



Our reference: FOIREQ22/00171

Attention: Lucy Lovich

By email: foi+request-9102-8266a88e@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00171

Dear Lucy Lovich

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 6 July 2022.

In your request you seek access to the following:

“I seek access to a breakdown of the number of FOI staff allocated to conduct duties related to the regulation of FOI duties.

- 1. how many staff in total actively working on FOI files*
- 2. how many FOI staff have resigned from 1 July 2021 to todays date*
- 3. how many FOI staff have been recruited from 1 July to todays date*
- 4. how long do FOI recruited staff stay - length of employment*
- 5.any briefing document prepared for the new freedom of information commissioner regarding staffing in FOI.”*

On 8 July 2022 I wrote to you acknowledging your request and seeking clarification of the scope. In that email I stated:

“Could you please clarify the scope of your request. Would you please kindly advise whether by ‘FOI staff allocated to conduct duties related to the regulation of FOI duties’ and ‘FOI staff’:

- 1. you are seeking information relating to the FOI Regulatory Group who has functions of conducting FOI complaint investigations, Information Commissioner reviews and general FOI functions of the office, or*
- 2. or the Legal team who processes FOI requests received by the OAIC, or*
- 3. both of the above?”*

In an email received by the OAIC on 11 July 2022 you clarified the scope of your request. In that email you stated:

“Both of the above but broken down into the two teams. I want the separate information for both teams.

1. FOI Regulatory Group

2. Legal team”

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 3 documents within the scope of your request. I have decided to release 3 documents in part.

Reasons for Decision

Material taken into account

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

- your freedom of information request dated 7 July 2022;
- the documents at issue;
- the FOI Act, in particular sections 17, 47E(c) and 47F;
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines, and;
- relevant case law

Document created under s 17 of the FOI Act

Your FOI request contained the following:

“I seek access to a breakdown of the number of FOI staff allocated to conduct duties related to the regulation of FOI duties.

1. how many staff in total actively working on FOI files

2. how many FOI staff have resigned from 1 July 2021 to todays date

3. how many FOI staff have been recruited from 1 July to todays date

4. *how long do FOI recruited staff stay - length of employment*”

This appears to be a request for the OAIC to produce the requested information under section 17 of the FOI Act. I have considered whether it is possible to produce a document that contains the information you have requested. Relevantly, the FOI Guidelines at [3.212] state that the obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a ‘computer or other equipment that is ordinarily available’ to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s 17(2)).

A table has been generated which contains the information you have requested. Please see the table below.

	FOIDR	Legal
Staff actively working on FOI files	17 staff	7 staff
Staff who have resigned from 1 July 2021 to 27 July 2022	7 staff	3 staff
Staff who have been recruited from 1 July 2021 to 27 July 2022	8 staff	4 staff
Length of employment	18.42 months	5.67 months

Management and assessment of personnel (s 47E(c))

I have found material in one document exempt in part under section 47E(c) of the FOI Act. The document can be described as:

1. A organisational chart of the FOI Regulatory Branch, which was prepared for the new freedom of information commissioner.

Based on my examination of the relevant document, the exempt material that I have found exempt under s 47E(c) can be described as:

- the full names of all non-SES OAIC staff members.

Under s 47E(c) of the FOI Act, a document is conditionally exempt if its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by an agency.

Section 47E(c) 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:

...

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

The FOI Guidelines explain at [6.114]:

For this exemption to apply, the document must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback and assessment for bonus or eligibility for progression.

I have considered the material at issue in the 1 document which was provided by the OAIC FOI Regulatory Branch. I consider the relevant material relates to the management of personnel, including the broader human resources policies and activities, recruitment and occupational health and safety.

In September 2020, the OAIC published a position paper on the disclosure of public servants' personal information in response to FOI requests.¹ The paper outlined the following key principles:

1. Transparency and accountability are fundamental to Australian democracy and to the Australian public service. Public servants should be accountable for their decisions, their advice and their actions in the service of the Commonwealth.
2. Public servants also have a right to be safe at work and safe from harm as a result of their work.

