



Our reference: FOIREQ22/00198

Attention: Julie

By email: foi+request-9195-c2e0ee25@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00198

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 27 July 2022.

In your request you seek access to the following:

“I request copy of all s 15AB and s 15AC requests received by the OAIC from DVA in the period 1 June to 27 July 2022.

Personal information of private individuals (not Commonwealth employees and contractors) is irrelevant.”

On 29 July 2022 we wrote to you to ask if you were willing to exclude the names of private businesses from the scope of this request, for example, where the FOI request subject to the s15AB and s15AC applications from the Department of Veterans’ Affairs (the Department) were made by a private business.

In an email to the OAIC, received on 1 August 2022 you stated:

“You requested that I advise whether I am willing to exclude names of private businesses from the scope of this request (for example, where the FOI request subject to the 15AB and s 15AC applications from DVA was made by a private business).

Yes, you may.”

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 71 documents within the scope of your request. I have decided to give you access to 63 documents in part, and refuse access to 8 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 27 June 2022;
- the documents at issue;
- the FOI Act, in particular ss 22, 47E(c) and 47E(d);
- 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 63 documents to 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.

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 FOI request, you specified that the following material was irrelevant to your request:

Personal information of private individuals (not Commonwealth employees and contractors) is irrelevant.

You later extended the scope of irrelevant material to include:

...names of private businesses from the scope of this request (for example, where the FOI request subject to the 15AB and s 15AC applications from DVA was made by a private business).

I have reviewed all documents located by the relevant line area. These documents contain information you have identified as irrelevant to your request. Accordingly, I

have found that this material is irrelevant to your request and it has been deleted under s 22 of the FOIA Act.

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

I have found material contained in 10 documents that are exempt under section 47E(c) of the FOI Act. Based on my examination of the relevant document, the exempt material can be described as:

- the surnames and direct contact details (such as email addresses and mobile numbers) of DVA 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.

During the course of processing this FOI request, the OAIC undertook courtesy consultation with the department, who objected to the disclosure of this material.

Based on the material before me at this time, I am satisfied that the disclosure of the surnames and direct contact details of the Department's staff members would, or could reasonably be expected to have a substantial and adverse effect to the

Department's ability to manage its personnel, including its broader human resources policies and activities towards occupational health and safety.

In my view, this material is conditionally exempt under s 47E(c) of the FOI Act. I will consider public interest factors in the later parts of my decision.

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

I find 8 documents exempt in full and 63 documents exempt in part under s47E(d) of the FOI Act.

Section 47E(d) of the FOI Act provides that:

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.

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.

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 material and documents that I have found to be exempt under s 47E(d) of the FOI Act can be described as:

- Material contained in and attached to extension of time applications submitted by the Department, that are not related to you
- Department's staff surnames,

- direct email addresses of its staff,
- direct mobile phone numbers of the Department's staff

Material contained in and attached to extension of time applications submitted by the Department, that are not related to you

During the course of processing this FOI request, the OAIC undertook courtesy consultation with the department, who objected to the disclosure of this material. Based on the information before me at this time, I am satisfied that disclosure of some of this material would, or could be expected to substantially and adversely affect the proper and efficient operations of the OAIC. Therefore, I have decided to give you access to 63 documents in part and exempt access to 8 documents.

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 range of functions and powers promoting access to information under the FOI Act, including making decisions on extension of time request matters.

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 investigation process.

The documents which I have decided to refuse you access in full (8 in total) relate to current and open extension of time applications that are being considered by the OAIC. In my view, until such time that the parties to these applications have had the opportunity to make submissions regarding the applications, and have been advised of the outcome of the application, disclosure of these documents to a third party, via a public forum on Right to Know, would, or could reasonably be expected to have a substantial and adverse effect on the OAIC's proper and efficient conduct of determining extension of time applications. Parties to an extension of time application have an expectation that the application will be considered by the OAIC and conducted in a private manner.

Nevertheless, where the extension of time application have been finalised, I have decided to give you access to some material contained in these applications which the Department lodged with the OAIC. I have found only parts of these applications exempt under s 47E(d), comprising the materials relating to specific FOI requests made by individuals who are not associated with you, sensitive parts of the

Department's submissions to the OAIC that are particular to these FOI requests, and are particular to the EOT application that are not related to you. While these applications have been finalised, I am of the view that the release of this material at this time to a third party who is not associated with the matter, via a public forum on Right to Know would negatively impact on the OAIC's assessment process regarding EOT requests if parties cannot be confident that the information they provide to the OAIC for the purposes of making an administrative decision will be kept confidential and adversely affect the quality of the information received by the OAIC in making an assessment for extension of time in the future.

As such, I consider the release of that is not currently in the public domain would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Surnames, Direct Email Addresses and Mobile Phone Numbers of Department of Veterans' Affairs Staff

In the IC Review decision on *'LY' and Commonwealth Ombudsman (Freedom of information)* [2017] AICmr 68 (17 July 2017) the Commissioner accepted that 'giving the applicant access to the contact details would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations under the Ombudsman Act 1976'. Having considered the material in this case, I consider the reasoning in 'LY' is equally applicable to the material in this case.

From the documents at issue, I note that it appears in general outgoing correspondences to members of the public, the Department would provide a general contact phone number and a general email address as the main point of contact for the Department. Based on my examination of the relevant material, noting that the surnames of Department officers were embedded in their direct contact email address, that the mobile phone numbers would provide direct access, and the reasoning in 'LY' which I consider is applicable here, I am satisfied that due to the nature of the work of the Department of Veterans Affairs, if the relevant material is disclosed which will allow contact to be made to the individual officer rather than through the established contact arrangements, this would, or could reasonably be expected to substantially and adversely affect the efficient operations of the Department's functions.

Therefore, I am satisfied that the surnames, direct email addresses and mobile phone numbers of Department of Veterans' Affairs' staff members are conditionally exempt from disclosure under s 47E(d) of the FOI Act.

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 the AAT case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, Deputy President Forge explained that:¹

... 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.

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. In my view, the relevant public interest factor in favour of disclosure in this case is that the disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance. Other factors are not relevant in this instance.

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 factor against disclosure in this case is that:

- disclosure of material relating to extension of time request matters could reasonably be expected to prejudice an agency’s ability to obtain confidential information’.
- disclosure of material relating to extension of time request matters could reasonably be expected to prejudice the proper and efficient conduct of the extension of time request review functions of the OAIC.

¹ *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

- disclosure of the mobile phone numbers, direct email addresses and surnames of DVA staff could reasonably be expected to prejudice the Department's ability to manage its personnel.
- disclosure of the mobile phone numbers, direct email addresses and surnames of DVA staff could reasonably be expected to prejudice the efficient operations of the Department's functions and maintaining the existing contact arrangements with members of the public.

Whilst I acknowledge the factors that support disclosure of this information, particularly that disclosure would promote the objects of the FOI Act, I am satisfied that giving access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

Conclusion

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

Yours sincerely



Margaret Sui
Senior Lawyer

26 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.