



Australian Government

Office of the Australian Information Commissioner

**Our reference:** FOIREQ22/00321

**Attention:** Julie

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

## Your internal review application – FOIREQ22/00321

Dear Julie

I refer to your request for internal review of a decision of the OAIC relating to a review of a decision made on 23 September 2022 under the *Freedom of Information Act 1982* (Cth) (the FOI Act), by the original decision maker Alessia Mercuri.

An internal review is a fresh decision made by a person other than the person who made the original decision (section 54C of the FOI Act). All materials available to the original decision maker have been made available to me. I have also undertaken further searches and deliberation before making my decision.

### Scope of your application for internal review

On 23 August 2022, you applied to the Office of the Australian Information Commissioner (OAIC) for access on the following terms:

*“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’.”*

On 23 September 2022, the OAIC provided you with a decision. The OAIC identified 14 documents within the scope of your request. The original decision maker made the decision to refuse access to all 14 documents in full. In making its decision, the OAIC relied on the investigation of a breach of law exemption (s 37(1)(a)) and the certain operations of agencies – management or assessment of personnel conditional exemption (s 47E(c)).

On 4 October 2022 you wrote to the OAIC requesting an internal review of this decision on the following terms:

*“I am writing to request an internal review of Office of the Australian Information Commissioner’s access refusal decision in FOIREQ22/00242.”*

*Where a claim is made by an FOI agency that release of a document in its original form is exempt in full, the FOI Act creates an obligation on the FOI agency to consider if access in another form would allow some release.*

*This was not done. Some individual details may have some valid concerns, but this is untrue for every part of such documents.”*

A decision on your internal review decision is due on 3 November 2022.

## **Decision**

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests on behalf of the OAIC. I have again identified 14 documents within the scope of your request. I have decided to vary the original decision and refuse access to 13 documents in full and refuse access to 1 document in part.

Regarding the document that I have refused access to in part, please note that the rest of the material in this document is irrelevant to your request and has therefore not been provided to you.<sup>1</sup> Please find attached a schedule detailing the access decisions made regarding the documents within the scope of your request.

## **Reasons for decision**

Material taken into account

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

- your FOI request dated 23 August 2022
- the OAIC’s FOI decision FOIREQ22/00242 dated 23 September 2022 and the accompanying schedule and documents
- your internal review request dated 4 October 2022
- the FOI Act, in particular ss 37(1)(a) and 47E(c) of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which regard must be had in performing a function or exercising a power under the FOI Act (FOI Guidelines)
- consultation with line areas of the OAIC in relation to your request
- relevant case law

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<sup>1</sup> Document 10 on the attached schedule, containing 23 pages, only contains one paragraph on page 7 within the scope of your request. The rest of this document is unrelated to your request for “...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’.”.

## Searches undertaken

Section 24A of the FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

As part of the internal review process, I reviewed the searches performed in the course of processing your original request. I also conducted additional searches in an effort to locate documents within the scope of your request.

The following line areas of the OAIC were contacted to conduct reasonable searches for documents relevant to your request:

- OAIC Executive
- Dispute Resolution Branch
- Freedom of Information Branch
- Corporate Services

Searches were conducted across the OAIC's various document storage systems including:

- the OAIC's case management system - *Resolve*
- the OAIC's document storage system - *Content Manager*
- the Outlook accounts of relevant staff members and line areas

In the course of processing this internal review, no further documents within the scope of your request were able to be located, beyond those already identified in the course of processing your original request.

Having consulted with the relevant line areas and undertaken a review of the records of the various search and retrieval efforts previously undertaken, I am satisfied that a reasonable search has been undertaken in response to your request and that no further documents have been found in addition to those located in response to your original request.

## Irrelevant material (s 22)

I have found that 1 document that I have found to be exempt in part contains irrelevant material, or material outside the scope of your request. As noted above, I have found the other 13 documents are exempt in full, for the reasons discussed below.

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 original FOI request you have requested a “...*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’.*”

Regarding the one document that I have refused access to in part, all other material in this document is unrelated to reporting of threats of harm to OAIC staff. Accordingly, I am satisfied that these material are irrelevant or outside the scope of your FOI request in accordance with s 22(1)(a)(ii) of the FOI Act.

I note that in your internal review request you state the following:

*“...the FOI Act creates an obligation on the foi agency to consider if access in another form would allow some release.*

*This was not done. Some individual details may have some valid concerns, but this is untrue for every part of such documents.”*

The FOI Guidelines relevantly state the following at [3.95]

An agency or minister may refuse access to a document on the ground that it is exempt. If so, the agency or minister must consider whether it would be reasonably practicable to prepare an edited copy of the document for release to the applicant, that is, a copy with relevant deletions (s 22).

