



Our reference: FOIREQ22/00162

**Attention: Julie**

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

Your Freedom of Information Request – FOIREQ22/00162

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 1 July 2022.

In your request you seek access to the following:

*“As the OAIC has alleged it needed 30 days to consult a third party for FOIREQ22/00095, I request under the Freedom of Information Act 1982 (Cth) (FOI Act) copy of all documents relating to the third party consultations the OAIC says it took for FOIREQ22/00095.”*

## 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 8 documents within the scope of your request. I have decided to release 2 documents in full and release 6 documents in part.

A schedule of documents is attached.

## Reasons for Decision

### Material taken into account

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

- your freedom of information request dated 1 July 2022;
- the documents at issue;
- the FOI Act, in particular sections 47E(d) and 47F;

- 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 release 4 documents in part 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).

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

- Information regarding a current regulatory matter.
- Submissions provided by a private organisation in the course of third-party consultations.

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 documents identified in the schedule as being exempt under s47E(d) of the FOI Act contain information that is not publicly known, regarding a private organisation. 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. The information considered exempt is in relation to a current regulatory matter. 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 regulatory process.

The documents also contain submissions, made by a private organisation, about the release of their business information in response to an FOI request lodged with the OAIC. The submission was marked in confidence. In my view, the ability of the OAIC to carry out its obligations under the FOI Act, would be affected if private organisations could not seek to make submissions in relation to their information being released under FOI without those submissions being made public.

As such, I consider the release of information on regulatory and FOI 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

#### Personal privacy exemption – s 47F

I consider that 4 documents contain material that is conditionally exempt under s 47F of the FOI Act. This material can be described as:

- names of staff members of a private organisation who were the subject of a third-party consult
- direct contact details of staff members of a private organisation who were the subject of a third-party consult

As discussed in the FOI Guidelines and IC review cases, the main requirements of this public interest conditional exemption are that a document contains 'personal information' and that disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)).

#### Personal Information

Subsection 4(1) of the FOI Act provides that ‘personal information’ has the same meaning as in the *Privacy Act 1988* (the Privacy Act).

I am satisfied that material described above is ‘personal information’ for the purposes of s 47F(1) of the FOI Act.

Would disclosure involve an unreasonable disclosure of personal information?

When determining whether disclosure of information would involve an unreasonable disclosure of personal information, s 47F(2) provides that a decision maker must have regard to:

- 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, and
- any other matters that the agency or Minister considers relevant.

The FOI Guidelines explain at [6.138] that the test of ‘unreasonableness’ in s 47F ‘implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals’.

Consistent with FG and National Archives of Australia [2015] AICmr 26, the FOI Guidelines explain that other relevant factors include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency’s collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

Documents containing names and direct contact details of staff members of a private organisation

Material relating to the full names and direct contact details of a private organisation’s staff, is information about the private affairs of these staff members

and is not well known. Disclosure of this information, due to its wholly private nature, would not advance the public interest in government transparency and integrity. I consider that it would be unreasonable to disclose this information and find that this material is conditionally exempt from disclosure 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 Forge explained that:<sup>1</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.*

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:

---

<sup>1</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

- disclosure of Information regarding a private organisation which was subject to a third-party consultation could reasonably be expected to prejudice the proper and efficient conduct of the an agency's regulatory functions.
- disclosure of Information regarding a private organisation which was subject to a third-party consultation could reasonably be expected to prejudice the proper and efficient conduct of the Freedom of Information request functions of the OAIC.
- disclosure of staff details of a private organisation which was subject to a third-party consultation could reasonably be expected to prejudice the protection of an individual's right to privacy.

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.

#### Conclusion

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

Yours sincerely



**Emily Elliott**  
Senior Lawyer

31 August 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](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\\_](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](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 [FOIDR@oaic.gov.au](mailto: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 contain personal and business information. I have decided that it would be unreasonable to publish. As such, these documents will not be published on the disclosure log.