



Our reference: FOIREQ21/00171

**Mr Charles Wentworth**

**By email:** [foi+request-7791-d429e94a@righttoknow.org.au](mailto:foi+request-7791-d429e94a@righttoknow.org.au)

Your Freedom of Information Request – FOIREQ21/00171

Dear Mr Wentworth

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 September 2021.

**Scope of your request**

On 1 September 2021, you applied to the OAIC for access to the following:

*I am requesting a copy of all successful applications made by a Commonwealth agency to OAIC to have an individual declared vexatious for the period 2018-2021.*

On 9 September 2021, the OAIC wrote to you to acknowledge the request.

**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 seven documents within the scope of your request. I have decided to refuse you access to all seven documents.

**Reasons for decision**

**Material taken into account**

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

- your freedom of information request of 1 September 2021
- the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines)
- searches conducted by the line area



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

The seven documents relate to six applications made by government agencies to the OAIC to declare a person to be a vexatious applicant under s 89K of the FOI Act. I have decided that all seven documents within scope of the request are conditionally exempt under s 47E(d) of 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).

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), the FOI Commissioner (office currently vacant), and the staff of the OAIC.

Due to the nature of the documents at issue, I have specific regard to the Information Commissioner’s power and functions under s 89K of the FOI Act to make a vexatious

applicant declaration. The power to make a declaration is discretionary<sup>1</sup> and the Commissioner may make such declaration on the application of an agency or Minister, or on the Commissioner's own initiative. However, to date, no Information Commissioner has made a decision to declare a person a vexatious applicant on their own initiative.<sup>2</sup> The FOI further Guidelines provides that:<sup>3</sup>

[a] declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act. For that reason, a declaration will not be lightly made, and an agency that applies for a declaration must establish a clear and convincing need for a declaration.

Under s 89K(3) of the FOI Act, an agency who applies for a vexatious applicant declaration has the onus of establish that a declaration should be made. The FOI Guidelines provides that an application for a vexatious applicant declaration must include:<sup>4</sup>

- background information about the person's access actions and how the agency or minister dealt with those access actions
- a clear statement of the grounds under s 89L of the FOI Act on which the agency or minister seeks the declaration
- evidence that supports those grounds, such as copies of correspondence with the person, or file notes documenting interactions between the person and agency staff
- any proposed terms or conditions which the agency or minister believes the declaration should include.

In addition to considering the grounds for a declaration under s 89L of the FOI Act, the Information Commissioner may consider other relevant features of a person's access actions or the FOI administration by the agency, either generally or in relation to the person whose actions are under consideration.<sup>5</sup>

In *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission*, Deputy President Forgie considered ASIC's contentions that:

*It is essential for the regulatory work of ASIC that its officers are able to communicate their ideas and approaches to the surveillance and investigation of members of the regulated population. It can reasonably be expected that, should information regarding these deliberations be disclosed, ASIC officers may be discouraged from expressing a range of preliminary ideas and analysis. Rather, officers may be more circumspect and less inclined to provide preliminary and/or innovative views. One could expect these kinds of communication to be less efficient and timely and also less*

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<sup>1</sup> *Re Sweeney and Australian Information Commissioner & Ors* [2014] AATA 531 [81]

<sup>2</sup> FOI Guidelines [12.7]

<sup>3</sup> *Ibid*

<sup>4</sup> FOI Guidelines [12.34]

<sup>5</sup> FOI Guidelines [12.9]

*fulsome should officers be of the view that they should be more considered in these less formal communications.*<sup>6</sup>

In that case, Forgie DP said that the weight to be given to such contentions ‘depends upon the factual context in which [they] are said to arise’, given the obligations upon Australian Public Service Officers to be to be ‘professional, objective, innovative and efficient, and work collaboratively to achieve the best results for the Australian community and the Government. That would include being open in their comments and in providing comments that are appropriate to the subject-matter, thoughtful, relevant and directed to the tasks at hand.’<sup>7</sup>

In considering whether to exercise the discretion to make a declaration under s 89K of the FOI Act, the OAIC relies on the cooperation of agencies in providing full and accurate information about the circumstances of their applications. This may include confidential or sensitive information about an agency’s FOI administration and their previous engagements with a person about their access actions. If such information is released, agencies may be less willing to be candid in their applications to the OAIC which may adversely affect the proper and efficient conduct of the OAIC’s vexatious applicant declaration function under s 89K of the FOI Act.

