



Our reference: FOIREQ17/00021

Dear Ms Pane

Outcome of your Freedom of information request for internal review

I am writing to advise you of my decision in response to your application of 4 April 2017 for internal review of an Office of the Australian Information Commissioner (OAIC) decision of 3 April 2017 (OAIC reference FOIREQ17/00012) refusing access to documents you requested under the *Freedom of Information Act 1982* (the FOI Act).

Background

On 4 March 2017, you requested:

The Project TV reported on changes proposed by the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016, namely the power for the Secretary of the Commonwealth Department of Veterans' Affairs (DVA) to "leak" (as Deputy Prime Minister Barnaby Joyce stated in his interview with The Project TV) otherwise protected personal information about a veteran or veterans who complain about DVA's regular abuses of power and unethical behaviour.

In a statement provided by the Minister of Veterans' Affairs Dan Tehan, to The Project TV... the Minister for DVA said:

"This Bill passed the House with bipartisan support after three months of public exposure, which included the scrutiny of two Senate committees, a public hearing and submissions, cross-party consultation, consultation with the Privacy Commissioner and the Commonwealth Ombudsman and consultation with the ex-service community. The government took on board all suggestions and recommendations throughout this process. The Bill has also undergone a privacy impact assessment. We have consulted extensively and nothing will happen without the support of Parliament."

I request copy of all notes, records, minutes, and any and all other documents and records in the OAIC's possession and/or control that relate to this "consultation with the Privacy Commissioner" that DVA and/or the Minister for Veterans' Affairs or any other Commonwealth official or Minister had with the OAIC (whether directly-with the Privacy Commissioner or any staff member of the OAIC).

On 23 March 2017, the OAIC advised you that part of your request was transferred to the Department of Veterans' Affairs (DVA) under s 16 of the FOI Act. The effect of this transfer is that there were essentially two requests, one with the OAIC and the other with DVA.

On 3 April 2017, OAIC officer Ms Amanda Nowland made a decision on your OAIC request. Ms Nowland identified 45 documents within the scope of your request and decided to give you access to seven document in full, 33 documents in part and refused access to the remaining five documents. In making her decision, Ms Nowland relied on the deliberative processes exemption (s 47C), the certain operations of agencies exemption (s 47E(d)) and the personal privacy exemption (s 47F) of the FOI Act. Ms Nowland also deleted material she considered irrelevant to your request under s 22 of the FOI Act.

I note that of the 40 document released to you either in full or in part, only four were edited to delete exempt material.¹

On 4 April 2017, you applied for internal review of Ms Nowland's decision. In your application, you said that Ms Nowland's decision 'failed to provide sufficient evidence to back up exemption claims (particularly on s 47E(d) which has a higher bar than that made out in the decision).'

There are nine documents at issue in this internal review (the documents), four document Ms Nowland exempted in part under either s 47C,² s 47E(d)³ and/or s 47F⁴ and five documents that Ms Nowland exempted in full under s 47E(d).⁵

An internal review decision is a 'fresh decision' made by a person other than the person who made the original decision (s 54C of the FOI Act). Accordingly, in conducting an internal review it is open to me to decide the basis on which the decision is made.

Decision

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

I have decided that the documents are exempt under s 47E(d) of the FOI Act.

For the purposes of s 22 of the FOI Act, I have further decided that it is apparent from your application that you are not seeking edited copies of the four documents to which you have already been given partial access (s 22(1)(d)).⁶ In making this decision, I have considered that preparing a further edited copy of the four documents would not give you access to any additional material.

Reasons for decision

Material taken into account

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

- the original decision
- the documents at issue
- the FOI Act, in particular ss 11A(5), 22 and 47E(d)
- the *Australian Information Commissioner Act 2010*
- 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), in particular paragraphs [6.1] — [6.28] and [6.95] — [6.123]
- relevant case law, in particular *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 and *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, and
- your submissions.

