as of December 31st, 2023.

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 create and grant full access to 1 document.

Reasons for decision

Material taken into account

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

- your FOI request dated 28 December 2023
- the FOI Act, in particular ss 17 and 26 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 line areas of the OAIC in relation to your request

Requests involving the use of computers (s 17)

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.

Your request sought access to the number of reviews by agency name that are open as of December 31st, 2023. Business Analytics, Data and Reporting advised me that the material sought 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(s) has been created under section 17 in response to your request and is attached.

Disclosure log decision

Section 11C of the FOI Act requires the OAIC to publish documents released under the FOI Act on the OAIC's disclosure log within 10 days of release, except if they contain personal or business information that would be unreasonable to publish.

As discussed above and I have identified 1 document subject to your request that does not contain personal or business information.

Accordingly, I have made a decision to publish the document subject to your request on the OAIC's disclosure log.

Release of document/s

The document is enclosed for release.

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

Yours sincerely,

Emily Elliott

23 January 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.

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Or by email to foidr@oaic.gov.au, or by fax on 02 9284 9666.

Accessing your information

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Our reference: FOIREQ23/00305

By email: s 47F

Freedom of Information Request – FOIREQ23/00305

Dear Applicant

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 December 2023.

I am writing to inform you of my decision.

I have made a decision to refuse your request on the basis that a practical refusal reason exists.

In accordance with section 26(1)(a) of the FOI Act, my reasons for 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 under the freedom of information, act documents to/from/between the A.C.I.C and the O.A.I.C 1/1/23 to date

On 8 January 2024 I consulted with you under s 24AB of the FOI Act on the basis that there was a ‘practical refusal reason’ as I could not sufficiently identify the documents that you requested (s 24AA(1)(b)). I intended to refuse your request for access to documents unless the terms of your request were revised, so as to remove the practical refusal reason.

On 8 January 2024 you responded to my consultation notice specifying the scope of the ‘documents’ to be:

emails between O.A.I.C STAFF / MANAGEMENT TO FROM AND BETWEEN, a.c.i.c (staff and management), A.C.I.C IS AS PER understood

Further, on 8 January 2024 you also identified:

the 'A.C.I.C' to be referring to the *Australian criminal intelligence commission*

On 15 January, I consulted with you under section 24AB of the FOI Act for a second time. I found that a practical refusal reason still existed as the work involved in processing your revised request would substantially and unreasonably divert the resources of the OAIC from its other operations due to its size and scope (s 24AA(1)(a)(i) of the FOI Act). I thus gave you the opportunity to revise your request again.

On 18 January, you responded to my second s 24AB notice email with the following:

Altered to read, emails between A.C.I.C AND o.a.i.c

Request timeframe

On 15 January 2024, following my second consultation notice under s 24AB of the FOI Act, the statutory period was paused. You responded on 18 January 2024 and a decision is due in relation to your request on 25 January 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.

Following consultation with you under s 24AB of the FOI Act, I have decided to refuse access to the documents you requested under s 24(1) of the FOI Act because a 'practical refusal reason' still exists under s 24AA of the FOI Act.

I am satisfied that the work involved in processing your request will substantially and unreasonably divert the OAIC's resources from its other operations due to its size and broad scope.

Reasons for decision

Request consultation process

On 15 January 2024, I wrote to you under s 24AB of the FOI Act to advise you of my intention to refuse your request under s 24(1) of the FOI Act on the basis that you

request gave rise to the following practical refusal reason under s 24AA of the FOI Act) being:

- I believe that the work involved in processing your request/your revised request will substantially and unreasonably divert the resources of the OAIC from its other operations due to its size and scope (s 24AA(1)(a)(i))

I gave you an opportunity to respond to my consultation notice and revise the scope of your request so as to remove the practical refusal reason. Specifically, I asked you to advise whether you wanted to:

- withdraw your request
- make a revised request
- tell us that you do not wish to revise your request.

In my consultation letter, I suggested the following ways you could revise your request:

- narrowing the terms of your request to a document category (e.g. email correspondence)
- refer to particular matter or issue
- limit the request by time period
- limit the request by records held on Resolve

I also suggested the following revision of scope for your consideration:

*i request under the freedom of information, act documents to/from/between the A.C.I.C and the O.A.I.C 1/1/23 to date **held on resolve***

On 18 January 2024, you responded to the consultation notice, with the following revised scope:

Altered to read , emails between A.C.I.C AND o.a.i.c

Materials taken into account

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

- your freedom of information request of 22 December 2023;
- the reasons why a practical refusal reason exists, as provided to you in my consultation notice of 15 January 2024;
- your correspondence of 18 January 2024;
- the FOI Act, in particular s 15, 24, 24AA and 24AB; and

- the Guidelines issued by the Australian Information Commissioner under s 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).

Practical refusal reason

Under s 24(1) of the FOI Act, if an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request, the agency or Minister:

- (a) must undertake a request consultation process; and
- (b) If, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists- the agency or Minister may refuse to give access to the document in accordance with the request.

For the purposes of s 24, a practical refusal reason exists in relation to a request if:

- the work involved in processing the request will substantially and unreasonably divert the resources of the OAIC from its other operations (s 24AA(1)(a)(i)); and/or
- the request does not sufficiently identify the documents being sought (s 24AA(1)(b) and s 15(2)(b)).

Unreasonable diversion of resources

An estimate of processing time is only one of the considerations to be taken into account when deciding whether a practical refusal reason exists. As well as requiring a request to substantially divert an agency's resources, s 24AA also requires the request to unreasonably divert an agency's resources from its other functions before it can be refused under s 24.

The Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (FOI Guidelines) identify matters that may be relevant when deciding whether processing the request will unreasonably divert an agency's resources from its other functions. These include:

- the staffing resources available to the OAIC for FOI processing
- the impact that processing the request may have on other tasks and functions of the OAIC
- whether an applicant has cooperated in revising the scope of the request

- whether there is a significant public interest in the requested documents
- other steps taken by an agency or minister to publish information of the kind requested by an applicant.

The OAIC is a small agency, employing approximately 150 (head count) staff. I consider that processing a request of this size would substantially impact on the OAIC's operations because of the limited number of people the OAIC has available to process FOI requests of this size and nature.

Calculation of the processing time – substantial diversion

As outlined in my second consultation notice, based on preliminary analysis of the potential documents within the scope of your request, I consider that it would in excess of 70 hours to complete search and retrieval for documents relevant to your request. This is before any time is taken into account for the review of the documents and decision making.

I acknowledge that in your response to the consultation notice you revised the scope to *emails between A.C.I.C AND o.a.i.c*. However, without limiting the scope to emails held on resolve as suggested or limiting the timeframe further the same search and retrieval will be required to identify all documents relevant to your revised request.

My preliminary analysis identified that to identify documents within the scope of your request:

- Staff would need to review 35 resolve files where the ACIC was named to identify relevant correspondence between the OAIC and the ACIC. Relevant documents would need to be downloaded and scheduled.
- Staff would need to review 50 documents on content manager where the ACIC was named to identify relevant correspondence between the OAIC and the ACIC. Relevant documents would need to be downloaded and scheduled.
- All staff (approximately 150) would need to conduct searches on their outlook to identify correspondence between themselves and the ACIC. Relevant documents would need to be downloaded and scheduled
- Generic outlook inboxes (approximately 30).

I have conservatively estimated that it would take on average:

- 1 hour per resolve file to (1 hour x 35 = 35 hours)
- 6 minutes per document on content manager (0.1 x 50 = 5 hours)
- 12 minutes per staff member to search their outlook (0.2 x 150 = 30 hours)
- 12 minutes per search of generic outlook inboxes (0.2 x 30 = 6 hours)

As set out above, I consider that the same search and retrieval would be required for your revised request. As such, I consider it would take more than 76 hours to complete the search and retrieval and identify all documents relevant to your request.

I have reviewed the sample of documents falling within scope of your request. I have reviewed 3 resolve files and a total of 270 pages of documents. The documents comprise of documents to and from applicants in addition to correspondence with ACIC. I have identified on these files only a small number of documents relevant to the request (>10).

A preliminary review of this material indicates that the documents contain sensitivities. At a minimum, I would have to consider the application of the following FOI Act exemption provisions;

- Section 47E (operations of an agency)
- Section 47F (personal information)
- Section 42 (legal professional privilege)

Based on a sampling exercise, I estimate that it will take between 1-2 minutes per page to examine and assess each document for potential release in accordance with FOI Act exemption provisions. However, even after conducting a sample it is difficult to accurately ascertain how many documents relevant to the scope of the request would be identified. I have conservatively estimated 5 hours for decision making. I further estimate that it will require 3 hours to prepare an edited PDF copy of the documents, including the redaction of exempt material. I also estimate that it will take 2 hours to prepare a decision statement and schedule of documents.

