



Our reference: FOIREQ22/00205

**Attention: Julie**

**By email:** [foi+request-9216-7ba761cd@righttoknow.org.au](mailto:foi+request-9216-7ba761cd@righttoknow.org.au)

Your Freedom of Information Request – FOIREQ22/00205

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 1 August 2022.

In your request you seek access to the following:

*“In reviewing the documents released by the OAIC here [https://www.righttoknow.org.au/request/copy\\_of\\_commissioner\\_briefs](https://www.righttoknow.org.au/request/copy_of_commissioner_briefs) the OAIC has shown that it can generate using computer systems ordinarily available to the OAIC, without manual intervention, reports listing IC reviews and foi complaints disposed of under s 54W(a)(i) and s 73(e), for any desired period.*

*Those documents show that the OAIC disposed of 34 IC review requests under s 54W(a)(i) and 13 foi complaints under s 73(e) between 1 July and 31 December 2021.*

*It is likely that those numbers would be in a similar range for any given six month period.*

*As the OAIC is the regulator for Commonwealth Freedom of Information practice, there is a public interest in ensuring that such disposals are done on appropriate grounds, fairly, that any reasonable reader of those decisions could understand.*

*I therefore request copy of all notice of decisions (including their reasons) to dispose of ic reviews and foi complaints under s 54W(a)(i) and s 73(e) between 1 January 2022 and 30 June 2022.*

*Personal information of individuals and businesses who are not federal public servants or contractors to the federal public service is irrelevant and may be redacted under s 22.”*

## 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 33 documents within the scope of your request. I have decided to give you access to 33 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 1 August 2022;
- the documents at issue;
- the FOI Act, in particular ss 22 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 33 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 individuals and businesses who are not federal public servants or contractors to the federal public service is irrelevant and may be redacted under s 22.*

I have reviewed all documents located by the relevant line area. These documents contain personal information of individuals who are not public servants, or contractors to the public service, which you identified as irrelevant to your request. Accordingly, I am satisfied that the material comprising personal information of individuals who are not federal public servants or contractors to the federal public service is irrelevant material that is outside the scope of your request in accordance with s 22(1)(a)(ii) of the FOI Act.

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

I have decided to grant access in part to 33 documents under s 47E(d) of the FOI Act.

The material and documents I have found to be exempt under s 47E(d) of the FOI Act can be described as material specifically relate to IC review and FOI complaint matters.

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).

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 Information Commissioner (IC) reviews and investigating FOI complaints. I note the documents in scope of this review were from IC review matters and FOI complaints that external third parties lodged with the OAIC, which you are not a party to.

The AAT has recognised in *Telstra Australian Limited and Australian Competition and Consumer Commission [2000] AATA 71 (7 February 2000)* at [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.

All 33 documents within scope of your request contain material pertaining to IC review matters and FOI complaints that is not publicly available or publicly known. The release of this information to a third party who is not a party to these reviews would, or could reasonably be expected to, adversely impact on the ability of the OAIC to manage the specific matters referred to and future matters if parties cannot be confident that their information will be kept confidential. While you have excluded the personal information of private individuals from the scope of your request, the documents contain information particular to these IC reviews and FOI complaints that was provided to the OAIC for the purposes of conducting IC reviews and investigating FOI complaints.

In my view, the OAIC's ability to carry out its regulatory functions in conducting IC reviews and investigating FOI complaints would be substantially and adversely affected if there was a lack of confidence in the confidentiality of the review and investigatory processes. In each case, the information that has been considered exempt relates to sensitive information that the OAIC has been provided in relation to reviewing FOI decisions or investigation FOI complaints. The disclosure of the information to third parties, who are not a party to these reviews and investigations, of the material within this matter, will impact on the willingness of parties to provide this information to the OAIC in the future and thus directly impact the efficient conduct of the OAIC. 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.

The public interest test – s 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 Forgie explained that:<sup>1</sup>

*... 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. 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:

- prejudice the OAIC’s ability to obtain confidential information
- prejudice the ability of the OAIC to conduct IC reviews and investigate FOI complaints in a private manner
- prejudice the proper and efficient conduct of the Information Commissioner review and FOI complaint investigation functions of the OAIC.

I have given significant weight to the factor that disclosure of the material outlined above could reasonably be expected to prejudice the proper and efficient conduct of the Information Commissioner review and FOI complaint investigation of the OAIC.

The disclosure of the information to a third party, who is not a party to these reviews, of the material within this matter would or could reasonably be expected to substantially and adversely impact on the willingness of parties to provide this information to the OAIC in the future and thus directly impact the efficient conduct of

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

the OAIC. 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

A handwritten signature in black ink, appearing to be 'MS', written in a cursive style.

**Margaret Sui**  
Senior Lawyer

31 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](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.

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.