



Our reference: FOIREQ22/00211

Julie

By email: foi+request-9232-c95577b1@righttoknow.org.au

Your Freedom of Information request – FOIREQ22/00211

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 on 5 August 2022.

Scope of your request

In your original request you sought access on the following terms:

"I request copy of the minutes of the 2022 OAIC Executive Committee Meetings (some are in file 21/000157)"

On 10 August 2022, the OAIC acknowledged your request and sought to clarify your request, stating:

"Version of minutes requested

It would be much appreciated if you could clarify whether you are seeking the Executive Committee meeting minutes in summary version (a version that is available to OAIC staff) or a full copy of the minutes.

Date range of request

It would also be appreciated if you could clarify the date range of the documents you are seeking. Are you seeking meeting minutes just from the 2022 calendar year, or the financial year? For the avoidance of doubt, it would be preferable if you could provide an exact date range for your request.

Personal information

Noting that this is a request made on the public Right to Know platform, we also wanted to ask if you would be happy to exclude personal information from the scope of your request? Please let us know if you would be willing to exclude such information from your request.

On 15 August 2022 you wrote back to the OAIC, clarifying your request to be as follows:

"1. I request the full copy of minutes for Executive Committee meeting in the calendar year of 2022, but if access is refused in full to those minutes, then the scope of this foI is for summary minutes in lieu. Summary minutes are not required if full minutes are provided.

2. Information relating to the private personal relationship and household affairs of individuals in these documents is irrelevant. Information that is official information is relevant.

In the course of processing your request, the personal information of third party entities identified within the documents the subject of your request. In light of this, on 2 September 2022, you were informed that, under s 27A of the FOI Act, a third-party consultation was being undertaken in relation to your request. Under s 15(6) of the FOI Act the period for processing your request was extended for a further 30 days, making the due date of your request 5 October 2022.

I note that, as outlined above, you agreed to exclude from the scope of your request "*Information relating to the private personal relationship and household affairs of individuals*". I confirm that the relevant personal information in this matter did not relate to the private personal relationships or household affairs of individuals. I note that this personal information was therefore within scope of your request.

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 12 documents totalling 79 pages of material within the scope of your request. I have decided to grant access in part to these documents.

Reasons for decision

Material taken into account

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

- your original freedom of information request of 5 August 2022
- all subsequent correspondence regarding your request, as outlined above,
- any submissions made by third parties,
- the documents at issue

- the FOI Act, in particular s 22, s 47C, and s 47E(d)
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), and
- relevant case law

Searches undertaken

Section 24A requires that an agency take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist.

The FOI Guidelines at [3.89] explain:

“Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment.

At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency who may be able to assist with the location of documents, and*
- *the age of the documents”*

To locate documents within the scope of your request, a staff member of the Legal Services team contacted the Executive Assistant to the Australian Information Commissioner and requested that the minutes of the 2022 OAIC Executive Committee Meetings within the scope of your request be provided. These documents were subsequently located by the Executive Assistant and provided to the Legal Services team. I am satisfied that all reasonable searches have been conducted to locate documents within the scope of your request.

Irrelevant material (s 22)

Section 22(1)(a)(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.

Please note that I have excluded from release the material that you agreed is excluded from the scope of your request. I have excluded material relating to the personal leave taken by OAIC staff, with this being personal information regarding the “*... household affairs of individual*” as outlined above. Where irrelevant material was within documents that were within the scope of your request, I have deleted this material in accordance with s 22(1)(a)(ii) of the FOI Act.

Accordingly, I have deleted this material in accordance with s 22(1)(a)(ii) of the FOI Act.

Deliberative material (s 47C)

I have found documents within the scope of your request contain material that is conditionally exempt under s 47C of the FOI Act.

Under s 47C of the FOI At, a document is conditionally exempt if its disclosure “*...would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) *an agency; or*
- (b) *a Minister; or*
- (c) *the Government of the Commonwealth.*

The material and documents I have found to be conditionally exempt under s 47C of the FOI Act can be described as material related to:

- internal discussions regarding international events and the impact that such events may have on the OAIC, and
- internal deliberations regarding unfinalized budget decisions

As noted in *Amanda Hay and Australian Bureau of Statistics (Freedom of information) [2019] AICmr 7 (25 February 2019)* at [28] The term ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.

In the AAT decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945* at [39], Deputy President Forgie explains that the meanings of the words ‘opinion’, ‘advice’ and ‘recommendation’ all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view

The FOI guidelines state the following at [6.61]:

A deliberative process may include the recording or exchange of:

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *interim decisions or deliberations*

In this instance, as noted above, the material at issue concerns deliberations and discussions of the OAIC Executive Committee.

Owing to the nature of this material, I am satisfied that it meets the definition of ‘deliberative matter’ for the purpose of s 47C of the FOI Act and is therefore conditionally exempt under this provision. The public interest test in s 11A(5) will be considered below.

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

I have found documents within scope of your request conditionally exempt in part under section 47E(d) of the FOI Act.

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' is 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'.

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

- current matters being investigated by the OAIC
- discussion regarding ongoing legal proceedings
- information regarding the OAIC IT Network
- information regarding the OAIC's Executive Meeting ID Codes
- discussion of OAIC's budget position

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 privacy powers, freedom of information powers and regulatory powers, under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act), the Privacy Act and the FOI Act. The Information Commissioner has a range of functions and powers directed towards protecting the privacy of individuals by ensuring the proper handling of personal information. In addition, under the AIC Act and the FOI Act, the Information Commissioner has a range of functions and powers promoting access to information under the FOI Act, including making decisions on Information Commissioner reviews and investigating and reporting on freedom of information complaints.

