



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ22/00048

Attention: Julie

By Email: foi+request-8508-b01e3041@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00048

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 24 February 2022.

In your request you seek access to the following:

“The OAIC has appeared (via videolink or in person) before the Legal and Constitutional Affairs Legislative Committee (Senate Estimates) on 15 February 2022 (Angelene Falk, Elizabeth Hampton, Melanie Drayton) and 26 October 2021 (Angelene Falk, Elizabeth Hampton, Bruce Cooper).

As part of the appearance of the above named OAIC officials, to enable these above named OAIC officials to address any issues or questions Committee members might raise, the OAIC prepares a 'briefing book' or 'briefing folder' for each official appearing, that typically consists of a 'corporate folder', a 'privacy folder', an 'FOI folder', and other folders that contain 'Commissioner Briefs', 'Hot Topic Briefs', and other documents.

Excluding drafts and duplicates, I seek copy of such briefing folders or briefing books consisting of such documents provided by the OAIC to the above named OAIC officials for their appearances before the Committee on the dates specified.

Personal information of private individuals (not Commonwealth officials) is irrelevant.”.

On 17 March 2022, we provided you with a notice under s24AB that we intended to refuse your request on the basis that the work involved in processing your request in its current form would substantially and unreasonably divert the resources of the OAIC. We then provided an opportunity for you to revise your request to enable it to proceed.

On 22 March 2022, you clarified the scope of your request to include:

“the first page of each Comm Brief as listed:

* Feb 2022 - Corporate: Docs 1, 3-11; Privacy: Docs 1-20; FOI: All docs except 17; Folder B: Docs 5-22

* Oct 2021 - Corporate: Docs 1, 3-11; Privacy: Docs 1-20; FOI: All docs except 17; Folder B: Docs 5-22".

Decision

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

In relation to the first part of your request for "Feb 2022 - Corporate: Docs 1, 3-11; Privacy: Docs 1-20; FOI: All docs except 17; Folder B: Docs 5-22", I have identified 64 documents within the scope of your request. I have decided to release 59 documents in full and release 5 documents to you in part.

In relation to the second part of your request for a "Oct 2021 - Corporate: Docs 1, 3-11; Privacy: Docs 1-20; FOI: All docs except 17; Folder B: Docs 5-22", I have identified 65 documents within the scope of your request. I have decided to release 59 documents in full and release 6 documents to you in part.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 24 February 2022;
- your correspondence dated 18 March 2022;
- your revised freedom of information request dated 22 March 2022;
- the FOI Act, in particular sections 11A(5), 17 and 47E(d);
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines),

Information stored in electronic form - s 17

You have requested that the already provided documents of the OAIC, created under s 17 of the FOI Act, named 'Senate Estimates February 2022 Index' and 'Senate Estimates October 2021 Index' are updated to have the number of pages and date of each document added. The schedules attached to this letter have the number of pages and date of each document as requested.

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

I have decided to refuse access in part to 11 documents under s47E(d) of the FOI Act. Section 47E(d) of the FOI Act provides that:

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.

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.

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).

The material that I have found to be conditionally exempt under s 47E(d) of the FOI Act can be described as information relating to:

- breakdown of additional funding
- current matters;
- legal proceedings;
- draft legislation; and
- international relationships.

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.

In particular, I have had regard to the Australian Information Commissioner’s privacy powers, 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 Information Commissioner has a range of functions and powers directed towards protecting the privacy of individuals by ensuring the proper handling of personal information. In addition, under the AIC Act and the FOI Act, the Information Commissioner has a range of functions and powers promoting access to information under the FOI Act, including making decisions on

Information Commissioner reviews and investigating and reporting on freedom of information complaints.

Breakdown of additional funding

One document contains detail of additional funding provided MYEFO 21-22. The total expenditure contained in this document has been released. However, the breakdown of how these funds are distributed within the OAIC is not in the public domain. The level of funding provided to separate activities is subject to ongoing consideration by the Commissioner and the Department of Finance and may be subject to change over the financial year. In my view, the OAIC's ability to manage its ongoing funding would be adversely affected if this information was released as it may impact on the ability of the Commissioner to undertake confidential engagement with the Department of Finance. As such, I consider the release of information in relation to the breakdown of additional funding would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Current matters

A number of documents have information about current and ongoing matters (assessments, investigations and preliminary inquiry processes) being considered by the OAIC that are not publicly known. The information includes details including the names of relevant parties, the subject matter being considered and the current status of the matter. The release of this information at this time may impact on both the ability of the OAIC to manage the specific matters referred to and future matters if parties cannot be confident that their information will not be kept confidential.

The AAT has recognised in *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) [24] 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. In my view, the OAIC's ability to carry out its regulatory functions would be affected if there was a lack of confidence in the confidentiality of the investigative process. As such, I consider the release of information on current and ongoing matters that are not currently in the public domain would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Legal proceedings

The Information Commissioner is currently involved in legal proceedings with Senator Patrick. One document includes details of his claims and information about actions and discussions held with Senator Patrick that is not publicly available. This information is not subject to legal professional privilege but is sensitive information concerning an ongoing litigation matter before the Federal Court. In my view, the OAIC's ability to manage the litigation in accordance with its obligations would be adversely affected if this information was released. In addition to any impact its release would have in relation to these proceedings, it may also adversely impact future legal proceedings if applicants cannot rely on the confidentiality of discussions held in relation to litigation, including potential litigation. As such, I consider the release of

information in relation to the current litigation matter would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Draft legislation

A number of documents include details of draft legislation provided to the OAIC by another agency. The responsibility for undertaking consultation in relation to draft legislation rests with the minister/department sponsoring the legislation. In this case, the OAIC has been provided a copy of this draft legislation from another agency. In my view, disclosing such information about such draft legislation could reasonably be expected to adversely affect the ability for the OAIC to work in partnership with agencies on draft legislation concerning matters relevant to the Commissioner's statutory functions. As such, I consider the release of information would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

International relationships

One document refers to preliminary discussions with another country in relation to personal data protection with a view to exploring further cooperation between the two countries. In my view, the OAIC ability to carry out its functions in relation to such matters would be affected if there was a lack of confidence in the confidentiality of such preliminary discussions. As such, I consider the release of such information would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

I am satisfied that 11 documents 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)

Subsection 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

Subsection 11B(3) of the FOI Act provides a list of public interest factors favouring disclosure. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure, as well as public interest factors against disclosure. In my view, the relevant public interest factor in favour of disclosure in this case is that the disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance.

The public interest factors favouring disclosure must be balanced against any public interest factors against disclosure. The FOI Guidelines contain a non-exhaustive list of factors against disclosure. In my view, the following relevant public interest factor against disclosure in this case is that it:

- could reasonably be expected to impede the administration of justice generally, including procedural fairness

- could reasonably be expected to prejudice an agency's ability to obtain confidential information
- could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
- could reasonably be expected to prejudice the management function of an agency

I have given significant weight to the factor that disclosure could reasonably be expected to prejudice the management function of an agency and an agency's ability to obtain similar information in the future. In each case, the information that has been considered exempt relates to sensitive information that the OAIC has been provided in relation to financial, legal, legislation, international and investigative matters. The disclosure of the information may impact on the willingness of parties to provide this information to the OAIC in the future and thus directly impact the management function of the OAIC. Whilst I acknowledge the factors that support disclosure of this information, particularly that disclosure would promote the objects of the FOI Act, I am satisfied that giving access to the conditional exempt material at this time 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

A handwritten signature in dark ink, appearing to read 'E Elliott', written in a cursive style.

Emily Elliott
Senior Lawyer

1 April 2022

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 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 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.