I have therefore calculated it will take at least 86 hours to process your request.

I consider that the processing of your request would be a substantial diversion of the OAIC's resources, for the purposes of section 24AA(1)(a)(i) of the FOI Act.

On the basis that your request will require at least 86 hours to process, it is likely that the processing of your request would divert OAIC staff away from their other work, including the OAIC's:

- ability to process its ongoing FOI request load
- regulatory functions in both FOI and privacy
- activities set out in the OAIC's 2020/2021 Corporate Plan such as:

- conciliating and investigating privacy complaints, responding to notifiable data breaches, and overseeing the privacy aspects of the My Health Record system
- monitoring the handling of personal information in the COVIDSafe system.
- implementation of the Consumer Data Right scheme
- monitoring compliance with new legislation and providing guidance and education
- improvement of processes for managing FOI requests
- engage with the Open Government Partnership, with delivery of the third National Action Plan.

I have also taken into consideration relevant decisions from the Administrative Appeals Tribunal (AAT). In particular, I have had regard to the decision of *Tate and Director, Australian War Memorial [2015] AATA 107*, another smaller agency of a similar size to the OAIC, in which the AAT affirmed a decision by the Australian War Memorial to refuse access to documents for a practical refusal reason. In making its decision, the AAT considered not only the size of the Australian War Memorial (which employs 330 full-time equivalent staff) but also that at the time the request was made the corporate priority of the Australian War Memorial was to prepare for and deliver on the Centenary of ANZAC and First World War commemorations. In this context, processing the request was considered to involve a substantial and unreasonable diversion of the Australian War Memorial's resources. In that matter, the AAT also considered that the Australian War Memorial had acted reasonably in relation to the applicant's requests and had cooperated with him to a significant extent by providing documents in response to informal requests.

Having regard to the above time estimate and advice received in relation to the processing of your request. I consider that 86 hours to process one FOI request is clearly both a substantial and unreasonable diversion of the OAIC's resources from its other operations.

Conclusion

On the basis of the above considerations, I have found that:

- the processing of your FOI request would substantially and unreasonably divert the resources of the OAIC from its other operations (s 24AA(1)(a)(i))

As such I have decided to refuse your request on the basis that a practical refusal reason exists in relation to your request for access to the documents. Accordingly, I have decided to refuse your request under s 24(1) of the FOI Act.

Your review rights are outlined on the following page.

Yours sincerely,

Emily Elliot
Senior Lawyer
25 January 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.

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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.

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10

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Accessing your information

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Our reference: FOIREQ24/00019

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ24/00019

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 6 January 2024.

I am writing to inform you of my decision.

I have identified 2 documents within the scope of your request. I have made a decision to grant full 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:

Under the FOI act 1982

I request the position description and hiring advertisement for the attached position.

This request isn't personally directed at the individual.

Decision

Searches undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

In response to your request, the following line areas of the OAIC conducted reasonable searches for documents relevant to you request:

- OAIC People and Culture

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

- the OAIC's document holding system – Content Manager
- OAIC's email system

The following search terms were used when undertaking electronic records searches:

- Position description information all stored in one folder relating to the advertisement of this job.

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 and that all relevant documents have been found.

Reasons for decision

Material taken into account

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

- your FOI request dated 06 January 2024.
- the FOI Act, in particular section 3, 11, 11A, 15 and 26 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 line area/s of the OAIC in relation to your request

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 made a decision to grant full access to the 2 documents identified as relevant to your request

Disclosure log decision

Section 11C of the FOI Act requires the OAIC to publish documents released under the FOI Act on the OAIC's disclosure log 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/s

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 Elliott

Senior Lawyer

24 January 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

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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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00005

s 47F

By email: s 47F

Freedom of Information Request – FOIREQ24/00005

Dear s 47F

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 24 December 2023.

I am writing to inform you of my decision.

I have made the decision to refuse your request on the basis that documents cannot be found or do not exist.

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

Background

Scope of your request

Your FOI request sought access to the following information:

All internal documents that the OAIC uses to determine whether to grant or reject extension of time requests made by government agencies (pursuant to section 15AB and also section 54D of the FOI Act).

I am specifically looking for documents that are still in effect (that is, still being used by the OAIC) as of today. I do not require draft documents, unless those draft documents are being used by the OAIC.

Request timeframe

Your request was made on 24 December 2023.

On 4 January 2024, you agreed to an extension of time under section 15AA of the FOI Act.

This means that a decision on your request is due to be decided by 6 February 2024.

Decision and reasons for 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 made the decision to refuse your request on the basis that documents cannot be found or do not exist.

Material taken into account

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

- your FOI request dated 24 December 2023
- 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)

Documents cannot be found, do not exist or have not been received – Section 24A of the FOI Act

I have made the decision to refuse your request under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find documents relevant to your request and that documents cannot be found or do not exist.

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

Searches Undertaken

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

I have reviewed the searches undertaken and am satisfied that all reasonable steps have been taken to identify documents relevant to your request. I note that draft guidance was identified but as this draft is not currently in use it is excluded by the terms of your request. I also note that staff refer to the FOI guidelines and in particular, part 3 of the FOI Guidelines, available on the Office of the Australian Information Commissioner website. You can access this document at [Part 3: Processing and deciding on requests for access | OAIC](#). Again, as your request only related to internal guidance, this document is excluded by the terms of your request.

Conclusion

Based on the terms of your request and searches undertaken, I am satisfied that all reasonable steps have been taken to find documents that fall within the scope of your request and am satisfied that documents cannot be found or do not exist

I have made the decision to refuse your request for access to documents under section 24A of the FOI Act.

Please see the following page for information about your review rights in relation to this FOI request.

Yours sincerely,

Emily Elliott
Senior Lawyer
29 January 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:

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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:

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Accessing your information

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Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00280

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ23/00280

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 request (FOI request) was received by the Office of the Australian Information Commissioner (OAIC) on 7 December 2023.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

s 47F

s 47F
the Teams chat records the OAIC has actual and/or constructive access to that are about the HWL Ebsworth data breach, which are available to the OAIC using computers ordinarily available to them.

s 47F

Request timeframe

Your request was made on 7 December 2023.

On 8 December 2023, the OAIC wrote to you to acknowledge receipt of your request and requested whether you would be agreeable to an extension of time under section 15AA of the FOI Act due to reduced staff capacity over the Xmas and New Year period. On the same day, you replied with the following:

s 47F



On 4 January 2024, the OAIC wrote to you to inform you that your request includes documents which contain information concerning an organisation's business or professional affairs and third-party personal information. Accordingly, as the OAIC is required to consult with those individuals and organisation(s) under s 27 and s 27A of the FOI Act before making a decision on the release of those document(s), the period for processing your request has been extended by 30 days to allow time for this consultation.

This means that a decision on your request is due by 5 February 2024.

Consultation

I consulted with the relevant third party in relation to this request and they did not raise any objection in relation to the release of the relevant documents.

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 30 documents, and
- grant access in part to 27 documents, and
- refuse access in full 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.

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within the scope of an FOI request.

The following line areas of the OAIC conducted reasonable searches for documents relevant to your request:

- Legal Services
- Strategic Communications
- OAIC Executive staff

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

- individual OAIC staff members' Microsoft Teams chat messages

The following search terms were used when undertaking electronic records searches:

- HWL Ebsworth
- HWLE
- Ebsworth

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 7 December 2023
- the FOI Act, in particular sections 22, 27, 27A, 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)
- third party submissions in relation to the release of the documents dated 16 January 2024
- consultation with line areas 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.

I have also identified the following material within the documents to be irrelevant or out of scope of your request:

- discussions between OAIC staff regarding work not related to the HWL Ebsworth data breach

Accordingly, I have made an edited copy of the documents which removes this irrelevant material.

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

In accordance with section 47E(d) of the FOI Act, I have also 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 material relating to ongoing and closed investigation and litigation matters. This material includes information about the third parties that were impacted by the HWL Ebsworth data breach. In addition, I have also decided that some material relating to how the OAIC was to manage the HWL Ebsworth data breach is subject to the conditional exemption where that information may impact on the ability to manage this and other similar data breaches that may occur in the future.

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 resulted 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 and the Privacy Commissioner (both offices currently held by Angelene Falk), the FOI Commissioner (office currently held in an acting capacity by Toni Pirani), and the staff of the OAIC.

