



Our reference: FOIREQ22/00095

Attention: Julie

By Email: foi+request-8726-eb263b53@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00095

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 10 April 2022.

In your request you seek access on the following terms:

"I request copy of the following Commissioner Briefs listed at:

<https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.righttoknow.org.au%2Frequest%2F8508%2Fresponse%2F24932%2Fattach%2F8%2FFINAL%2520Schedule%2520Feb%252022.pdf&data=04%7C01%7Clegal%40oaic.gov.au%7C7c48683bb34f4d717ecb08da1af868a9%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637851951752063302%7CUnknown%7CTWFpbGZsb3d8eyJWlloiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6IjEhaWwiLCJXVCI6Mn0%3D%7C3000&data=v9%2FFGaFbBKDL1Cyrqw%2FY%2F%2F%2B7UWkE5H%2FLkCXqo4EbxKw%3D&reserved=0>

Corporate 3, 4, 5, 6, 8, 9

Privacy 20, 25, 26, 29, 30, 32, 34

FOI 35-38, 40, 42, 43, 48, 53..."

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 22 documents within the scope of your request. I have decided to give you access to 17 documents in full and 5 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 request dated 10 April 2022
- any submissions made by third parties;
- the documents at issue
- the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), and
- relevant case law

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

I have decided to refuse access in part to 4 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:

- material related to current matters (investigations, assessments and preliminary inquiries) being considered by the OAIC;
- information provided by private organisations under the Notifiable Data Breach (NDB) scheme;
- ongoing legal proceedings; 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.

Information regarding current matters and the NDB scheme

Documents 3 and 20 contains information provided under the NDB scheme that is not publicly known and material regarding current investigation processes being undertaken by the OAIC, respectively. 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. Indeed, if third parties become aware that it is possible that their engagement with OAIC may be incidentally disclosed under FOI requests, it is reasonably likely to cause third parties to adopt a more adversarial approach in their engagement with OAIC and therefore prejudice the flow of information to the OAIC.

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.

Ongoing legal proceedings

The Information Commissioner is currently involved in legal proceedings with Senator Rex Patrick. Document 35 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 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.

International relationships

Document 25 contains material regarding discussions and potential collaborations with the regulators of other nations. These conversations are still in their early stages and remain outside of the public record. Were they to be made public, 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 for these specific discussions and also for further discussions with other nations. As details of these arrangements remain non-public at the time of this internal review decision, I am satisfied that the release of such information have a substantial adverse effect on the OAIC's operations.

For these reasons, I am satisfied that the above material is conditionally exempt under s 47E(d) of the FOI Act.

Personal privacy conditional exemption - section 47F

I have decided one document is exempt in part under section 47F of the FOI Act.¹ This conditionally exempt material is the signatures of staff members of the Australian Broadcasting Corporation and the Australian Electoral Commission.

Section 47F of the FOI Act conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased 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 section 6 of the Privacy Act, personal information means:

¹ Document 53.

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 for the purposes of the FOI Act, an individual's signature is personal information.

In determining whether disclosure of personal information would be unreasonable, section 47F(2) of the FOI Act requires me to have regard to the following matters:

- the extent 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.

Personal signatures of government agency staff members

I note that the FOI Guidelines at paragraph [6.153] state that, where a public servant's personal information is included in a document because of their usual duties or responsibilities, it would ordinarily not be unreasonable to disclose unless special circumstances exist.

In these circumstances, I have considered the fact that the relevant personal signatures are not widely known nor publicly available, as well as taking into consideration the fact that these signatures are only incidental to the terms of your FOI request.

Disclosure under FOI is disclosure to the world at large, and release of personal signatures can expose the affected party to the risk of identity fraud and harassment. I also note that the AEC has recently been experiencing large amounts of disinformation online, as well as harassment to specific Commission staff members, including harassment to the staff member whose signature is found within this document. While noting that there are other signatures within this document from the Commonwealth Department of Public Prosecutions and the Norfolk Island Authority, I note that these agencies did not have any concerns with the release of these signatures and therefore these signatures have not been exempted in this instance.

For these reasons, I am satisfied that the material outlined above is conditionally exempt under section 47F of the FOI Act.

The public interest test – section 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 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:²

... 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 documents at this time would 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 at paragraph [6.19] 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. Other factors are not relevant in this instance.

The public interest factors favouring disclosure must be balanced against any public interest factors against disclosure. The FOI Guidelines at paragraph [6.22] 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 disclosure:

- 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 the proper and efficient conduct of the OAIC; and
- would unreasonably infringe upon the privacy of individuals.

I have given significant weight to the factor that disclosure could reasonably be expected to prejudice the proper and efficient conduct of the OAIC and the OAIC’s ability to obtain similar

² *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

information in the future, as well as placing significant weight on the impact disclosure could have on the privacy of individuals. 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 efficient conduct 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 conditionally exempt material at this time would, on balance, be contrary to the public interest.

[Access to edited copies with irrelevant and exempt matter deleted \(s 22\)](#)

The documents within the scope of your request contain material which is exempt from disclosure.

On this basis, I have prepared the documents for release by removing exempt material in accordance with section 22 of the FOI Act. As noted above, the material that has been edited for release will be marked within the documents as well as in the document schedules, when these are provided to you in due course.

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

[Conclusion](#)

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

Yours sincerely



Margaret Sui
Senior Lawyer

9 June 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, an edited copy of the documents will be published on our [disclosure log](#) shortly after being released to you.