Therefore, I find that the documents at issue are conditionally exempt under s 47E(d) 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)). The FOI Guidelines explain that disclosure of conditionally exempt documents is required unless the particular circumstances at the time of decision reveal countervailing harm which overrides the public interest in giving access.

In *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, Deputy President Forgie explained that<sup>[4]</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.

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<sup>6</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [101].

<sup>7</sup> *Ibid* [102].

<sup>[4]</sup> *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 documents at this time would be contrary to the public interest.

In considering where the public interest lies, I must balance the factors for and against disclosure. The factors favouring disclosure are set out in s 11B(3) of the FOI Act and further explained in the FOI Guidelines.<sup>8</sup> In this case, I consider that the public interest factor favouring disclosure is that disclosure would promote the objects of the FOI Act by increasing scrutiny and discussion of the OAIC's freedom of information functions.

The FOI Act does not specify any factors against disclosure, however the FOI Guidelines provides a non-exhaustive list of factors against disclosure.<sup>9</sup> In this case, I consider that disclosing applications made by government agencies to the OAIC under s 89K(2)(a) of the FOI Act could reasonably be expected to prejudice the OAIC's ability to obtain confidential or similar information from those agencies in the future.<sup>10</sup> I give weight on the fact that any hesitancy or unwillingness on the part of the agency to provide full and accurate information about could prejudice the proper and efficient conduct of the OAIC's vexatious applicant declaration function under s 89K of the FOI Act.

In this particular case, at this point in time, I find that the public interest factors against disclosure outweighs the factor for disclosure. I find that the importance of the proper and efficient conduct of the OAIC's vexatious applicant declaration function under s 89K of the FOI Act outweighs any benefit to be obtained by releasing the documents at this time. Therefore, I have decided it would be contrary to the public interest to give access to the documents I have found to be conditionally exempt under s 47E(d) of the FOI Act.

On this basis, I find that the document in issue is exempt under s 47E(d).

#### **Personal privacy exemption – s 47F**

I have also decided that all seven documents within scope of the request are also conditionally exempt under s 47F of the FOI Act.

Under s 47F of the FOI Act, a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information of any person. This conditional exemption is intended to protect the personal privacy of individuals.

The relevant material that I have found to be conditionally exempt under s 47F of the FOI Act can be described as the personal information of third-party individuals and the legal representatives of government agencies, including:

- names
- email addresses

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<sup>8</sup> FOI Guidelines [6.19]

<sup>9</sup> FOI Guidelines [6.22]

<sup>10</sup> FOI Guidelines [6.22]

- contact phone numbers

#### Personal information

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 relevant material outlined above consisting of the names, email addresses, and contact phone numbers are personal information for the purposes of the FOI Act.

#### Would disclosure involve an unreasonable disclosure of personal information?

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.

I am satisfied that the relevant material is not public information and is not well known. I am also satisfied that the individuals to whom the information relates is not known to be associated with the matters dealt with in the document. If this information were disclosed publicly, it would unreasonably impact on the privacy of those individuals.

On this basis, I consider that disclosure of personal information would be unreasonable. I find the relevant material to be conditionally exempt under s 47F.

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

I apply the same public interest test as discussed above.

In this case, I consider that the public interest factor favouring disclosure is that disclosure would promote the objects of the FOI Act by increasing scrutiny and discussion of the OAIC's freedom of information functions.

In considering the public interest factors against disclosure, I give weight to the consideration that disclosure of the personal information of third-party individuals and the

legal representatives of government agencies could reasonably be expected to interfere with their right to privacy. I also consider that specific harm in disclosing the personal information of these individuals would also be an interference with their right to privacy.

In this particular case, at this point in time, I find that the public interest factors against disclosure outweighs the factor for disclosure. Therefore, I have decided it would be contrary to the public interest to give access to the documents I have found to be conditionally exempt under s 47F of the FOI Act.

On this basis, I find that the document in issue is exempt under s 47F.

If you are not satisfied with this decision, 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 'Nora Truong', written in a cursive style.

**Nora Truong**  
Paralegal

1 October 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 [FOIDx@xxx.xxv.au](mailto:FOIDx@xxx.xxv.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.

Having considered the documents at issue, noting that an edited copy of the document is to be released with the relevant exempt material removed, I do not consider it is unreasonable to publish the information released to you on the Oaic's disclosure log under s 11C of the FOI Act.