



Our reference: FOIREQ22/00372

Attention: Julie

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

Your Freedom of Information request – FOIREQ22/00372

Dear Julie,

I refer to your request for access to documents made under the *Freedom of Information Act* 1982 (Cth) (the FOI Act) received on 5 November 2022.

You seek access to the following:

I request copy of the file properties of each of the 14 documents listed in the schedule of documents given in FOIREQ22/00321. File properties are able to be produced using computers ordinarily available to the OAIC by selecting properties or file information of the document in question in the file manager application.

On 9 November 2022, we wrote to you seeking to clarify the scope of your FOI Request. We asked you to confirm our interpretation of the scope by noon 10 November 2022. We advised you that, if we did not hear from you, we would assume you agreed to our interpretation of the scope of your request and process your request accordingly.

At noon on 10 November 2022, it was confirmed that we did not receive a response from you in relation to our request to clarify the scope of your request. As a result, the scope of your request was revised as follows:

1. Properties concerning the location of the files,
2. Properties concerning the size of the files and
3. Properties concerning the created, modified or access date of the files.

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 one document within the scope of your request. The document was created under s 17 of the FOI Act and it contains document property information collected from the OAIC's IT systems.

I have decided to refuse access to the document in full.

Reasons for decision

Material taken into account

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

- your FOI request dated 5 November 2022;
- the FOI Act, in particular s47E(d);
- 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); and
- relevant caselaw.

Requests involving the use of computers – s 17

Under s 17 of the FOI Act, if an FOI request is made for a document that could be produced by using a computer ordinarily available to the agency for retrieving or collating stored information, an agency is required to deal with the request as if it was a request for written documents to which the FOI Act applies.

The FOI Guidelines at [3.204] explain that s 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded. 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)).

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

Regarding your request, you have requested '*the file properties of each of the 14 documents listed in the schedule of documents given in FOIREQ22/00321*'. This was information that was not available in a discrete form but was able to be produced in a written document through the use of a computer.

In light of this, Officers in the OAIC Legal Services team created a document under s 17 in response to your request. I have decided to refuse access to that document in full.

Certain operations of agencies exemption- section 47E(d)

I have decided to refuse access in full to 1 document that was created under s 17 of the FOI Act under section 47E(d) of the FOI Act.

The material within this document that I have found to be conditionally exempt is material disclosing:

1. Properties concerning the location of the files,
2. Properties concerning the size of the files and
3. Properties concerning the created, modified or access date of the files

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'.

OAIC File Location Properties

The OAIC material that I have held to be exempt under section 47E(d) of the FOI Act in this matter is material concerning the file location properties of the 14 documents in question within the OAIC's IT system.

The OAIC collects and stores a range of personal and financial information about members of the public. The location properties of a file contain information about the OAIC's IT system (including the network location and storage of information). I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC. The impact of any compromise to the safety and security of the OAIC's information systems would result in a serious adverse impact on the functions and responsibilities of the OAIC.

I therefore consider that the disclosure of the location properties (from the OAIC's computer system) of the 14 documents in question could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. I have decided that the location properties of the documents are conditionally exempt from disclosure under section 47E(d) of the FOI Act.

Size and details relating to the documents

In addition to the file location properties, the material I have held to be exempt under section 47E(d), also contains material concerning the size and details relating to the documents (including date created and accessed).

The 14 documents in question contain material for which access was refused in full in FOIREQ22/00242 on 23 September 2022. The decision in FOIREQ22/00242 to refuse access to the documents varied upon internal review (FOIREQ22/00321) on 3 November 2022. Namely, the decision maker decided to vary the original decision and refuse access to 13 documents in

full and refuse access to 1 document in part. As was explained to you in FOIREQ22/00321, the documents contain material pertaining threats of harm made against OAIC staff members. I agree with the findings of the decision maker 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.

I note that the document properties sought in your FOI request include the location, size and creation, modification and access date of the files. I am of the view that file location properties form a crucial part of the documents in question, insofar as they indirectly disclose information about the content and material within each file. I consider that the release of this information may reveal how the OAIC manages security incidents and could have a substantial and unreasonable impact on the management of security incidents.

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.

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 [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 factors against disclosure are:

- Disclosure of the document at issue could reasonably be expected to prejudice and have an adverse impact on the OAIC's functions and responsibilities in safely and securely maintaining OAIC's information systems

- Disclose of the document at issue, could have a substantial and unreasonable impact on the management of security incidents at the OAIC.

I conclude that the factors against disclosure outweigh 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(d) of the FOI Act.

Conclusion

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

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

Yours sincerely

Alessia Mercuri

Lawyer

5 December 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.