



Our reference: FOIREQ18/00045

Ms Verity Pane

By email to: [foi+request-4555-6c16d34b@righttoknow.org.au](mailto:foi+request-4555-6c16d34b@righttoknow.org.au)

Dear Ms Pane

### Freedom of Information request – Decision on access

I refer to your request for access to documents, made under the *Freedom of Information Act 1982* (Cth) (FOI Act) and received by the Office of the Australian Information Commissioner (OAIC) on 3 May 2018.

By way of background you explained:

Jenny Noyes, a journalist with Fairfax Media, had her article published by Fairfax Media on 2 May 2018, about 20 million bank account records having been ‘lost’ by the Commonwealth Bank (CBA) in 2016, circumstances that CBA could not verify had not fallen into third party hands.

In that article Ms Jenny Noyes writes:

“CBA says it discussed the decision not to inform customers with the Office of the Australian Information Commissioner, and that OAIC advised it would not pursue the issue further.

But this week, the OAIC [after having been contacted by the media about the privacy breach] contacted CBA again, requesting additional information on the matter and the course of action undertaken by the bank”

You sought access to:

Under FOI I seek copy of the RESOLVE case management record that relates to this enquiry/notification by CBA to the OAIC.

I also seek separately copy of any document from the OAIC to the CBA that advises the CBA of the OAIC’s views on this breach (especially the referred to advice that the OAIC “would not pursue the issue further” and requests from the OAIC to the CBA for information or documents relating to the circumstances of this breach/notification).

If there are any internal executive briefings to the Commissioner on the CBA privacy breach, I seek copy of that too.

## Decision

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

I have identified four documents within the scope of your request. A schedule describing each document and the access decision I have made is at **Appendix A** to this decision.

I have decided to grant you access to the documents in part, with matter exempt under ss 45 (material obtained in confidence), 47E(d) (certain operations of agencies), and 47F (personal privacy) deleted from the documents.

Further information about my decision follows.

## Reasons for decision

### Material taken into account

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

- your freedom of information request dated 3 May 2018
- the documents at issue
- the FOI Act, in particular ss 11A(5), 45, 47E(d) and 47F
- submissions made by CBA
- 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 [5.155] – [5.172], [6.1] – [6.28] and [6.124] – [6.148]
- relevant case law, in particular *Maurice Blackburn Lawyers and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 111; *Dan Conifer and Department of the Prime Minister and Cabinet (Freedom of information)* [2017] AICmr 103; *Debra Duncan and Australian Criminal Intelligence Commission (Freedom of information)* [2017] AICmr 75; *‘LK’ and Department of the Treasury (Freedom of information)* [2017] AICmr 47; *Bell and Secretary, Department of Health, (Freedom of information)* [2015] AATA 494; *Re Maksimovic and Australian Customs Service* [2009] AATA 28; *‘FG’ and National Archives of Australia* [2015] AICmr 26; *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707; *‘AW’ and Australian Taxation Office (Freedom of information)* [2014] AICmr 1 and *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269.

### Material obtained in confidence (s 45)

I have decided that parts of document 1 are exempt from disclosure s 45 of the FOI Act.

Section 45 provides that a document is exempt if ‘its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence’.

As discussed in the FOI Guidelines and in IC review cases,<sup>1</sup> the main requirement of this exemption is that disclosure of a document would found an action for breach of confidence.

The FOI Guidelines explain that for s 45 to apply, the following five criteria must be satisfied:

- the information must be specifically identified
- the information must have the necessary quality of confidentiality
- the information must have been communicated and received on the basis of a mutual understanding of confidence
- the information must have been disclosed or threatened to be disclosed, without authority, and
- unauthorised disclosure of the information has or will cause detriment.<sup>2</sup>

Document 1 is a file note of a meeting between CBA and the OAIC on 7 June 2016.

The 7 June 2016 meeting was conducted on a confidential basis. The OAIC agreed to treat the information provided at the meeting in confidence and returned hard copies of the briefing pack to CBA at the end of the meeting.