¹ Other edits were made only to delete material irrelevant to your request.

² Identified on the original schedule of documents as document 24.

³ Documents 30, 35 and 37.

⁴ Document 35.

⁵ Documents 29, 39-40, 42 and 45.

⁶ Documents 24, 30, 35 and 37.

Proper and efficient conduct of the operations of an agency exemption (s 47E(d))

Section 47E of the FOI Act relevantly provides:

Public interest conditional exemptions—certain operations of agencies

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 explain:

For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur ... There must be more than merely an assumption or allegation that damage may occur if the document were to be released.⁷

...

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...⁸

In the Administrative Appeals Tribunal (AAT) case of *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707, Deputy President Forgie discussed that for a claim under s 47E(d) to succeed, the substantial adverse effect that would, or could reasonably be expected to occur must be on the 'proper and efficient conduct of the operations of an agency'. Forgie DP explains that the 'ordinary meanings of the word "operation" in this context' includes 'an act, method or process of working or operating.'⁹

In deciding whether disclosure would, or could reasonably be expected to have a substantial adverse effect on the OAIC's methods or processes of working or operating, I have considered the functions and responsibilities of the OAIC.

The OAIC has three primary functions:¹⁰

- privacy functions, conferred by the *Privacy Act 1988* and other laws
- freedom of information functions, in particular, oversight of the operation of the FOI Act and review of decisions made by agencies and ministers under that Act, and
- government information policy functions, conferred on the Australian Information Commissioner under the *Australian Information Commissioner Act 2010*.

⁷ FOI Guidelines [6.101].

⁸ FOI Guidelines [6.103].

⁹ *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 [119].

¹⁰ For more information about the OAIC see: <https://oaic.gov.au/about-us/>.

The OAIC's responsibilities include:

- conducting investigations
- reviewing decisions made under the FOI Act
- handling complaints
- monitoring agency administration, and
- providing advice to the public, government agencies and businesses.

The OAIC was consulted in relation to the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the Bill). This falls under the OAIC's privacy function.

The documents you seek comprise internal OAIC emails, memoranda and letters relating to proposed changes to the Bill. They contain comments, discussions and opinions of agency officers regarding the introduction of the Bill, much of which is in draft form.

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 considered ASIC's contentions that:

It is essential for the regulatory work of ASIC that its officers are able to communicate their ideas and approaches to the surveillance and investigation of members of the regulated population. It can reasonably be expected that, should information regarding these deliberations be disclosed, ASIC officers may be discouraged from expressing a range of preliminary ideas and analysis. Rather, officers may be more circumspect and less inclined to provide preliminary and/or innovative views. One could expect these kinds of communication to be less efficient and timely and also less fulsome should officers be of the view that they should be more considered in these less formal communications.¹¹

In that case, Forgie DP said that the weight to be given to such contentions 'depends upon the factual context in which [they] are said to arise', given the obligations upon Australian Public Service Officers to be to be 'professional, objective, innovative and efficient, and work collaboratively to achieve the best results for the Australian community and the Government. That would include being open in their comments and in providing comments that are appropriate to the subject-matter, thoughtful, relevant and directed to the tasks at hand.'¹²

In this internal review, the factual context surrounding the documents is that of preparing and providing advice and opinion on the Bill. The documents are largely in draft form.

I note that the Bill passed both Houses of Parliament on 29 March 2017 without the relevant 'Public interest disclosures' provisions.

It is my view in this case, that giving you access to predominantly draft documents would substantially and adversely affect the efficiency and effectiveness of the OAIC's consultation processes. In particular, I consider that publicly disclosing the OAIC's comments, discussions and opinions in this case could reasonably be expected to result in less consultation in future; and where there is consultation, the parties would become more circumspect and less inclined to provide preliminary or draft views.

¹¹ *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [101].

¹² *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [102].