I consider that the disclosure of the material would or could reasonably be expected to have an adverse effect on this function for the following reasons:

Litigation and investigations impacted by the HWL Ebsworth breach

The material that I have considered as conditionally exempt, is the names of individuals and parties (and identifying information such as file reference numbers) who have or had matters with the OAIC. If this information is disclosed in response to this FOI request, it will become known that these individuals and parties were also affected by the HWL Ebsworth breach. In my view, the disclosure of this information may subject these individuals and parties to a greater risk of harm from the HWL Ebsworth breach. In addition, it may impact on the confidence of those making complaints to the OAIC to manage data breaches affecting the OAIC to ensure the minimisation of harm. In my view, the disclosure particularly of the identity of those affected by the HWL Ebsworth breach could reasonably be expected to have an adverse effect on the OAIC's functions.

Management of the HWL Ebsworth breach

The material I have considered as conditionally exempt, is material relating to the management of the HWL Ebsworth breach where that information is not in the public domain and its release could impact on the effectiveness of the response to both this breach and future breaches. In my view, the disclosure of this material could reasonably be expected to have an adverse effect on the OAIC's functions.

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

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.

Public interest conditional exemptions--personal privacy (section 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.*

Teams messages are used by OAIC to message about both work and work related personal matters such as medical appointments, leave and personal circumstances. I am satisfied that this material meets the definition of personal information.

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*

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 it relates to the personal circumstances of individual staff members. This is because the relevant material is not publicly available and is not well known. If this information 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.

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.

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, 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, we consider the following to be relevant:

- promote the objects of the FOI Act,
- inform debate on a matter of public importance, and
- allow a person to access his or her own personal information

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 could subject individuals and organisations subject to the HWL Ebsworth breach to greater risk of harm from the breach;
- disclosure could have an impact on the ability to respond effectively to the breach and future breaches; and
- disclosure of the personal information contained in the documents could reasonably be expected to interfere with an individual's right to privacy.

In balancing these factors for and against, I have placed significant weight on ensuring the OAIC can effectively respond to the HWL Ebsworth breach and protect the interests of those individuals and organisations affected by the breach. I have also given weight to the fact that Teams messages are used by OAIC to advise colleagues of absences and personal matters and these while related to the workplace do not contribute to public understanding of how the OAIC has responded to the HWL Ebsworth breach as an agency affected by the breach.

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 to not disclose 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.

Although I have determined that the documents released will be uploaded to the OAIC's disclosure log, I note that your name appears within the document. I have

decided to exempt your name from the documents released on the disclosure log under s 11C(1)(a) of the FOI Act.

Release of document

The documents are enclosed for release.

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

Yours sincerely,

Emily Elliott
Senior Lawyer
5 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.

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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.

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Accessing your information

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Our reference: FOIREQ24/00030

By email: s 47F

Freedom of Information Request – FOIREQ24/00030

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 10 January 2024.

I am writing to inform you of my decision.

I have identified 1 document within the scope of your request. I have made a decision to grant **full access** to that document.

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:

s 47F

Request timeframe

Your request was made on 10 January 2024.

This means that a decision on your request is due by 9 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.



Subject to the following provisions of the FOI Act, I have made a decision to grant **full access** to 1 document.

Searches undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

In response to your request, the OAIC conducted reasonable searches for documents relevant to your request. In relation to your previous request **s 47F** you requested:

s 47F

I have concluded that any documents relevant to your current request would be contained within the documents identified as relevant to the above request. As such, a review of these documents was undertaken and 1 document was identified as relevant to your request.

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 10 January 2024;
- the FOI Act, in particular sections 3, 11, 11A, 15 and 26 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)

Disclosure log decision

Section 11C of the FOI Act requires the OAIC to publish documents released under the FOI Act on the OAIC's disclosure log within 10 days of release, except if they contain personal or business information that would be unreasonable to publish.

The document subject to this decision contains personal information.

Accordingly, I have determined that it would be unreasonable to publish the document on the disclosure log.

Release of document

The documents are enclosed for release.

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

Yours sincerely,

Emily Elliott

Senior Lawyer

7 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 30 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00029

By email: s 47F

Internal review decision – FOIREQ24/00029

I refer to your request for internal review of a decision of the OAIC in FOIREQ23/00285 relating to a request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The decision in FOIREQ23/00285 was made by Ms Emily Elliott on 10 January 2024 which refused the FOI request on the basis that all reasonable steps have been taken to find the documents in scope of the request and that no relevant documents could be found or do not exist.

An internal review is a fresh decision made by a person other than the person who made the original decision (section 54C of the FOI Act). All materials available to the original decision maker have been made available to me. I have also conducted an independent search of the relevant storage area.

I have made a decision to:

- affirm the original decision of 10 January 2024.

Background

Your original FOI request

On 13 December 2023, you applied to the OAIC for access to the following:

s 47F

Following consultation with you on the scope of your request, on 19 December 2023 you revised your request as follows:

s 47F



On 10 January 2024, the OAIC advised you of the original decision. The delegate Ms Emily Elliott decided to refuse the FOI request on the basis that all reasonable steps have been taken to find the documents in scope of the request, and that relevant documents cannot be found or do not exist, in accordance with s 24A of the FOI Act.

On the same day, you applied for an internal review of that decision. You said:

s 47F



A decision on your internal review decision is due on 9 February 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:

- affirm the decision of 10 January 2024.

Reasons for decision

Materials taken into account

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

- your FOI request dated 13 December 2023 and subsequent revised scope dated 19 December 2023
- your internal review request dated 10 January 2024
- original decision of Ms Emily Elliott dated 10 January 2024
- consultation/communications with you in relation to your request
- the FOI Act, in particular s 24A of the FOI Act

- the Guidelines issued by the Australian Information Commissioner under s 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 line area/s of the OAIC in relation to your request, and search efforts from the line area in conducting search and retrieval of your FOI request.
- Search results from the searches I conducted of the relevant Outlook mailbox.

Searches Undertaken (s 24A)

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

Part [3.88] and [3.89] of the FOI Guidelines explain:

The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office.

As part of the internal review process I reviewed the searches performed in the course of processing your original request.

The following line areas of the OAIC conducted reasonable searches for documents relevant to you request:

- Corporate Services Team
- Enquiries Team
- Information, Communication and Technology team (ICT) and
- Legal Services Team.

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

- OAIC’s email system – Microsoft Outlook, and
- OAIC’s relevant IT systems.

The Corporate Services Team coordinated with the ICT team, which provided the following additional information as to the searches conducted/documents found:

We have coordinated feedback from the relevant technical teams in response to the enquiry.

.....

Email messages from the oaic.gov.au domain, or any DEWR managed domains, do not actively track users outside of system administration. There is no method for IT to send tracking/cookie agents via email.

The Enquiries team provided the following additional information as to the searches conducted:

s 47F



Having consulted with the relevant line areas and undertaken a review of the records of the various search and retrieval efforts, and having considered your internal review request, there is no evidence of any dishonesty or officers acting in bad faith in conducting the searches, as you have alleged.

Based on the search efforts before me, and having considered the requirements of reasonable steps undertaken under the FOI Act, I am satisfied that a reasonable search has been undertaken in response to your request, and that no relevant documents can be found or they do not exist.

If you are not satisfied with my decision, please see the following page for information about your review rights.

Yours sincerely

Margaret Sui
Principal Lawyer

9 February 2024

If you disagree with my decision

Further Review

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

You have the right to seek review of this decision by the Information Commissioner.

(IC review). If you wish to apply for IC review, you must do so in writing within 30 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.

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 post your application to:

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

Or apply by email to foidr@oaic.gov.au, or by fax on 02 9284 9666.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00301

By email: **s 47F**

Freedom of Information Request – FOIREQ23/00301

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 15 December 2023.

I am writing to inform you of my decision.

I have identified 54 documents within the scope of your request. I have made a decision to grant full access to 54 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:

request under the freedom of information act documents related to the 1 kb limit as to documents sent ,or sought sent to enquiries@oaic.gov.au

Request timeframe

Your request was made on 15 December 2023.

This means that a decision on your request is due by 15 January 2023.

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 decided to grant full access to 54 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:

- Dispute Resolution Team

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

- the OAIC's case management system - Resolve
- OAIC's email system
- general computer files

The following search terms were used when undertaking electronic records searches:

- Summary contains '1KB' & 's 47F' and 's 47F'

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 15 December 2023
- the FOI Act, in particular, including sections 3, 11, 11A, 15 and 26 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)

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 no exemptions apply to this 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.

As discussed above and identified in the attached documents schedule, the documents subject to this decision contain personal information.

Accordingly, I have determined that it would be unreasonable to publish documents on the disclosure log.

Release of document

The documents are enclosed for release.

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

Yours sincerely,

Emily Elliott
Senior Lawyer
15 January 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00042

CR

By email: 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, 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.

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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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00066

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ24/00066

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 29 January 2024.

I am writing to inform you of my decision.

