



Our reference: FOIREQ21/00007

Attention: Julie

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

Internal review decision – Freedom of Information Request – FOIREQ21/00007

Dear Julie,

I am writing to advise you of my decision in response to your application for internal review of a decision, made under the *Freedom of Information Act 1982* (the FOI Act) on 14 January 2021, by a delegate of the Information Commissioner.

An internal review decision is a ‘fresh decision’ made by a person other than the person who made the original decision (s 54C of the FOI Act).

Scope of your application for internal review

On 7 December 2020, you requested access to:

For the purposes of the Freedom of Information Act, I request full copy of documents listed as numbers 2, 9, 17, 19, 20, 21, 26, 27, 28, 29, 30, 32, 33, 36, 37, 40, 46, 47, 49 & 50 in the Schedule of Documents to FOIREQ20/00213.

On 6 January 2021, the delegate granted you full access to 14 documents and refused access to 6 documents in part (documents numbered 6, 8, 10, 11, 12 and 18).

On 14 January 2021, you applied for internal review of the initial decision. In your application you said:

I am writing to request an internal review of Office of the Australian Information Commissioner's handling of my FOI request 'Commissioner Briefs'.

The breadth of exemptions, given the scope of the documents they apply to (especially redactions of what are statutory reporting statistics), is excessive and needs review.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.righttoknow.org.au%2Frequest%2Fcommissioner_briefs&data=04%7C01%7Clegal%4

<https://www.oaic.gov.au/7Cdc0f28b670ed40d910c608d8b83322b0%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637461877196830695%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6IjEhaWwiLCJXVCi6Mn0%3D%7C2000&data=DGZ36YvLA55HUYzLN0DfqQXh7CiTmQXwzBq7i1j2C4Q%3D&:reserved=0>

On 14 January 2021, you submitted:

In relation to the Internal Review, it is relevant to note the documents in scope are briefs for the Information Commissioner's appearance before Senate Estimates and as such (and are often provided in a possible question and answer format) are created with the intention and knowledge that their contents may be disclosed in a public recorded forum (unless explicitly flagged otherwise).

As such, the original delegate has erred with respect to most of his exemption claims, given the primary purpose of these documents. It is apparent that only one or two of the redactions actually falls into material that was not intended for potential disclosure during estimates.

When you follow this link, you are referred to two related requests regarding 'Commissioner Briefs', FOIREQ20/00213 and FOIREQ20/00232. On 28 January 2021, the OAIC wrote to you to seek to confirm which decision you seek to review. We did not receive a response to this email. However, after closer consideration of the correspondence referred to in the link provided with your request for internal review, I consider your request to be for internal review of the OAIC's FOI decision FOIREQ20/00232. This decision was made on 6 January 2021.

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 6 documents within the scope of your internal review request. I have decided to refuse access to 6 documents in part. These were identified as documents 6, 8, 10, 11, 12 and 18 in the schedule provided with the decision of 6 January 2021.

A schedule describing the documents and the access decisions I have made is attached to this decision. This schedule and the documents provided with this decision retain the original document and page numbers to assist you to identify the documents considered and decision made on each document.

Material taken into account

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

- the decision under review and the documents identified as falling within scope of your request in that decision
- your application for internal review of 14 January 2021, and the terms of your freedom of information request dated 7 December 2020
- the FOI Act, in particular ss 11A, 47C and 47E(d), and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

Documents subject to deliberative processes (s 47C)

I have decided that material in 3 documents is conditionally exempt in part under s 47C of the FOI Act.

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

- consultation, opinion or advice about draft legislation
- draft findings of a report not yet published, and
- opinion, advice or recommendation on the operation and effectiveness of legislation including the FOI Act.

Under s 47C of the FOI Act, a document is conditionally exempt if it contains deliberative matter.

The FOI Guidelines [6.52-6.53] explain that deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).

Deliberative matter does not include operational information or purely factual material (s 47C(2)).

The FOI Guidelines [6.52-6.88] also explain that the main requirements of this public interest conditional exemption are that a document:

- contains or relates to ‘deliberative matter’
- was prepared for a ‘deliberative purpose’

- the material not is 'purely factual' or non-deliberative, and
- it would not be 'contrary to the public interest' to give access at this time (s 11A(5)).

I have reviewed the material as described above and consider that it is deliberative matter that does not include operational information or purely factual material. I am satisfied that the material is deliberative for the purposes of s 47C of the FOI Act. I will consider the public interest in relation to this conditionally exempt material below.

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

I have decided that material in 4 documents is conditionally exempt in 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:

- the operations of other agencies obtained through inter-agency consultation and cooperation
- investigations and/or complaints, and
- commentary on the operation and effectiveness of legislation including 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).

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 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 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

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].

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

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

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.

Further s 29 of the AIC Act imposes strict conditions on the collection, use and disclosure of information acquired in the course of performing information commissioner, privacy and freedom of information functions.

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:

- the operations of other agencies obtained through inter-agency consultation and cooperation
- investigations and/or complaints, and
- commentary on the operation and effectiveness of legislation including the FOI Act.

In the exercise of statutory functions under the AIC Act, Privacy Act and Freedom of Information 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.

Disclosing documents that include information on complaints, investigations and preliminary inquiries to individuals not party to these processes before these matters have been finalised, may be prohibited under s 29 of the AIC Act. Further, it is likely that if the material is disclosed, contrary to the parties' expectation of confidentiality, it is likely that agencies 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 material in 4 documents is conditionally exempt under s 47E(d) of the FOI Act. I will consider the public interest in relation to this conditionally exempt material 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.

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 OAI in its capacity as an FOI and privacy regulator
- reasonably be expected to prejudice the Information Commissioner's and OAI's ability to obtain confidential information in the future
- reasonably be expected to prejudice the Information Commissioner's and OAI's ability to obtain and deliberate regarding sensitive information.

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 access to the material, which I have found to be conditionally exempt under ss 47C and 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 OAI's disclosure log.

Yours sincerely

Emma Liddle
Director, Legal

15 February 2021

If you disagree with my decision

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.