



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ19/00188

O Wendell

By Email: foi+request-5260-da701b49@righttoknow.org.au

Your Freedom of Information Request

Dear O Wendell

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act) and received by the Office of the Australian Information Commissioner (OAIC) on 16 August 2019

In your request you seek access to the following:

copies of invoices given to the OAIC by Holding Redlich and HWL Ebsworth in respect of their services related to consideration of whether the OAIC's contractual arrangements with Hotjar comply with the requirements of the Privacy Act.

On 11 September 2019 you advised that you:

consent to the OAIC redacting the personal information of and any other person from any relevant document/invoice who is not/was not an OAIC staff member and/or public servant. I also consent to the OAIC redacting the hourly rates charged by Holding Redlich and HWL Ebsworth and the amount of time spent by those law firms on matters to which the invoices relates.

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 two documents within the scope of your request. There is one invoice sent from Holding Redlich to the OAIC. The other document is an invoice sent from HWL Ebsworth to the OAIC.

I have decided to give you access to both documents in part, with exempt material redacted under ss 47E(d) and 47G(1)(a) of the FOI Act.

I have also made redactions under s 22 where information is irrelevant because you have excluded it from the scope of your request by email dated 11 September 2019.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 16 August 2019
- the FOI Act, in particular sections 22, 47E, 47G and 11A
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines)

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

I have decided that documents 1 and 2 are conditionally exempt in part 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.

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).

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.

As a Commonwealth agency, members of the public are able to make complaints about the OAIC through various means. This includes, but is not limited to, service complaints, complaints to the Commonwealth Ombudsman, public interest disclosures and privacy complaints. The documents at issue concern a complaint made about the OAIC.

Individuals who make complaints do so with the understanding that investigations about their complaints will be conducted in confidence, and that all information obtained during the course of the investigation will not be disclosed.

In order to effectively conduct complaint investigations, it is necessary for the OAIC to openly engage with the relevant parties. Open engagement is imperative during an investigation as the OAIC relies upon the candour and frankness of the disclosure to provide pertinent information that will inform the OAIC's view. As such, the OAIC's ability to work with parties to elicit information, imperative to the investigation, will be adversely affected by the disclosure of the documents.

If the documents at issue were disclosed under the FOI Act, contrary to the parties' expectation of confidentiality, it is likely that the parties will be less likely to make complaints to Commonwealth agencies and parties will be less likely to be frank and participate fully in investigations, if there was an expectation that documents provided during the investigation would be disclosed under the FOI Act.

Therefore, I consider that disclosure of the relevant documents could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC in investigating complaints about the OAIC. I find that the documents at issue are conditionally exempt under s 47E(d) of the FOI Act

Business affairs exemption – s 47G(1)(b)

Under s 47G(1) of the FOI Act, a document is, relevantly here, conditionally exempt if its disclosure under this Act would disclose information ... concerning the business, commercial or financial affairs of an organisation .. in a case in which the disclosure of the information could:

- (a) reasonably be expected to unreasonably affect that.... organisation .. in respect of its lawful business, commercial or financial affairs.

The FOI Guidelines explain that the test 'would, or could reasonably be expected' requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document ([5.16]). The word 'could' 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 ([5.17]).

The FOI Guidelines explain that the term ‘unreasonably’ implies a need to balance public and private interest factors to decide whether disclosure is unreasonable ([6.187]). The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect ([6.188]).

The documents contain specific information about the billing process of both law firms, and if disclosed would reveal details of how the law firms deal with their clients. If information on pages 1, 3 and 6 of the documents was disclosed the law firms could be affected in their dealings with other clients.

On examination of the information contained in the documents, I am satisfied that the information contained in one of the documents constitutes business information of a third party. The disclosure of this information could reasonably be expected to unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

Therefore, I am satisfied that the specific information contained in the invoices is conditionally exempt under s 47G(1)(b) of the FOI Act.

Public interest test – s 11A(5)

Section 11A(5) of the FOI Act provides that access must be given to a conditionally exempt document unless in the circumstances giving access would, on balance, be contrary to the public interest.

In considering where the public interest lies, I must consider the factors that favour disclosure balanced against the factors that favour non-disclosure.

The public interest factors that would favour disclosure is that the disclosure would promote the objects of the FOI Act and promote effective oversight of public expenditure.

Against these factors I must balance any factors against disclosure. The FOI Act does not specify any factors against disclosure, however the FOI Guidelines, at paragraph [6.22], provide a non-exhaustive list of factors against disclosure. This includes factors such as when disclosure could;

- prejudice the competitive commercial activities of a group of individual or businesses
- prejudice the interests of third parties dealing with the government
- prejudice the ability of agencies to engage law firms
- reasonably be expected to prejudice the efficient management of the OAIC.

- reasonably be expected to impede the ability of the OAIC to continue to investigate complaints with a mutual understanding that information obtained during the course of an investigation will not be disclosed
- reasonably be expected to prejudice the OAIC's ability to thoroughly investigate current and future complaints

On balance, I consider that the factors against disclosure outweigh the factors in favour of disclosure. I have therefore decided that it would be contrary to the public interest to give you access to the information that I have found to be conditionally exempt under ss 47E(d), and 47G of the FOI Act.

Please see the following page for information about your review rights and information the OAIC's disclosure log.

Yours sincerely,



Megan McKenna
FOI Officer
Legal Services

15 October 2019

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, 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 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, 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. More information is available on the [Access our information](#) page on our website.

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 would be unreasonable to publish. As a result, the documents will be published on our [disclosure log](#) shortly after being released to you.



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Appendix A: Schedule of documents – Freedom of information request no FOIREQ19/00188

Document No	Date	Description	Decision on Access	Exemption	Page
1.	31 May 2019	Invoice	Exempt in part	ss 47E(d) and 47G	1-3
2.	31 July 2019	Invoice	Exempt in part	ss 47E(d) and 47G	4-6