



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ22/00096

Julie

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

Your Internal Review Application - FOIREQ22/00096

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the decision made on **1 April 2022** - FOIREQ22/00096.

Original FOI Decision

You lodged a FOI request on 24 February 2022. In your request, you sought access on the following terms:

“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, the original decision maker provided you with a notice under s 24AB 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 Office of the Australian Information Commissioner (OAIC). The original decision maker invited you to respond to the consultation notice to advise whether you wished to withdraw the request, make a revised request, or did not wish to revise the scope of the request.

On 22 March 2022, you amended your request to be on the following terms:

“...I request 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. Such a document was previously able to be produced using computers ordinarily available to the OAIC in FOIREQ20/00213 with even more fields than requested here (<https://www.righttoknow.org.au/request/6...>)

I also seek 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*

That means only 20 pages of Corporate, 40 pages of Privacy, 34 pages of FOI, and 36 pages of Folder B (130 pages) need to be considered, and that number of pages and date of document need to be added to already existing s 17 documents...”

The original decision maker considered your revised FOI request and found that a practical refusal reason no longer existed. Accordingly, the decision maker processed the revised FOI request.

On 1 April 2022, the delegate advised you that they had identified 129 documents within scope of your request. Of these 129 documents, the delegate decided to grant access to 118 documents in full and 11 documents in part. In making this decision, the delegate relied upon the conditional exemption in s 47E(d) of the FOI Act – certain operations of agencies. The delegate also provided you with the s 17 document, as per the terms of your request.

Material taken into account

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

- Your original freedom of information request FOIREQ22/00048 dated 24 February 2022;
- your amended request dated 22 March 2022;
- the decision of the delegate dated 1 April 2022 the subject of this review;

- further line area consultations I have completed in undertaking this internal review;
- the FOI Act;
- relevant case law; and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

Preliminary issues

In the documents released to you by the original decision, in the ‘Senate Estimates February 2022 Index’ document, I note that the requested dates and page numbers are missing in the documents from the heading ‘Folder B’ until the end of the document.

We apologise for this oversight. I have provided a corrected version of this schedule as part of this decision.

Internal Review Decision

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

An internal review decision is a ‘fresh decision’ made by a person other than the person who made the original decision (s 54C of the *Freedom of Information Act 1982* (the FOI Act)). As such, I have had regard to, but not relied on, the delegate’s original Freedom of Information (FOI) decision.

I have identified 11 documents as at issue for the purposes of this internal review: documents numbered 23, 26, 30, 31, 52 and 77 in the Senate Estimates October 2021 schedule from the original decision, and documents numbered 5, 17, 20, 24 and 71 of the Senate Estimates February 2022 schedule from the original decision. The attached schedule outlines 11 folios that correspond to those 11 documents. Based on the information before me at this time, I have decided to set aside the original decision in relation to the 11 documents at issue, and substitute my decision that:

- at **folio 1**¹ of the attached document bundle² and **folio 8** of the attached document bundle³ the sentence outlining the period of High Profile NDBs captured for the purpose of the Commissioner Brief: High Profile NDBs and the columns headings in the table of High Profile NDBs that the original decision maker found to be exempt under s 47E(d) are not exempt.

¹ A reference to ‘folio’ refers to the page number of the document bundle (e.g. page 1 is folio 1).

² Document 23 of the October 2021 schedule.

³ Document 17 of the February 2022 schedule.

- at **folio 2** of the attached document bundle⁴ and **folio 9** of the attached document bundle⁵ the Commissioner brief title and first sentence of the first dot point under the sub-heading ‘Key messages’, along with the first sentence of the second dot point under the sub-heading ‘Critical facts’ that the original decision maker found to be exempt under s 47E(d) are not exempt.
- the material on **folio 7** of the attached document bundle⁶ found to be exempt under s 47E(d) is not exempt. Accordingly, document 5 is provided to you in full.

I affirm the remainder of the original decision to refuse access in part to 10 of the 11 documents at issue under s 47E(d) of the FOI Act.⁷

Please refer to the schedule of documents attached.

The reasons for this decision are as follows.

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

I have found parts of folios 1-4 and 6-11 to be conditionally exempt under s 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.

As discussed in the FOI Guidelines and in IC review cases⁸, for a document to be conditionally exempt under s 47E(d) it needs 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] explain:

⁴ Document 26 of the October 2021 schedule.

⁵ Document 20 of the February 2022 schedule.

⁶ Document 5 of the October 2021 schedule

⁷ Documents 23, 26, 30, 31, 52, 77 of the October 2021 schedule; Documents 17, 20, 24, 71 of the February 2022 schedule.

