



Our reference: FOIREQ22/00161

Julie

By email: [foi+request-8726-eb263b53@righttoknow.org.au](mailto:foi+request-8726-eb263b53@righttoknow.org.au)

## Your Internal Review Application - FOIREQ22/00161

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the decision made on **9 June 2022** - FOIREQ22/00095.

### Original FOI Decision (FOIREQ22/00095)

You lodged a FOI request on 10 April 2022. In your request, you sought access on the following terms:

*"Dear Office of the Australian Information Commissioner,*

*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%40oiaic.gov.au%7C7c48683bb34f4d717ecb08da1af868a9%7Cea4cdebd454f4218919b7adc32bf1549%7C0%7C0%7C637851951752063302%7CUnknown%7CTWFpbGZsb3d8eyJWljojMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6IjEhaWwWwLCJXVCi6Mn0%3D%7C3000&sdta=v9%2FFGaFbBKDL1Cyrqw%2FY%2F%2F%2B7UWkE5H%2FLkCXqo4EbxKw%3D&amp;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 ....*

On 10 May 2022, you were informed that, as documents within the scope of your request contained information concerning an organisation's business and professional affairs, the OAIC had decided under s 27 of the FOI Act to consult the relevant organisation. As per s 15(6) of the FOI Act, the period for processing your request was extended by 30 days to allow time to undertake this third-party consultation.

On 9 June 2022, the original delegate informed you that they had identified 22 documents within the scope of your request. They informed you that they had decided to give you access to 17 documents in full and 5 documents in part. In making this decision, the delegate relied upon the conditional exemptions in s 47E(d) of the FOI Act – certain operations of agencies and s 47F of the FOI Act – personal privacy.

On 1 July 2022, you wrote the OAIC requesting internal review of the original delegate's decision.

### Material taken into account

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

- your original freedom of information request FOIREQ22/00095 dated 10 April 2022;
- the decision of the delegate dated 9 June 2022 the subject of this review;
- your request for internal review dated 1 July 2022;
- line area consultations made by the original delegate in processing your original request;
- submissions received from third parties in the course of processing your original request;
- further consultations (both internal and external) 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.

### 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)). I have had regard to, but not relied on, the delegate's original Freedom of Information (FOI) decision.

I have identified 5 documents as at issue for the purposes of this internal review: documents numbered **3, 20, 25, 35, and 53** in the schedule from the original decision. Based on the information before me at this time, I have decided to affirm the original decision in full. Please find attached a schedule of listing the documents at issue, the original decision and the decision on internal review.

The reasons for this decision are as follows.

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

I have decided to affirm the original delegate's decision to refuse access in part to 4 documents under s 47E(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).

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 Forge 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 Forge at [19] explains that the ‘ordinary meanings of the word “operation” in this context’ includes ‘an act, method or process of working or operating.’

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 s 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 QC) - as well as the staff of the OAIC. s 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). s 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.

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 affirmed as 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.

#### Information regarding current matters and the NDB scheme

**Documents 3 and 20** contain information provided under the NDB and material regarding current investigation processes scheme that is not publicly known. In undertaking this internal review, both the line area, and the third-party organisation to which some of the information relates, were consulted. I am satisfied that the release of the relevant information at this time would reasonably be expected to impact on both the ability of the OAIC to manage the specific matters referred to, as well as future matters, if parties cannot be confident that their information will not be disclosed to members of the public who are not parties to an investigation. I note that if entities become aware that it is possible that their engagement with OAIC may be disclosed in response to FOI requests, it is reasonably likely to cause entities to adopt a more adversarial approach in their engagement with OAIC and therefore prejudice the flow of information to the OAIC.

I consider that 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. Accordingly, 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 Mr Rex Patrick.

**Document 35** includes details of these legal proceedings. This is sensitive information concerning an ongoing litigation matter before the Federal Court.

In undertaking this internal review, the lawyer managing this litigation was consulted and it was confirmed that this information was not publicly available. I am satisfied that the OAIC's ability to manage these proceedings 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. 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 are not yet publicly available. The disclosure of this information would adversely impact on the confidence of other parties 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. In undertaking this internal review, I consulted with the line area and confirmed that this material was not yet publicly available. Accordingly, I am satisfied that the release of such information would 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 – s 47F

I have chosen to affirm the original delegate's decision that **Document 53** is conditionally exempt in part under s 47F of the FOI Act. The conditionally exempt material in this document is the signatures of staff members of the Australian Broadcasting Corporation and the Australian Electoral Commission.

### Personal information

s 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:

*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.

## Consideration

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. 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. In undertaking this internal review, I consulted with the AEC and ABC to confirm whether they still held concerns about the release of the relevant staff members' signatures. I am satisfied that this material is conditionally exempt.

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 – 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)).

I must consider whether disclosure of the information at this time would be contrary to the public interest. As noted above, based on the additional internal and external consultations I undertook in processing this internal review, I am satisfied that the relevant information is conditionally exempt under s 47E(d) and 47F of the FOI Act.

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. 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. Other factors are not relevant in this instance.

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 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 information in the future, as well as placing significant weight on the impact disclosure could have on the privacy of individuals.

I am satisfied that giving access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

### Conclusion

Please find attached a schedule listing the documents at issue and the exemptions applied to each document. I have not supplied you with a further copy of the documents that were released to you in full in the original decision FOIREQ22/00095. Please let me know if you would like to be provided with another copy of these documents. Please see the following page for information about your review rights.

Yours sincerely

**Emma Liddle**  
Director Legal

1 August 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](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](mailto: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](mailto:foi@oaic.gov.au). More information is available on the [Access our information](#) page on our website.