



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ22/00290

Verity Pane

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

Your Internal Review Application – FOIREQ22/00290

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 13 September 2022 (FOIREQ22/00225).

Original FOI Decision

You lodged an FOI request on 12 August 2022. In your request you sought 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.”

On 12 September 2022 the OAIC made a decision in relation to your request. The OAIC identified 33 documents within the scope of your request. The OAIC gave you access to 3 documents in part and refused access to 30 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 complaints 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'.”

Material taken into account

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

- your original freedom of information request FOIREQ22/00225 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)
- 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 33 documents in scope of your FOI request.

I have decided to vary the original decision and give you access to further materials. I have decided to give you access to 27 documents in part, and refuse access to 6 documents. Details of the exemptions applied to each document and the variations 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 request the subject of this internal review, a member of the OAIC Legal Services team sent a search and retrieval request to the OAIC's FOI Investigations and Compliance team, who searched the OAIC's case management system *Resolve* to extract and compile the documents within scope of your request. I have considered the search efforts taken by that line area.

In conducting this internal review, I have also conducted an independent search of the *Resolve* system and confirm the documents in scope canvas all FOI complaints received by the OAIC in the period nominated by you in your FOI request. Accordingly, I am satisfied that all reasonable searches have been conducted in locating documents within scope of your request, and that other than the 33 documents identified to be in scope of your request, no further documents exist.

Irrelevant material (s 22)

I have found that 27 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, being material that you have expressly excluded in your request.

Regarding the pages of the documents within scope of your request of which all substantive material is outside the scope of our 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.

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

I have found 6 documents to be exempt in full under section 47E(d) of the FOI Act.

The documents that I have found to be exempt contain material that relates to current freedom of information complaint investigations being considered by the OAIC. These complaints are ongoing and I note that you are not a party to any of the complaints. Please note that, since the time of the original decision being made, 22 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.

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.

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 72 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).

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, 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.

Personal privacy exemption (s 47F)

I have decided that 1 document is exempt in part under s 47F of the FOI Act. The material that I have found exempt can be described as the name of a Department staff member who was subject to the complaint.

As discussed in the FOI Guidelines and IC review cases, the main requirements of this public interest conditional exemption are that a document contains 'personal information'; disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)); and it would be 'contrary to the public interest' to release the personal information at the time of the decision (s 11A(5)).

Personal information

Subsection 4(1) of the FOI Act provides that 'personal information' has the same meaning as in the Privacy Act 1988 (the Privacy Act). I am satisfied that material consisting of the name of a Department staff member comprises 'personal information' for the purposes of s 47F(1) of the FOI Act.

Would disclosure involve an unreasonable disclosure of personal information?

In relation to the second requirement of s 47F, that disclosure of the information under the FOI Act would involve an unreasonable disclosure of personal information, s 47F(2) provides that a decision maker must have regard to:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources, and
- any other matters that the agency or Minister considers relevant.

The FOI Guidelines explain at [6.138] that the test of 'unreasonableness' in s 47F 'implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals'.

Consistent with *FG and National Archives of Australia* [2015] AICmr 26, the FOI Guidelines explain that other relevant factors include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person

- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

The OAIC has always taken the position that where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstance existed. As outlined in part [6.153] of the FOI Guidelines, this is because the information would reveal only that the public servant was performing their public duties.

In the documents, where names of agency staff members arise during the course of their dealings with the OAIC in investigating the complaint, I have decided to release this material in full as the information would reveal only that the public servant was performing their public duties.

However, where the name of a staff member appears in the context of the complaint to the OAIC, it is my view that disclosure of this material at this time is unreasonable. The name of a staff members appears in the document because a complainant has complained about the conduct of this staff member. The substance of the complaint is in part, allegations about the conduct of this individual staff member.

Under Part VIIB of the FOI Act, the Information Commissioner can investigate an action taken by an agency in the performance of its functions or the exercise of its powers under the FOI Act. The complaints process set out in Part VIIB is intended to deal with the way *agencies* handle FOI requests and procedural compliance matters. Following the receipt of the complaint by the OAIC, the Information Commissioner may make preliminary inquiries for the purposes of determining whether or not to investigate a complaint. The Information Commissioner also has a discretion not to investigate, or not to continue to investigate the complaint in circumstances set out in s 73 of the FOI Act. At times, the complainant withdraws the complaint and no further action is required. Accordingly, not all complaints received by the OAIC will lead to a notice on completion with investigation recommendations to the Department. In my view, disclosure of the names of agency staff members contained as part of the complaint is unreasonable because:

- the information is not well known
- the agency staff members subject to the complaint is not known to be associated with the matters dealt with in the document
- the agency staff names subject to the complaint are not available from publicly accessible sources other than in the s 70 complaint files with the OAIC

- the substance of the s 70 complaints to the OAIC are being disclosed either in the complaint or the Resolve reports contained with the documents found to be within the scope of this request. These documents include concerns raised by members of the public as to the procedural compliance issues *with the agency* and allegations about particular staff members. Release of the names of agency staff members whose name appear in the complaints would serve no additional public purpose and would cause stress on the staff member, particularly in circumstances where allegations are found to be unsubstantiated.
- I am also mindful that the FOI request has been made through the Right to Know website, and that the documents released will be published on the website upon release. As DP Forgie noted in AAT decision in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (Warren) at para 118, the FOI Act does not limit those to whom, or the platforms on which, a person might choose to publish the documents to which they are given access. Others may choose to do what the applicant would not do; in addition, if they choose to do so, modern means of communications enable information to be disseminated very broadly and quickly. In this case, disclosure of the names of agency staff members will indeed be “disclosure to the world at large”.

Having examined the documents at issue and based on the information before me at this time, for the reasons outlined above, I am of the view that disclosure of materials comprising the names of a staff member where the staff member was subject to the complaint to the OAIC is unreasonable in this case.

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 complaint investigations by the OAIC
- that disclosure of the personal information of the Department staff members nominated in the complaint, would, or could reasonably be expected to prejudice the protection of these individuals' right to privacy, as well as potentially exposing these individuals to unnecessary stress.

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) and 47F 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

Margaret Sui
Senior Lawyer

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, 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 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](#).