



Our reference: FOIREQ22/00296

Attention: Ben Fairless

By Email: foi+request-9379-8b0284f4@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00296

Dear Ben Fairless

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 16 September 2022.

In your request you seek access to the following:

“I’m seeking information (or documents) that:

- 1. Discuss or explain why an AICmr number may not be allocated to a decision.*
- 2. Discuss why, if an AICmr number has been allocated to a decision, that decision may not be published on Austlii, and if so where it would be published.*
- 3. Are policies or procedures on the publication of decisions on Austlii, including the process that is used to publish those decisions and any approval processes required for a decision to be published.*
- 4. Are any policies or procedures on the removal of decisions from Austlii, including approval processes and steps required to remove a decision from Austlii.*
- 5. Are any requests to remove decisions that have already been published on Austlii, and all documents that relate to each of those requests.*

I am happy to exclude as irrelevant:

- 1. Duplicates of documents (for example, duplicate emails or email chains).*
- 2. All phone numbers, both landline and mobile.*
- 3. The portion of all email addresses before the domain (for example, for the email address jane.smith@oaic.gov.au I am happy for you to exclude “jane.smith” but do not exclude “oaic.gov.au”).*
- 4. Names of OAIC staff below SES level *unless* the position of the staff member is not defined in the document (for example, if an email contains “John Smith” and their position “Senior Lawyer” then I am happy for “John Smith” to be redacted. If*

“Senior Lawyer” is not contained in the document then I do not consent to it being redacted).

- 5. The names of individuals not part of the OAIC. Please note the rules at part 2 and 3 apply to individuals not part of the OAIC. I do not consent to the removal of position descriptions, organisation names, or domain names of non-OAIC entities.*

...

In addition to providing suggested documents, any information the OAIC line areas are willing to provide that alleviates the concerns that decisions are not correctly being published correctly.”

On 10 October 2022 we wrote to you to clarify the scope of your request as follows:

“We would be grateful if you could please clarify the scope of your request, as soon as possible and ideally before 12pm Wednesday 12 October 2022:

- 1. whether your request only relates to FOI decisions, or both FOI and privacy decisions made by the OAIC?*

- 2. In relation to your request #5 “any requests to remove decisions that have already been published on Austlii, and all documents that relate to each of those requests” – are you seeking recent removal requests or all removal requests unlimited by time?”*

On 10 October you clarified the scope of your request as follows:

I've answered your questions below:

- “1. whether your request only relates to FOI decisions, or both FOI and privacy decisions made by the OAIC?*

- My request relates to all requests that are issued an AICmr number

- 2. In relation to your request #5 “any requests to remove decisions that have already been published on Austlii, and all documents that relate to each of those requests” – are you seeking recent removal requests or all removal requests unlimited by time?*

- I don't know how many requests have been made, so I will keep my requests to all removal requests. If this causes an undue burden, it would be helpful if the OAIC could tell me how many requests over the last few years fit this category.”

Discussion

We note that your request includes ‘any information the OAIC line areas are willing to provide that alleviates the concerns that decisions are not correctly being published correctly.’ We have consulted with the FOI branch of the OAIC which has provided

further information in addition to the documents they have provided. The FOI branch has advised as follows regarding your request:

1. Your request states:

To assist the OAI, examples of decisions from Austlii that I can't find include but are not limited to:

[2022] AICmr 60

[2022] AICmr 59

[2022] AICmr 33

The FOI Branch has identified that both [2022] AICmr 60 and [2022] AICmr 59 are available on Austlii and the following links are provided for your reference:

- [William Summers and Department of the Prime Minister and Cabinet \(Freedom of Information\) \[2022\] AICmr 59 \(12 August 2022\)](#)
- [Rex Patrick and Department of the Prime Minister and Cabinet \(Freedom of Information\) \[2022\] AICmr 60 \(12 August 2022\)](#)

Your request correctly identifies that that third decision [2022] AICmr 33 is currently unavailable on Austlii.

2. As set out in the schedule and documents provided, we have only been able to identify a small number of cases in which the OAI has requested the removal of a decision from Austlii. Of the three cases we have identified one was published with errors in the decision and was subsequently republished with the errors corrected. One was removed from Austlii while the decision was subject to litigation. Once the litigation had been finalised the decision was republished. The final decision, identified in your request, [2022] AICmr 33 is the subject of current litigation and is not currently published.
3. All IC review decisions made under s 55K of the FOI Act are allocated AICmr reference numbers. All IC review decisions are published.
4. All vexatious declarations are also allocated AICmr reference numbers. With respect to the publishing of s 89K decisions, the FOI Guidelines at [12.51] advise that the Information Commissioner will generally publish reasons for making a s 89K declaration, but there is no requirement that the Commissioner publish a s 89K decision. There may be circumstances where the OAI considers it inappropriate or unnecessary to publish.

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

- grant full access to 7 documents;
- refuse access in full to 8 documents; and
- grant access in part to 2 documents.

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

Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

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

- FOI Dispute Resolution
- Privacy
- Legal services

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
- OAIC's email system
- general computer files

Having consulted with the relevant line areas 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. I am satisfied that all reasonable steps have been taken to find documents within the scope of your request and that no other documents within the scope of your request exist.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 16 September 2022;
- the documents at issue;

- the FOI Act, in particular ss 3, 11, 11A, 15, 22, 42, 46(b) 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.

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

In accordance with section 22 of the FOI Act, an agency must consider whether it would be reasonably practicable to prepare an edited copy of documents subject to an FOI request where material has been identified as exempt or irrelevant to the request.

I have determined that FOI Act exemptions apply to this material.