I have made the decision to refuse your request on the basis that the requested documents do not exist.

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

Background

Scope of your request

Your FOI request sought access to the following information:

s 47F

Request timeframe

Your request was made 29 January 2024.

This means that a decision on your request is due to be decided by 28 February 2024.

Decision and reasons for 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 made the decision to refuse your request on the basis that documents do not exist or cannot be found

Material taken into account

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

- your FOI request dated 29 January 2024
- the FOI Act, in particular sections 3, 11, 11A, 15, 26 and 24A 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 line area of the OAIC in relation to your request

Documents cannot be found, do not exist or have not been received – Section 24A of the FOI Act

Section 24A(1) of the FOI Act provides that an agency may refuse a request for access to a documents requested under the FOI Act if all reasonable steps have been taken to find the document and the agency is satisfied that the document cannot be found or do not exist.

Section 24A(2) of the FOI Act provides that an agency may refuse a request for access to a documents requested under the FOI Act if the agency has taken contractual measures to ensure it receives a document from a contracted service provider but has not done so after taking all reasonable steps to receive the document in accordance with the contractual measures (section 24(2)).

I have made the decision to refuse your request under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find the documents you have requested and the documents do not exist or cannot be found.

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

Searches Undertaken

In response to your request, the following line area of the OAIC conducted reasonable searches for documents relevant to you request:

- Corporate Services

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

The following search terms were used when undertaking electronic records searches:

s 47F

A large black rectangular redaction box covers the majority of the text in this section, starting below the 's 47F' label and extending to the right edge of the page.

The officer from the line area who completed the search for documents was nominated as that officer manages Content Manager and assists with Resolve system administration. The officer conducted searches of both record titles and document content, as well as searches of case entities and client contacts. They concluded that no relevant documents could be found after conducting these searches.

Having consulted with the relevant line area and having 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 and that relevant documents do not exist or cannot be found.

Conclusion

Based on the terms of your request and searches undertaken, I am satisfied that all reasonable steps have been taken to find documents that fall within the scope of your request and am satisfied that the documents do not exist.

I have made the decision to refuse your request for access to documents under section 24A(1)(b)(ii) of the FOI Act, on the basis that documents do not exist or cannot be found.

Please see the following page for information about your review rights in relation to this FOI request.

Yours sincerely,

Emily Elliott

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.

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Further review

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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

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Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00297

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ23/00297

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 21 December 2023.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

s 47F



s 47F



Request timeframe

Your request was made on 21 December 2023.

On 12 January 2024, you were informed that documents within the scope of your request contained information concerning an organisation's business or professional affairs and third-party personal information. Accordingly, the OAIC was required to consult with those third parties under s 27 and s 27A of the FOI Act before making a decision on the release of those documents.

For this reason, the period for processing your request was extended by 30 days to allow time for this consultation (see s 15(6) of the FOI Act).

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

Consultation

I consulted with one third party in relation to third party personal information and third-party business information contained within the documents.

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 8 documents, and
- grant access in part to 12 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

Section 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document requested under the FOI Act if all reasonable steps have been taken to find the document and the agency is satisfied that the document cannot be found or does not exist.

The FOI Act therefore requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

In response to your request, the following line areas of the OAIC conducted reasonable searches for documents relevant to your request:

- Privacy Early Resolution; and
- Privacy Dispute Resolution.

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
- Electronic documents on OAIC-issued laptops
- the OAIC's email system
- Records of Microsoft Teams
- iPads or tablets, smartphones and third-party apps (emails, text messages, etc.)
- Portable media devices including USBs or CD drives
- CCTV
- Hardcopy files
- Searches for Metadata

Resolve

Searches of your complaint files regarding s 47F was undertaken by the Privacy Dispute Resolution and Privacy Early Resolution branches to obtain all correspondence relating to these case files held by the OAIC. All correspondence on this file has been extracted and provided to you for the purposes of this FOI request.

Content Manager

The Information Management team and Privacy Dispute Resolution branch were instructed to undertake searches for documents relating to s 47F and s 47F and s 47F and no additional documents were found that were not already saved to the Resolve files.

Metadata

Previously in processing your FOI requests, the OAIC Business and Analytics and Data Reporting team (BARD) advised that:

*Metadata is **the information that defines and describes data**. It is often referred to as data about data or information about data because it provides data users with information about the purpose, processes, and methods involved in the data collection. Metadata is information about the fields not the content of the field.*

BARD advised that should you wish to seek the metadata from your case files, this could be obtained by generating a Resolve report. The relevant Resolve report has been provided.

In our acknowledgement to you on 11 September, we sought clarification to whether the Resolve Report was the document you were after. We did not receive a direct response from you relating to this, and therefore your request has been processed accordingly.

I can confirm that these searches and the Resolve Report incorporate and address the following:

- Internal and external phone calls, including the associated data & metadata;
- Internal and external meetings;
- Recordings of conciliation and associated metadata, notes, system notes, including applicant, respondent and mediator; and
- Ditto, notes system notes.

Internal and External calls

The OAIC does not record phone calls, both external and inbound phone calls, hence the metadata for calls is not available.

Electronic documents on OAIC-issued laptops

The Privacy Dispute Resolution and Privacy Early Resolution branches undertook

searches for electronic documents associated with the case files saved on any OAIC issued laptops. All records saved to OAIC issued laptops are stored on Cloud System called OneDrive which is the shared online network used by the OAIC. The line area confirmed that there were no additional documents found on OAIC-issued laptops.

Microsoft Teams

Searches were conducted by Privacy Dispute Resolution and Privacy Early Resolution branches on the Microsoft Teams program in relation to your OAIC case files, and no documents were identified.

iPads or Tablets, smartphones and third-party apps (emails, text messages)

Searches were conducted by Privacy Dispute Resolution and Privacy Early Resolution branches on the above devices who advised that they have not been issued with iPads or tablets, and third-party apps (such as Twitter, WhatsApp) were not used to discuss matters associated with the relevant case files.

Portable media devices including USBs and CD drives

The Privacy Dispute Resolution and Privacy Early Resolution branches confirmed that no documents were saved on USBs or CD drives for the relevant case files.

CCTV

CCTV is relevant to the case files if you were provided access to the OAIC's Sydney Office. s 47F [REDACTED]

Hardcopy files

The Privacy Dispute Resolution and Privacy Early Resolution branches confirmed that no hard copy documents exist for the relevant case files.

I note that consistent with the terms of your request I have only provided access to documents that have not already been exchanged with you.

Reasons for decision

Material taken into account

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

- your FOI request dated 21 December 2023,
- the FOI Act, in particular sections 3, 11, 11A, 15, 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
- third party submissions in relation to the release of the documents.

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 **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 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).

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, the Privacy Commissioner, and the FOI Commissioner.

I consider that the disclosure of the material would or could reasonably be expected to have an adverse effect on this function for the following reasons:

Contained in a document within the scope of your request is the network address for the OAIC's IT system. The OAIC collects and stores a range of personal and financial information about members of the public. The network address contains information about the OAIC's IT system (including the network location and storage of information). I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC. The impact of any compromise to the safety and security of the OAIC's information systems would result in a serious adverse impact on the functions and responsibilities of the OAIC.

In *'AW' and Australian Taxation Office (Freedom of information)* [2014] AICmr 1, the then FOI Commissioner considered the decision by the Australian Taxation Office (ATO) to exempt user IDs under section 47E(d) of the FOI Act. The user IDs are used by ATO staff to access the ATO's IT system. The Commissioner found that disclosing the user IDs 'would have an adverse effect on the security of the ATO's IT systems and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ATO'. In a series of subsequent IC review decisions, the former Australian Information Commissioner agreed with the reasoning given by the Commissioner in 'AW' to find that user IDs used by ATO staff to access the ATO's IT system are exempt under section 47E(d) of the FOI Act.

I consider that the disclosure of the network address of the OAIC's computer system could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. I have decided that the network address of the OAIC's IT system is conditionally exempt from disclosure under section 47E(d) of the FOI Act.

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

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.

Public interest conditional exemptions--personal privacy (section 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.*

The documents contain the names, phone numbers, and contact details of 3rd parties.

I am satisfied that this material meets the definition of personal information because disclosure of this information would reasonably identify the individuals to which the information relates.

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*

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, although the relevant personal information may have previously been released to you in the course of the matter to which your request relates, I have taken into consideration the fact that there is no limit to what an applicant may do with released documents.

I am satisfied that the relevant material is not public information and is not well known. I am also satisfied that if this information were disclosed publicly it would unreasonably impact on the privacy of the relevant individuals.

