



Our reference: FOIREQ22/00120

**Julie**

By email: [foi+request-8854-c1e6c27c@righttoknow.org.au](mailto:foi+request-8854-c1e6c27c@righttoknow.org.au)

## Your Freedom of Information request – FOIREQ22/00120 - Decision

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 3 May 2022.

In your FOI request, you sought access to the following documents:

I request copy of all s 70 complaints made under the FOI Act about Veterans Affairs. I also request copy of the corresponding Resolve report for each of these s 70 complaints in scope.

I also request copy of any own motion investigation under the FOI Act about Veterans Affairs.

All personal information about private individuals (persons who are not Commonwealth officials performing their duties) is irrelevant and exempt under s 22, requiring no consideration. All email addresses and telephone numbers are also irrelevant and exempt under s 22, requiring no consideration.

## 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 88 documents falling in scope of your request. I have decided to:

- grant access to 21 documents in full
- grant access to 48 documents in part
- refuse access to 19 documents.

Please be advised that the OAIC has recently undergone a transition of ICT systems to a new provider, and this has led to delays in the OAIC's ability to prepare documents for release under FOI during this period.

As such, we will be releasing documents to you in one tranche by close of business on Thursday 9 June 2022. These documents will be accompanied by a schedule.

## **Reasons for decision**

### **Material taken into account**

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

- your freedom of information request of 3 May 2022
- any submissions made by third parties
- the documents at issue
- the FOI Act, in particular ss 11A(5), 17, 22, 24A, 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

### **Irrelevant material (s 22)**

I have found material in 69 documents to contain irrelevant material, or material outside the scope of your request.

Section 22(1)(b)(ii) of the FOI Act provides that an agency may prepare an edited copy of a document by deleting information that is exempt or that would reasonably be regarded as irrelevant to the request.

The FOI Guidelines explain at [3.54] that a request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.

In your FOI request, you agreed to exclude the following material:

All personal information about private individuals (persons who are not Commonwealth officials performing their duties) is irrelevant and exempt under s 22, requiring no consideration. All email addresses and telephone numbers are also irrelevant and exempt under s 22, requiring no consideration.

Based on my examination of the documents in scope, in addition to the above material which you agreed to exclude from the scope of the request, I have also found the following material to be outside the scope of your request:

- documents relating to other Commonwealth agencies not related to the complaint against the Department of Veterans' Affairs (DVA).

I am satisfied that the above materials are irrelevant or outside the scope of your FOI request.

### **Whether reasonable steps taken to find documents (s 24A)**

I have decided to refuse you access to one document as I have found that all reasonable steps have been taken to find the document in scope of your FOI request and I am satisfied that the document cannot be found.<sup>1</sup>

Section 24A requires that an agency take 'all reasonable steps' to find a requested document before refusing access to it on the basis that it cannot be found or does not exist.

The FOI Guidelines explain at [3.88] – [3.89] that:

The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents, and
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and

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<sup>1</sup> Document 15

- the age of the documents.

In conducting search and retrieval of documents falling in the scope of your request, the FOI Regulatory Group line area conducted searches on the OAIC's case management system Resolve.

In collating documents from Resolve, the line area advised that for one complaint matter, the original complaint cannot be located on the Resolve file. The line area advised that the document appear to have been destroyed in accordance with the OAIC's records authority.

I have independently examined the Resolve file for that complaint. An error sign occurs on Resolve when attempting to access a copy of the complaint, which says "Document could not be found at the specified location."

For the above reasons, I am of the view that all reasonable steps have been taken to find the document in scope of your FOI request and I am satisfied that the document cannot be found.

In relation to the part of your request for "copy of any own motion investigation under the FOI Act about Veterans Affairs", the FOI Regulatory Group line area has advised that no own motion investigations have been conducted by the OAIC about the Department of Veterans' Affairs (the Department) under the FOI Act.