⁸ See *FOI Guidelines* [6.95] – [6.103] and [6.120] – [6.123]; ‘VG’ and *Department of the Prime Minister and Cabinet* (Freedom of information) [2020] AICmr 42; ‘SV’ and *Services Australia* (Freedom of information) [2020] AICmr 32; ‘SA’ and *Department of Home Affairs* (Freedom of information) [2020] AICmr 17; *Paul Farrell and Australian Federal Police* (Freedom of information) [2019] AICmr 68 and *Paul Farrell and Department of Home Affairs (No 5)* (Freedom of information) [2019] AICmr 65.

For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur. ... There must be more than merely an assumption or allegation that damage may occur if the document were to be released.

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 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 considered 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 at [19] explains that the 'ordinary meanings of the word "operation" in this context' includes 'an act, method or process of working or operating.'

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 privacy powers, freedom of information powers and regulatory powers, under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act), the *Privacy Act 1988* (Cth) (Privacy Act) and the FOI Act.

The OAIC is an independent statutory agency within the Attorney-General's portfolio, established under section 5 of the AIC Act. The OAIC consists of information officers - the Australian Information Commissioner and the Privacy Commissioner (both offices currently held by Angelene Falk) and the FOI Commissioner (Leo Hardiman)- as well as the staff of the OAIC. Section 5 of the AIC Act also provides that the Information Commissioner is the head of the OAIC for the purposes of the *Public Service Act 1999* (Cth). Section 5 further provides that for the purposes of the *Public Governance, Performance and Accountability Act 2019* (Cth) the Information Commissioner is the accountable authority of the OAIC.

The functions of the OAIC are the freedom of information functions, which are about giving the Australian community access to information held by the Australian Government in accordance with the FOI Act (and other Acts); the privacy functions, which are about mainly about protecting the privacy of individuals in accordance with the Privacy Act; and the information commissioner functions, which are strategic functions concerning information management by the Australian Government. All the information officers may

perform freedom of information functions and the privacy functions, while only the Information Commissioner can perform the information commissioner functions.

Investigating privacy breaches, either in response to a complaint from a member of the public or on the Commissioner's own initiative; conducting privacy assessments of APP entities; and regulating the Notifiable Data Breaches (NDB) scheme are among the Information Commissioner's primary privacy functions.

Assessing and managing vexatious declaration applications made by Commonwealth agencies, making decisions on Information Commissioner reviews, and investigating and reporting on freedom of information complaints are among the Information Commissioner's primary FOI functions. Section 29 of the AIC Act imposes strict conditions on the recording, use and disclosure of information acquired in the course of performing information commissioner, privacy and freedom of information functions.

Consideration

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.

The material that I have found conditionally exempt under s 47E(d) of the FOI Act is material related to:

- current matters (preliminary inquiries, assessments and investigations) being considered by the OAIC;
- ongoing legal proceedings;
- draft legislation; and
- international relationships.

Information related to ongoing matters (investigations, assessments, and preliminary inquiries) involving the OAIC

A number of the documents at issue contain information about ongoing matters being undertaken by the OAIC.⁹ This information is not in the public domain and includes information on issues being investigated or considered by the OAIC, as well as the current status of the matter. I consider that if information of this nature is disclosed it is reasonably likely to prejudice the OAIC's ability to properly manage ongoing matters, with management of such matters a part of the OAIC's statutory functions.

As noted in the FOI Guidelines at [6.121], in *Re Telstra Limited and Australian Competition and Consume Commission* [2000] AATA 71, it was upheld by the AAT that, where it is established that disclosure of information would be reasonably likely to prejudice a

⁹ Documents 23, 26, 30 and 77 of the October 2021 Schedule; Documents 17, 20, 24 and 71 of the February 2022 Schedule.

government agency's statutory functions, the conditional exemption at s 47E(d) of the FOI Act applies.

I consider that such circumstances exist in this matter, with it being reasonably likely that disclosure of the information at issue could negatively impact the OAIC's ability to conciliate, investigate and engage with relevant parties regarding ongoing investigations, assessments and preliminary inquiries. This is because relevant parties may consider that they cannot engage openly with the OAIC if the information they provide is at risk of becoming publicly available. The OAIC relies heavily on relevant parties to provide information including sensitive and confidential information in the course of a preliminary inquiry, assessment or investigation. If there is a loss of confidence in the confidentiality of those processes, it is highly likely that relevant parties would become less likely to provide full and frank information to the OAIC, leading to a substantial adverse impact on the proper and efficient conduct of the OAIC in its undertaking of ongoing investigations, assessments and preliminary inquiries. For example, the OAIC may not be alerted to conduct which may be in breach of the Australian Privacy Principles and the Privacy Act; it may have insufficient information on which to open an investigation; and may have insufficient information to ascertain whether breaches of the APPs or Privacy Act have occurred.

