



Our reference: FOIREQ20/00213

Attention: Julie

By Email: foi+request-6862-1b945ec6@righttoknow.org.au

Your Freedom of Information Request – FOIREQ20/00213

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 Commissioner (OAIC) on 2 November 2020.

In your request you seek access to the following:

“I wish to obtain access (for the purposes of the Freedom of Information Act 1982) to official information held by the Office of the Australian Information Commissioner. The official information sought may not be available in discrete form, in the written documents of the agency, therefore I request the agency to produce a written document containing the information in discrete form by use of computer and other equipment to retrieve and collate the stored official information sought.

Please provide a listing of all "Commissioner Brief" documents provided to the Australian Information Commissioner since 1 July 2020 (giving date, number of pages, and purpose of brief), and provide copy of the first page of each "Commissioner Brief".

On 17 November 2020, we sought to clarify the scope of your request and request that you confirm whether you seek only “Commissioner Briefs” relating to Senate Estimates (in line with the usual usage within the OAIC) or whether you intend the scope of your request to include *all* written briefs to the Commissioner since 1 July 2020 on *all* subjects.

On 23 November 2020, you clarified the scope of your request to include “documents that are titled (at least in part) "Commissioner Briefs"”.

Decision

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

In relation to the first part of your request for “a listing of all "Commissioner Brief" documents provided to the Australian Information Commissioner since 1 July 2020 (giving

date, number of pages, and purpose of brief)", I have, in accordance with s17 of the FOI Act, created and granted access in full to one (1) document that most closely meets the scope of your request. The document released to you in accordance with the FOI Act is attached.

In relation to the second part of your request for a "*copy of the first page of each "Commissioner Brief"*" provided to the Australian Information Commissioner since 1 July 2020, I have identified 52 documents within the scope of your request. I have decided to release 44 documents in full and refuse access to eight [8] documents in part or full.

A schedule describing the documents and the access decisions I have made is attached to this decision.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 2 November 2020;
- your revised freedom of information request dated 23 November 2020;
- the FOI Act, in particular sections 11A(5), 17 and 47E(d);
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), specifically paragraphs [3.204] – [3.210] and [6.120] – [6.123];
- searches conducted and advice provided by the teams responsible for providing organisational support to the Commissioner and preparing and collating Senate Estimates Briefs.

Information stored in electronic form - s 17

In relation to the first part of your request for "a listing of all "Commissioner Brief" documents provided to the Australian Information Commissioner since 1 July 2020 (giving date, number of pages, and purpose of brief)", at the time of your request, the information was not available in a discrete written form.

I have considered whether the Office of the Australian Information Commissioner (OAIC) can create a document in accordance with the section 17 of the FOI Act. Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded.

I have created one (1) document from the readily available information held by the OAIC, that most closely meets your request. This document has been incorporated into the

“Schedule of documents” describing the documents and the access decisions I have made and is attached to this decision.

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

In relation to the second part of your request for a “*copy of the first page of each “Commissioner Brief”*” provided to the Australian Information Commissioner since 1 July 2020, I have interpreted your request broadly to include documents with the words “Commissioner Briefs” included in the title on the face of the document.

I have identified 52 documents within the scope of your request. I have decided that 8 of these documents are conditionally exempt in part or full 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:

- inter-agency functions;
- preliminary inquiries or ongoing privacy investigations;
- commentary on the operation and effectiveness of legislation including the Privacy Act and the FOI Act; and

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).

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 *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707, Deputy President Forgie considered 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 operations².

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 process³.

In *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

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].

proper and efficient conduct of ASIC's operations. I am also satisfied that the adverse effect would be substantial⁴.

Functions and powers of the OAIC and Information Commissioner

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.

Due to the nature of the documents at issue, I have had regard to the Australian Information Commissioner's privacy powers, freedom of information powers and regulatory powers, under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act), the Privacy Act and the FOI Act.

The OAIC is an independent statutory agency within the Attorney-General's portfolio, established under the 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.