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

I have found a number of documents or certain material contained in some documents are exempt under section 47E(d) of the FOI Act. Based on my examination of the relevant documents, the exempt material can be described as:

- Full names of Commonwealth Ombudsman staff members
- Network address of OAIC's IT system, and
- Documents relating to complaints that are current and ongoing.

The information within these documents that I have found to be conditionally exempt is the names of Commonwealth Ombudsman staff members, and material disclosing the network address of the OAIC's IT system.

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.

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.

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).

### *Commonwealth Ombudsman*

I have decided that a number of documents are exempt in part as they contain the surnames of Commonwealth Ombudsman staff members.

In order to determine whether disclosure of the outlined material would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Commonwealth Ombudsman, I have taken into consideration the functions and activities of the Commonwealth Ombudsman.

The office of the Commonwealth Ombudsman is created by the *Ombudsman Act 1976* (Cth). Under this act, the Commonwealth Ombudsman functions to investigate complaints regarding the administrative actions of Federal Government departments, as well as certain private sector organisations.

In order to manage its complaint workload accordingly, the Commonwealth Ombudsman has procedures in place to manage complaints, which includes an online complaint form and a general line for the public to call. The direct contact details of Commonwealth Ombudsman employees are not publicly available and are not listed on the Commonwealth Ombudsman website. It appears that, were the surnames of Commonwealth staff members made available to the public, this would

have a significant adverse effect on the Commonwealth Ombudsman's ability to appropriately manage its complaints and investigation processes, through allowing members of the public to directly contact staff members, undermining the ability of the Ombudsman to appropriately receive and manage enquiries in accordance with its established procedures.

Relevantly, in the Information Commissioner review (IC review) case of *'PX' and Australian Federal Police (Freedom of information)* [\[2019\] AICmr 8](#) at [64], as the Commonwealth Ombudsman has in place "...procedures in place to manage their contact with members of the public and investigate complaints", it was found that the release of direct contact details of staff "...would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations."

Considering the above, and in line with the above IC review decision, I am satisfied that the release of the surnames of Commonwealth Ombudsman staff members would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations. I therefore find that the relevant material is conditionally exempt under section 47E(d) of the FOI Act.

#### *Network address of the OAIC's IT system*

As noted above, a number of documents contain the network address for the OAIC's IT system. The OAIC collects and stores a range of personal and financial information about members of the public. The network address contains information about the OAIC's IT system (including the network location and storage of information). I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC. The impact of any compromise to the safety and security of the OAIC's information systems would result in a serious adverse impact on the functions and responsibilities of the OAIC.

In the IC review case of *'AW' and Australian Taxation Office (Freedom of information)* [\[2014\] AICmr 1](#) ('AW'), the then Freedom of Information Commissioner considered the decision by the Australian Taxation Office (ATO) to exempt user IDs under section 47E(d) of the FOI Act. The user IDs are used by ATO staff to access the ATO's IT system. The Commissioner found that disclosing the user IDs "would have an adverse effect on the security of the ATO's IT systems and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ATO". In a series of subsequent IC review decisions, the former Australian Information Commissioner agreed with the reasoning given by the Commissioner in 'AW' to find that user IDs used by ATO staff to access the ATO's IT system were exempt under section 47E(d) of the FOI Act.

I consider that the disclosure of the network address of the OAIC's computer system could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. I have decided that the network address of the OAIC's IT system is conditionally exempt from disclosure under section 47E(d) of the FOI Act.

#### *Complaints that are current and ongoing*

I have refused access in full to a number of documents that relate to complaints made to the OAIC that are current and ongoing. Please refer to the schedule of documents. The documents that I found exempt consist of copies of the s 70 complaint to the OAIC, as well as the Resolve for these matters.

Given that these complaints remain open, I consider that while the investigation is on foot, disclosure of the relevant material at this stage can impede the efficient conduct of the case. Specifically, the investigating officers are still in the process of formulating their views, and gathering facts and evidence, and no decisions or findings have been made regarding these complaints. Parties to the investigation will be provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. Further, if a finding is made regarding the complaint, it is appropriate for the parties to the complaint to be advised of that outcome.