The FOI Guidelines at paragraph 6.171 state:

An agency or minister must have regard for any submissions made before deciding whether to give access to the document (ss 27A(3) and 27A(4)). The third party does not, however, have the right to veto access and agencies should take care that the third party is not under such a misapprehension.

I have also had regard to the submissions of relevant third parties in respect of the release of the personal information contained within the document. Those third parties raised concerns as to release of the personal information at issue.

For the reasons given above, I consider the relevant documents identified in the schedule contain conditionally exempt material 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.

Section 11A(5) provides that where a document is considered to be conditionally exempt, an agency **must** give the person access to that 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 following to be relevant:

- promote the objects of the FOI Act generally.

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 IT security.

- Disclosure of the personal information contained in the documents could reasonably be expected to interfere with the affected individual's right to privacy.

In balancing these factors for and against, I have placed greater weight on factors in relation to the OAIC's IT security, and an individual's right to privacy.

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 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.

The documents subject to this decision contain personal information.

Accordingly, I have determined that it would be unreasonable to publish the documents subject to this request on the 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,

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.

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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.

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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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00050

By email: s 47F

Internal review decision – FOIREQ24/00050

I refer to your request for internal review of a decision of the OAIC made by Molly Cooke, Lawyer, relating to a request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The decision was made by Molly Cooke, Lawyer, on 18 January 2024 and:

- refused access in full to 7 documents.

An internal review is a fresh decision made by a person other than the person who made the original decision (section 54C of the FOI Act). All materials available to the original decision maker have been made available to me. I have also undertaken further searches, deliberation and/or consultation before making my decision.

I have made a decision to:

- affirm the decision of 18 January 2024 and refuse you access to the 7 documents.

Background

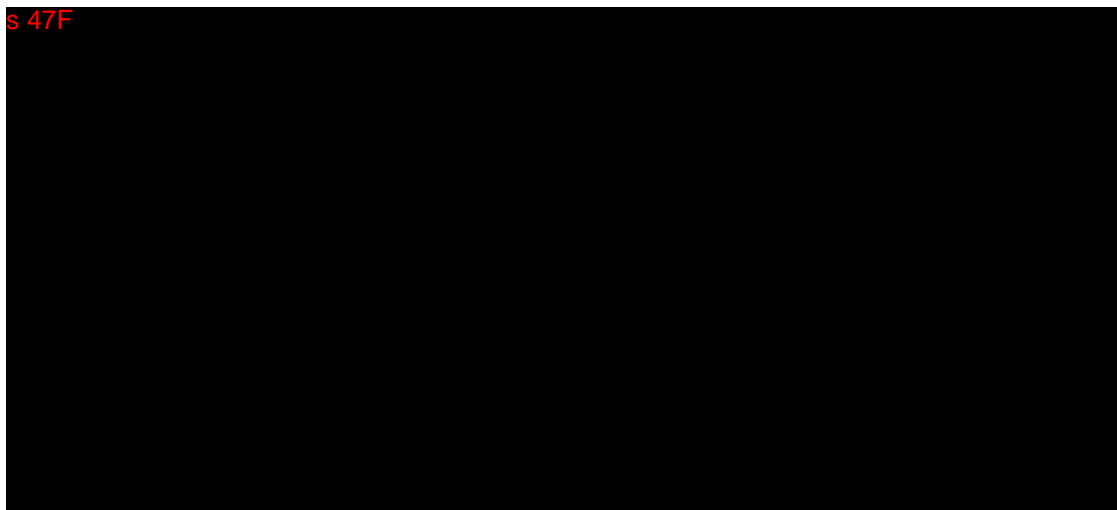
On 21 December 2023, you applied to the OAIC to seek access to the following:

s 47F

On 18 January 2024, the OAIC advised you of its original decision made by Ms Molly Cooke, Lawyer. The OAIC identified 7 documents in scope of the FOI request. The OAIC refused you access to the 7 documents. In making the original decision, the OAIC relied on the personal privacy exemption (47F).

On 22 January 2024 you wrote to the OAIC requesting an internal review of this decision.

Your internal review request was on the following terms:



A decision on your internal review decision is due on 21 February 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.

I have made a decision to affirm the original FOI decision and refuse you access to the 7 documents in full.

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

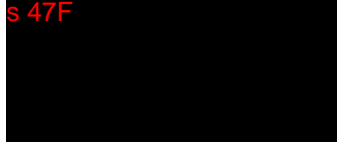
As part of the internal review process I reviewed the searches performed in the course of processing your original request.

Based on the information before me, the Privacy Dispute Resolution branch conducted searches for the documents which may fall in scope of your FOI request. 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
- MS Teams.

The following search terms were used when undertaking electronic records searches:



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. and that all relevant documents have been located and no additional documents other than the 7 documents identified as being in scope of the request, exist.

Reasons for decision

Materials taken into account

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

- your FOI request dated 21 December 2023
- Original decision of Molly Cooke, Lawyer, dated 18 January 2024
- your internal review request dated 22 January 2024
- the FOI Act, in particular s 3, 11, 11A, 15, 26 and 47F of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 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).

Personal privacy conditional exemption (section 47F)

I have decided to refuse you access to the 7 documents identified as being in scope of your request.

Whether the documents contain personal information

Based on my review of the 7 documents, the documents at issue contain the names, email addresses, contact details, and other personal information including nature of their complaint relating to a privacy complaint made by a third-party individual to the OAIC, that is not related to you.

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.

I am satisfied that this material meets the definition of personal information because the material relates to the personal matters of individuals, and disclosure of the material would reasonably identify these individuals.

Whether disclosure would involve an unreasonable disclosure of personal information

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

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:

- none of the personal information within the documents at issue is publicly known, or appears to be available from publicly available sources;
- the individual to whom the information relates is not known to be associated with the matters dealt with in the documents at issue. If this information was disclosed publicly it would unreasonably impact on the privacy of the affected individual
- the personal information was collected and used by the OAIC to respond to a privacy complaint made by that individual;
- the individual to which the personal information relates would not reasonably expect their personal information to be released by the OAIC, and would likely be distressed by the release of the personal information
- there is no evidence that the individual has provided you with consent for the information to be released.

Further, your internal review request suggested that “...Where the documents as to the request are understood as to be solely internal...” There is no evidence before me, either through my review of your original FOI request and subsequent dealings

with the OAIC in FOIREQ23/00298, or during the course of this internal review, that you have made any indication to the OAIC that your FOI request is limited to internal documents. In any event, any documents relating to the complaints the OAIC received from other individuals not related to you, will be subject to the same considerations and assessments required under s 47F of the FOI Act, that is, whether disclosure of this material to you, who is not the complainant, is unreasonable in the circumstances.

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 privacy complaint. I consider that it would be unreasonable to disclose this information.

For the reasons given above, I am satisfied that disclosure of the documents to you in this case is unreasonable.

I consider the relevant documents identified in the schedule are conditionally exempt under section 47F of the FOI Act.

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 section 47F.

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 is satisfied that disclosure would, on balance, 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 factor to be that disclosure would generally promote the objects of the FOI Act.

Section 11B(4) of the FOI Act provides factors which are not to be taken into account, which I have not 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 personal information contained in the documents could reasonably be expected to interfere with an individual’s right to privacy.

In balancing these factors for and against, I have placed greater weight on the importance of protecting an individual's right to privacy, particularly in the context of a privacy complaint made by that individual to the OAIC.

In this case, I am satisfied that the public interest factor against disclosure outweighs the public interest factor in favour of disclosure.

I have decided that at this time, giving you access to the documents which I have found to be conditionally exempt under s 47F of the FOI Act, would, on balance, be contrary to the public interest.

Other issues

s 47F

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As outlined above in the body of my decision, there is no evidence either in your original FOI request subject to this internal review, or during the course of this internal review, that you indicated as such to the OAIC of this scope.

s 47F

A large black rectangular redaction box covering several lines of text. The text 's 47F' is visible in red at the top left corner of the redaction.

We encourage you to read the decision provided to you and the documents released which may already contain the information you are seeking.

Next steps

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

Yours sincerely

Margaret Sui
Principal Lawyer

20 February 2024

If you disagree with my decision

Further Review

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

You have the right to seek review of this decision by the Information Commissioner.

(IC review). If you wish to apply for IC review, you must do so in writing within 30 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.

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 post your application to:

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

Or apply by email to foidr@oaic.gov.au, or by fax on 02 9284 9666.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ23/00173

Attention: s 47F

By email: s 47F

Freedom of Information Request – FOIREQ24/00004

Dear s 47F

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 Information Commissioner (OAIC) on 24 December 2023

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

I am seeking, under the Freedom of Information Act, the following documents in relation to the processing of OAIC FOIREQ23-00173:

- *The final statement of reasons*
- *all internal correspondence relating to the processing of the request*
- *the documents that were found to be in scope of the request.*

Following consultation with you on the scope of your request on 28 January 2024, you also agreed to limit the scope of your request in respect of internal correspondence to exclude line area responses to search and retrieval requests. You further confirmed that duplicate documents and duplicate emails produced in email chains could also be excluded from your request.

