



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ18/00103

**Ms Verity Pane**

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

## Freedom of Information request FOIREQ18/00103 – internal review decision

Dear Ms Pane

I refer to your request for internal review dated 2 August 2018 of a freedom of information (FOI) decision of 2 July 2018 (FOIREQ18/00045 – “the original decision”).

References in this decision record to provisions are to those of the *Freedom of Information Act 1982* (Cth) (FOI Act).

### Your application

In your application for internal review you make a number of claims which I summarise below:

- The original decision involved a long delay and only provided very limited release of documents
- The documents or parts of documents that were released involved copious amounts of redactions under s 47E(d) and the reasons for decision do not justify the basis for making such redactions. In particular, you claim that there is insufficient evidence to establish that disclosure would or could reasonably be expected to, have a substantial adverse effect of the proper and efficient conduct of the operations of an agency
- The OAIC is not entitled to choose the information that it wants to release, on the basis that future reporting may be impaired, without giving reasons as to how each specific redaction would impair that reporting. In particular, you claim that the OAIC has released information on this matter previously and that it cannot be said to be a confidential matter. You also take issue with the basis upon which personal information has been redacted
- The OAIC has not acted with transparency and accountability and it has “secret arrangements” with third parties

- You seek internal review so that you may obtain a proper statement of reasons that addresses the evidentiary grounds for each s 47E(d) redaction, including the nature of the information in each individual redaction which would prevent disclosure in the future
- You also query the basis of findings that rely on comments of third parties arising out of the consultation process in circumstances where you claim that there have been no further enquiries or independent investigations. In particular, you note that the third party, in providing comments, has a level of “self-interest”.

## **Background to the application**

On 3 May 2018 you made your FOI application to the OAIC. In your application you referred to a media article published on 2 May 2018 regarding bank account records having been “lost” by the Commonwealth Bank (CBA) in 2016, and citing information that the OAIC advised that it would not pursue the issue further with CBA.

In your application you sought a copy of the Resolve case management record relating to CBA’s notification to the OAIC. In addition, you also sought any document from the OAIC to the CBA advising the CBA of the OAIC’s views on the breach. In particular, you sought any document that refers to advice that the OAIC “would not pursue the issue further” and any document in the nature of a request from the OAIC to the CBA for information or documents relating to the circumstances of its breach/notification. You also sought any internal executive briefings to the Australian Information Commissioner (Commissioner) in relation to the circumstances of CBA’s breach/notification.

On 4 May 2018 an officer of the OAIC acknowledged your request and set out the timeframes for dealing with your request. On that same day, the officer made enquiries with the OAIC’s Acting Assistant Commissioner and Acting Director of the Dispute Resolution section and sought that area’s assistance in locating documents by asking them to conduct searches on their own systems, including their Outlook, personal drives, TRIM, and any other place where they stored documents.

On 15 May 2018 the Acting Assistant Commissioner and then Acting Director of Dispute Resolution section both confirmed by separate emails that such searches had been conducted and that no documents within the scope of the request were contained on any system other than Resolve.

On 17 May 2018 an officer wrote to CBA, inviting CBA to make submissions in relation to a redacted version of the Resolve case report. CBA was invited to make submissions in relation to ss 47(1), 47G(1) and 47F. This had the effect of extending the processing period to 2 July 2018.

CBA provided its response on 24 May 2018. On 12 June 2018 an officer asked questions and clarification of submissions that CBA had made, and on 14 June 2018 CBA responded to these questions. On 15 June 2018 an OAIC officer identified an additional two documents falling within scope of the request, requiring consultation with CBA, and it provided these

documents to CBA for comment. CBA provided a response to these additional documents on 20 June 2018. On 29 June 2018 the original decision maker located a further document requiring consultation with CBA and put this to CBA, noting that CBA had already made submissions on the same document in relation to a separate FOI request, and noting that those submissions would be taken into consideration. No further response was received from CBA.

On 27 June 2018 the original decision maker made enquiries with the Acting Assistant Commissioner and then Acting Director of Dispute Resolution section regarding the confidential nature of telephone conversations reflected in records obtained from the Resolve file.

On 2 July 2018 the original decision maker made a decision granting partial access to the four documents found to be within the scope of the request, redacting some content under the following exemptions:

- s 45 – material obtained in confidence
- s 47E(d) – certain operations of agencies
- s 47F – personal privacy

As CBA objected to the disclosure of the documents, release of the documents was delayed to enable CBA to avail itself of its review rights. As CBA did not pursue review within the 30 day time limit, the documents were released to you on 2 August 2018.