At [3.97] – [3.98] the FOI Guidelines state:

The obligation to prepare an edited copy of a document so that it does not contain exempt or irrelevant content is subject to the following conditions:

- it is possible for the agency or minister to prepare an edited copy of the document (s 22(1)(b))
- it is reasonably practicable to prepare an edited copy, having regard to the nature and extent of the modification required, and the resources available to modify the document (s 22(1)(c)), and

- it is not apparent, from an applicant's request or consultation with the applicant, that the applicant would decline access to the edited copy (s 22(1)(d)).

Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

In the course of processing this internal review, I have considered whether it would be reasonably practicable to prepare an edited copy of the document pages within scope of your request that I have held to be exempt or out of scope in full. I have had regard to the nature and extent of the modification required, and the resources available to modify the document, as per s 22(1)(c) of the FOI Act.

In light of the highly sensitive nature of the majority of the material the subject of your request and the extent of the deletions required, all that would be left to be released to you would be heavily redacted documents that would convey no material of substance, and no material relevant to your FOI Act. I am therefore satisfied that in this instance it would not be reasonably practicable to prepare an edited copy of the documents the subject of this internal review and have therefore not done so. In light of this, there are no documents to be provided to you.

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

I have found 13 documents within the scope of your request exempt in full, and 1 document exempt in part under s 37(1)(a) of the FOI Act.

Section 37(1)(a) specifies that 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 relevant material relates to an ongoing investigation concerning threats of harm made to OAIC staff. The relevant events and investigation have not been publicised. As the investigation is current, the disclosure of documents to the Right to Know forum would likely have the ability to prejudice the investigation. As the original decision-maker noted, the publication of the documents and information could discourage parties from actively participating in the investigation, and therefore the investigation would be prejudiced in this manner.

I therefore agree with the original decision-maker that the documents within the scope of your request are exempt under s 37(1)(a) of the FOI Act.

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

I have also found that, in the alternative, 13 documents within the scope of your request conditionally exempt in full, and 1 document conditionally exempt in part under s 47E(c) of the FOI Act.

Section 47E(c) of the FOI Act specifies that a document will be 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.

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.

The documents contain information that concerns threats of harm made against OAIC staff members. I consider the material relevant to the management of personnel, including the broader human resources policies and activities, recruitment and occupational health and safety.

I agree with the original decision-maker's finding that the material contained within the relevant documents is for internal use only, specifically for the management of OAIC personnel, and that the material is not published on the OAIC's website.

As was outlined to you in FOIREQ22/00190 and FOIREQ22/00242, 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 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.

As an employer, the OAIC has obligations under the *Work Health and Safety Act 2011* to ensure, as far as is reasonably practicable, that risks to the health and safety of its employees are minimised. I am of the view, for the reasons discussed above, that the

release of the documents and their publication to the Right to Know website would prevent the OAIC from complying with its obligations under the *Work Health and Safety Act 2011*. It could therefore 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 with regard to statutory work health and safety obligations.

I therefore find that the relevant documents concerning threats of harm to OAIC staff conditionally exempt under s 47E(c) at this particular 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.

The explanation from Deputy President Forgie in the AAT case of Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information) [2017] AATA 269 at [4] is relevant here:

... 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.

For the purposes of this internal review, I must consider whether the disclosure of the documents at would be contrary to the public interest in order for the documents to be conditionally exempt under s 47E(c) at this particular time.

Noting the non-exhaustive factors favouring disclosure, as listed in the FOI Guidelines at paragraph [6.19]), I find that the only public interest factor favouring disclosure is that disclosure would generally promote the objects of the FOI Act through promoting access to government held information. No other factors are relevant.

Having regard to the factors against disclosure in the FOI Guidelines at [6.22], I have found that the factor against disclosure are as follows:

- Disclosure of the documents at issue 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.
- Disclosure of the documents at issue could negatively impact a criminal investigation.
- Disclosure of the documents at issue could create a safety risk for OAIC staff members.

I conclude that the factor against disclosure outweighs the factor in favour of disclosure and it would therefore be contrary to the public interest to provide access to the documents that are conditionally exempt under s 47E(c) of the FOI Act.

### **Conclusion**

Please find attached a schedule of documents detailing the access decisions made regarding the documents within the scope of your request.

Please see the following page for information about your review rights.

Yours sincerely,

**Margaret Sui**  
Senior Lawyer

3 November 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 have the right to seek review of this decision by the Information Commissioner.

(IC review). If you wish to apply for IC review, you must do so in writing within 30 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.

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\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

Alternatively, you can post your application to:

Office of the Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001

Or apply by email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au), or by fax on 02 9284 9666.

#### Disclosure log

Section 11C of the FOI Act requires agencies to publish online document 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 no further documents or information have been located in response to your Internal Review request and any documents within scope of your request have been found to exempt, there is no requirement for such materials to be published on the OAIC's disclosure log.