



Our reference: FOIREQ22/00270

Attention: Julie

By email: foi+request-9216-7ba761cd@righttoknow.org.au

Your Internal Review Application - FOIREQ22/00270

Dear Julie

I am writing to advise you of my decision in response to your application for internal review made on **10 September 2022** of the decision in FOIREQ22/00205.

Original FOI Decision (FOIREQ22/00205)

On 1 August 2022, you applied to the OAIC for access to the following:

“In reviewing the documents released by the OAIC here 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.”

On 31 August 2022, the OAIC made a decision in relation to your request. **33 documents** were identified as being within the scope of your request. You were

granted access to all 33 documents in part. All documents were exempt in part under s 47E(d) of the FOI Act.

Internal review

On 10 September 2022 you sought internal review of this decision stating:

“I am writing to request an internal review of Office of the Australian Information Commissioner's handling of my FOI request FOIREQ22/00205 'FOI matters disposed of under s 54W(a)(i) and s 73(e)'.”

Material taken into account

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

- your original freedom of information request FOIREQ22/00205 dated 1 August 2022
- the decision of the delegate dated 31 August 2022 the subject of this internal review and accompanying schedule and documents
- your request for internal review dated 10 September 2022
- the FOI Act, in particular ss 22 and 47E(d)
- relevant case law, and
- the FOI Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

Internal Review Decision

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

An internal review decision is a ‘fresh decision’ made by a person other than the person who made the original decision (s 54C of the *Freedom of Information Act 1982* (the FOI Act)). I have had regard to, but not relied on, the delegate’s original Freedom of Information (FOI) decision.

I have decided to affirm the decision to release 33 documents in part under s47E(d) of the FOI Act. However, I have decided to vary the decision regarding the material exempted from release. The additional material I have decided to release to you is as follows:

- Information regarding dates

Details of my decision are included in the attached schedule and the reasons for my decision are set out below

Irrelevant material (s 22)

I have found all 33 documents contain exempt material, or material irrelevant to 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 original FOI request you stated the following:

“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.”

Consistent with your request, I have deleted this irrelevant material from your request under s 22 of the FOI Act. In addition, a number of documents within the scope of your request contain material which is exempt from disclosure. On this basis, I have prepared the documents for release by removing exempt material in accordance with s 22 of the FOI Act.

Please note that in the original decision the subject of this internal review request, agency reference numbers were held to be exempt under s 47E(d). In this internal review I have decided that these are out of scope under s 22 of the FOI Act, by virtue of them being the personal information of private individuals or businesses (who are not federal public servants or contractors to the federal public service) which you have stated is irrelevant.

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

I have found 33 documents to be exempt in part under section 47E(d) of the FOI Act.

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

- Material specifically relating to Information Commissioner (IC) review matters

- Material specifically relating to Freedom of Information (FOI) complaint matters

Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure would, or 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 provide:

- at [6.101] *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.*
- at [6.103] *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’.

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 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* 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 by relevant parties in the confidentiality of the agency’s investigation process.

All documents within scope of your request contain material relating to IC review matters and FOI complaints that are not publicly available or publicly known. Parties provide information to the OAIC to respond to specific IC reviews and FOI complaints. 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 the ability of the OAIC to manage the specific matters and future matters because parties

cannot be confident that the information will be kept confidential. While you have excluded the personal information of private individuals from the scope of your request, the documents contain sensitive information particular to these IC reviews and FOI complaints that were provided to the OAIC solely 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 is sensitive information that the OAIC has been provided in the course of reviewing FOI decisions or investigating FOI complaints.

The disclosure of the information to third parties, who are not a party to these reviews and investigations, of the material within these matters, could significantly deter parties from providing this information to the OAIC in the future, or impact the openness and frankness of their submissions to the OAIC. Therefore this could directly impact the proper and efficient conduct of the operations of the OAIC. As such, consistent with *Telstra Australian Limited and Australian Competition and Consumer Commission [2000] AATA 71*, I consider the release of sensitive information 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.

Public interest (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) FOI Act). 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 this case, I must consider whether disclosure of the documents at this time would be contrary to the public interest. I must consider whether disclosure of the documents at this time would be contrary to the public interest.

The FOI Guidelines provide a non-exhaustive list of factors favouring disclosure (see [6.19]). I consider 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.

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 factors against disclosure in this instance are as follows:

- disclosure of this material would prejudice the OAIC's ability to obtain information in the future as it would adversely impact the willingness of parties to provide submissions or be full and frank in providing submissions to the OAIC
- disclosure of this material would prejudice the ability of the OAIC to conduct IC reviews and investigate FOI complaints in a private manner
- disclosure of this material would prejudice the proper and efficient conduct of the IC review and FOI complaint investigation functions of the OAIC, and
- disclosure of this material would lead to a loss of confidence in the OAIC's IC review and FOI complaint investigation processes.

In particular, I have given significant weight to the factor that disclosure of the material outlined above could reasonably be expected to prejudice and undermine the proper and efficient conduct of the IC review and FOI complaint investigation functions of the OAIC.

I have decided that at this time, giving you full access to the documents, which I have found to be conditionally exempt under s 47E(d) of the FOI Act, would, on balance, be contrary to the public interest.

Regarding the additional material released to you (information regarding dates), I am satisfied that providing this material to you will not have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

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 it would be unreasonable to publish.

The documents I have decided to release to you contains exempt material. As a result, an edited version of the documents will be published on our [disclosure log within 10 days of providing you access](#).

Yours sincerely

Jian Liu

Acting Director, Legal

10 October 2022

If you disagree with my decision

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 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. 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.

s 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>
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Alternatively, you can submit your application to:

Office of the Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Or by email to foi@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 foi@oaic.gov.au. More information is available on the [Access our information](#) page on our website.