Request timeframe

Your request was made on 24 December 2023. You agreed to a 14-day extension on 3 January 2024. The clock was stopped in relation to your request under s.24AB of the FOI Act when a consultation request was sent to you on 15 January 2024. The clock was restarted when you responded on 28 January 2024. A decision in relation to your request is due on 20 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 22 documents relevant to your request. Subject to the following provisions of the FOI Act, I have made a decision to:

- grant full access to 17 documents, and
- grant access in part to 5 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.

Reasons for decision

Material taken into account

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

- your FOI request dated 24 December 2023;
- the FOI Act, in particular sections 3, 11, 11A, 15, 22, 24A, 26, 42, 47C and 47E(c) 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).

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

The following business units of the OAIC conducted reasonable searches for documents relevant to your request:

- Legal Services

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

Having consulted with the relevant staff members of the OAIC 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.

Access to edited copies with irrelevant and exempt material 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 have also identified the following material within the documents to be irrelevant or out of scope of your request:

- Some emails refer to matters which are not regarding the processing of FOIREQ23/00173.

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

Documents subject to legal professional privilege (section 42)

I have identified material contained within the documents that contain legal advice in relation to the subject matter of FOIRE23/00173, being Leo Hardiman's testimony. In accordance with section 42 of the FOI Act, I have made a decision to redact material on the basis that it is subject to legal professional privilege.

Section 42(1) of the FOI Act provides that

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

In determining whether or not these documents could be privileged from production in legal proceedings I have considered:

- whether there is a legal adviser-client relationship,
- whether the communication was for the purpose of giving or receiving, legal advice, or use in connection with actual or anticipated litigation,
- whether the advice given is independent, and
- whether the advice given is confidential.

Generally, privilege may be claimed in legal proceedings in relation to advice sought from and given by an in-house lawyer, where the professional relationship between the lawyer and the agency seeking advice has the necessary quality of independence, as per *Taggart and Civil Aviation Safety Authority (Freedom of information) [2016] AATA 327 at [32]*.

Having regard to this material, I am satisfied that there is a legal adviser - client relationship between OAIC General Counsel and the Executive.

The OAIC legal team is part of the corporate branch and is separate from the Executive which requested the legal advice. Although not a determinative factor, all members of the legal team hold practising certificates and are subject to all professional obligations of legal practitioners.

I consider that the separation of the General Counsel from the Executive reinforces the independence of the legal advice and made the relationship a legal adviser – client relationship.

Whether privilege attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test, as per *Esso Australia Resources Ltd v Commissioner for Taxation (1999) 201 CLR 49*. The relevant documents, including the request for legal advice and the legal advice provided in response to that request were all created for the dominant purpose of providing legal advice to the Executive in relation to Mr Hardiman's testimony.

Finally, I have turned my mind to whether the advice was given in confidence. In relation to the relevant documents, the legal advice was clearly marked legal in confidence, and it was only distributed to a limited number of OAIC staff who were involved in the matter. I have not been able to identify any express or implied waiver of the privilege and am satisfied that the advice was provided in confidence.

Waiver

Section 42(2) of the FOI Act provides that a document is not exempt under section 42(1) if ‘the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim’. As such, I have also considered whether the privilege attached to the relevant documents has been waived. Waiver of privilege may be express or implied.

The General Counsel has not waived privilege in relation to this advice and the advice was only distributed within a limited number of staff who were required to know the outcome of the advice. As such, I do not consider privilege has been waived in relation to this advice.

Finally, I have considered the ‘real harm’ test. The FOI Guidelines provide at paragraph 5.150 that:

Agencies are advised not to claim exemption for a document under s 42 unless it is considered that ‘real harm’ would result from releasing the document. A ‘real harm’ criterion is not an element of the common law doctrine of LPP, but has been acknowledged within government as a relevant discretionary test to apply in FOI administration. The phrase ‘real harm’ distinguishes between substantial prejudice to the agency’s affairs and mere irritation, embarrassment or inconvenience to the agency.

I consider ‘real harm’ would result in the release of this legal advice. It would prejudice the affairs of the OAIC if it was not able to seek confidential legal advice in responding to Mr Hardiman’s testimony.

For the reasons given above, I consider the relevant documents identified in the schedule are exempt under section 42 of the FOI Act.

As section 42 is not a conditional exemption, I am not required to consider the application of a public interest test.

Public interest conditional exemption-deliberative processes (section 47C)

Section 47C of the FOI Act provides for the exemption of deliberative matter as follows:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or*

consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

- (a) *an agency; or*
- (b) *a Minister; or*
- (c) *the Government of the Commonwealth.*

Exceptions

- (2) *Deliberative matter does not include either of the following:*
 - (a) *operational information (see section 8A);*
 - (b) *purely factual material.*

Paragraph [6.55] of the FOI Guidelines confirms that section 47C of the FOI Act is not a harm provision and that the only consideration is whether the document does or does not contain deliberative matter. As explained in the decision of *Parnell & Dreyfus and Attorney-General's Department* [2014] ALCmr 71 (30 July 2014) at [38], deliberative matter is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation'.

The documents subject to the request contain material in relation to a draft response to Mr Hardiman's testimony. The material I have considered exempt is deliberative in nature for the purpose of section 47C of the FOI Act, because it relates to different opinions expressed in drafting a media response to Mr Hardiman's testimony.

For the reasons given above, I consider the relevant documents identified in the schedule are conditionally exempt under section 47C of the FOI Act. As section 47C 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 47E(c) – Management or assessment of personnel

In accordance with section 47E(c) 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 management or assessment of personnel by the Commonwealth or an agency.

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.

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).

Paragraph 6.144 the FOI Guidelines confirms that for 47E(c) to apply the documents must relate to either the management or assessment of personnel. Having considered the material within the document, I consider the relevant material relates to the management of personnel, including the broader human resources policies and activities, particularly occupational health and safety.

As a Commonwealth employer the OAIC has duties and obligations under the *Work Health and Safety Act 2011*. This includes a duty to manage workplace health and safety by eliminating and minimising risks as much as is reasonably practicable. Psychosocial hazards are any occupational hazard that affects the psychological and physical wellbeing of employees. I note that the public testimony of Mr Hardiman on 29 August 2023 including criticism of the OAIC Executive, culture, systems and processes. This testimony was provided after Mr Hardiman had resigned as the FOI Commissioner. For staff, these criticisms were heard for the first time and staff used the instant messaging system Teams to discuss the testimony as it unfolded. A number of wellbeing checks were undertaken with staff particularly effected by the testimony. While I have released in most instances the messages themselves, to ensure the OAIC manages the psychosocial hazards associated I have removed staff names, including SES and above. I consider that the removal of the names is consistent with the OAIC’s obligation under the *Work Health and Safety Act 2011* to

eliminate the risks associated with psychosocial hazards as much as reasonably practical.

I note that although OAIC generally releases all staff names in response to an FOI request, I would distinguish this scenario with this request, in so far as that these messages do not relate to the work of the OAIC or how it has managed a particular matter or issue. These messages relate to staff responses to a Senate Committee hearing that was critical of the work and culture at the OAIC. In my view, releasing the names of the staff associated with particular messages could be reasonably expected to have a substantial adverse impact on the OAIC's ability to manage psychosocial hazards.

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

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.

Public interest conditional exemption – operations of the agency (section 47E(d))

In accordance with section 47E(d) of the FOI Act, I have made a decision to exempt mobile phone numbers of OAIC staff and material relating to open and ongoing IC matters with the OAIC, 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).

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 agencies, I have taken into consideration the functions and activities of the relevant agency being the OAIC.

Mobile phone numbers of OAIC staff

In the IC review decision of *'PX' and Australian Federal Police (Freedom of information)* [2019] AICmr 8 at [64], it was found that, since the agency in this matter had in place "...procedures in place to manage their contact with members of the public", the release of direct contact details of staff "...would have a substantial adverse effect on the proper and efficient conduct..." of the relevant agency.

Similarly, in *In 'WN' and Inspector General of Taxation* [2020] AICmr 70 at [34] the Information Commissioner accepted that:

...unsolicited calls to IGT employees' direct telephone numbers and work mobile telephone numbers will fall outside the integrated service platform and would not be electronically recorded, adversely affecting accountability, transparency, quality assurance and the provision of support to employees in relation to those calls...on balance I find that this circumstance could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the IGT's operations.