## **Decision and reasons for decision**

In conducting an internal review I can exercise all the powers of the original decision maker. It is also my duty to consider any changes in circumstances or new information or evidence that has come to light since the original decision.

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

Having inspected the Resolve file (the OAIC's case management system), and having had regard to the enquiries made by the original decision maker and another OAIC officer, I am satisfied that there are no further documents beyond the four documents that were located and found to fall within the scope of the FOI request. I find each of these four documents to be within the scope of your request.

I have decided to affirm the original decision maker's decision in relation to documents 1, 2 and 3. In relation to document 4, I have decided to grant access in part, redacting certain material under ss 47E(d) and 47F. Essentially, I have decided to release parts of this document additional to that which was released in the original decision.



I attach a copy of document 4 reflecting my decision on access.

### **Documents affecting certain operations of agencies (s 47E)**

The original decision maker decided that parts of documents 1 and 4 are conditionally exempt from disclosure under s 47E(d), on the basis that disclosure of these parts is reasonably likely to have a substantial adverse effect on the OAIC's ability to conduct investigations into privacy breaches.

Subsection 47E(d) conditionally exempts documents where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Document 1 is the Resolve summary for CBA's notification to the OAIC, containing various summaries of conversations between CBA and the OAIC. The information redacted under s 47E(d) provides information that the CBA disclosed to the OAIC voluntarily, the release of which it opposes.

Document 4 is an internal OAIC email which describes the information that the CBA voluntarily provided to the OAIC in 2016, part of which contains similar information to that set out in document 1. I consider that release of this information would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC because it would interfere with the OAIC's ability to efficiently conduct investigations.

### **Documents containing material obtained in confidence (s 45)**

The original decision maker found parts of document 1 to be exempt from disclosure under s 45.

Subsection 45(1) provides that a document is an exempt document if its disclosure would found an action by a person for breach of confidence under the general law.

The FOI Guidelines set out the criteria that must be met in order to found an action for breach of confidence. Namely, it must be the case that the information:

- is specifically identified
- has the necessary quality of confidentiality
- has been communicated and received on the basis of a mutual understanding of confidence
- has been disclosed or threatened to be disclosed without authority
- has or will cause detriment if it is disclosed without authorisation.

The FOI Guidelines further explain that a breach of confidence will not be made out, and that the exemption will therefore not apply, if the information to be disclosed is a crime, civil wrong or serious misdeed of public importance which ought to be disclosed to a third party with a real and direct interest in redressing the crime, wrong or misdeed.

Part of document 1 details a meeting that took place between CBA and the OAIC on 7 June 2016. It is specifically identified as confidential.

While I am satisfied that some of the information contained in this file note is publicly available, the contents of the discussion, including CBA's expressed views at that time continue to be known only to a limited group. This information retains its quality of confidentiality.

CBA asserts that the information discussed at the meeting was provided on a confidential basis and has pointed to further documentary evidence to establish the confidential nature of the discussions. The entry on document 1 dated 29 September 2016 corroborates the fact that CBA provided information in relation to the notification on the basis that it would remain confidential. I am satisfied that the information was communicated and received on the basis of a mutual understanding of confidence.

I am also satisfied that disclosure without authorisation would result in reputational detriment to CBA.

I do not consider that the information falls within those categories set out in the FOI Guidelines in terms of being a crime, wrong or misdeed. This is because the information is expressed views given at a particular point in time and does not reveal anything that would fit within those categories.

For this reason I agree with the original decision maker's decision to refuse access to this part of document 1.

### **Documents affecting personal privacy (s 47F)**

Section 47F conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any person. Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in material form or not.

The information redacted contains personal information in the form of names, position titles, telephone numbers and email addresses of individuals from CBA who engaged with the OAIC in relation to this notification.

The FOI Guidelines provides guidance on determining whether the disclosure of personal information will be unreasonable. This requires a consideration of:

- 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.

