



Our reference: FOIREQ22/00291

Verity Pane

By email: [foi+request-9264-541747d1@righttoknow.org.au](mailto:foi+request-9264-541747d1@righttoknow.org.au)

## Your Internal Review Application – FOIREQ22/00291

Dear Verity Pane,

I am writing to advise you of my decision in response to your application for internal review of the decision made on 12 September 2022 (FOIREQ22/00224).

### Original FOI Decision

You lodged an FOI request on 12 August 2022. In your request you sought access to the following:

*“I want copy of all s 55G decisions (excluding drafts) the OAIC received in July 2022. Let's see if you'll claim 100% exemption to me.*

*The personal information of private individuals (not Commonwealth public servants and contractors) is irrelevant.”*

On 12 September 2022 the OAIC made a decision in relation to your request. The OAIC identified 40 documents within the scope of your request. The OAIC gave you access to 22 documents in part and refused access to 18 documents. In making its decision, the OAIC relied on the certain operations of agencies exemption (s 47E(d)) of the FOI Act. The OAIC also deleted material that it found to be irrelevant or outside the scope of your request in accordance with s 22(1)(a)(ii) of the FOI Act.

On 14 September 2022 you requested an internal review of the decision FOIREQ22/00225. In your request, you stated the following:

*“Slapping s 47E(d) exemptions on everything simply because a complaint is open is an abuse of the exemption. The OAIC take years to deal with FOI ICRs so this is not a black box you can hide things in.*

*It was not intended to be used indiscriminately as a blanket barrier to access to a class of documents, especially given the benefits that transparency in procedure provides to the public interest.*

*Pass this on to the person who conducts Freedom of Information reviews, as an internal review of the Office of the Australian Information Commissioner's decision in my FOI request 'FOI Act complaints received by the OAIC in July 2022'."*

*Pass this on to the person who conducts Freedom of Information reviews, as an internal review of FOIREQ22/00224."*

## Material taken into account

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

- your original freedom of information request FOIREQ22/00224 dated 12 August 2022
- the decision of the delegate dated 12 September 2022 the subject of this review
- the correspondence received from you, as outlined above
- the FOI Act, in particular s 22 and 47E(d)
- any submissions received from third parties
- relevant case law
- the 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 (section 54C of the *Freedom of Information Act 1982* (the FOI Act)). As such, I have had regard to, but not relied on, the delegate's original Freedom of Information (FOI) decision.

I have identified 40 documents in scope of your FOI request.

I have decided to vary the original decision. I have decided to give you **access to 29 documents in part** and **refuse access to 11 documents**. Details of the exemptions applied to each document are contained in the schedule of documents.

## 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”*

In processing your original FOI request that is the subject of this internal review, a member of the OAIC Legal Services team sent a search and retrieval request to the OAIC's Freedom of Information Intake & Early Resolution team Investigations and Compliance team, who searched the OAIC's case management system *Resolve* to extract and compile the documents within scope of your request. This line area then conducted the following searches across the OAIC's various document storage systems:

- the OAIC's case management system - Resolve
- the OAIC's document holding system – Content Manager
- OAIC's email system
- general computer files

The following search terms were used when undertaking electronic records searches:

- 's55G'
- 'Revised decision'

I have considered the searches taken by the line area. Accordingly, I am satisfied that all reasonable searches have been conducted in locating documents within scope of your request, and that other than the 40 documents identified to be in scope of your request, no further documents exist.

#### Irrelevant material (s 22)

I have found that 29 documents 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.

Regarding the pages of the documents within scope of your request of which all substantive material is outside the scope of your request, or fully exempt under s 47E(d) of the FOI Act, I have considered as to whether it would be reasonably practicable to prepare an edited copy of these documents to release to you, as required under s 22 of the FOI Act. Noting the extent of the modifications required, and the lack of any material related to your request that would be left in the edited pages, I am satisfied that it is not reasonably practicable in the circumstances to prepare an edited copy of these pages. Therefore, these pages have been noted on the attached schedule, but deleted from the document bundle released to you.

Please note that in undertaking this internal review, I consider that some of the material which the original decision maker deleted irrelevant or outside the scope of your request is within scope, and I have decided to release this further material to you in this internal review decision.

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

I have found 11 documents to be exempt in full under section 47E(d) of the FOI Act.

The documents that I have found to be exempt can be described as:

- s 55G decisions made by a number of Commonwealth agencies, each provided to the OAIC for the purposes of conducting Information Commissioner (IC) reviews currently being considered by the OAIC

These matters are ongoing, and I note that you are not a party to any of the IC review applications. Please note that, since the time of the original decision being made, 6 of the matters whose documents are within the scope of your request have been closed. Since these matters are closed, further material is now being released to you.

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’.

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. 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, as well as assessing and making decisions on vexatious applicant declarations.

### *Consideration*

These 11 documents contain information that is not publicly known, regarding IC reviews that are currently open and to which you are not a party. These IC reviews are still being undertaken and the Commissioner is yet to decide the relevant IC review applications. The release of this information at this time to a third party who is not a party to these reviews would, or could reasonably be expected to, adversely 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 be kept confidential while their reviews are still being investigated. While you have excluded the personal information of private individuals and

the names of private businesses from the scope of your request, the documents contain information particular to these IC reviews that was provided to the OAIC for the purposes of conducting IC reviews, which remain ongoing.

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 investigative process. Similarly, in this instance, the OAIC's ability to carry out its regulatory functions would be affected if there was a lack of confidence in the confidentiality of this process.

While I note the concerns raised in your request for internal review, in light of the above reasoning, there is no evidence before me that the provision is being used "indiscriminately" or as an "abuse" of the exemption. I am satisfied that the application of s 47E(d) in relation to the documents is an appropriate use of this exemption provision in accordance with the FOI Act.

Accordingly, I consider that at this time, disclosure of this material to you via the Right to Know website, where the IC reviews to which this material relates are still being undertaken and to which you are not a party, would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in conducting IC reviews.

#### **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)). 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.

The FOI Guidelines provide a further 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 do not consider that the material that has been identified as exempt under s47E(d) and s47F of the FOI Act would enhance the scrutiny of government decision making.

The only 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. Other factors are not relevant in this instance.

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:

- that disclosure could reasonably be expected to prejudice the OAIC's ability to obtain confidential information
- that disclosure could reasonably be expected to prejudice the OAIC's ability to obtain similar information in the future
- that disclosure could reasonably be expected to prejudice the conduct of IC reviews by the OAIC if materials relating to open matters at hand are disclosed to a non-party to the IC review while the matter is still awaiting determination by the FOI Commissioner.

I again note the concerns raised in your internal review request, particularly your comment regarding "...the benefits that transparency in procedure provides to the public interest." I have considered the benefit of providing public access to government information, as outlined above. In this instance, I am satisfied that the public interest factors against disclosure outweigh the public interest factor in favour of disclosure at this time.

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.

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

Yours sincerely

**Caren Whip**

General Counsel

14 October 2022

## If you disagree with my decision

### 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](mailto: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](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 it would be unreasonable to publish.



The documents I have decided to release to you contain exempt material that would be unreasonable to publish. As a result, an edited version of the documents will be published on our [disclosure log](#).