Noting the above, the mobile phone numbers of the OAIC staff is not publicly available. As part of the documents released to you, the general work number associated with the staff member has been disclosed. I therefore consider that release of the OAIC staff mobile number would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. This is on the basis that the release of this information is likely to result in a high volume of unsolicited communications to the staff, which would divert resources from the ordinary functions of the OAIC.

Open and ongoing IC reviews

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. In particular, I have had regard to the Australian Information Commissioner's privacy

powers, freedom of information powers and regulatory powers, under the Australian Information Commissioner Act 2010 (Cth) (AIC Act), the Privacy Act 1988 (Cth) ('The Privacy Act') and the Freedom of Information Act 1982 (Cth) ('The FOI Act'). Under the AIC Act and the FOI Act, the Information Commissioner has a range of functions and powers promoting access to information under the FOI Act, including making decisions on Information Commissioner reviews and investigating and reporting on freedom of information complaints, as well as assessing and making decisions on vexatious applicant declarations.

The AAT has recognised in *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) [24] 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 investigative process. Similarly, in this instance, the OAIC's ability to carry out its regulatory functions would be affected if there was a lack of confidence in the confidentiality of this process.

I have refused access in part to documents that relate to Information Commissioner reviews that are current and ongoing. Given that these reviews remain open, I consider that while the matter is on foot, disclosure of the relevant material at this stage can impede the efficient conduct of the case. Specifically, review officers are still in the process of formulating their views, and gathering facts and evidence, and no decisions or findings have been made regarding these reviews. Parties to the review will be provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. The fact that an Information Commissioner review has been lodged in relation to certain FOI requests, is not public knowledge and is only known by the parties. The OAIC's Freedom of Information Regulatory Action Policy advises at paragraph 73 that the Information Commissioner will generally not comment publicly about ongoing IC review applications.

The release of this information at this time to a third party who is not a party to these reviews would, or could reasonably be expected to, adversely impact on both the ability of the OAIC to manage the specific matters referred to and future matters if parties cannot be confident that their information will be kept confidential while their reviews are still being investigated.

Accordingly, I am satisfied that disclosure of this material to you at this time will have a substantial and adverse effect on the proper and efficient operations of the OAIC in conducting Information Commissioner review. I have found this material to be exempt under s 47E(d) of the FOI Act.

For the reasons given above, I consider the relevant documents identified in the schedule are conditionally exempt under section 47E(d) of the FOI Act. As section

47E(d) 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 conditional exemptions--personal privacy (section 47F)

In accordance with section 47F of the FOI Act, I have made a decision to exempt 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 the name and contact information of a person seeking access to information under the Freedom of Information Act. I am satisfied that this material meets the definition of personal information.

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*

This information is not publicly available, and I do not consider the disclosure of the name and contact details of the individual who made the original request would advance the public interest in government transparency and integrity. In my view, it may cause the individual undue stress to be publicly associated with the request.

For the reasons given above, I am satisfied that the disclosure of the personal individual would be unreasonable and 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 s.47C, s. 47E(c) and s.47E(d) of the FOI Act.

Section 11A(5) provides that where a document is considered to be conditionally exempt, an agency **must** give the person access to that 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, we consider the following to be relevant:

- promote the objects of the FOI Act, and
- 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:

- promote effective oversight of public expenditure
- inform debate on a matter of public importance, including to:
 - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official

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 factor against disclosure of the information is that it could reasonably be expected to prejudice the management function of the agency.

In relation to the removal of staff names from instant messages, I acknowledge the importance of public oversight of government agencies and recognise the public interest in the current Senate Committee inquiry. However, I have balanced this with the need to manage psychosocial hazards of staff. I note that access to the content of most documents have been provided in full and only removed those parts of the documents necessary to ensure this balance. For the material I have decided is exempt I have put a significant weight on the management of psychosocial hazards of staff.

In relation to the removal of staff mobile numbers, I note that the OAIC has available a number of avenues to contact staff including publicly available phone numbers and direct staff phone numbers are provided in relation to specific matters. Mobile numbers are not generally provided to members of the public and I consider that the release of these mobile numbers could be expected to prejudice the operations of the OAIC. In relation to the open IC reviews, I have put significant weight on the importance of allowing the regulatory functions to be undertaken in an efficient and confidential process.

In relation to the material exempt in draft media response, I have considered FOI Guideline material provided at paragraphs [6.52] to [6.88], relevant AAT decisions including *Secretary, Dept of Prime Minister and Cabinet and Secretary, Dept of*

Infrastructure and Regional Development and Sanderson [2015] AATA 361, and the recent Information Commissioner decisions of *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66 (10 November 2021) which discuss the application of this conditional exemption provision. In both decisions whilst the material itself was identified as deliberative, there was not sufficient evidence to prove that disclosure of the material would be contrary to the public interest, particularly in circumstances where a significant passage of time had passed since the material was the subject of active deliberation. I note that although the inquiry has now been finalised, many of the recommendations are under consideration by government.

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 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 document

The documents are currently being prepared for release and will be provided to you tomorrow, Wednesday 21 February 2024. The documents are identified in the attached schedule of documents. Please note that where documents that are relevant to your request would be a duplicate of the documents released to you, we have provided a single copy of these documents at document 2.

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

Yours sincerely,

Emily Elliott
Senior Lawyer
20 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 5288
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 5288
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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00048

s 47F

By email: s 47F

Dear s 47F

Freedom of Information Request – FOIREQ24/00048

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 January 2024.

I am writing to inform you of my decision.

I have identified **135** documents within the scope of your request. I have made a decision to:

- refuse access in full to 135 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 under the FOI Act written correspondence between the OAIC and Bunnings Group Limited and Kmart Australia Limited relating to the investigation into the companies use of facial recognition technology for the period between 10 July 2022 and December 31 2023.

Request timeframe

Your request was made on 22 January 2024.

This means that a decision on your request is due by 21 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.

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

- refuse access in full to 135 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 you request:

- Privacy Dispute Resolution

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

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 22 January 2024

- the FOI Act, in particular sections 3, 11, 11A, 15, 26, 37(1)(a) 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 relevant line areas 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. However, due to these exemptions covering the entirety of substantive material within the documents at issue, I have decided that it is not reasonably practicable to prepare an edited copy of the documents at issue for release.

Investigation of a possible breach of law (s 37(1)(a))

I have found the documents subject to your request are exempt under s 37(1)(a) of the FOI Act.

Under s 37(1)(a), a document is exempt if its disclosure would, or could reasonably be expected to, prejudice the conduct of a current investigation.

Section 37(1)(a) of the FOI Act states:

37 Documents affecting enforcement of law and protection of public safety

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

The FOI Guidelines at [5.82] provide:

To be exempt under ss 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law... This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches

The FOI Guidelines at [5.86] – [5.87] further explain:

Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in a particular instance’, it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.

(...)

The exemption is concerned with the conduct of an investigation. For example, it would apply where disclosure would forewarn the applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body – putting the investigation in jeopardy. The section will not apply if the investigation is closed or if it is being conducted by an overseas agency.

In order to determine whether disclosure of documents would, or could reasonably be expected to prejudice the conduct of a current investigation, the FOI Guidelines at [5.16] - [5.17] note:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document. The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

It was relevantly noted in the recent IC review decision at *AFR and Department of Home Affairs (Freedom of information)* [2023] AICmr 120 at [90] – [91]:

The FOI Act does not define prejudice. The FOI Guidelines instead describe a 'prejudicial effect' as 'one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes.

Whether disclosure would prejudice the Department's investigation will depend upon the nature and context of the particular document or information at issue.

Noting the above, I am satisfied that the material within the scope of your request relates to issues that are currently being investigated by the OAIC, and release of such material prematurely could impact the flow of information to the OAIC in this matter, through reducing confidence in the confidentiality of the OAIC's investigative processes. I am satisfied that this would constitute a prejudicial effect for the purposes of s 37(1)(a) of the FOI Act.

Accordingly, I have decided that the documents at issue are exempt under s 37(1)(a) of the FOI Act. I consider that disclosure of these documents would, or could reasonably be expected to, prejudice the conduct of an open OAIC investigation.

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

I have decided that the documents at issue which I have found exempt under s 37(1)(a) are in the alternative exempt under s 47E(d) of the FOI Act.

Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

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 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 consists of the Australian Information Commissioner, the Privacy Commissioner, the FOI Commissioner, and the staff of the OAIC.

The OAIC has a range of functions and powers directed towards protecting the privacy of individuals by ensuring the proper handling of personal information. These functions and powers are conferred by the Privacy Act 1988 (Privacy Act) and by other legislation containing privacy protection provisions. Investigating privacy breaches, either in response to a complaint from a member of the public or on the Commissioner's own initiative, is one of the OAIC's primary functions.