Addressing the five criteria in the FOI Guidelines I find as follows:

- The information has been specifically identified. The document comprises a file note of a meeting between the OAIC and CBA on 7 June 2016.
- The document has the necessary quality of confidentiality. Information about the meeting between CBA and the OAIC on 7 June 2016 is not in the public domain; this remains confidential between the OAIC and CBA.
- CBA undertook to meet with the OAIC on 7 June 2016 on the basis that the information provided would be treated confidentially by the OAIC. The OAIC agreed to meet CBA on this basis. The information was therefore communicated and received on the basis of a mutual understanding of confidence.
- CBA has asserted that information about the 7 June 2016 meeting is confidential and that disclosure by the OAIC would breach the mutual understanding of confidence which attaches to this document if it was disclosed in response to this FOI request.
- Disclosing the document is likely to cause detriment to CBA. Specific information relating to the meeting is not in the public domain. Release has the potential to disclose commercially sensitive information which may negatively impact on CBA's reputation and competitive standing.

The part of document 1 that relates to the 7 June 2016 meeting between CBA and the OAIC is exempt from disclosure under s 45 of the FOI Act.

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<sup>1</sup> Generally, see *FOI Guidelines* [5.155] – [5.172]; *Maurice Blackburn Lawyers and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 111; *Dan Conifer and Department of the Prime Minister and Cabinet (Freedom of information)* [2017] AICmr 103; *Debra Duncan and Australian Criminal Intelligence Commission (Freedom of information)* [2017] AICmr 75 and *'LK' and Department of the Treasury (Freedom of information)* [2017] AICmr 47.

<sup>2</sup> *FOI Guidelines* [5.159], footnotes omitted.

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

I have decided that parts of documents 1 and 4 are conditionally exempt from disclosure under s 47E(d) of the FOI Act.

Section 47E(d) 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.<sup>3</sup>

...

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...<sup>4</sup>

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

In particular, I have had regard to the regulatory powers conferred on the Information Commissioner by the Privacy Act and other legislation, which includes investigation and enforcement powers.

Parts of the documents form the basis of an ongoing privacy investigation. Disclosing these documents in response to an FOI request, to individuals not party to the investigation, is reasonably likely to disrupt or prejudice the ongoing investigation and potentially the

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<sup>3</sup> FOI Guidelines [6.101].

<sup>4</sup> FOI Guidelines [6.103].

outcome of the investigation, which would have a substantial and adverse effect on the OAIC's operations.

In making this finding, I have considered decisions of the Administrative Appeals Tribunal (AAT) which discuss the s 47E(d) exemption. The AAT has found that disclosure of documents held by statutory regulators and investigatory bodies would have a substantial adverse effect on an agency's proper and efficient conduct of operations.<sup>5</sup>

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.<sup>6</sup>

I note also that 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 complaint investigation process.<sup>7</sup>

It is my view, based on the factual context and character of these documents, that the predicted adverse effect of disclosure would be likely to occur.

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

I am satisfied that parts of documents 1 and 4 are conditionally exempt under s 47E(d) of the FOI Act. I will consider the public interest in relation to these conditionally exempt documents below.

### **Personal privacy conditional exemption (s 47F)**

I have decided that the personal information of CBA staff in the documents is conditionally exempt from disclosure under s 47F. This personal information includes names, email addresses, mobile and landline telephone numbers and position titles.

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<sup>5</sup> *FOI Guidelines* [6.121] and [6.122].

<sup>6</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [103].

<sup>7</sup> *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) [24].

Section 47F of the FOI Act provides a conditional exemption for personal privacy, where a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The FOI Guidelines explain that the personal privacy exemption is designed to prevent unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.<sup>8</sup>

'Personal information' means:

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; and
- (b) whether the information or opinion is recorded in a material form or not.<sup>9</sup>

In establishing whether the disclosure of a document would involve the unreasonable disclosure of personal information, s 47F(2) requires me to have regard to:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources
- any other matters that the agency considers relevant.

The FOI Guidelines provide further factors that may be relevant when considering whether disclosure of personal information would be unreasonable.

6.142 Key factors for determining whether disclosure is unreasonable include:

- a. the author of the document is identifiable
- b. the documents contain third party personal information
- c. release of the documents would cause stress on the third party
- d. no public purpose would be achieved through release.

6.143 As discussed in the leading s 47F IC review decision of *'FG' and National Archives of Australia* [2015] AICmr 26, other factors considered to be relevant 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

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<sup>8</sup> FOI Guidelines [6.138] (footnotes omitted)

<sup>9</sup> Privacy Act 1988 (Cth), s 6.

- 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. [Footnotes omitted]

The conditionally exempt information (names, email addresses, mobile and landline telephone numbers and position titles) is not publicly available and the relevant individuals are not known to be associated with the matters dealt with in the documents (that is, the data breach). The OAIC obtained this personal information for the purpose of communicating with CBA about this privacy incident.

