



Our reference: FOIREQ22/00204

Attention: Julie

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

Your Internal Review Application - FOIREQ22/00204

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the FOI decision made on 1 August 2022 in FOIREQ22/00164.

Original FOI Decision (FOIREQ22/00164)

On 1 July 2022, you applied to the Office of the Australian Information Commissioner (OAIC) and sought 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- the number of code of conduct reviews carried out by the OAIC listed by outcome (sanction/warning; withdrawn/closed without adverse finding)”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."

On 1 August 2022, the OAIC made its original decision. Ms Emily Elliott (the original decision maker) identified one document in scope of your request, which was created under s 17 of the *Freedom of Information Act 1982* (Cth) (FOI Act) in response to your request. The OAIC refused you access to the document in full. In making the decision, the OAIC relied on the personal privacy exemption (s 47F).

On 1 August 2022, you applied to the OAIC for internal review of the original decision under s 54B of the FOI Act, writing the following:

I am writing to request an internal review of Office of the Australian Information Commissioner's handling of my FOI request 'Code of Conduct Reviews'.

Emily Elliot, the delegate who refused access to this s 17 created document that contains no personal information has refused access because she considers "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" it would reasonably identify individuals who the code of conduct is about.

As stated by Emily Elliott, the s 17 document does not contain personal details about any individual. In order for such a non-PI document to reasonably identify an individual, there must be something more than just that the OAIC is small and code of conduct reviews are uncommon.

It also should be noted that the type of information in this s 17 document is of the type routinely published by the APSC as cases. The APSC even includes more information than this s 17 document does.

This access refusal is therefore not only wholly unjustified and untenable, but nonsensical.

Material taken into account

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

- your original freedom of information request FOIREQ22/00164 dated 1 July 2022
- the decision of the delegate dated 1 August 2022 the subject of this review;
- your request for internal review dated 1 August 2022
- the *Freedom of Information Act Act 1982* (FOI Act), in particular s 47F
- 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 one document at issue for the purposes of this internal review: being the document that was created by the relevant line area under s 17 of the FOI Act in response to your FOI request in the original decision. I have decided to affirm the original decision in refusing you access to the document.

The reasons for my decision are as follows.

Personal privacy conditional exemption – s 47F

I find 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.

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 material at the time of the decision (s 11A(5)).

Personal information

In relation to the first requirement of s 47F, under s 4(1) of the FOI Act, ‘personal information’ has the same meaning as in section 6 of the *Privacy Act 1988* (Privacy Act), which provides:

“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.*

In relation to whether a person is reasonably identifiable, the FOI Guidelines explain at [6.131] – [6.135]:

What constitutes personal information will vary, depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. For particular

information to be personal information, an individual must be identified or reasonably identifiable.

Where it may be possible to identify an individual using available resources, the practicability, including the time and cost involved, will be relevant to deciding whether an individual is 'reasonably identifiable'. An agency or minister should not, however, seek information from the applicant about what other information they have or could obtain.

Where it may be technically possible to identify an individual from information, if doing so is so impractical that there is almost no likelihood of it occurring, the information is not personal information.[106] In Jonathan Laird and Department of Defence [2014] AICmr 144, the Privacy Commissioner was not satisfied that DNA analysis of human remains could reasonably identify the World War II HMAS Sydney II crewmember. In finding that the DNA sequencing information held by the Department was not personal information, the Commissioner discussed that identifying the remains by utilising DNA sequencing would be 'impractical for a reasonable member of the public'.

Similarly, in a series of recent IC review cases, the Information Commissioner had to decide whether or not aggregate information relating to the nationality, language and religion of refugees resettled under Australia's offshore processing arrangements is the personal information of the relevant individuals. In each case, the Commissioner found that the individuals were not reasonably identifiable from the aggregated information.

Therefore, whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.

Based on my examination of the document, the document that I have found exempt contains information detailing the number of Code of Conduct reviews and details relevant to the nature of the non-compliance/outcomes. Having considered the information, I agree with the original decision maker that given the limited amount of code of conduct reviews identified in the document, when combined with the other information detailed in the document about the nature of the non-compliance/outcomes, if this material is released via the Right to Know website allowing public access to the document, the individual or individuals are reasonably identifiable in the particular circumstances.

I have considered it relevant that the OAIC is a small agency of only around 130 staff, and that release of this document under FOI, via the Right to Know website, provides public and perpetual access to the document.

For these reasons, the aggregated information, in my view, would make the individual or individuals to whom the document relates reasonably identifiable.

In your request for internal review you state the following

"It also should be noted that the type of information in this s 17 document is of the type routinely published by the APSC as cases. The APSC even includes more information than this s 17 document does."

I note that, regarding the material published by the Australian Public Services Commission (APSC), you appear to be referring to aggregate code of conduct investigation data

published by the APSC, as opposed to information regarding a single small agency. As explained above, due to the small size of the OAIC and the information contained in the document at issue in this internal review, I am satisfied that were this document to be released, the individual or individuals to which the information relates would be reasonably identifiable.

Accordingly, I am satisfied that the document contains personal information for the purposes of s 47F of the FOI Act.

Whether disclosure involve an unreasonable disclosure of 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.

The FOI Guidelines at [6.143] 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.

Based on the information before me, and having examined the document at issue, I am of the view that disclosure of the document at issue at this stage to you would involve an unreasonable disclosure of personal information, for the following reasons:

1. Having considered the nature of the personal information, it is still of current relevance
2. The specific personal information is not well known or available from publicly accessible sources

3. The individual/s whose personal information is contained in the document should have a reasonable expectation that their personal information would not be released.

As noted by the original decision maker, in *'YC' and Department of Foreign Affairs and Trade (Freedom of information) [2021] AICmr 53* (13 October 2021) the disclosure of some 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 involved in. For these reasons I consider that these circumstances can be distinguished from this Information Commissioner review and am satisfied that the disclosure of the personal information would in this instance be unreasonable.

While I consider that there is some utility in disclosure of the document in advancing the public interest in government transparency and integrity in relation to performance of its staff members, having considered all the relevant factors in this case, I am still of the view that disclosure of the document would involve an unreasonable disclosure of personal information.

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 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 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 section 3, 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.

The FOI Guidelines provide a further non-exhaustive list of factors favouring disclosure (see [6.19]). I consider that disclosure of the document at issue would promote the objects of the FOI Act and advance the public interest in government transparency, as it would create greater transparency around the circumstances in which the Code of Conduct reviews arise and the outcome of reviews at the OAIC. I consider this to be a relevant public interest factor favouring disclosure and that some weight should be given to this factor.

I consider that the relevant FOI Guideline factor against disclosure in this case is that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.

In balancing the relevant factors in this case, I consider that the public interest weighs against disclosure. In particular, I am mindful that the information contained in the document is information of a personal nature and that it is not well-known. I consider significant weight should be given to an individual's right to privacy.

For the above reasons, I am of the view that the document at issue, which contains information detailing the number of Code of Conduct reviews and details relevant to the nature of the non-compliance/outcomes, is exempt from disclosure under s 47F 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

For the above reasons, I affirm the original decision to refuse you access to the document.

Please see the following page for information about your review rights.

Yours sincerely

Emma Liddle
Director Legal

31 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

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, 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. More information is available on the [Access our information](#) page on our website.