



Our reference: FOIREQ22/00181

Attention: Verity Pane

By email: foi+request-9124-d204e3ec@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00181

Dear Verity Pane

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 13 July 2022.

In your original request you sought access on the following terms:

“I want copy of every letter the OAIC sent in FY2021/22 that states “The purpose of this letter is to advise you of my intention to recommend the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application”.

Personal information of any person to be redacted under s 22, as well as the FOI and IC review references numbers.

Transparency of reasoning as to why ic reviews are not recommended by OAIC staff is important in showing what confidence can be had in the Office's primary statutory functions.”

Request consultation process

On 8 August 2022, I wrote to you under s 24AB of the FOI Act to advise you of our intention to refuse your request under s 24(1) of the FOI Act. This was because the work involved in processing your request in its then-current form would substantially and unreasonably divert the resources of the OAIC from its other operations. In the letter, I advised that you could:

- withdraw your request
- revise the scope of the request (a number of options for revising the scope were provided to you), or
- not respond and your FOI request would be taken to have been withdrawn.

On 12 August 2022, you wrote to the OAIC with your consultation response. In your response you revised your scope as follows:

“...I agree to vary my scope to the first 100 ITD ICR letters that were issued in FY2021-22.”

On 15 August 2022, after further consultation with the relevant line area on the feasibility of processing your revised request, a staff member of the OAIC wrote back to you, informing you that, due to limitations with the OAIC’s matter management and filing system Resolve, we are unable to organise matters by the date that Intention to Decline (ITD) letters are sent out. The relevant line area informed us that, in order to process your request, a staff member would have to:

1. open up all 422 Information Commissioner (IC) review matters that were identified by the line area as having had an ITD sent between 1 July 2021 and 30 June 2022
2. record the date the ITD letter was sent in each of the 422 matters, and
3. cross reference all of these matters in order to determine which were the first 100 ITD letters sent in the 2022 financial year.

In light of this, and in light of the short timeframe remaining to process your request, you were informed that, in order to allow us to process your request, we would interpret your scope as follows:

“ITD letters from the first 100 IC Review matters received by the OAIC in the 2022 Financial Year”.

You were informed that if we did not hear from you by 10am on Tuesday 16 August 2022, we would move forward with processing your request on this basis. At time of writing, we have not received a response from you.

In light of this revised scope, we considered that your request was able to be processed and that a practical refusal reason no longer existed.

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 100 documents within the scope of your request. I have decided to:

- grant access to 90 documents in part
- refuse access to 10 documents in full.

Due to resourcing issues that the OAIC Legal Services team is currently experiencing, I confirm that the documents and schedule for this request will be provided to you in two tranches as follows:

1. Tranche 1 to be provided by close of business on Wednesday 24 August 2022, and
2. Tranche 2 to be provided by close of business on Wednesday 31 August 2022.

Reasons for Decision

Material taken into account

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

- your freedom of information request dated 13 July 2022;
- the documents at issue;
- the FOI Act, in particular s 22 and s 47E(d)
- 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)

Section 22(1)(a)(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 request, you state the following:

“ Personal information of any person to be redacted under s 22, as well as the FOI and IC review references numbers.”

Accordingly, I am satisfied that personal information, as well as FOI and IC review reference numbers are irrelevant and outside the scope of this FOI request pursuant to s 22(1)(a)(ii) of the FOI Act.

Certain operations of agencies exemption – s 47E(d)

I have decided to grant access in part to 90 documents and refuse access to 10 documents under s 47E(d) of the FOI Act.

The material and documents I have found to be exempt under s 47E(d) of the FOI Act can be described as material specifically relate to IC review matters.

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).

I note that within the scope of your request there is both material relating to ongoing IC reviews, as well as that relate to IC reviews that have been closed.

I have had regard to the Australian Information Commissioner’s range of functions and powers promoting access to information under the FOI Act, including making decisions on Information Commissioner (IC) reviews. I note the documents in scope of this review were from IC review matters that external third parties lodged with the OAIC, which you are not a party to.

The AAT has recognised in *Telstra Australian Limited and Australian Competition and Consumer Commission [2000] AATA 71 (7 February 2000)* at [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.

All documents within scope of your request contain material pertaining to IC review matters that is not publicly available or publicly known. The release of this information to a third party who is not a party to these reviews would, or could reasonably be expected to, adversely impact on the ability of the OAIC to manage the specific matters referred to and

future matters if parties cannot be confident that their information will be kept confidential. While you have excluded the personal information of private individuals from the scope of your request, the documents contain information particular to these IC reviews that was provided to the OAIC for the purposes of conducting IC reviews.

Specifically, where the documents relate to IC review matters that remain open, I am satisfied that disclosure of any part of these documents would impede the efficient conduct of the case. As noted above, it is important that parties involved in ongoing IC review matters have confidence in the private manner to which the IC review is to be conducted. Further, with open IC reviews, the context to which these letters arise is to allow the parties, in a confidential manner, provide any further submissions so that the delegate of the Information Commissioner can decide whether or not to exercise the discretion under s 54W of the FOI Act to not undertake, or continue to undertake the IC review. Until a decision has been made, and the parties advised of the outcome, in my view, disclosure of this material to a third party not associated with the IC review would substantially and adversely interfere with the proper and efficient conduct of IC reviews by the OAIC.

For the above reasons, I am satisfied that disclosure of the relevant material to you at this time would, or could reasonably be expected to, substantially and adversely affect the proper and efficient conduct of OAIC's ability to conduct IC reviews and perform its functions under 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 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:¹

... 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.

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

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 disclosure:

- could reasonably be expected to prejudice an agency's ability to obtain confidential information' and
- could reasonably be expected to prejudice the proper and efficient conduct of the Information Commissioner review functions of the OAIC.

I have given significant weight to the factor that disclosure of the material outlined above could reasonably be expected to prejudice the proper and efficient conduct of the Information Commissioner review functions of the OAIC.

The disclosure of the information to a third party, who is not a party to these reviews, of the material within this matter would or could reasonably be expected to substantially and adversely impact on the willingness of parties to provide this information to the OAIC in the future and thus directly impact the efficient conduct of the OAIC. 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

If you are seeking further information about the manner in which certain applications were finalised by the OAIC in a certain period, we encourage you to consider making requests for statistics that are desensitised. We will endeavour to provide to you within the capacity of what our computer systems can generate.

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 black ink, appearing to be 'MS', written in a cursive style.

Margaret Sui
Senior Lawyer

17 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.

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 it would be unreasonable to publish.

The documents I have decided to release to you does contain exempt material. As a result, an edited version of the documents be published on our disclosure log within 10 days of providing you access.