



Our reference: FOIREQ22/00420

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

Your Freedom of Information Request- FOIREQ22/00420

Dear Ms 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 4 December 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 October 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 16 documents within the scope of your request. I have decided to refuse access in full to 7 documents and grant access in part to 9 documents.

Material taken into account

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

- All material within the scope of your request on the OAIC's Case Management System Resolve
- the FOI Act
- relevant case law
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act

Whether reasonable steps were taken to find documents – s 24A

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.

I have considered the search and retrieval efforts in processing your FOI requests. As previously advised to you, this involved:

- A search and retrieval request to the relevant line area (Freedom of Information Regulatory Group), who conducted searches and located a document on the OAIC’s Case Management System Resolve

On the basis of the search conducted, I am satisfied that under s 24A of the FOI Act, all reasonable steps have been taken by the OAIC to find the documents that fall within the scope of your request. I am also satisfied that the 16 documents identified during the search and retrieval process is the only documents within the scope of your request.

Access to edited copies with irrelevant and exempt matter deleted– s 22

I have found that 9 documents located within the scope of your request 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 9 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- s47E(d)

I have found 7 documents to be conditionally exempt in full under section 47E(d) of the FOI Act.

The information within the 7 documents that I have found to be exempt in full is material that relates to open complaint matters that are still being investigated by the OAIC.

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 OAIC’s powers the Freedom of Information Act 1982 (Cth) (‘The FOI Act’) to investigate and make determinations in relation to Freedom of Information complaints by members of the public.

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 7 documents that relate to ongoing complaint matters that are still open and being investigated by the OAIC. Given that these complaints remain open, I consider that while the matters are on foot, disclosure of the relevant material at this stage can impede the efficient conduct of the investigation. Specifically, investigation 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 complaint will be provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. Further, if a determination is made regarding the complaint, it is appropriate for the parties to the complaint to be advised of that outcome.

The release of this information at this time to a third party who is not a party to these investigations 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 complaints are still being 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 investigating and making determinations on complaints.

I consider that at this time disclosure of this material to you via the Right to Know website, when the complaint is open and ongoing, would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in reviewing and making determinations concerning complaints.

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.

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. The relevant public interest factor in favour of disclosure in this case is that disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance. Other factors are not relevant.

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 an agency's ability to obtain confidential information
- could reasonably be expected to prejudice the OAIC's ability to obtain similar information in the future, and
- could reasonably be expected to prejudice the conduct of complaint investigations and determinations by the OAIC

As this list is non-exhaustive, I have also taken into account that refusing to release the documents at issue is in line with the OAIC's Freedom of Information Regulatory Action Policy, which relevantly states the following at [72]:

"The Information Commissioner will not comment publicly about the commencement of or ongoing complaint investigations and CIs as the FOI Act provides that investigations must be conducted in private"

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 s 47E(d) of the FOI Act would, on balance, be contrary to the public interest.

Conclusion

As noted above, I have decided to refuse access in full to 7 documents and grant access in part to 9 documents.

The documents for release and document schedule can be found attached to this decision.

Please see the following page for information about your review rights.

Yours sincerely

Alessia Mercuri

Lawyer

Legal Services

3 January 2023

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 would be unreasonable to publish.

I am not of the view that the documents I have decided to release to you contain personal and business information that would not be unreasonable to publish. As a result, the documents will be published on our [disclosure log](#).