¹ [Disclosure of public servants' name and contact details in response to FOI requests - Home \(oaic.gov.au\)](https://www.oaic.gov.au/foi/foi-requests/foi-requests-response)

3. The evolution of the digital environment – including its ubiquity, accessibility and longevity – gives rise to new risks for public servants, as well as for citizens. These risks include the traceability and trackability of public servants’ personal lives and the risk of physical or online harassment.
4. Previously existing risks have been compounded by the normalisation of digital communications and publication. Risk may be increased when contact details are published to a wider audience, for a longer period of time, and at no cost, on a digital platform.
5. This paper recognises changes resulting from the development of the online environment when balancing the accountability and safety of public servants within the context of disclosures required by the FOI Act.

...

I find the discussions in the position paper useful in considering the material before me at this time.

The OAIC generally releases its staff member’s names in response to FOI requests, particularly where OAIC applicants seek to access their files and records held by the OAIC which, in line with the objects of the FOI Act, promote better-informed decision-making and increases scrutiny, discussion, comment and review of the Government’s activities. This is contrasted with the circumstances of this request where the relevant material arises in documents is for internal use only for the management of personnel purposes by the OAIC and is material that is not published on the OAIC’s website. It is apparent from these documents that the names of the OAIC non-SES staff members arise in the documents not because of their usual responsibilities in performing a function of the OAIC but as a result of their status as an employee of the OAIC. Section 19 of the *Work Health and Safety Act 2011* requires employers to ensure, as far as is reasonably practicable, the health and safety of their workers. This means employers must eliminate risks to health and safety so far as it is reasonably practicable to do, or minimise the risks if it is not reasonably practicable to eliminate them (section 17).

There have been instances where OAIC staff members have received threats of harm from members of the public, raising both security and work health and safety concerns. This real risk of harm is compounded in this case as it is almost certain that all documents released in response to FOI requests made via the Right to Know website can be published without effort and quickly disseminated globally.

In my view, based on the information before me at this time, I am of the view that disclosure of all non-SES OAIC staff names en masse via a public forum such as Right to Know, would, or could reasonably be expected to substantially and adversely

affect the OAIC's ability to manage its personnel, including its broader human resources policies and activities, particularly in relation to its statutory occupational health and safety obligations as an employer.

I find the relevant material comprising of non-SES OAIC staff names conditionally exempt under s 47E(c) at this time.

I will consider public interest factors in the later parts of my decision.

Personal privacy exemption – s 47F

I consider that 1 document contains material that is conditionally exempt under s 47F of the FOI Act. This material can be described as:

- leave details of OAIC staff

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 the leave details of OAIC staff

Material relating to the leave details of OAIC 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:²

... 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

² *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

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 s 47E(c) 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. In my view, the relevant public interest factors against include that:

- disclosure of the full names of all non-SES OAIC staff members via a public forum on Right to Know could reasonably be expected to prejudice the OAIC's ability to manage its personnel, including its broader human resources policies and activities towards occupational health and safety. In particular, in light of past instances where OAIC staff members have been subject to threats of harm, disclosure of this material by the OAIC via a public form on Right to Know in this case would be in contravention of OAIC's obligations under the *Work Health and Safety Act 2011* to eliminate or minimise known risks to health and safety as far as it is reasonably practicable to do so.
- disclosure of leave details of OAIC staff could reasonably be expected to prejudice the protection of an individual's right to privacy.

On balance, I consider that the factors against disclosure outweighs the factor in favour of disclosure. I have therefore decided that it would be contrary to the public interest to give you access to the information that I have found to be conditionally exempt under s 47E(c) and s47F of the FOI Act.

Access to edited copies with irrelevant and exempt matter deleted (s 22)

The documents within the scope of your request contain material which is exempt from disclosure. The documents within the scope of your request also contain material which is irrelevant to your request, particularly to your request for *any briefing document prepared for the new freedom of information commissioner regarding staffing in FOI*. In relation to 3 documents the briefing included information regarding the FOI functions and activities of the FOI Regulatory Group in addition to information regarding staffing. Irrelevant material has been removed as exempt under s22 of the FOI Act. On this basis, I have prepared the documents for release by removing exempt material in accordance with section 22 of the FOI Act.

Conclusion

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

Yours sincerely

A handwritten signature in cursive script that reads "Emily Elliott".

Emily Elliott
Senior Lawyer

5 September 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.

Accessing your information

If you would like access to the information that we hold about you, please contact 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.