



Our reference: FOIREQ22/00228

Attention: Julie

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

## Your Internal Review Application – FOIREQ22/00228

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the decision made on **12 August 2022** (FOIREQ22/00188).

### Original FOI Decision

You lodged a FOI request on 16 July 2022. In your request you sought 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.”*

On 12 August 2022 the OAIC made a decision in relation to your request. **Twenty documents** were identified within the scope of your request, excluding duplicates. All **20 documents** were refused in full as exempt under s 47E(d) of the FOI Act. You have now sought internal review of this decision.

### Material taken into account

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

- your original freedom of information request FOIREQ22/00188 dated 16 July 2022
- submissions from relevant third parties
- the decision of the delegate dated 12 August 2022 the subject of this review
- the FOI Act, in particular sections 22 and 47E(d)
- relevant case law

- submissions from other Commonwealth agencies in relation to the release of the documents received in relation to the primary request
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

## Internal Review Decision

I am an officer authorised under section 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 (section 54C of the *Freedom of Information Act 1982* (the FOI Act)). As such, I have had regard to, but not relied on, the delegate’s original Freedom of Information (FOI) decision.

I have decided to affirm the original decision in part, in relation to **14 documents** which concern Information Commissioner reviews that still open and still being determined by the OAIC.

I have decided to vary the original decision in part, in relation to the remaining **6 documents**. These documents relate to Information Commissioner reviews which are now closed. I have decided that these documents are not exempt under s 47E(d), and that partial access can be provided with irrelevant material deleted to all **6 documents**.

Overall, I have reviewed **20 documents**, excluding duplicates. I have decided to grant you access to **6 documents** in part and refuse access to **14 documents** in full. Details of the exemptions applied are contained in the schedule of documents.

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

I have found material in 6 documents contain irrelevant material, or material outside the scope of your request.

Section 22(1)(b)(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.

In your FOI request you excluded personal information of private individuals (excluding Commonwealth public servants and contractors). Consistent with your request, I have deleted irrelevant material, including material that you have expressly excluded in your request. I have released 6 documents in part with personal information of private individuals deleted as irrelevant to your request in accordance with section 22 of the FOI Act.

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

I have found 14 documents to be exempt in full under s 47E(d) of the FOI Act.

The documents that I have found to be exempt contain information that is not publicly known, regarding Information Commissioner reviews that still being determined by the OAIC. These reviews are ongoing and I note that you are not a party to any of the reviews.

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.

Section 47E(d) 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:

...

(d) 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 term ‘substantial adverse effect’ explained in the Guidelines [at 5.20] and it broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’.

The word ‘substantial’, taken in the context of substantial loss or damage, has been interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.

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 privacy powers, freedom of information powers and regulatory powers, under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act), the Privacy Act and the FOI Act. Under the AIC Act and the FOI Act, the Information Commissioner has a 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, as well as assessing and making decisions on vexatious applicant declarations.

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 investigative process. Similarly, in this instance, the OAIC's ability to carry out its regulatory functions would be affected if there was a lack of confidence in the confidentiality of this process.

I have refused access in full to a number of documents that relate to Information Commissioner reviews that are current and ongoing. Given that these reviews remain open, I consider that while the matter is on foot, disclosure of the relevant material at this stage can impede the efficient conduct of the case. Specifically, review officers are still in the process of formulating their views, and gathering facts and evidence, and no decisions or findings have been made regarding these reviews. Parties to the review will be provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. Further, if a finding is made regarding the review, it is appropriate for the parties to the review to be advised of that outcome. The OAIC's Freedom of Information Regulatory Action Policy advises at paragraph 73 that the Information Commissioner will generally not comment publicly about ongoing IC review applications.

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 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.

I consider that at this time disclosure of this material to you via the Right to Know website, when the IC review is ongoing, would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in conducting IC reviews.

#### **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 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. The relevant public interest factor in favour of disclosure in this case is that disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance. Other factors are not relevant.

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 factors against disclosure in this case is that disclosure:

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

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 47E(d) of the FOI Act would, on balance, be contrary to the public interest.

#### Further information

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

Yours sincerely

**Emma Liddle**  
Director – Legal

14 September 2022

## **If you disagree with my decision**

### **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, it is likely that the Information Commissioner will decide (under s 54W(b) of the FOI Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the AAT.

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 internal review or IC review 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.

## **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.

## **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 do not contain personal or business information that would be unreasonable to publish. As a result, an edited version of the documents will be published on our [disclosure log](#).