



Our reference: FOIREQ20/00187

Julie

By email: foi+request-6746-ebedaa1a@righttoknow.org.au

Your freedom of information request

Dear Julie

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 on 23 September 2020.

In your request you seek access to the following:

copy of that briefing book or pack used by the Information Commissioner on Tuesday 3 2020 (when she appeared before the Senate Legal and Constitutional Affairs Legislation Committee for the 2019-20 Additional Budget Estimates).

On 15 October 2020, Ms Angela Wong advised you that a practical refusal existed under s 24AA of the FOI Act, as processing your request would substantially and unreasonably divert the resources of the OAIC.

Ms Wong gave you an opportunity to consult her to revise your request to remove the practical refusal reason and asked you to confirm whether you wanted to revise your request, withdraw your request or whether you did not want to revise your request.

On 22 October 2020 you responded seeking:

a schedule of the documents...

On 28 October 2020, Ms Wong provided a list of index tabs for the brief provided to the Commissioner for Additional Senate Estimates Hearing on 3 March 2020 to assist you with revising the scope of your request.

On 2 November 2020, you responded and revised the scope of your request to:

(In order of preference, up to the limit of that which may otherwise be voluminous):

*Corporate Folder - Documents 1-6, 9, & 12

*Privacy Folder - Documents 1-3, 5, 7-8, 10, 12, 17-19, 21, 25

* FOI Folder - Nil

* Folder B - Nil

I have consulted with the Information Commissioner during the processing of your request. The Information Commissioner has confirmed that document one listed in the corporate folder in the index provided to you on 28 October 2020 was not included in the briefing pack used by the Information Commissioner on Tuesday 3 March 2020 when she appeared before the Senate Legal and Constitutional Affairs Committee. Accordingly, this document is out of the scope of your request.

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 20 documents within the scope of your request. I have decided to release 9 documents in full and refuse access to 11 documents in full and part.

A schedule describing the documents and the decision I have made on each document is at Appendix A.

Reasons for decision

Material taken into account

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

- your freedom of information request of 23 September 2020
- your revised scope of 2 November 2020
- the FOI Act, particular at ss 11A(5), 37, 47E(d) and 47F
- 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 (the FOI Guidelines), in Part 6.

Investigation of a breach of law – s 37(1)(a)

Under s 37(1)(a) of the FOI Act, a document is exempt if its disclosure would, or could reasonably be expected to, prejudice the conduct of a current investigation.

Section 37(1)(a) of the FOI Act states:

37 Documents affecting enforcement of law and protection of public safety

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
 - (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

The FOI Guidelines at [5.86] provides:

Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in a particular instance’, it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.

Additionally, at [5.87] the FOI Guidelines further explains:

The exemption is concerned with the conduct of an investigation. For example, it would apply where disclosure would forewarn the applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body – putting the investigation in jeopardy. The section will not apply if the investigation is closed or if it is being conducted by an overseas agency.

In order to determine whether disclosure of the documents would, or could reasonably be expected to prejudice the conduct of a current investigation, the FOI Guidelines at [5.16] - [5.17] notes:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

The use of the word ‘could’ in this qualification 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.

Under s 40(2) of the *Privacy Act 1988* (Cth) (the Privacy Act), the Information Commissioner has the power to investigate an act or a practice if the act or practice may be an interference with the privacy of an individual or a breach of Australian Privacy Principle 1, and the Commissioner thinks it is desirable that the act or practice be investigated.

The document at issue pertains to a s 40 investigation that is currently on foot. The relevant case officers are in the process of investigating the matter, and the outcome of the investigation has not yet been determined. Releasing the document at issue will prejudice the conduct of the current s 40 investigation.

Furthermore, I consider that disclosure of the documents would prejudice the current investigations if preliminary material were disclosed before an investigation has been finalised. I consider it likely that the documents and the parties involved, will be subject to scrutiny over matters which have not been thoroughly investigated. It is likely that as a result, the relevant parties would be discouraged from actively participating in the current investigation.

In order to effectively conduct investigations under s 40 of the Privacy Act, it is necessary for the OAIC to openly engage with the parties subject to the inquiry. Open engagement is important during an investigation as the OAIC relies in part upon the candour and frankness of the relevant entity to provide pertinent information that will inform the OAIC's view. As such, the OAIC's ability to work with parties to elicit information, important to the investigation, will be adversely affected by the disclosure of the document.

Accordingly, I have decided that the document at issue is exempt under s 37 of the FOI Act. I consider that disclosure would, or could reasonably be expected to, prejudice the conduct of the current s 40 of the Privacy Act investigation.

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

I have decided that 9 documents at issue are conditionally exempt in full and part under s 47E(d) of the FOI Act.

The material that I have found to be conditionally exempt under s 47E(d) can be described as information in relation to:

- resourcing of the Office of the Australian Information Commissioner
- inter-agency functions
- preliminary inquiries and ongoing privacy investigations, and
- ongoing privacy assessments.

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.

The OAIC is an independent statutory agency within the Attorney-General’s portfolio, established under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act). The OAIC comprises the Australian Information Commissioner and the Privacy Commissioner (both offices currently held by Angelene Falk), the FOI Commissioner (office currently vacant), and the staff of the OAIC.

Due to the nature of the documents at issue, I have had regard to the Australian Information Commissioner’s privacy powers and the Australian Information Commissioner’s regulatory powers, under the AIC Act and the Privacy Act.

Relevant Administrative Appeals Tribunal decisions

In making this decision I have considered decisions of the Administrative Appeals Tribunal (AAT) which discuss the s 47E(d) exemption.