This would make the OAIC's consultation process less effective and efficient, thereby affecting the OAIC's information policy function and its ability to provide advice to the public, government agencies and businesses.

Accordingly, in this case, I am satisfied that giving you access to the documents would substantially adversely affect the proper and efficient conduct of the operation of the OAIC.

You submit that 'the OAIC had previously released documents of a similar nature before, with no adverse outcome' and that 'it is entirely fraudulent for such [s 47E(d)] claims to be made on future release decisions of like for like documents and records.'

However, I have considered the specific documents in this case. It is my view, based on the factual context and character of these specific documents, that the predicted adverse effect of disclosure would be likely to occur.

The documents are conditionally exempt under s 47E(d) of the FOI Act.

Public interest test

In finding that the documents are conditionally exempt, I am therefore required to consider whether giving access to a conditionally exempt document at this time would, on balance, be contrary to the public interest (s 11A(5)).

Section 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to public interest'.

Of the public interest factors favouring disclosure listed in s 11B(3) of the FOI Act, two are relevant in this internal review. Disclosure would:

- promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the Government's activities, and
- inform debate on a matter of public importance.

The FOI Act does not provide any public interest factors against disclosure. However, the FOI Guidelines provide a non-exhaustive list. Two of the FOI Guidelines factors are relevant in this internal review. Disclosure

- could reasonably be expected to prejudice an agency's ability to obtain confidential information, and
- could reasonably be expected to prejudice an agency's ability to obtain similar information in the future.¹³

¹³ FOI Guidelines [6.22] (footnotes omitted).

I also consider that two public interest factors from Information Commissioner review decisions are relevant in this internal review. Disclosure:

- would inhibit the effectiveness of the evaluation and decision-making processes of an agency,¹⁴ and
- could reasonably be expected to prejudice an agency's ability to obtain and deliberate regarding sensitive information.¹⁵

Looking at the range of factors against disclosure compared to those factors in favour of disclosure, I find that the factors against outweigh the factors for in this case.

Giving you access to the documents at this time would, on balance, be contrary to the public interest.

Your review rights

If you disagree with my decision, you have the right to seek review by the Information Commissioner (IC review). If you wish to apply for IC review, you must do so in writing within 60 days from the date of my decision.

I note that, where it is in the interest of the administration of the FOI Act to do so, the Information Commissioner may decide not to undertake an IC review, to allow the applicant to go direct to the Administrative Appeals Tribunal (AAT) for a full merit review of the FOI decision. The Information Commissioner considers that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of an FOI 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, it is likely that the Information Commissioner will decide (under s 54W(b) of the FOI Act) not to undertake an IC review on the basis that it is desirable that any review be undertaken by the AAT. 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.

Complaints about the handling of FOI requests

If you are not satisfied with the way that your FOI request has been handled, you can complain to the Information Commissioner or the Commonwealth Ombudsman.

If you wish to complain to the Information Commissioner the OAIC prefers that you use the FOI complaint application form available at www.oaic.gov.au/foi/complaints.html. Other ways to contact the OAIC to lodge an FOI complaint are by email to enquiries@oaic.gov.au, by facsimile to 02 9284 9666 or by post to GPO Box 5218, Sydney NSW 2001. For further information, please call our enquiries line on 1300 363 992.

¹⁴ Accepted by the Commissioner as a public interest factor against disclosure in *Dreamsafe Recycling Pty Ltd and Department of Education, Employment and Workplace Relations* [2013] AICmr 34 at [34].

¹⁵ Accepted by the Commissioner as a public interest factor against disclosure in *Foundation for Alcohol and Research Education and Department of Health* [2015] AICmr 38 at [24].

If you wish to complain to the Commonwealth Ombudsman, they can be contacted on 1300 363 072.
Other contact details are available at their web site: www.ombudsman.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Ken Richards', with a stylized, cursive script.

Ken Richards
Assistant Director
Freedom of Information

4 May 2017