Accordingly, I consider that at this time, disclosure of this material to you via the Right to Know website, when the complaint is still being investigated by the OAIC, and where the parties have not yet been advised of the outcome of the investigation, would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in investigating FOI complaints.

#### **Personal privacy exemption (s 47F)**

I have decided a number of documents are exempt in part under s 47F of the FOI Act. The material that I have found exempt can be described as the following:

- Personal leave details of staff members of OAIC, the Department and the Australian Government Solicitor (AGS), and
- Names of Department's staff members, and that of the Australian Government Solicitor (AGS) who were subject to the complaint, where they appear in the complaint to the OAIC or in the Resolve report.

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'; disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)); and it would be 'contrary to the public interest' to release the personal information at the time of the decision (s 11A(5)).

### 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 consisting of staff leave arrangements, and staff names of the OAIC, the Department and AGS comprises 'personal information' for the purposes of s 47F(1) of the FOI Act.

### Would disclosure involve an unreasonable disclosure of personal information?

In relation to the second requirement of s 47F, that disclosure of the information under the FOI Act 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 personal leave details of staff*

Information relating to personal leave of agency staff members of OAIC, the Department and AGS is not in the public domain and contains information about the private affairs of the affected individuals. I note that this information has no connection to the subject of your FOI request and relates only to the personal lives of these individuals. Release of this information, due to its wholly private nature, would not advance the public interest in government transparency and integrity due to it only being tangentially related to government activity.

I am therefore satisfied that the personal information identified above would be unreasonable to release in the circumstances and is conditionally exempt from disclosure under section 47F of the FOI Act

#### *Names of agency staff members subject to the complaint*

I have also considered whether disclosure of materials comprising the names of staff members of the Department, and AGS, where the staff member was subject to the complaint to the OAIC, is unreasonable in this case.

The OAIC has always taken the position that where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstance existed. As outlined in part [6.153] of the FOI Guidelines, this is because the information would reveal only that the public servant was performing their public duties.

In the documents, where names of agency staff members arise during the course of their dealings with the OAIC in investigating the complaint, I have decided to release this material in full as the information would reveal only that the public servant was performing their public duties.

However, where the names of agency staff members appear in the documents, in the context of the complaint to the OAIC, it is my view that disclosure of this material at this time is unreasonable. The names of agency staff members appear in the documents because complainants have complained about the conduct of these staff

members. In several complaints, the substance of the complaint is in part, allegations about the conduct of individual staff members.

Under Part VIIB of the FOI Act, the Information Commissioner can investigate an action taken by an agency in the performance of its functions or the exercise of its powers under the FOI Act. The complaints process set out in Part VIIB is intended to deal with the way *agencies* handle FOI requests and procedural compliance matters. Following the receipt of the complaint by the OAIC, the Information Commissioner may make preliminary inquiries for the purposes of determining whether or not to investigate a complaint. The Information Commissioner also has a discretion not to investigate, or not to continue to investigate the complaint in circumstances set out in s 73 of the FOI Act. At times, the complainant withdraws the complaint and no further action is required. Accordingly, not all complaints received by the OAIC will lead to a notice on completion with investigation recommendations to the Department. In my view, disclosure of the names of agency staff members contained as part of the complaint is unreasonable because:

- the information is not well known
- the agency staff members subject to the complaint is not known to be associated with the matters dealt with in the document
- the agency staff names subject to the complaint are not available from publicly accessible sources other than in the s 70 complaint files with the OAIC
- the substance of the s 70 complaints to the OAIC are being disclosed either in the complaint or the Resolve reports contained with the documents found to be within the scope of this request. These documents include concerns raised by members of the public as to the procedural compliance issues *with the agency* and allegations about particular staff members. Release of the names of agency staff members whose name appear in the complaints would serve no additional public purpose and would cause stress on the staff member, particularly in circumstances where allegations are found to be unsubstantiated.
- I am also mindful that the FOI request has been made through the Right to Know website, and that the documents released will be published on the website upon release. As DP Forgie noted in AAT decision in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (Warren) at para 118, the FOI Act does not limit those to whom, or the platforms on which, a person might choose to publish the documents to which they are given access. Others may choose to do what the applicant would not do; in addition, if they choose to do so, modern means of communications enable information to be

disseminated very broadly and quickly. In this case, disclosure of the names of agency staff members will indeed be “disclosure to the world at large”.

