



Our reference: FOIREQ24/00149

Waldek

By email: foi+request-11205-d27cb789@righttoknow.org.au

Freedom of Information Request – FOIREQ24/00149

Dear Waldek

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 March 2024.

I am writing to inform you of my decision.

Background

Scope of your request

Your FOI request sought access to the following information:

- a) *any and all applications for extensions of time to process FOI23/463 made by the AGD to the OAIC; and*
- b) *any and all applications for extensions of time to process FOI23/500 made by the AGD to the OAIC; and*
- c) *any and all decision notices issued by officials in the OAIC in respect of the applications for extensions of time to process FOI23/463; and*
- d) *any and all decision notices issued by officials in the OAIC in respect of the applications for extensions of time to process FOI23/500.*

Request timeframe

Your request was made on 6 March 2024

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

Decision

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

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

- grant access in part 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.

Searches Undertaken

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

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

- Freedom of Information Branch

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

- the OAIC's case management system - Resolve

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

- MR numbers
- Agency reference number

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 6 March 2024

- the FOI Act, in particular 3, 11, 11A, 15, 26, 47F and 47E 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 Attorney General's Department (AGD)
- consultation with the applicable line area of the OAIC in relation to your request

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

In accordance with section 47E(d) of the FOI Act, I have made a decision to redact material on the basis that disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations.

Paragraph 6.101 of the FOI Guidelines explains that:

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

Additionally, at 6.103 the FOI Guidelines further explain:

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

The material that I have decided is subject to conditional exemption comprises of information shared between the Attorney-Generals' Department and the OAIC during a private meeting between the two parties, in relation to an ongoing Information Commissioner review (IC review).

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. 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 4 documents over material which relates to information pertaining to the open and ongoing IC review. I accept that as party to the IC review, you will be privy to the information related to this matter in future, however, as this review remains open and is in its preliminary stages, I consider 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.

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.

I consider that there would or could be a substantial adverse impact on the operation of the OAIC if the OAIC cannot conduct its regulatory functions in a confidential manner. Premature release of information that is being considered by the OAIC in relation to an open IC review, may impact on the efficiency of the process and divert staff to respond to deal with further inquiries about information and issues that are not yet determined.

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.

There are two elements which must be satisfied to determine whether section 47F applies:

- 1) Whether the information constitutes 'personal information'; and
- 2) Whether the disclosure of the personal information is 'unreasonable'.

I will now consider both elements of this test.

Whether the information constitutes ‘personal information’

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 of public servants who work within AGD. This includes their full name, phone number and email addresses.

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.

Whether disclosure of the personal information would be ‘unreasonable’

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

- the extent to which the information is well known
- whether the person to whom the information relates is known to be associated with the matters in the document
- the availability of the information from publicly accessible sources
- 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, apart from the first name of AGD employees, would be unreasonable.

Primarily, I consider that the release of surnames and contact information of AGD employees unreasonable as the information is current, the individuals have objected to the disclosure and the fact that the information will be published on the right to know website and available to the world at large. I also do not consider the disclosure of the information would advance the public interest in government transparency and integrity. AGD FOI provides both a phone number and email address for applicants to contact them. I do not consider that it would advance the public interest to provide individual AGD FOI employee surnames and contact details.

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 s 47E(d) and s 47F.

Section 11A(5) provides that where a 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 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, we consider the following to be relevant:

- promote the objects of the FOI Act, and
- allow a person access to their own personal information.

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

- 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 could reasonably be expected to have a substantial adverse effect on the conduct of the IC reviews; and
- disclosure of the personal information contained in the documents could reasonably be expected to interfere with the individuals right to privacy.

In relation to information pertaining to your IC review, I acknowledge the public interest in allowing individuals access to information that relates to them. However, I have balanced this with the fact that the IC review is only in its preliminary stages and discussions between AGD and the OAIC are ongoing. I have granted access to large portion of the documents and only considered material exempt where I consider that factors against disclosure outweighs the public interest in allowing you access to information that relates to your IC review.

In relation to AGD employees' surnames and contact details, I consider that there is little public interest in the release of these details in these circumstances. When balanced with the objections raised by the effected staff about the interference on their right to privacy I have decided that the factors against disclosure outweigh the public interest.

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.

As discussed above and identified in the attached documents schedule, 4 documents subject to this decision contain personal information, and information specifically relevant to an ongoing IC review.

Accordingly, I have determined that it would be unreasonable to publish these 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 Elliot
Senior Lawyer

5 April 2024

If you disagree with my decision

Internal review

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

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

Applications for internal reviews can be submitted to:

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

Alternatively, you can submit your application by email to foi@oaic.gov.au, or by fax on 02 9284 9666.

Further review

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

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

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

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

Applications for IC review can be submitted online at:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Alternatively, you can submit your application to:

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

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

Accessing your information

If you would like access to the information that we hold about you, please contact foi@oaic.gov.au. More information is available on the Access our information page on our website.