



Our reference: FOIREQ22/00225

Attention: Verity Pane

By email: foi+request-9265-abc0e14a@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00225

Dear Verity Pane

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 12 August 2022.

In your request you seek access to the following:

“I request copy of all Freedom of Information Act complaints received by the OAIC in July 2022. Let's see if you pull this 100% exemption rubbish on me.

Personal information of private individuals (excluding Commonwealth public servants and contractors) is irrelevant.”

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 that 30 documents are exempt in full and 3 documents are exempt in part. The schedule and documents will be provided to you tomorrow, **13 September 2022**.

Reasons for Decision

Material taken into account

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

- your freedom of information request dated 12 August 2022;
- the documents at issue;
- the FOI Act, in particular s 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 3 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.

In your FOI request you excluded personal information of private individuals (excluding Commonwealth public servants and contractors). Consistent with your request, I have deleted irrelevant material, including material that you have expressly excluded in your request. I have released 11 documents in part with personal information of private individuals deleted as irrelevant to your request in accordance with section 22 of the FOI Act. I note that personal information is more than just names and contact details and includes representative details and details of the FOI requests where those details may identify an individual.

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

I have decided to refuse access to 30 documents 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 documents that I have found to be exempt under s 47E(d) of the FOI Act can be described as:

- documents related to current freedom of information complaint investigations being considered by the OAIC

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 Information Commissioner reviews and investigating and reporting on freedom of information complaints.

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 in conducting FOI complaint investigation would be substantially and adversely affected if there was a lack of confidence in the confidentiality of the investigative process while the investigations are still on foot. 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.

I have refused access in full to a number of documents that relate to complaints made to the OAIC that are current and ongoing. Given that these complaints remain open, I consider that while the investigation is on foot, disclosure of the relevant material at this stage can impede the efficient conduct of the case. Specifically, the investigating officers are still in the process of formulating their views, and gathering facts and evidence, and no decisions or findings have been made regarding these complaints. Parties to the investigation will be provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. Further, if a finding is made regarding the complaint, it is appropriate for the parties to the complaint to be advised of that outcome. The OAIC's Freedom of Information Regulatory Action Policy advises at paragraph 70 that the Information Commissioner will not comment publicly about ongoing complaint investigations as the FOI Act provides that investigations must be conducted in private (see s 76(1) of the FOI Act).

Accordingly, I consider that at this time, disclosure of this material to you via the Right to Know website, when the complaint is still being investigated by the OAIC, and where the parties have not yet been advised of the outcome of the investigation, would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in investigating FOI complaints.

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 Forgie 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.

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

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:

- could reasonably be expected to prejudice an agency's ability to obtain confidential information' and
- could reasonably be expected to prejudice the proper and efficient conduct of FOI complaint investigation functions of the OAIC.

I have given significant weight to the factor that disclosure could reasonably be expected to prejudice the proper and efficient conduct of the FOI complaint investigation functions of the OAIC. The disclosure of the information to third parties, who is not a party to these reviews, of the material within this matter, while the complaints are being investigated, 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. 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

Emily Elliott

Emily Elliott
Senior Lawyer

12 September 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 it would be unreasonable to publish.

The documents I have decided to release to you do not contain personal or business information that would be unreasonable to publish. As a result, an edited version of the documents will be published on our [disclosure log](#).