Current matters

A number of documents have information about current and ongoing matters (assessments, investigations and preliminary inquiry processes) being considered by the OAIC that are not publicly known. The information includes details including the names of relevant parties, the subject matter being considered and the current status of the matter. The release of this information at this time may impact on both the ability of the OAIC to manage the specific matters referred to and future matters if parties cannot be confident that their information will not be kept confidential.

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. In my view, the OAIC's ability to carry out its regulatory functions would be affected if there was a lack of confidence in the confidentiality of the investigative process. As such, I consider the release of information on current and ongoing matters that are not currently in the public domain would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Legal proceedings

The OAIC is currently involved in a number of legal proceedings. The material within the scope of your request contains discussion of ongoing litigation matters that involve the OAIC. The OAIC's ability to manage the relevant matters in accordance with its obligations would be adversely affected if this information was released. In addition to any impact its release would have in relation to these proceedings, it may also adversely impact future legal proceedings if applicants cannot rely on the confidentiality of discussions held in relation to litigation matters. As such, I consider the release of information in relation to the current litigation matter would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Information regarding OAIC's IT system

This material includes information regarding the OAIC's IT network and sever settings. I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC.

The OAIC collects and stores a range of personal and financial information about members of the public. 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.

In the IC review case of '*AW*' and Australian Taxation Office (Freedom of information) [2014] AICmr 1 ('AW'), the then Freedom of Information Commissioner considered the decision by the Australian Taxation Office (ATO) to exempt user IDs under section 47E(d) of the FOI Act. The user IDs are used by ATO staff to access the ATO's IT system. The Commissioner found that disclosing the user IDs "would have an adverse effect on the security of the ATO's IT systems and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ATO". In a series of subsequent IC review decisions, the former Australian Information Commissioner agreed with the reasoning given by the Commissioner in '*AW*' to find that user IDs used by ATO staff to access the ATO's IT system were exempt under section 47E(d) of the FOI Act.

I consider that the disclosure of the network and server settings of the OAIC could reasonably be expected to have a substantial adverse effect on the proper and efficient

conduct of the OAIC's operations. I have therefore decided that this material OAIC's IT is conditionally exempt from disclosure under section 47E(d) of the FOI Act.

Information regarding the OAIC's Executive Meeting ID Codes

The documents within the scope of your request contain the dial-in and conference ID information for the OAIC Executive meeting minutes. Were this information released, this would allow third parties to access the OAIC executive meetings. I consider that the reasoning in AW, as outlined above, is also applicable to this material. The inability for the OAIC to conduct secure meetings without the risk of third-party incursion would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC, due to a loss of ability to conduct meetings over a secure network.

Discussion of OAIC's budget position

One document within scope of your request contains discussion of the OAIC's budget position. This information is not in the public domain. The level of funding provided to separate activities is subject to ongoing consideration by the Commissioner and the Department of Finance and may be subject to change over the financial year. The OAIC's ability to manage its ongoing funding would be adversely affected if this information was released as it may impact on the ability of the Commissioner to undertake confidential engagement with the Department of Finance. As such, I consider the release of information in relation to the breakdown of additional funding would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

Findings

For the above reasons, I am satisfied that the disclosure of the relevant materials in this case would, or could reasonably be expected to substantially and adversely affect the proper and efficient conduct of the operations of the OAIC in performing and managing its various functions outlined in the reasons above.

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. In this case, I must consider whether disclosure of the documents at this time would be contrary to the public interest.

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^[4]:

... 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.

The FOI Guidelines provide a non-exhaustive list of factors favouring disclosure (see [6.19]). These factors include when disclosure will reveal the reason for a government decision and any background or contextual information that informed the decision and when disclosure will enhance the scrutiny of government decision making. I consider that the public interest factor favouring disclosure in this case is that disclosure would:

- promote the objects of the FOI Act generally through promoting access to government held information,
- promote effective oversight of public expenditure, and
- Inform debate on a matter of public importance,

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 could reasonably be expected to negatively impact OAIC’s ability to manage legal matters that are on foot involving the OAIC,
- disclosure could reasonably be expected to prejudice the OAIC’s ability to manage its investigations,
- disclosure could reasonably be expected to inhibit the frankness and candour of OAIC officials when discussing internal issues relating to budget decisions,
- disclosure could prejudice the security of OAIC internal meetings for internal staff members, and
- disclosure could prejudice the security of the OAIC’s IT systems

Regarding the public interest considerations related to s 47C, I note that, as per the FOI Guidelines at [6.85], ‘frankness and candour’ arguments may still be contemplated when

^[4] *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [133].

considering deliberative material and weighing the public interest. I note that, while the FOI Guidelines state at [6.83] that agencies “...should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times” and that for frank and candour claims to be successful they must relate to “some particular practice, process [or] policy”, I am satisfied that, due to this deliberative material relating specifically to internal budgetary decisions and considerations, I am satisfied that this is a circumstance where public interest considerations necessitate that the relevant information not be released. I am satisfied that giving access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

Therefore, in this case, I am satisfied that the public interest factors against disclosure outweigh the public interest factor in favour of disclosure.

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

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

5 October 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.

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, it is likely that the Information Commissioner will decide (under s 54W(b) of the FOI Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the AAT.

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 internal review or IC review 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.

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 it would be unreasonable to publish.

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