



Our reference: FOIREQ22/00164

Attention: Julie

By Email: foi+request-9071-493f4a92@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00164

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:

“I request under the Freedom of Information Act copy of documents relating to any code of conduct review/s conducted by the OAIC.

It would be more efficient and cost effective however for the OAIC to produce a s 17 document (like done here

<https://www.righttoknow.org.au/request/6767/response/19110/attach/4/FOI%2038412%20Document%20created%20in%20accordance%20with%20section%2017%20of%20the%20FOI%20Act%20final.pdf>) instead that lists:

- the number of such code of conduct reviews carried out by the OAIC, listed by topic (Conflict of interest; Honesty and integrity; procedural fairness; respect, courtesy and harassment; unauthorised access to information; other)

- the number of code of conduct reviews carried out by the OAIC listed by outcome (sanction/warning; withdrawn/closed without adverse finding)”

On 7 July 2022, Ms Janani Balasubramanian of the OAIC acknowledged your request and requested the following clarification:

*“Please kindly advise by **close of business on Monday 11 July 2022** whether you are requesting documents for code of conduct reviews in relation to a defined time period? If so, please specify the date range. The APS Code of Conduct breach procedure is linked [here](#) for your reference.”*

On 16 July 2022, you responded with the following:

“I limit the scope of my request to the last 50 Code of Conduct reviews carried out by the OAIC.”

Decision

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

A document has been created in response to your request under s 17 of the FOI Act. I have decided to refuse your access to this document in full.

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;
- your limiting of the scope of your request dated 16 July 2022;
- the document at issue;
- the FOI Act, in particular s 47E(c);
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), and;
- relevant case law

Requests involving use of computers (s17)

Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if the agency could produce the written document by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information. In retrieving information relevant to your request, the relevant line area produced a document under s 17 of the FOI Act, detailing the topic and outcome of code of conduct reviews.

Personal Privacy (s 47F)

I have found the document exempt in full under s 47F of the FOI Act.

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:

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 have considered whether the document created under s 17 of the FOI Act contains personal information. I note that the document only includes the number of code of conduct reviews by topic and outcome, however the statistical number of code of conduct reviews is small. When this information is combined with the fact:

- the OAIC is only a small agency of around 130 staff; and
- release of the document under FOI, via the right to know website, provides public access to the document

the information could be used to identify the individual or individuals reported within the document. For this reason, I consider the document created under s 17 of the FOI Act contains personal information.

In determining whether disclosure of personal information would be unreasonable, s47F(2) of the FOI Act requires me to have regard to the following matters:

- a) the extent the information is well known
- b) 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
- c) the availability of the information from publicly accessible sources
- d) any other matters I consider relevant.

In this instance, I consider that the information is not well known, nor is it available from publicly accessible sources. Recently, in ‘YC’ and Department of Foreign Affairs and Trade (*Freedom of information*) [\[2021\] AICmr 53](#) (13 October 2021) the disclosure

of information in relation to a code of conduct investigation was found not to be unreasonable in circumstances where the disclosure was to the person who made the original complaint. However, I note the information you have requested is not about you or a code of conduct review you were directly involved in. For these reasons I consider the disclosure of the personal information would be unreasonable.

The public interest test – 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^[4]:

... 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.

Section 11B(3) of the FOI Act lists factors that favour access to the document in the public interest. I find the relevant factors to be the promotion of the objects of the Act as stated in sections 3 and 3A, particularly the object to increase the scrutiny and review of the Government’s activities as specified in s 3(2)(b) of the FOI Act, as well as informing debate on a matter of public importance as specified in s 11B(3)(b) of the FOI Act.

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

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

informed the decision and when disclosure will enhance the scrutiny of government decision making. I acknowledge that information about the actions of public servants and their behaviour under the Code of Conduct may enhance the scrutiny of government decision making.

However, 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 that the disclosure of the material outlined above could reasonably be expected to prejudice the affected individuals' right to privacy.

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 47F of the FOI Act, 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
1 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, 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.