Furthermore, the ability of the OAIC to undertake these functions may be stymied where the subject of a matter under investigation, assessment or inquiry remains out of the public domain, or the investigation, assessment or inquiry is ongoing, such that premature release of information at issue would be reasonably likely to prejudice the progression of that investigation, assessment or inquiry.

I am satisfied that parts of folios 1-3 and 6¹⁰; and parts of folios 8-11¹¹ contain information provided to the OAIC in the course of or in connection with an investigation, assessment or inquiry and that their disclosure would substantially adversely affect the willingness of third parties to provide information, and release of this information would be reasonably likely to prejudice progression of that ongoing investigation, assessment or inquiry. I therefore find those documents (parts thereof) are conditionally exempt under s 47E(d).

Ongoing legal proceedings

Folio 5¹² contains sensitive information about discussions with Senator Rex Patrick in respect of ongoing legal proceedings between the Information Commissioner and the Senator. In line with the aforementioned reasoning, in my view, it would be reasonably expected that disclosure of that information would have a substantially adverse effect on the OAIC's ability to engage in such discussions with parties during legal proceedings, if there is a loss of confidence in the OAIC's ability to maintain confidence in these processes.

¹⁰ Documents 23, 26, 30 and 77 of the October 2021 schedule.

¹¹ Documents 17, 20, 24 and 71 of the February 2022 schedule.

¹² Document 52 of the October 2021 schedule.

Proceedings may be less easily resolved, and/or resolved in a less efficient, timely, or cost-effective manner.

I therefore find that the material at issue in folio 5 is conditionally exempt from disclosure under s 47E(d) on the basis that disclosure would have a substantially adverse effect on the proper and efficient conduct of the operations of the OAIC in respect of the conduct of legal proceedings in which it is a party.

Draft legislation

Folio 3¹³ and folio 10¹⁴ contain information regarding draft legislation provided by another agency, for the purpose of consulting with the OAIC on that legislation. Were aspects of this consultation process to be disclosed by the OAIC, I am satisfied that this could reasonably be expected to lead to reduced confidence in the OAIC by other agencies such that the ability of OAIC to engage in such consultation activities would be substantially adversely affected. I am therefore satisfied that release of this material would adversely affect the proper functioning of the OAIC's operations. I am also satisfied that, despite the passing of time this information remains private, and its disclosure will have a substantial adverse effect on the OAIC's operations.

International Relationships

Folio 4¹⁵ contains material regarding discussions with another country's government in relation to exploring cooperation regarding data protection between the two countries. These conversations are still in their early stages and remain outside of the public record and were undertaken on the mutual understanding of confidence. Were they to be made public without prior consultation with the other party, this would, in line with the above reasoning, impact upon the confidence of the other party that the OAIC was able to maintain confidentiality of such discussions. This would be reasonably expected to lead to a substantial adverse effect on the OAIC's ability to engage in these discussions with other nations, both in respect of these specific discussions and additionally in respect of further discussions with other nations. As details of these discussions remain non-public at the time of this internal review decision, I am satisfied that the release of such information would have a substantial adverse effect on the OAIC's operations in respect particularly of its international engagement with other nations.

The public interest test – 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)).

¹³ Document 30 of the October 2021 schedule.

¹⁴ Document 24 of the February 2022 schedule.

¹⁵ Document 31 of the October 2021 schedule.

In *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 at [113] 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.

In the circumstances here, I must consider whether disclosure of the information at this time would be contrary to the public interest. As noted above, I am satisfied that the relevant information remains conditionally exempt under s 47E(d) of the FOI Act.

In addition to the factors favouring disclosure found listed the FOI Act, the FOI Guidelines provide a non-exhaustive list of factors favouring disclosure (see [6.19]). In this case, I am of the view that factors favouring disclosure are that disclosure will promote the general objects of the FOI Act, inform the community of the Government’s operations and enhance the scrutiny of government decision making.

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 [see 6.22]. In my view the factors that weigh against disclosure in this instance are as follows.

Disclosure of the information at issue:

- could reasonably be expected to impede the administration of justice generally, including procedural fairness;
- could reasonably be expected to impede the flow of information to a regulatory agency; and
- could reasonably be expected to prejudice an agency’s ability to obtain confidential information.

On balance, I consider that the factors against disclosure outweigh the factor in favour of disclosure. In making my decision, I have given significant weight to the need of the OAIC to be able to conduct its operations properly and efficiently, in order to perform its statutory functions.

I have therefore decided that it would be contrary to the public interest to give you access to the information that I have found to be conditionally exempt under s 47E(d) of the FOI Act.

Further information

Please see the following page for information about your review rights.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'C Whip', is positioned above the printed name.

Caren Whip
General Counsel

10 May 2022

If you disagree with my decision

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 30 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.

s 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

Alternatively, you can submit your application to:

Office of the Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Or by email to foi@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.