



Our reference: FOIREQ21/00019

**C Roberts**

By email: [foi+request-7048-e2bed787@righttoknow.org.au](mailto:foi+request-7048-e2bed787@righttoknow.org.au)

**Your Freedom of Information Request – FOIREQ21/00019**

Dear C Roberts,

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 1 February 2021.

In your email you sought access to the following:

*“I refer to the Information Commissioner’s investigation into the Department of Home Affairs’ compliance with the requirements of the FOI Act. The Information Commissioner exercised her discretion to publish her report of that investigation here: <https://www.oaic.gov.au/freedom-of-information/foi-reports/commissioner-initiated-investigation-into-the-department-of-home-affairs/#comm> presumably because it is in the public interest to reveal that a major Commonwealth agency has been acting illegally.*

*In particular, noting his obligations as Principal Officer under the FOI Act (being the person who is ultimately responsible for his Department’s compliance with the law), and his legal obligations under ss. 12, 13(4) and 13(11) of the Public Service Act 1999, the Information Commissioner’s investigation report makes it plain that the Secretary of the Department of Home Affairs is, by definition, corrupt.*

*Further, the Information Commissioner’s investigation report reveals a worrying practice, apparently routinely engaged in by the Department of Home Affairs, of unnecessarily consulting with the Minister’s Office in respect of requests received under the FOI Act. Noting the requirements of the doctrine of the separation of powers, and the legal obligations imposed on public servants to be impartial and to use Commonwealth resources for proper purposes, it’s likely that whomever implemented a policy whereby the Department is to consult with the Minister in respect of applications made under the FOI Act (where such consultation is not required by law), and whoever gives effect to that policy, is also corrupt.*

*I now refer to this article which suggests the Information Commissioner investigated the Department of the Prime Minister and Cabinet's compliance with the FOI Act:*  
<https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.theguardian.com%2Faustralia-news%2F2020%2Ffeb%2F27%2Fprime-ministers-department-broke-the-law-delaying-foi-request-watchdog-finds&data=04%7C01%7Clegal%40oaic.gov.au%7Cf864d18b69dd4eb4ebc208d8c6618207%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637477470113936906%7CUnknown%7CTWFpbGZsb3d8eyJWljiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Ikl1haWwiLCJXVCi6Mn0%3D%7C3000&data=25TiiqXifvUqMam%2FSin411KX5dSg67Ga4glN%2Fpgd8dE%3D&reserved=0>

*I also refer to the interchange on 2 March 2020 at the Senate's Finance and Public Administration Legislation Committee between Stephanie Foster, a senior executive at the Department of the Prime Minister and Cabinet with oversight of the Department's compliance with the FOI Act, and Senator Rex Patrick, in relation to the above mentioned Information Commissioner investigation into the Department of the Prime Minister and Cabinet's compliance with the FOI Act:*

*Senator PATRICK: I have some questions that relate to FOI. On 27 February this year The Guardian produced an article that talked about some findings delivered by the Office of the Australian Information Commissioner to the department in relation to FOIs. Can you confirm that the department did in fact receive a report or findings from the OAIC?*

*Ms Foster: Yes, we did.*

*Senator PATRICK: Could those comments—those findings, that report, or it may be a letter—made by the Office of the Australian Information Commissioner be made available to the committee?*

*Ms Foster: It's my understanding that the commissioner is, shortly, planning to publish that information and that that's the normal manner in which the material is released. We could walk through the outcomes, if that would be helpful.*

*Senator PATRICK: Sure. There's an irony in you not disclosing information about freedom of information performance!*

*As best as I can tell though, the Information Commissioner's investigation report into the Department of the Prime Minister and Cabinet's compliance with the FOI Act (referred to above) has not been made publicly available. Under the FOI Act, I seek a copy of that report.*

*In support of my application I note that the FOI Guidelines (paragraph 6.19) make it clear that a public interest factor favouring disclosure of a document is that it will inform debate on a matter of public importance, including to reveal “that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct”. As above, if the Information Commissioner’s investigation report found that the Department of the Prime Minister and Cabinet did not comply with the FOI Act, the Department and, ipso facto, the Secretary of the Department, is corrupt - that is clearly in the public interest.*

*If the investigation report the subject of my request is already publicly available, I would appreciate if you could tell me how I can access that report, upon which I will withdraw this request, with apologies..”.*

On 18 February 2021, I wrote to you advising that your request covers documents which contain personal information, to which the OAIC is required to consult the individuals on under s 27A of the FOI Act before making a decision on release of the documents. The period for processing your request was extended by 30 days to 2 April 2021 to allow time for consultation per s 15(6) of the FOI Act. As 2 April 2021 is a public holiday, the processing period ends on 6 April 2021.

## **Decision**

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

Searches were conducted by an Assistant Director of the Investigations and Compliance Team in the FOI Regulatory Group to locate documents within the scope of your request. One document containing two attachments was found to fall within the scope of your FOI request. I have decided to grant access to the documents in part and refuse access to the documents in part.

## **Reasons for decision**

### Material taken into account

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

- your freedom of information application
- the FOI Act, in particular s 47F and

- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

#### Public interest conditional exemptions – personal privacy – s 47F

I have decided that the 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 the name and contact details of a third party individual.

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 document contains the names and contact details of individual who lodged an FOI complaint against the Department of Prime Minister and Cabinet.

Based on internet searches I have conducted, I am satisfied that the individual to whom the information relates are not known to be associated with the matters dealt

with in the documents and the information is not available from publicly accessible sources or well known. I am satisfied that disclosure of this material would be an unreasonable disclosure of personal information.

Therefore, I am satisfied that the name and contact details of the third party individual who lodged an FOI complaint with the OAIC to be conditionally exempt under s 47F of the FOI Act.

#### 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<sup>1</sup>:

... 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.

Section 11B(3) of the FOI Act lists factors that favour access when applying the public interest test. The FOI Guidelines at [5.138] include a non-exhaustive list of further factors that favour disclosure. I consider the public interest factors favouring disclosure in this case is that disclosure would promote the objects of the FOI Act.

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 of personal information could be reasonably be expected to harm the interests of an individual or group of individuals and to impede the administration of justice by affecting individuals’ willingness to lodge complaints with the OAIC.

---

<sup>1</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

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 s 47F of the FOI Act, would, on balance, be contrary to the public interest.

#### Conclusion

Please be advised that a summary of the investigation is also available on the OAIC website at <https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions/freedom-of-information-investigation-outcomes/>.

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

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Angela Wong', with a long horizontal line extending to the right.

**Angela Wong**  
**Lawyer**

6 April 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=ICR10>

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.

#### Disclosure log

Section 11C of the FOI Act requires agencies to publish online documents released to members of the public within 10 of release, except if they contain personal or business information that it would be unreasonable to publish.

The personal information contained in this document has not been disclosed. As such, the document will be published on the OAIC's disclosure log within 10 working days.