



Our reference: FOIREQ20/00245

Mr Warrick Alexander

By email: foi+request-6988-2b414e7a@righttoknow.org.au

Your Freedom of Information Request – FOIREQ20/00245

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 20 December 2020.

Scope of your request

In your email of 20 December 2020, you sought access to the following:

I would like to see all data breach notifications to date (including all email correspondence and associated attachments to date) lodged by or with respect to 1Form (REA-Group), including but not limited to breaches pertaining to:

- *Shead Property*
- *Raine and Horne Green Square*
- *Metropole Property Management.*

On 24 December 2020, I wrote to you and acknowledged receipt of your FOI request.

On 14 January 2021, I wrote to you informing you that the scope of your request included documents which contain information concerning an organisation’s business or professional affairs and third party personal information, and the OAIC was required to consult the individuals and organisation under ss 27 and 27A of the FOI Act before making a decision to release the documents. No document containing your name or other personal information was disclosed as part of this process.

The period for processing your request was extended by 30 days to allow time to consult pursuant to s 15(6) of the FOI Act.

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 45 documents within the scope of your request. I have decided to grant you access to 45 documents in part, with the redaction of material found to be exempt under ss 45, 47E(d), 47F and 47G of the FOI Act.

My reasons for this decision follow.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 20 December 2020
- the documents at issue
- the FOI Act, in particular ss 11A(5), 45, 47E(d), 47G and 47F
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), to which regard must be had in performing a function or exercising a power under the FOI Act.

Section 45 – Material obtained in confidence exemption

The documents that I have identified within scope of your request can be characterised as data breach notification reports made to the OAIC by third parties in Notifiable Data Breach (NDB) forms. I have also identified file notes from the OAIC’s case management system, Resolve, and email correspondence from third parties to the OAIC.

I have decided that material in 17 documents is exempt in part under s 45 of the FOI Act.

The material that I have described above and have identified within the scope of your request is information that has been provided to the OAIC in confidence and has not been released publicly at this time.

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence.

The FOI Guidelines explain the elements of the cause of action for breach of confidence at [5.159]:

To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- It must be specifically identified
- It must have the necessary quality of confidentiality
- It must have been communicated and received on the basis of a mutual understanding of confidence
- It must have been disclosed or threatened to be disclosed, without authority

- Unauthorized disclosure of the information has or will cause detriment [footnote omitted].

The FOI Guidelines provide at [5.162]:

For the information to have the quality of confidentiality it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality. For example, information that is provided to an agency and copied to other organisations on a non-confidential or open basis may not be considered confidential [footnote omitted].

Part two of the NDB form provides a check box option for an entity to request that the information provided in part two of the form is held by the OAIC in confidence.

The form states:

The OAIC will respect the confidence of commercially or operationally sensitive information provided voluntarily in support of a data breach notification, and will only disclose this information after consulting with you, and with your agreement or where required by law.

Where notifying entities have requested that the information provided in part two of the NDB form is held by the OAIC in confidence, by checking the aforementioned check box, I am satisfied that the information is specifically identified, has the necessary quality of confidentiality and was received on the basis of a mutual understanding of confidence. I am also satisfied that unauthorised disclosure of this information would cause detriment.

Therefore, I find that material in these document is exempt under s 45 of the FOI Act.

Section 47F – Conditional Exemption for Personal Information

I have decided that material in 42 documents within scope of your request is also conditionally exempt under s 47F of the FOI Act.

The material that I have found to be conditionally exempt under s 47F can be described as the names and contact details of third party individuals.

Section 47F of the FOI Act conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any 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 the name and contact details of individuals is personal information for the purposes of the FOI Act.

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 to which 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.

The documents contain the names and contact details of individuals who have communicated with the OAIC in relation to data breach notifications. I am satisfied that disclosure of this material would be an unreasonable disclosure of personal information.

Therefore, I am satisfied that the names and contact details of the third party individuals who have communicated with the OAIC in relation to data breach notifications are conditionally exempt under s 47F of the FOI Act.

Business affairs conditional exemption – s 47G(1)(a)

I have decided that material in 44 documents within scope of your FOI request is conditionally exempt in part under s 47G of the FOI Act.

The material that I have found to be conditionally exempt under s 47G can be described as information released to the OAIC as part of the submission of data breach notification reports by third parties. This includes information that is not publicly available about how third parties detect and respond to data incidents and security protocols that have been implemented.

A document is conditionally exempt under s 47G(1)(a) of the FOI Act where disclosure would disclose information concerning a person in respect of his or her business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking (business information), where the disclosure of the information would, or could reasonably be expected to, unreasonably affect the person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking 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 document contains information pertaining to the operation of third parties’ security systems that is not in the public domain. I consider that release of this information could reasonably be expected to compromise IT systems and increase susceptibility to a cyberattack.

I find that release of the information could reasonably be expected to have an unreasonably adverse effect on the third party in respect of its business, commercial or financial affairs as disclosure of the information could make the third party vulnerable to future data breaches. In addition to this, the third party’s competitors may not employ similar security measures. The release of the information could reasonable be expected to have an unreasonable adverse effect on that third party.

Therefore, I am satisfied that the material pertaining to the operation of the IT systems of the third party is conditionally exempt under s 47G(1)(a) of the FOI Act.

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

I have decided that material in 7 documents within scope of your request is also conditionally exempt in part under s 47E(d) of the FOI Act.

OAIC’s internal assessment processes

The material that I have found to be conditionally exempt under s 47E(d) can be described as information about the way in which the OAIC assesses NDBs reported under the NDB scheme and recommendations and decisions made resulting from this assessment.

