



Our reference: FOIREQ22/00188

**Attention: Julie**

**By email:** [foi+request-9140-5e20032b@righttoknow.org.au](mailto:foi+request-9140-5e20032b@righttoknow.org.au)

## Your Freedom of Information Request – FOIREQ22/00188

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 16 July 2022.

In your request you seek access to the following:

*“I request copy of all s 55G decisions (excluding drafts) the OAIC received in June 2022.*

*The personal information of private individuals (not Commonwealth public servants and contractors) is irrelevant.”*

### 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 20 documents within the scope of your request. I have decided to refuse you access to these documents.

A schedule of documents is attached.

### Reasons for Decision

Material taken into account

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

- your freedom of information request dated 16 July 2022;
- the documents at issue;
- the FOI Act, in particular 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

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

I have decided to refuse access to 20 documents under s 47E(d) of the FOI Act.

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).

The documents that I have found to be exempt under s 47E(d) of the FOI Act can be described as:

- s 55G decisions made by a number of Commonwealth agencies, each provided to the OAIC for the purposes of conducting Information Commissioner reviews currently being considered by the OAIC.

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

In particular, 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 reviews and investigating and reporting on freedom of information complaints.

Information regarding current Information Commissioner review matters

All 20 documents contain information that is not publicly known, regarding Information Commissioner reviews that are currently open and are still being determined by the OAIC. The release of this information at this time to a third party who is not a party to these reviews would, or could reasonably be expected to adversely impact on both 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 their reviews are still being investigated. While you have excluded the personal information of private individuals and the names of private businesses 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.

The AAT has recognised in *Telstra Australian Limited and Australian Competition and Consumer Commission [2000] AATA 71* (7 February 2000) [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. In my view, the OAIC's ability to carry out its regulatory functions in conducting Information Commissioner reviews would be substantially and adversely affected if there was a lack of confidence in the confidentiality of the review process while the Information Commissioner reviews are still on foot.

As such, I consider the release of information on current and ongoing matters that are not currently in the public domain would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

#### **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 Forgie explained that:<sup>1</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.

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 could reasonably be expected to prejudice the proper and efficient conduct of the Information Commissioner review functions of the OAIC. In each case, the information that has been considered exempt relates to sensitive information that the OAIC has been provided in relation to determining Information Commissioner reviews. The disclosure of the information to third parties, who is not a party to these reviews, of the material within this matter, while the reviews are being considered, 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

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

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**

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 'Margaret Sui', written in a cursive style.

**Margaret Sui**  
Senior Lawyer

12 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](mailto: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\\_](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](mailto: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](mailto:FOIDR@oaic.gov.au). More information is available on the Access our information page on our website.