



Our reference: FOIREQ22/00354

Attention: Verity Pane

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

Your Freedom of Information Request – FOIREQ22/00354

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 30 October 2022.

In your request you seek access to the following:

“I seek copy of all Freedom of Information Act complaints received by the OAIC in September 2022.

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

In the event of a practical refusal consultation I do not agree to vary or withdraw my foi.”

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 **15** documents within the scope of your request. I have made a decision to:

- Grant access in full to 3 documents; and
- Refuse access in full to 12 documents.

The documents and schedule of documents are attached to this decision.

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 following line area of the OAIC conducted reasonable searches for documents relevant to your request:

- FOI Dispute Resolution

Searches were conducted across the OAIC’s various document storage systems including:

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

Having consulted with the relevant line area and undertaken a review of the records of the various search and retrieval efforts, I am satisfied that a reasonable search has been undertaken in response to your request.

Material taken into account

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

- your FOI request dated 30 October 2022;
- the FOI Act, in particular sections 3, 11, 11A, 15, 22, 47E(d) and 76(1) of the FOI Act;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act to which regard must be had in performing a function or exercising a power under the FOI Act (FOI Guidelines); and
- relevant case law.

Access to edited copies with irrelevant matter deleted (section 22)

Material contained within 3 documents in scope has been identified as irrelevant to your request. This material can be described as ‘Personal information of private individuals (excluding Commonwealth public servants and contractors)’ which has been identified by you as irrelevant in your request. I note that personal information is more than just names and contact details, and includes representative details and details of the FOI complaints where those details may identify an individual.

Section 22 of the FOI Act authorises an agency to prepare, and to give an applicant access to, an edited copy of a document in specified circumstances. The specified circumstances are set out in s 22(1) and are, relevantly to this FOI request, as follows:

- the agency decides that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access (s 22(1)(a)(ii));
- the agency could prepare an edited copy which, with appropriate deletions, would not disclose any information that would reasonably be regarded as irrelevant to the request (s 22(1)(b)(ii));
- it is reasonably practicable for the agency to prepare the edited copy (s 22(1)(c)); and
- it is not apparent from the applicant's request, or consultation with the applicant, that the applicant would decline access to the edited copy (s 22(1)(d)).

We have decided that based on the wording of your request, giving access to these documents unedited would disclose material which you have identified to be irrelevant. It is possible, and reasonably practicable, for the OAIC to prepare edited copies of these documents by redacting the information which would reasonably be regarded as irrelevant to the request. Finally, as you have identified this material as being irrelevant, it is not apparent that you would decline access to edited copies of the documents.

I have therefore made edited copies of these three documents which removes irrelevant material and otherwise grant you **full access** to the material in scope of your request.

Reasons for decision

Certain operations of agency exemption (section 47E(d))

In accordance with section 47E(d) of the FOI Act, I have made a decision to refuse access to 12 documents on the basis that disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations.

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.

Paragraph 6.101 of the FOI Guidelines explains that:

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 material that I have decided is subject to the conditional exemption consists of complaints made about agency actions, relating to the handling of FOI matters under Part VIIB of the FOI Act (FOI complaints) made to the OAIC that are still open and in the process of being assessed 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 assessing and investigating FOI complaints.

Information regarding current Freedom of Information complaints

The 12 documents contain information that is not publicly known, being the content of complaints which are still open and being assessed or investigated by the OAIC. The release of this information at this time would, or could reasonably be expected to, adversely impact on the ability of the OAIC to manage these particular matters and future matters if parties cannot be confident that their information will be kept confidential while complaints are still being investigated.

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.

I consider that while the matters are on foot, disclosure of the relevant material at this stage is likely to impede the efficient conduct of the case. Specifically, 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 complaints will be provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. Further, if findings are made regarding the complaints, it is appropriate for the parties to the complaint to be advised of that outcome.

I note that section 76(1) of the FOI Act provides that investigations must be conducted in private. Similarly, the OAIC's Freedom of Information Regulatory Action Policy advises at paragraph 72 that the Information Commissioner will generally not comment publicly about the commencement of, or ongoing, FOI complaint investigations.

The release of this information at this time to a third party who is not a party to these complaints would, or could reasonably be expected to, adversely impact on 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 complaints are still being assessed and investigated. While you have excluded the personal information of private individuals from the scope of your request, the documents contain information particular to these complaints that was provided to the OAIC for the purposes of assessing and investigating the complaints.

As such, I consider the release of information on current and ongoing matters to the general public via the Right to Know website would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC in conducting these ongoing assessments and investigations into 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.

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 by informing the community of the government’s operations, revealing the reasons for a government decision and enhancing scrutiny of government decision making. 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 factors against disclosure in this case is that disclosure could reasonably be expected to prejudice:

- the OAIC’s ability to obtain confidential information;
- the OAIC’s ability to obtain similar material in the future; and
- the proper and efficient conduct of the FOI complaint management function 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 management functions of the OAIC. I consider the reasonably expected prejudice to the management functions of the OAIC, and to its ability to obtain material relevant to complaints, to outweigh the factor which would support disclosure.

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

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. It is generally in the public interest to inform the public of the government's operations, however in this case, doing so would not promote the objects of the FOI Act when it would undermine the process for complaints established in the FOI Act.

Accordingly, I have found that disclosure of these documents would not be in the public interest.

Conclusion

Please find attached a document schedule and documents released to you as part of this decision.

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

Yours sincerely

Molly Cooke
Lawyer

29 November 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_10

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 would be unreasonable to publish.

An edited version of the documents I have decided to release, with the irrelevant material removed, will be published on our disclosure log shortly after their release to you.