



Our reference: FOIREQ22/00190

Attention: Julie

By email: foi+request-9143-8cd5d561@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00190

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.

On 16 July 2022, you applied to the OAIC for access to the following:

“I request copy of the current OAIC position tree report (that lists all OAIC positions, their classifications, current occupant, etc).

By way of example I previously requested copy of DVA's position tree in January of this year <https://www.righttoknow.org.au/request/p...>

This report can be produced entirely by the OAIC's computers.”

On 5 August 2022, Mr Toby Shanks, Paralegal contacted you and requested that you resend the URL link contained in your FOI request, which appeared to be broken.

On 5 August 2022, you responded with the following:

“FOIREQ19/00217 is an example that will be easier for you to access as the page seems to have gone.

The FOIREQ19/00217 decision and released document is available here https://www.righttoknow.org.au/request/organisational_position_report#incoming-15834

I understand that the OAIC can produce a table using preset reporting functions that generate a report that lists:

- Position Number*
- Position/Job Title*

- *Classification (APS Level or Contractor)*
- *Occupant (Vacant if position not filled)*
- *Reports to Position*
- *Group / Branch / Section / etc”*

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 2 documents within the scope of your request. I have decided to give you access to the 2 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 16 June 2022;
- the documents at issue;
- the FOI Act, in particular ss 17, 22 and 47E(c);
- 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)

I have found material in one document to be irrelevant and outside the scope of your FOI 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.

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 initial email to the OAIC, you have named that you were seeking the following information: OAIC positions, classifications, current occupant etc. As the link you provided in your FOI request was broken, you provided further clarification in a subsequent email of 5 August 2022 that you sought:

- *Position Number*
- *Position/Job Title*
- *Classification (APS Level or Contractor)*
- *Occupant (Vacant if position not filled)*
- *Reports to Position*
- *Group / Branch / Section / etc”*

One of the documents provided by the line area contain the OAIC staff members' employee number, which is different to the position number you are requesting. In the other document, it contains material pertaining to the employment status of OAIC staff members.

In my view, having considered the scope of your FOI request and your email of 5 August 2022, I am satisfied that this material is outside the scope of your FOI request and is irrelevant material pursuant to ss 22(1)(a)(ii) of the FOI Act.

Document created under s 17 of the FOI Act

Your FOI request contained the following:

“This report can be produced entirely by the OAIC's computers”

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 current OAIC position tree as 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 information regarding five out of the six aspects of your request. Specifically, the table includes current information regarding:

- Position number
- Classification level
- Current Occupant (where the position has been filled)
- Reports to position
- Group/ Branch/ Section

This document is attached to the decision. The table includes information which has been found exempt under s 47E(c) of the FOI Act, please see further information below.

In relation to your request for a document to be produced to capture “Position/Job Title”, while it appears that the OAIC was able to generate this information in response to a previous FOI request in 2019 as mentioned in your email to the OAIC of 5 August 2022, the line area has advised that at this point in time, the OAIC is not able to produce such information in discrete form by the use of any computer programs ordinarily available to the OAIC for retrieving the information as a result of the OAIC’s transition to a new ICT system in late May 2022. The line area has also advised that at this time, the information pertaining to “Occupant”, to show positions vacant if a position has not yet been filled, is also unable to be generated in a discrete form by the use of any computer programs ordinarily available to the OAIC.

Relevant to your request, in the Full Federal Court case of *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67, the Court found at [43]-[44] that the reference in section 17(1)(c)(i) to ‘computer or other equipment that is ordinarily available’ means ‘a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available ...’ The Court further observed that ‘[T]he computer or other equipment ... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document’ [44]. Similarly, in the recent case of *YH and Australian Communications and Media Authority (Freedom of information)* [2021] AICmr 64, it was found that a “manual process” of locating the requested information in number of other documents and then manually collating this information in a new document goes beyond what s 17 requires, and therefore s 17 does not apply in these circumstances (see [30]-[33]).

For these reasons, I am satisfied that the ‘Position/Job Title’ and aspects of the “Occupant” information you requested cannot be produced by a computer or other equipment ordinarily available to the OAIC. As a result of the recent ICT system

transition, at this point in time, the OAIC is only able to create a document under s 17 of the FOI Act which satisfies five out of the six aspects of your request. However, I do note the line area was able to locate an existing document, current as at April 2022, that does contain the 'Position/Job Title information' you are seeking. I note that this organisational chart is not current as it does not include key positions including the FOI Commissioner Leo Hardiman, however, I have decided to provide you with access to this document as it provides information in relation to 'Position/ Job Title'.

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

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

1. A document created by the line area pursuant to s 17 of the FOI Act, and
2. A document which the line area located, being the latest version of the OAIC's organisational chart that was last updated in April 2022.

Based on my examination of the relevant documents, 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 2 documents which were provided by the OAIC human resources line area in this case. I consider the relevant material relate 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.
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

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/foi-requests-response-2020-09)

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.

The public interest test – s11A(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 at [4]:

... 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.

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.

I consider that the relevant factor against disclosure in this instance is 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.

On balance, I consider that the factor 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) 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. 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 OAIIC's disclosure log.

Yours sincerely

Margaret Sui
Senior Lawyer

15 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 would be unreasonable to publish.

The documents I have decided to release to you contains exempt material and therefore an edited version of the documents will be published on our disclosure log after being released to you.