



Our reference: FOIREQ22/00421

By email: [foi+request-9315-e8ea5c07@righttoknow.org.au](mailto:foi+request-9315-e8ea5c07@righttoknow.org.au)

## Your FOI Application - FOIREQ22/00421

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 4 December 2022.

In your request you seek access to the following:

*“This is also a fresh foi application for all records of third party consultation in FOIREQ22/00356, and the Resolve reports for FOIREQ22/00253, FOIREQ22/00352, FOIREQ22/00356, FOIREQ22/00357 which s 15(5)(b) requires decision must be given by 3 January. In the event of a practical refusal consultation being issued I give advance response that I do not withdraw or vary my foi application in response to such a notice.”*

### 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 **4 documents** within the scope of your request. I have decided to grant you partial access to 2 documents and full access to the other 2 documents. The documents and schedule of documents are attached to this decision.

### Material taken into account

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

- material on the OAIC 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.

Section 24A provides:

**Requests may be refused if documents cannot be found, do not exist or have not been received**

Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

I have considered the search and retrieval efforts in processing your FOI requests. As previously advised to you, this involved Officers in the Legal Service team conducted a search of the OAIC’s case management system Resolve and generated Resolve reports in scope.

I note that as part of your FOI request, you requested all documents concerning third party consultation for OAIC file FOIREQ22/00356. As part of the search and retrieval process, officers in the Legal Service team confirmed as of the date of your request, no third-party consultation has been commenced in relation to that matter,.

Accordingly, on the basis of the searches conducted, I am satisfied that under s 24A of the FOI Act that all reasonable steps have been taken by the OAIC to find the documents that fall within the scope of your request and the attached 4 document are the only documents relevant to your request.

## Certain operations of agencies exemption- section 47E(d)

I have decided to give access in part to the **2 documents** found within the scope of your request under section 47E(d) of the FOI Act.

The material within the documents that I have found to be conditionally exempt is material disclosing the network address of the OAIC's IT system.

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'.

### OAIC Network Address

The OAIC material that I have held to be exempt under section 47E(d) of the FOI Act in this matter is material containing the network address of the OAIC's IT system.

The OAIC collects and stores a range of personal and financial information about members of the public. The network address contains information about the OAIC's IT system (including the network location and storage of information). I consider that disclosure of this information could compromise the safety and security of the storage of the information held by the OAIC. The impact of any compromise to the safety and security of the OAIC's information systems would result in a serious adverse impact on the functions and responsibilities of the OAIC.

In the IC review case of *'AW' and Australian Taxation Office (Freedom of information)* [2014] AICmr 1 ('AW'), the then Freedom of Information Commissioner considered the decision by the Australian Taxation Office (ATO) to exempt user IDs under section 47E(d) of the FOI Act. The user IDs are used by ATO staff to access the ATO's IT system. The Commissioner found that disclosing the user IDs "would have an adverse effect on the security of the ATO's IT systems and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ATO". In a series of subsequent IC review decisions, the former Australian Information Commissioner agreed with the reasoning given by the Commissioner in 'AW' to find that user IDs used by ATO staff to access the ATO's IT system were exempt under section 47E(d) of the FOI Act.

I consider that the disclosure of the network address of the OAIC's computer system could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations. I have decided that the network address of the OAIC's IT system is conditionally exempt from disclosure under section 47E(d) of the FOI Act.

#### 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:

... 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.<sup>1</sup>

In this case, I must consider whether disclosure of the material subject to section 47E(d) at this time would be contrary to the public interest.

The FOI Act sets out at s11B(3) four factors favouring access, which must be considered if relevant. They are that disclosure would:

- promote the objects of the Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her personal information

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.

In my view, the public interest factors favouring disclosure in this case are that disclosure would promote the objects of the FOI Act generally. 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:

- disclosure of the network address of the OAIC's IT system could compromise the safety and security of the storage of the information held by the OAIC.

On balance, I consider that the factor against disclosure outweighs the factor in favour of disclosure. I have therefore decided that at this point in time, it would be contrary to the public interest to give you access to the information that I have found to be conditionally exempt under s47E(d) of the FOI Act.

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

## Conclusion

Please find attached a document schedule and documents released to you as part of this decision. As noted above, I have decided to provide you partial access to the **2 documents** identified within the scope of your request. The other 2 documents have been released in full.

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

The documents I have decided to release to you contain personal information that would be unreasonable to publish. As a result, the documents will not be published on our disclosure log.