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). The OAIC comprises the Australian Information Commissioner and the Privacy Commissioner (both offices currently held by Angelene Falk) 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 regulatory functions and powers under the Privacy Act, and the performance of those functions and exercise of those powers under the Notifiable Data Breaches Scheme (NDB scheme).

The OAIC has a number of roles under the NDB scheme in the Privacy Act. These include:

- receiving notifications of eligible data breaches
- encouraging compliance with the scheme, including by handling complaints, conducting investigations, and taking other regulatory action in response to instances of non-compliance
- offering advice and guidance to regulated entities, and providing information to the community about the operation of the scheme.

The NDB scheme, which is facilitated by the OAIC is a key contributor to safeguarding the privacy of individuals under the Privacy Act. In order for the OAIC to administer this scheme and ensure that organisations are in compliance with this, we need to conduct our assessment processes to ensure organisations are in compliance. If the OAIC were to release

the contents of our NDB assessment processes, this could jeopardise the integrity of our processes. As such, it is my view that the release of documents related to the OAIC's NDB assessment process at this time may have a substantial and adverse impact on our ability to administer the NDB scheme.

I find that release of information about the way in which the OAIC assesses NDBs reported under the NDB scheme and recommendations and decisions made resulting from this assessment could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC's NDB scheme and is conditionally exempt from disclosure under s 47E(d) of the FOI Act.

OAIC's network address

I have decided that material is conditionally exempt from disclosure under s 47E(d) of the FOI Act. The relevant material that I have found to be conditionally exempt is the network address for the OAIC's IT system.

In the Information Commissioner review (IC review) case of *'AW' and Australian Taxation Office (Freedom of information)* [\[2014\] AICmr 1](#) ('AW'), the then Freedom of Information Commissioner considered the decision by the Australian Taxation Office (ATO) to exempt user IDs under s 47E(d) of the FOI Act. The user IDs are used by ATO staff to access the ATO's IT system. The Commissioner found that disclosing the user IDs 'would have an adverse effect on the security of the ATO's IT systems, and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ATO'.

In a series of subsequent IC review decisions, the former Australian Information Commissioner agreed with the reasoning given by the Commissioner in 'AW' to find that user IDs used by ATO staff to access the ATO's IT system are exempt under s 47E(d).

In deciding whether disclosure of the network address of the OAIC's IT system, would or could reasonably be expected to, have a substantial adverse effect on the operation of the OAIC, I have had regard to the OAIC's functions and responsibilities.

The OAIC collects and stores a range of personal and financial information about members of the public. The network address contains information about the OAIC's IT system (including the network location and storage of information). I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC. The impact of any compromise to the safety and security of the OAIC's information systems would result in a serious adverse impact on the functions and responsibilities of the OAIC.

I consider that the disclosure of the network address of the OAIC's computer system could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations.

I have decided that the network address of the OAIC's IT system is conditionally exempt from disclosure under s 47E(d) of the FOI Act.

Section 11A(5) – Public Interest Test

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.

The public interest factors that would favour disclosure is that the disclosure would inform debate on a matter of public importance.

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:

- reasonably be expected to prejudice the protection of an individual's right to privacy
- reasonably be expected to impede the flow of information to the OAIC in its capacity as a privacy regulator
- reasonably be expected to prejudice the OAIC's ability to obtain confidential information in the future and to engage effectively with regulated entities
- reasonably be expected to impede the administration of justice generally, including procedural fairness.

In the circumstances of this case, one public interest factor that weighs against disclosure of the third party personal information is that disclosure could reasonably be expected to interfere with an individual's right to privacy. I have placed significant weight on this factor as I consider that the specific harm in disclosing an individual's name and contact details without agreement, and where this information has not been previously disclosed, would be an interference with an individual's right to privacy.

I have also considered that disclosure of information pertaining to the operation of a third party's security systems that is not in the public domain would unreasonably adversely affect the business affairs of the third party for the reasons above. Disclosure of this information in these circumstances would reasonably be expected to impede the flow of information to the OAIC in its capacity as a privacy regulator, and reasonably be expected to prejudice the OAIC's ability to obtain confidential information in the future and to engage effectively with regulated entities. This would reasonably be expected to prejudice the efficient management of the OAIC's regulatory function if entities are less likely to voluntarily provide fulsome information to the OAIC with respect to their responses following a notifiable data breach.

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

On balance, I find that the factors against disclosure, outweigh the factors in favour of disclosure. I have determined that disclosing material that is conditionally exempt under ss 47F, 47G(1)(a) and 47E(d) of the FOI Act would be contrary to the public interest. Therefore, this material is exempt from disclosure under ss 47F, 47G(1)(a) and 47E(d) of the FOI Act.

Release of the document

Because a relevant third party was consulted in the making of this decision and has objected to the release of the documents, I am required, under ss 27(6) and 27A(6) of the FOI Act, to advise them of my decision and provide them with an opportunity to seek:

- internal review of my decision, or
- review of my decision by the Information Commissioner.

The third party has 30 days from the date they are notified of my decision in which to seek review. As a result the document cannot be released to you until this time has expired, or any internal review or appeal has been completed and my decision to release the document is upheld or confirmed.

Yours sincerely

Joseph Gouvatsos
Lawyer

18 February 2021

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 it would be unreasonable to publish.

The document I have decided to release to you does not contain business or personal information that would be unreasonable to publish. As a result, the document will be published on our disclosure log shortly after being released to you.