



Our reference: FOIREQ21/00067

Boris

By email: foi+request-7314-27d8d662@righttoknow.org.au

Your Freedom of Information request – FOIREQ21/00067

Dear Boris,

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 **8 May 2021**.

In your email you seek access to the following:

Background:

<https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.the-mandarin.com.au%2F154857-rex-patrick-threatens-to-take-information-commissioner-to-court-over-foi-speed%2F&data=04%7C01%7Clegal%40oaic.gov.au%7C1f8b9dfd849a444fd8508d911d654ea%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637560435288433009%7CUnknown%7CTWFpbGZsb3d8eyJWlJoiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Iklk1haWwiLCJXVCI6Mn0%3D%7C1000&data=OAebyg4ajWmEDFMISca2nDF2Pxt6FTA0CxWwkrjJigY%3D&reserved=0>

Please consider processing this request administratively (outside the FOI Act) if possible. If you are unable to do so, please consider it a formal FOI request.

I request all documents pertaining to discussions or correspondence that the OAIC has had with Senator Rex Patrick or his office in relation Information Commissioner review timeframes.

Please limit my request to documents created by or received by the OAIC between the period 1 November 2020 and 7 May 2021.

I am happy for the names and direct contact details (but not positions) of staff of the OAIC to be excluded as irrelevant under this request. I am also happy for third party names and direct contact details to be excluded as irrelevant under this request.

On **19 May 2021** Mr Gouvatsos wrote to you seeking clarification on the scope of your request.

“Dear Boris,

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 8 May 2021.

I understand that you are seeking access to all documents between 1 November 2020 and 7 May 2021 pertaining to discussions or correspondence that the OAIC has had with Senator Rex Patrick or his office in relation to Information Commissioner review (IC review) timeframes.

For the OAIC to efficiently process your request, could you please clarify the following:

- 1) Whether you are seeking access to documents that pertain to discussions the OAIC has had with Senator Patrick in relation to timeframes of specific IC reviews, or whether you are seeking access to documents regarding timeframes for processing IC reviews more generally as detailed in the following article: <https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.themandarin.com.au%2F154857-rex-patrick-threatens-to-take-information-commissioner-to-court-over-foi-speed%2F&data=04%7C01%7Clegal%40oaic.gov.au%7C1f8b9dfd849a444fdf8508d911d654ea%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637560435288433009%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTil6lk1haWwiLCJXVCi6Mn0%3D%7C1000&psdata=OAebyg4ajWmEDFMISca2nDF2Pxt6FTA0CxWwkrjJigY%3D&reserved=0>*
- 2) Whether you are seeking documents in relation to discussions about IC reviews that were finalised as at 7 May 2021?*

*I would be grateful to receive your response by **21 May 2021**.*”

The OAIC did not receive a response from you to our correspondence of **19 May 2021**.

As a consequence, and in accordance with the FOI Guidelines, I have interpreted the scope of your FOI request broadly to include both documents that relate to discussions the OAIC has had with Senator Patrick in relation to specific IC review

timeframes and documents that relate to discussions the OAIC has had with Senator Patrick about IC reviews more generally.

Decision

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

Reasons for decision

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

- Your freedom of information request of 8 May 2021
- The documents in issue
- The FOI Act, in particular ss 42, 47E(d) and 11A(5)
- Any submissions made by third parties
- 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).

Searches undertaken

To find the documents you requested, staff of the OAIC searched in the OAIC's document storage systems including Outlook emails, and the OAIC case management system. I have reviewed each of the documents found as a result of these searches, and considered each of the 61 documents within scope.

Section 22

As set out in your FOI request, I have excluded as irrelevant the names and direct contact details (but not positions) of staff of the OAIC, as well as third party names and direct contact details.

Legal professional privilege exemption (s 42)

Under s 42 of the FOI Act, a document is exempt if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (s 42(1)) and privilege has not been waived (s 42(2)).

Legal professional privilege protects confidential communications between a lawyer and a client from compulsory production. The FOI Guidelines relevantly explain that,

at common law, determining whether a communication is privileged requires consideration of the following:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent, and
- whether the advice given is confidential.

The FOI Guidelines explain that a communication may have been brought into existence for more than one purpose, but it will be privileged if the main purpose for its creation was the giving or receiving of legal advice (legal advice privilege), or for use in connection with actual or anticipated litigation (litigation privilege): see [5.129] of the FOI Guidelines.

Having regard to the contents of the documents and the context in which they were created I consider that documents 20-36, 38-41, 44-46, 48-53, 56 and 58-60 were created for the dominant purpose of giving or receiving legal advice or for use in connection with anticipated litigation.

Accordingly, I find the documents 20-36, 38-41, 44-46, 48-53, 56 and 58-60 to be exempt under s 42 of the FOI Act.

Section 47E(d)

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).

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 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 Privacy Commissioner (both offices are currently held by Angelene Falk), the FOI Commissioner (office currently vacant), and the staff of the OAIC.

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, and in particular, the Information Commissioner's function of conducting IC reviews under Part VII of the FOI Act. I consider that release of the documents, at a time when most of the IC reviews to which they relate are ongoing and when there remains at least the possibility of litigation in respect of these IC reviews, would have a substantial adverse effect on the ability of the OAIC to conduct these ongoing IC reviews and respond to any possible future litigation relating to timelines.

The FOI guidelines at [6.123] state that where disclosure of the documents in issue would reveal 'unlawful activities or inefficiencies' the conditional exemption in s 47E(d) would not apply. To avoid doubt, I do not consider that any of the documents reveal either unlawful activities or inefficiencies.

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 documents 1-19, 42-43, 47 and 57 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 that¹:

... 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, in particular the object in s 3(1)(b) of providing access to documents, enhancing scrutiny of government decision making, and promoting effective oversight of public expenditure.

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. In this case, I consider that the public interest factor against disclosure is that disclosure would reasonably be expected to

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

prejudice the efficient management of the regulatory function of conducting IC reviews where the majority of those IC reviews remain ongoing and there is a possibility of litigation in relation to the IC reviews.

In this case, I am satisfied that the public interest factor against disclosure outweighs 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



Mark Lindsey-Temple

Senior Lawyer

7 July 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_

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 foi@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.