The personal information in the documents is current, and the relevant individuals have objected to their personal information being disclosed.

CBA submits that disclosure of this information is likely to cause stress to these employees and may generate unsolicited or nuisance communications directed to these employees, with members of the public using the disclosed contact details to circumvent established public channels of communication. I accept CBA's submissions that disclosure of the personal information identified above will cause detriment to the relevant individuals.

Further, I do not consider that disclosing the names, email addresses, mobile and landline telephone numbers and position titles of CBA staff advances the public interest in government operations and decision-making.

In considering whether the disclosure of the personal information of CBA staff is unreasonable, I have had regard to each of the factors set out above and have balanced the public interest in understanding the data breach notification process against the privacy of the individuals concerned.

I consider that disclosing the personal information in the documents would be unreasonable and that as a result it is conditionally exempt under s 47F of the FOI Act.

My consideration of the public interest follows.

### **The public interest (s 11A(5))**

An agency cannot refuse access to a conditionally exempt document unless giving access would, on balance, be contrary to the public interest (s 11A(5)).

In the AAT case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission*, Deputy President Forgie explained that:

... the time at which I make my decision for s 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.<sup>10</sup>

Therefore I must consider whether, in the context of an ongoing Commissioner initiated investigation into the CBA data breach, disclosure of the documents would be contrary to the public interest.

The public interest factors favouring disclosure in this case are that disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance.

Against these factors I must balance the factors against disclosure. The FOI Act does not specify any factors against disclosure, however the FOI Guidelines provide a non-exhaustive list of factors against disclosure. This includes factors such as when disclosure could:

- reasonably be expected to prejudice the protection of an individual's right to privacy
- reasonably be expected to impede the flow of information to the OAIC in its capacity as a privacy regulator
- reasonably be expected to prejudice the OAIC's ability to obtain confidential information in the future
- reasonably be expected to impede the administration of justice generally, including procedural fairness
- reasonably be expected to prejudice the OAIC's ability to obtain and deliberate regarding sensitive information.<sup>11</sup>

I have decided that in the context of an ongoing investigation, giving you access to the parts of the documents that I have found to be conditionally exempt under ss 47E(d) and 47F of the FOI Act would be on balance, at this time, contrary to the public interest.

## Release of documents

Because an affected third party was consulted in the making of this decision and has objected to release of the documents, I am required, under s 27(6) and 27A(5) of the FOI Act, to advise it of my decision and provide an opportunity to seek:

- internal review of my decision or
- review of my decision by the Information Commissioner.

CBA has 30 days from the date I notify it of my decision in which to seek review. As a result, the documents I have decided can be released with deletions cannot be released to you until this time has expired, or any internal review or appeal has been completed and my decision to release the documents upheld or confirmed.

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<sup>10</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

<sup>11</sup> Accepted by the Information Commissioner as a public interest factor against disclosure in *Foundation for Alcohol and Research Education and Department of Health* [2015] AICmr 38 at [24].



## Disclosure log

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 it would be unreasonable to publish.

The documents I have decided to release to you do not contain business or personal information that it would be unreasonable to publish. As a result, the documents will be published on our [disclosure log](#) shortly after being released to you (subject to third party review rights as outlined above).

Your review rights are outlined on the following page.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Raewyn Harlock', with a long horizontal flourish extending to the right.

Raewyn Harlock  
Assistant Director  
Freedom of Information

2 July 2018

## **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.

### ***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, 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 my decision be considered 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.

Applications for internal review or IC review 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](mailto:foi@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 [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au). More information is available on the [Access our information](#) page on our website.

## Schedule of documents – Freedom of information request no. FOIREQ18/00045

Doc no.	Page no.	Date	No. of pages	Description	OAIC decision on access	Exemption(s) applied by OAIC	Outcome
1	1–4	N/A	4	Resolve case summary (DBN16/00062)	Release with deletions	Sections 45, 47E(d) and 47F	Withheld pending expiry of third party review rights
2	5–6	24.5.2016	2	Notification of data breach	Release with deletions	Section 47F	Withheld pending expiry of third party review rights
3	7	24.10.2016	1	OAIC letter to CBA	Release with deletions	Section 47F	Withheld pending expiry of third party review rights
4	8	30.4.2018	1	Internal briefing to the OAIC Executives	Release with deletions	Sections 47E(d) and 47F	Withheld pending expiry of third party review rights