Consideration

The documents at issue relate to an ongoing OAIC investigation. I am satisfied that, as this investigation remains open, the release of the documents at issue at this time would be reasonably likely to disrupt and prejudice the OAIC's ability to exercise its regulatory functions. I consider that at this time, disclosure of the documents at issue could reasonably be expected to have an adverse substantial impact on the proper and efficient conduct of the OAIC's operations, through reducing confidence in the confidentiality of the OAIC's investigative processes.

Relevantly, paragraph 6.122 of the FOI Guidelines provides:

The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations. [footnotes omitted].

In the decision of *Knight v Commonwealth Ombudsman* [2021] AATA 2504, the Tribunal upheld the application of section 47E(d) to material relating to the Defence Abuse Response Taskforce (DART) which was an administrative body established in 2012. The Ombudsman contended that release of certain material would have a substantial adverse effect on its functions. In respect of the application of section 47E(d) the Tribunal found as follows (emphasis added):

- [40] *I consider that the ongoing maintenance of confidentiality is critical to the effective management of the defence abuse response program. Individuals may be discouraged from participating in meaningful engagement with the respondent if the documents sought were disclosed. **A failure to protect confidentiality would undermine the reputation of, and the trust in, the respondent. The operations of the respondent would be compromised.***

In the AAT case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 at [103], Deputy President Forgie found documents concerned with ASIC's investigation and surveillance functions to be exempt under s 47E(d). Deputy President Forgie found that the subject-matter of the documents was directed to the investigations associated with Utopia and that:

... disclosure would give insight into an aspect or aspects of the way in which ASIC goes about its task of investigating or conducting surveillance on those who come within its regulatory responsibilities. Utopia itself might have some idea of them as it has been the subject of such surveillance and examination of its affairs. Others would not. To disclose them under the FOI Act would, I find, have an adverse effect on the proper and efficient conduct of ASIC's operations. I am also satisfied that the adverse effect would be substantial.

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.

I consider these decisions to be of relevance to the material subject to this FOI request which comprises of confidential material obtained in the course of the OAIC's investigations. As part of its investigative function, it is vitally important that investigations are able to be undertaken in a timely and efficient manner and that participants fully engage in this process which at times is often because of an understanding of confidentiality.

I consider that release of material relating to an investigation part way through the investigation itself would likely undermine or interfere with the outcome of the investigation. I consider that release of this material would also likely mean that individuals are less inclined to fully engage with the OAIC and its investigative functions.

Accordingly, in this case, I am satisfied that giving you access to the documents at issue would, or could reasonably be expected to, substantially adversely affect the

proper and efficient conduct of the operations of the OAIC. In light of this, I find that the material at issue is conditionally exempt under section 47E(d) of the FOI Act.

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

As provided above, I have considered that material at issue is subject to conditional exemption under section 47E(d).

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:

- 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 following factors do not favour disclosure:

- disclosure could reasonably be expected to impede the flow of information to the OAIC in its capacity as a privacy regulator,
- disclosure could reasonably be expected to prejudice the OAIC’s ability to obtain confidential information in the future,
- disclosure could reasonably be expected to prejudice an ongoing OAIC investigation, and
- disclosure could reasonably be expected to prejudice the OAIC’s ability to obtain and deliberate regarding sensitive information.

I have also taken into account that refusing to release the document at issue is in line with the OAIC’s Regulatory Action Policy, which relevantly states the following at [58]:

The OAIC generally will not comment publicly about ongoing complaint investigations, complaint conciliations, CILs, the content of data breach notifications or the exercise of investigative powers.

In balancing these factors for and against, I have placed greater weight on factors in relation to the importance of preserving the functioning of the OAIC’s investigatory functions.

In this case, I am satisfied that the public interest factor against disclosure outweighs the public interest factor in favour of disclosure.

I have decided that *at this time*, giving you 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.

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

Yours sincerely,

Emily Elliott
Senior Lawyer
21 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.



Australian Government
Office of the Australian Information Commissioner

Our reference: FOIREQ24/00065

By email: s 47F

Freedom of Information Request – FOIREQ24/00065

Dear s 47F

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 29 January 2024.

I am writing to inform you of my decision.

I have made the decision to refuse your request under section 24A(1) of the FOI Act on the basis that all reasonable steps have been taken to find the documents you are requesting and I am satisfied the documents cannot be found or do not exist.

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

Background

Scope of your request

Your FOI request sought access to the following information:

(1) Has the Australian Government ever recommended, instructed or mandated its executives, officers, contractors or suppliers to employ methods to restrict, block or tighten online access to existing government accounts such as Centrelink or My Gov for people who do not have a Digital Identity set up and/or linked to these accounts (but have previously had access to their accounts through the usual, user-name/password method)?

(2) Is the Australian Government, its contractors or suppliers currently employing methods to restrict, block or tighten online access to existing government accounts such as Centrelink or My Gov for people who have not set up a Digital Identity and/or

linked it to their accounts (but have previously had access to their accounts through the usual, user-name/password method)?

(3) Has the Australian Government ever recommended, instructed or mandated its executives, officers, contractors or suppliers employ methods to restrict, block or tighten online access to those trying to set up new government accounts such as Centrelink or My Gov and who do not have a Digital Identity?

(4) Is the Australian Government, its contractors or suppliers currently employing methods to restrict, block or tighten online access to those trying to set up new government accounts such as Centrelink or My Gov and who do not have a Digital Identity?

Request timeframe

Your request was made on 29 January 2024.

This means that a decision on your request was due to be decided by 28 February 2024.

Reasons for 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.

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

- your FOI request dated 29 January 2024
- the FOI Act, in particular section 24A, 26
- 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 line areas of the OAIC in relation to your request

Documents cannot be found, do not exist or have not been received – Section 24A of the FOI Act

Section 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document requested under the FOI Act if all reasonable steps have been taken to find the document and the agency is satisfied that the document cannot be found or do not exist.

Searches Undertaken

In response to your request, the following line areas of the OAIC conducted reasonable searches for relevant documents:

- Dispute Resolution
- Regulation and Strategy

Searches were conducted across the following document storage systems at the OAIC:

- the OAIC's document holding system – Content Manager
- the OAIC's email system

The following search terms were used when undertaking electronic records searches:

- “MyGov account digital ID”
- “MyGov account digital identity”
- “MyGov account policy”
- “Centrelink account digital ID”
- “Centrelink account digital identity”

The line areas provided the following information as to why documents could not be found or do not exist:

I have searched CM and my inbox using the terms such as “MyGov account digital ID”, “MyGov account digital identity”, “MyGov account policy”, “Centrelink account digital ID” and “Centrelink account digital identity” but could not identify any documents within the scope of the request.

I also discussed the request with Jim Kormas Director Assessments. We are not aware of any documents within the scope of the request and could not identify other search terms that may assist.

I note that Services Australia may be better placed to assist with requests for documents relating to the creation of MyGov and Centrelink accounts. The Department of Finance is responsible for policy in relation to Digital ID and the development of legislation in this area and may also hold relevant documents.

And

I have also conducted searches (“MyGov account digital ID”, “MyGov account digital identity”, “MyGov account policy”, “Centrelink account digital ID” and “Centrelink account digital identity”) across Content Manager and Microsoft Outlook and have not

returned any results. I agree with ... comments below, that the search scope seems directed at operational matters for MyGov and Centrelink accounts and the agencies she has identified below are likely to better placed to receive this request.

Having consulted with the relevant line areas and having undertaken a review of the records of the various search and retrieval efforts, I am satisfied that all reasonable steps have been taken to find documents in response to your request and that no relevant documents were identified.

Conclusion

For the reasons outlined above, I have made the decision to refuse your request under section section 24A(1) of the FOI Act on the basis that all reasonable steps have been taken to find the documents you are requesting and I am satisfied the documents cannot be found or do not exist.

Services Australia

You may wish to consider making your FOI request to Services Australia, as I am of the view that they may hold the documents you are seeking. Please find their contact details below:

Post: Freedom of Information

Services Australia

PO Box 7820

Canberra BC ACT 2610

Email: freedomofinformation@servicesaustralia.gov.au

You may make your request by completing the form found at the following link: [Freedom of Information - access or change document\(s\) form \(SI031\) - Services Australia.](#)

Alternatively, you may compose a written letter which must:

- state that it is a request for the purposes of the Freedom of Information Act 1982 (Cth)
- specify the documents requested or provide such information as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document that is requested

- specify details of how notices under the FOI Act may be sent to you, such as a postal or email address

Please see the following page for information about your review rights in relation to this FOI request.

Yours sincerely,

Emily Elliott
Senior Lawyer
21 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.

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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.

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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.