CBA has pressed for non-disclosure of the personal information and I consider the individuals to be likely to oppose disclosure. Based on internet searches that I have conducted, I am satisfied that the relevant individuals are not publicly known to be associated with this particular notification. If this information were disclosed publicly, I am satisfied that there would be a substantial risk of detriment to these individuals, in the form of harassment and nuisance calls. I have also considered the circumstances in which this voluntary notification was made and the inherent right of individuals to maintain control over their personal information. On this basis, I consider that disclosure of the personal information would be unreasonable. I find those parts of documents 1, 2, 3 and 4 to be exempt under s 47F.

### **Public interest test (s 11A(5))**

I have found that parts of documents 1, 2, 3 and 4 are conditionally exempt under s 47F and that parts of documents 1 and 4 are conditionally exempt under s 47E(d). Disclosure of these conditionally exempt documents is required unless at the time of my decision there is, on balance, countervailing harm which offsets the inherent public interest of giving access.

In relation to the parts of the documents I found conditionally exempt under s 47F, the specific harm would be disclosure of personal information without the individual's consent, and the inherent harm that would arise from such a disclosure in removing an individual's control over their own personal information. The harm with regard to this personal information, and in these particular circumstances where the persons are not known to be associated with the subject matter and where their contact details would be disclosed, is the potential for unsolicited or nuisance communications being targeted at these individuals and the potential for the individuals to be caused stress.

Having regard to the factors set out in the FOI Guidelines, which I must balance in determining where the public interest lies, I find the following factor to favour disclosure of the personal information: promotion of the objects of the FOI Act. However I do not place significant weight on this factor, as the disclosure of the personal information of individuals from CBA involved in this notification would not lead to increased scrutiny, discussion, comment and/or review of the Government's activities, nor would it significantly increase public participation in Government processes, beyond what information has already been released.



Balanced against this factor, I find that the public interest factor against disclosure is that it would reasonably be expected to prejudice the protection of an individual's right to privacy. Further, I consider it to be plausible that if individuals' personal information were to be disclosed in circumstances of limited public benefit, this may make third parties reluctant to engage with the OAIC on a voluntary basis. I consider that this could reasonably be expected to prejudice the management function of the OAIC in terms of its being able to acquire information and engage with third parties efficiently.

On this basis, I find the personal information to be exempt under s 47F(1).

I have found that parts of documents 1 and 4 are conditionally exempt under s 47E(d). While I consider that disclosure would promote the objects of the FOI Act, in that it would contribute to the ability of the community to scrutinise the government's operations in relation to this particular notification and reveal the reason for a government decision, I find that it could reasonably be expected to prejudice the OAIC's ability to obtain confidential information in the future and could reasonably be expected to prejudice the conduct of investigations.

While I note that on 22 February 2018 the Notifiable Data Breaches (NDB) scheme commenced, requiring entities to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm, the circumstances of this notification are that CBA engaged with the OAIC voluntarily. There remains a voluntary component of the NDB scheme, in that entities that notify the OAIC are encouraged to provide additional information in relation to their notification that goes beyond their statutory obligations.

In the event that NDB information provided voluntarily were disclosed without the entity's authorisation, I consider that there is a real risk of harm and that other entities may be reluctant to provide additional information. As such, I consider there to be a greater public benefit in encouraging the flow of additional information, and giving assurance to such entities where they do not agree to such information being disclosed, than there is in revealing this information about this particular notification.

On this basis, I find that parts of documents 1 and 4 are conditionally exempt under s 47E(d).

Yours sincerely,



**Cate Cloudsdale**  
**Senior Lawyer**

3 September 2018

## Your review rights

If you disagree with my internal review decision, you may request a review by the Information Commissioner.

However, where it is in the interests of the administration of the FOI Act to do so, the Information Commissioner can refer requests for review directly to the Administrative Appeals Tribunal (AAT).

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 a decision made by her own agency. For this reason, if you apply for IC review of an OAIC decision, the Information Commissioner may decide not to undertake an IC review on the basis that it is desirable that the decision be reviewed by the AAT.

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Once the Information Commissioner has made that decision, you will be able to apply to the AAT. You cannot go directly to the AAT after receiving this notice of decision; you must first make an application for IC review. Information about requesting an IC review is available on the OAIC website on the Requesting a review page: <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

If you are not satisfied with the way we have handled your FOI request, you can complain to us by email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au) or by using the other ways to contact us published on the OAIC website. You can also complain to the Commonwealth Ombudsman. Information about how to do this is available on the Ombudsman website: <http://www.ombudsman.gov.au/>.