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’. Deputy President Forgie explains that the ‘ordinary meanings of the word “operation” in this context’ includes ‘an act, method or process of working or operating.’¹

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.²

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 investigation process.³

Consistently, 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.⁴

Consideration

In deciding whether disclosure of the documents requested in this case would, or could reasonably be expected to, have a substantial adverse effect on the OAIC’s

¹ *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 [119].

² *FOI Guidelines* [6.121] and [6.122].

³ *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) [24].

⁴ *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [103].

operations, I have considered the functions and responsibilities of the Information Commissioner and the OAIC.

The Office of the Australian Information Commissioner is established under s 5 of the AIC Act. Section 5 also provides that the Information Commissioner is the Head of the OAIC for the purposes of the *Public Service Act 1999* (Cth). Section 5 further provides that for the purposes of the *Public Governance, Performance and Accountability Act 2019* (Cth) the Information Commissioner is the accountable authority of the OAIC.

The Information Commissioner 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 AIC Act and 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; conducting privacy assessments of APP entities; and regulating the Notifiable Data Breaches (NDB) scheme are among the Information Commissioner's primary functions.

In this case, the documents at issue include information about the resourcing of the OAIC, inter-agency functions, and assessments, investigations and preliminary inquiries undertaken by the Information Commissioner to determine whether to commence investigation.

As Head and Accountable Authority of the OAIC the Information Commissioner is responsible for the resourcing and financial management of the OAIC. Disclosing information that relates to these functions at this time could reasonably be expected to adversely affect the proper and efficient conduct of the operations of the OAIC.

In the exercise of statutory functions under the AIC Act and Privacy Act, the Information Commissioner participates in inter-agency consultation and cooperation. Disclosing information that includes information received from other agencies relating to the exercise of statutory functions could have a substantial adverse effect on the Information Commissioner's inter-agency statutory functions.

During the assessment, investigation and preliminary inquiry processes, the OAIC requires third parties to actively participate by making submissions and participating in conferences. Disclosing information that do not represent the Commissioner's concluded view would have the effect of agitating issues in public before the completion of the investigation, preliminary inquiry or assessment which would allow the Commissioner to reach a final view. Disclosing such documents at this time is reasonably likely to disrupt or prejudice the ongoing investigation, preliminary inquiry or assessment and potentially jeopardise the outcome of the investigation,

preliminary inquiry or assessment which would have a substantial and adverse effect on the OAIC's operations.

Disclosing documents that include information on assessments, investigations and preliminary inquiries to individuals not party to these processes could also have an adverse impact on the reputation of those APP entities that are the subject of the OAIC's regulatory processes. If the documents were disclosed, contrary to the parties' expectation of confidentiality, it is likely that APP entities will be less likely to participate fully and frankly in the OAIC's assessment, investigation and preliminary inquiry processes, which would result in prejudice to these processes. This would ultimately circumvent the OAIC's regulatory function.

It is my view, based on the factual context, character and content 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 the documents at issue 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 one document is conditionally exempt in part under s 47F of the FOI Act.

The material that I have found to be conditionally exempt under s 47F can be described as information in relation to superannuation entitlements of an OAIC staff member.

Section 47F of the FOI Act conditionally exempts documents 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.

In the FOI Act, personal information has the same meaning as in the *Privacy Act 1988* (Cth) (Privacy Act). Under s 6 of the Privacy Act, 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

I am satisfied that for the purposes of the FOI Act, the superannuation entitlements of an OAIC staff member is personal information.

In determining whether disclosure of personal information would be unreasonable, s 47F(2) of the FOI Act requires me to have regard to the following matters:

- the extent 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 I consider relevant.

I consider that the release of the superannuation entitlements of an OAIC staff member would be an unreasonable disclosure of personal information. The relevant information is not well-known nor available on publicly accessible sources. Therefore, the information is conditionally exempt under s 47F of the FOI Act.

I am satisfied that the document at issue is conditionally exempt under s 47F of the FOI Act. I will consider the public interest in relation to this conditionally exempt document below.

The public interest test – s 11A(5)

An agency cannot refuse access to conditionally exempt documents 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 (Freedom of information)* [2017] AATA 269, Deputy President Forgie explained that: ⁵

... 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.

⁵ *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

In this case, I must consider whether, disclosure of the information at this time 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 impede the flow of information to the Information Commissioner and OAIC in its capacity as a privacy regulator
- reasonably be expected to prejudice the Information Commissioner's and 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 Information Commissioner's and OAIC's ability to obtain and deliberate regarding sensitive information.

In this case I consider that the public interest factor against disclosure is that disclosure would reasonably be expected to prejudice the efficient management of the regulatory function. I have placed significant weight on this factor as in relation to ongoing investigations and assessments, no finalised position has been reached. I have also considered that disclosure would reasonably be expected to prejudice the efficient management of the OAIC's regulatory function if participants are less likely to actively participate in the regulatory process such as by responding to preliminary inquiries, the Information Commissioner's regulatory function with respect to conducting investigations will be prejudiced.

I have also considered that disclosing an individual's superannuation entitlements in circumstances where those details have not been previously disclosed, would be an interference with an individual's right to privacy.

In this case, I am satisfied that the public interest factors against disclosure outweigh the public interest factors in favour of disclosure.

I have decided that at this time, giving you full access to the documents, which I have found to be conditionally exempt under s 47E(d) and 47F of the FOI Act, would, on balance, be contrary to the public interest.

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

Yours sincerely

Emma Liddle
Acting Principal Lawyer
6 November 2020

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 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 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.