The OAIC 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 and by other legislation containing privacy protection provisions. Part IV Division 2 of the Privacy Act sets out the functions of the Information Commissioner, which include guidance related functions, monitoring related functions, and advice related functions. The advice related functions of the Information Commissioner include providing advice to a Minister about any matter relevant to the operation of the Privacy Act, and providing reports and recommendations in relation to legislative or administrative action in the interests of the privacy of individuals. 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 addition, under the AIC Act and the FOI Act, the Information Commissioner has a range of freedom of information functions and powers, including assessing and managing vexatious

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

declaration applications made by Commonwealth agencies, making decisions on Information Commissioner reviews, and investigating and reporting on freedom of information complaints.

Under the AIC Act, the Commissioner's functions include making recommendations to the Minister for legislative change to the FOI Act:

8 The freedom of information functions are as follows:

...

(f) making reports and recommendations to the Minister about:

(i) proposals for legislative change to the Freedom of Information Act 1982 ;

or

(ii) administrative action necessary or desirable in relation to the operation of that Act;

Relevant to the exercise of the Commissioner's power to report and recommend legislative change or administrative action, the FOI Regulatory Action Policy further explains:

The factors the Information Commissioner takes into account in exercising the power to report and recommend legislative change or administrative action may include:

- the objects of the FOI Act
- the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
- any other factors which the Information Commissioner considers relevant in the circumstances

The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:

- stakeholder engagement
- reports of FOI statistics by agencies
- trends in applications for IC review and FOI complaints, and
- other sources of relevant information in the circumstances

The FOI Regulatory Action Policy further explains that the Commissioner seeks to work in partnership with agencies, ministers and regulators to promote access to information:

The Information Commissioner works with agencies, ministers and regulators (including other information commissioners) to promote access to information through regulatory action and participation in domestic and international networks.

The Information Commissioner will seek to work in partnership with agencies, ministers and regulators to promote access to information, recognising the practical and resource advantages in doing so.

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 operations, I have considered the functions and responsibilities of the Information Commissioner as set out above.

As noted above, in this case, the documents at issue include information about:

- inter-agency functions;
- preliminary inquiries or ongoing privacy investigations;
- commentary on the operation and effectiveness of legislation including the Privacy Act and the FOI Act; and

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.

In relation to disclosing material that can be described as commentary on the operation and effectiveness of legislation including the FOI Act, disclosing information that relates to the Commissioner's function to provide recommendations to the Minister at this time, may result in the disclosure of information received from other agencies or ministers in a different context that may have been provided in confidence. Disclosing such information could reasonably be expected to adversely affect the proper and efficient conduct of the operations of the OAIC by having a substantial adverse effect on the Information Commissioner's ability to work in partnership with agencies, ministers and regulators to promote access to information and by inhibiting agencies, minister and regulators engaging with the OAIC candidly and providing fulsome information relevant to the Commissioner's statutory functions in confidence.

Disclosing information that does not represent the Commissioner's considered recommendation on legislative reform would also have the effect of agitating issues in public before the Commissioner engages in the process outlined in the Regulatory Action Policy and decides whether or not to exercise the power to report and recommend legislative change or administrative action. The Regulatory Action Policy explains that the Commissioner may use a range of sources to inform her consideration of whether to exercise this power including stakeholder engagement. Disclosing such documents is reasonably likely to disrupt or prejudice processes such as stakeholder management and potentially jeopardise the outcome of the Commissioner's consideration on whether or not to exercise this power. This would have a substantial and adverse effect on the OAIC's operations, ultimately circumventing the Commissioner's regulatory function with respect to reporting and recommending legislative change or administrative action to the minister.

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 8 documents 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.

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 that⁵:

... 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.

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 and freedom of information 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

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

Information Commissioner's regulatory function with respect to conducting investigations will be prejudiced.

In addition, 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 of the Commissioner with respect to FOI functions. I have also considered that disclosure would reasonably be expected to prejudice the efficient management of the OAIC's regulatory function if regulated entities are less likely to actively participate in the regulatory process such as by engaging with the OAIC and working in partnership with the Commissioner to promote access to information. In this way, the Information Commissioner's regulatory function with respect to FOI will be prejudiced.

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) of the FOI Act, would, on balance, be contrary to the public interest.

Conclusion

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

Yours sincerely



John Molloy
Senior Lawyer

2 December 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_

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.