



Our reference: FOIREQ22/00242

**Attention: Julie**

**By email:** [foi+request-9143-8cd5d561@righttoknow.org.au](mailto:foi+request-9143-8cd5d561@righttoknow.org.au)

Your Freedom of Information Request – FOIREQ22/00242

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 23 August 2022.

On 23 August 2022, you applied to the OAIC for access to the following:

*“For the purposes of the FOI Act, I request copy of the reporting of the instances referred to in the statement given by the OAIC “There have been instances where OAIC staff members have received threats of harm from members of the public”.”*

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

## Reasons for Decision

### Material taken into account

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

- your freedom of information request dated 23 August 2022;
- the documents at issue;
- the FOI Act, in particular ss 37 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

#### Investigation of a breach of law (s 37(1)(a))

I have found the documents exempt in full under s 37(1)(a) of the FOI Act.

Under s 37(1)(a), a document is exempt if its disclosure would, or could reasonably be expected to, prejudice the conduct of a current investigation.

Section 37(1)(a) of the FOI Act states:

#### **37 Documents affecting enforcement of law and protection of public safety**

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

The FOI Guidelines at [5.86] provides:

Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in a particular instance’, it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.

Additionally, at [5.87] the FOI Guidelines further explains:

The exemption is concerned with the conduct of an investigation. For example, it would apply where disclosure would forewarn the applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body — putting the investigation in jeopardy. The section will not apply if the investigation is closed or if it is being conducted by an overseas agency.

In order to determine whether disclosure of the documents would, or could reasonably be expected to prejudice the conduct of a current investigation, the FOI Guidelines at [5.16] - [5.17] notes:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

The documents at issue pertain to an ongoing investigation by a law enforcement agency that is currently on foot. The existence of this investigation has not been made public. Releasing the documents at issue will prejudice the conduct of the current investigation.

Furthermore, I consider that disclosure of the documents would prejudice the current investigations on foot. I consider it likely that the documents and the parties involved, will be subject to scrutiny over matters which have not been thoroughly investigated by the appropriate law enforcement agency, if the documents are disclosed on a public forum such as Right to Know. It is likely that as a result, the relevant parties would be discouraged from actively participating in the current investigation.

Accordingly, I have decided that the documents at issue are exempt under s 37(1)(a) of the FOI Act. I consider that disclosure would, or could reasonably be expected to, prejudice the conduct of the current investigation by a law enforcement agency.

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

In the alternative, I have found the documents exempt under section 47E(c) of the FOI Act. The documents can be described as:

1. Documents containing information pertaining to threats of harm against 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 documents. 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.

The circumstances of this request where the relevant material arises in documents is for internal use only for the management of personnel and security purposes by the OAIC and is material that is not published on the OAIC's website.

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).

As was outlined to you in FOIREQ22/00190, 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 where in it the FOI request is made via the Right to Know website, where it is almost certain that all documents released can be published without effort and quickly disseminated globally. Release of documents containing information pertaining to threats of harm against OAIC staff members, would, or could reasonably be expected to increase the risk of further threats against these staff members.

Therefore, based on the information before me at this time, I am of the view that disclosure of these documents 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 documents containing information pertaining to threats of harm against OAIC staff members conditionally exempt under s 47E(c) at this time.

#### 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 documents containing information pertaining to threats of harm against 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 exempt under s47E(c) 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

**Alessia Mercuri**  
Lawyer

23 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](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.

#### 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.

As I have refused access to the documents, no documents are required to be published on the disclosure log.