



Our reference: FOIREQ21/00005

Julie C

By email: [foi+request-7007-e99c41c2@righttoknow.org.au](mailto:foi+request-7007-e99c41c2@righttoknow.org.au)

## Your Freedom of Information Request – FOIREQ21/00005

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 7 January 2021.

In your request you seek access to the following:

*“...a copy of the enquiries that the OAIC made to Uber about the matter reported on The Guardian on 30/10/20 (refer to [## Decision](https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.theguardian.com%2Ftechnology%2F2020%2Foct%2F30%2Fprivacy-concerns-as-uber-eats-drivers-start-taking-photos-of-id-for-alcohol-orders&data=04%7C01%7Clegal%40oaic.gov.au%7Cd8301db3e96446caeb5408d8b2d1ec9c%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637455962732932154%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLiAwMDA%7CjoiV2luMzliLjB%7Cil6lk1haWw%7CjXVCI6Mn0%3D%7C2000&data=VKLU%2BwsmEzNXpDWdw%2F5KAu%2F4235nU8%2B%2FCP%2BUVWuPqe0%3D&reserved=0).”</a></i></p></div><div data-bbox=)*

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

I have identified 4 documents within the scope of your request. I have decided to refuse you access to the documents in full.

## Reasons for decision

Material taken into account

- your freedom of information request of 7 January 2021
- the documents at issue
- the FOI Act, particular at ss 11A(5) and 47E(d)

- 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 Parts 5 and 6.

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

I have decided that the documents at issue are conditionally exempt from disclosure under s 47E(d) of the FOI Act.

As discussed in the FOI Guidelines and in IC review cases, for a document to be conditionally exempt under s 47E(d) of the FOI Act, it would need to be shown that disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The FOI Guidelines at [6.101] and [6.103] explain:

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.

...

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).

The FOI guidelines explain that ‘substantial adverse effect’ means that the expected effect needs to be both ‘substantial’ and ‘adverse’. The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’.

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.’<sup>1</sup>

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

In deciding whether disclosure 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 OAIC.

The OAIC 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 *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, is one of the OAIC's primary functions.

In particular, I have had regard to the regulatory powers conferred on the Information Commissioner by the Privacy Act and other legislation, which includes investigation and enforcement powers.

The documents at issue relate to Uber Technologies Inc (Uber) regarding their compliance with the Australian Privacy Principles (the APPs) under the Privacy Act. As this is an open matter, the release of the documents at issue at this time is reasonably likely to disrupt or prejudice the OAIC's ability to exercise its regulatory functions. I consider that at this time, disclosure of this information could reasonably be expected to have an adverse substantial impact on the proper and efficient conduct of the OAIC's operations.

In making this finding, I have considered decisions of the Administrative Appeals Tribunal (AAT) which discuss the s 47E(d) exemption. 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.<sup>2</sup>

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.<sup>3</sup>

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<sup>2</sup> FOI Guidelines [6.121] and [6.122].

<sup>3</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [103].

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.<sup>4</sup>

It is my view, based on the factual context and character 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.

### The public interest (s 11A(5))

An agency cannot refuse access to a conditionally exempt document 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*, Deputy President Forgie explained that:

... 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.<sup>5</sup>

Therefore I must consider whether, *at this point in time*, disclosure of the documents 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:

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<sup>4</sup> *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) [24].

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

- 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
- reasonably be expected to impede the administration of justice generally, including procedural fairness
- reasonably be expected to prejudice the OAIC's ability to obtain and deliberate regarding sensitive information.

I have decided that in the context of an ongoing matter, giving you access to the documents that I have found to be conditionally exempt under s 47E(d) of the FOI Act would be on balance, at this time, contrary to the public interest.

Information about your review rights appears on the following page.

Yours sincerely,

**Joseph Gouvatsos**  
Lawyer

8 March 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](mailto: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](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](mailto: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](mailto:FOIDR@oaic.gov.au). More information is available on the [Access our information](#) page on our website.