I have also considered recent Information Commissioner decisions involving public servants’ names and the application of s 47F. In *YO’ and Department of Home Affairs (Freedom of Information) [2021] AICmr 67 (10 November 2021)* (‘YO’), the acting Information Commissioner, Privacy Commissioner, and Freedom of Information Commissioner Elizabeth Hampton considered whether disclosure of two Departmental Officers’ names to the IC review applicant who was seeking documents relating to himself, was unreasonable. While the acting Commissioner Hampton was satisfied that the names of the two officers are not well known and not available from publicly accessible sources, and that the individuals are likely to be known to be associated with the matters in question only by a limited number of people, she gave greater weight to allowing the applicant to understand the Department’s reasoning and decision-making processes. Specifically, she acknowledged that government officers are accountable for their decisions, advice and actions. As such, the release of the information would contribute to the public interest in government transparency and integrity.

In my view, the circumstances of this request can be distinguished in ‘YO’. In ‘YO’ the FOI applicant was seeking to access material held by the Department, including the names of the two Officers who were part of the decision-making process that affected the applicant’s compensation claim, to assist his understanding of the Department’s reasoning and decision-making processes. There is no such submission here in support of the application as to your reasons for seeking access and the intended or likely use or dissemination of the names of agency officers who are subject to the s 70 complaint.

Having examined the documents at issue and based on the information before me at this time, for the reasons outlined above, I am of the view that disclosure of materials comprising the names of staff members of the Department, and AGS, where the staff member was subject to the complaint to the OAIC, is unreasonable in this case.

### **Public interest (s 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<sup>[4]</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.

The FOI Guidelines provide a further non-exhaustive list of factors favouring disclosure (see [6.19]). These factors include when disclosure will reveal the reason for a government decision and any background or contextual information that informed the decision and when disclosure will enhance the scrutiny of government decision making. I do not consider that the material that has been identified as exempt under s47E(d) and s47F of the FOI Act would enhance the scrutiny of government decision making.

As such, the only public interest factor favouring disclosure in this case is that disclosure would promote the objects of the FOI Act generally through promoting access to government held information. Other factors are not relevant in this instance.

Against these factors, I must balance the factors against disclosure. The FOI Act does not specify factors against disclosure, however the FOI Guidelines at paragraph [6.22] provides a non-exhaustive list of factors against disclosure.

I consider that the relevant factors against disclosure in this instance are as follows:

- disclosure of the surnames of Commonwealth Ombudsman staff is reasonably likely to prejudice the proper and efficient conduct of the Ombudsman
- disclosure of the OAIC’s network address could reasonably be expected to prejudice the security of the OAIC’s IT systems and could therefore be

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<sup>[4]</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

reasonably expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations.

- Disclosure of the personal information of the OAIC, Department and AGS staff including names of the Department and AGS staff members nominated in the complaint, as well as the personal leave arrangements of agency staff members, would, or could reasonably be expected to prejudice the protection of these individuals' right to privacy, as well as potentially exposing these individuals to unnecessary stress.

Therefore, in this case, I am satisfied that the public interest factors against disclosure outweigh the public interest factor in favour of disclosure.

I have decided that at this time, giving you full access to the documents, which I have found to be conditionally exempt under s 47E(d) and 47F of the FOI Act, would, on balance, be contrary to the public interest.

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

2 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.

### **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, it is likely that the Information Commissioner will decide (under s 54W(b) of the FOI Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the AAT.

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 internal review or IC review 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.

### **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 it would be unreasonable to publish.

The documents I have decided to release to you contain personal information that would be unreasonable to publish. As a result, an edited version of the documents will be published on our [disclosure log](#).