I have also identified the following material within the documents to be irrelevant or out of scope of your request:

- Names of individuals not part of the OAIC, which is identified to be out of scope in your request
- Portions of an OAIC procedural handbook which do not relate to publication of decisions

Accordingly, I have made an edited copy of the documents (other than those which I have found to be exempt in full) which removes irrelevant and out of scope material and otherwise grants you full access to the material in scope of your request.

Documents subject to legal professional privilege (section 42)

I have identified material contained within the documents that comprises a discussions in relation to ongoing legal proceedings involving the OAIC.

In accordance with section 42 of the FOI Act, I have decided to refuse access to these documents in full as they are subject to legal professional privilege.

Documents attracting legal professional privilege

Section 42(1) of the FOI Act provides that

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

In determining whether or not these documents could be privileged from production in legal proceedings I have considered:

- whether there is a legal adviser-client relationship,
- whether the communication was for the purpose of giving or receiving, legal advice, or use in connection with actual or anticipated litigation,
- whether the advice given is independent, and
- whether the advice given is confidential.

Generally, privilege may be claimed in legal proceedings in relation to advice sought from and given by an inhouse lawyer, where the professional relationship between the lawyer and the agency seeking advice has the necessary quality of independence, as per *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327 at [32].

Having regard to this material, I am satisfied that there is a legal adviser - client relationship between the OAIC's General Counsel and legal services team, and the FOI branch of the OAIC. The OAIC legal team is part of the corporate branch and is separate from the FOI branch. Although not a determinative factor, all members of the legal team hold practising certificates and are subject to all professional obligations of legal practitioners. I consider that the separation of the legal team from the FOI branch reinforces the independence of the legal advice and made the relationship a legal adviser – client relationship.

Whether privilege attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test, as per *Esso Australia Resources Ltd v Commissioner for Taxation* (1999) 201 CLR 49. The relevant documents were all created for the dominant purpose of being used in connection with litigation.

Finally, I have turned my mind to whether the advice was given in confidence. In relation to the relevant documents, the legal advice was clearly marked legal in confidence, and they were only distributed to a limited number of OAIC employees who were involved in the matter. I have not been able to identify any express or implied waiver of the privilege and am satisfied that the advice was provided in confidence.

Accordingly, I consider that the relevant documents are subject to legal professional privilege.

The 'real harm' test

The FOI Guidelines explain at [5.150] that while not stipulated in section 42 of the FOI Act, agencies should not claim exemption under section 42 unless it is considered that 'real harm' would result from releasing the document. At [5.150] the FOI Guidelines provide that:

The phrase 'real harm' distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency.

The material in question relates to litigation which is still ongoing, and particularly to elements of the matter which are still undecided. I consider that disclosure of confidential communications discussing the OAIC's strategies in ongoing litigation to the wider public via the Right to Know website would substantially prejudice the OAIC's ability to effectively manage this matter, satisfying the 'real harm' test.

For the reasons given above, I consider the relevant documents identified in the schedule are exempt under section 42 of the FOI Act.

Contempt of court (s 46)

I have found one document exempt from release under section 46(b) of the FOI Act.

Section 46 provides that a document is exempt if public disclosure of the would, apart from the FOI Act and any immunity of the Crown:

- (a) ...
- (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath;
or
- (c) ...

The FOI Guidelines explain at [5.187]:

Document protected by s 46(b) are document subject to an order prohibiting their publication, made by a Royal Commission, tribunal or other body having power to take evidence on oath. ...

This document I have identified as exempt is subject to a letter of orders from the Administrative Appeals Tribunal (AAT) concerning proceedings reviewing the decision [2022] AICmr 33. The orders, inter alia, stated:

Evidence given before the Tribunal, the contents of documents received in evidence by the Tribunal and information otherwise lodged with or given to the Tribunal, and which relates to this proceeding must not be published except to the extent that it is contained in the Tribunal's written reasons for a decision in the proceeding.

Based on the material before me at this time, I am satisfied that the release of the document would be contrary to the non-publication order issued by the AAT. Therefore, I am satisfied that the document is exempt from release on the basis that it would be contrary to an order given by a tribunal under s 46(b) of the FOI Act.

Proper and efficient conduct of the OAIC's operations (Section 47E(d))

In accordance with section 47E(d) of the FOI Act, I have also made a decision to redact material 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.

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 conditional exemption comprises of the OAIC's password for uploading decisions to the Austlii website.

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, particularly its functions in investigating privacy complaints, conducting

Information Commissioner reviews of FOI matters, and in making and publishing decisions in these matters.

In 'AW' and Australian Taxation Office (Freedom of information) [2014] AICmr 1, the then FOI 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 are exempt under section 47E(d) of the FOI Act.

I consider that the disclosure of the OAIC's password 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 OAIC's password for Austlii is conditionally exempt from disclosure under section 47E(d) of the FOI Act.

As section 47E is a conditional exemption, I am also required to consider the application of a public interest test.

The public interest test – 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 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 at [4]:

... 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.

The public interest factors are specified in s 11B(3):

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own 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. I consider that 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.

Against these factors, I must balance the factors against disclosure. Section 11B(4) of the FOI Act provides factors which are not to be taken into account in , which I have had regard to. Section 11B does not further prescribe the factors against disclosure to be considered. In considering the documents subject to this request, I consider that the follow factors do not favour disclosure:

- disclosure of the OAIC's password could reasonably be expected to prejudice the OAIC's data security, and its efficient operations in making and publishing its decisions.

On balance, I consider that the factors against disclosure outweigh the factor in favour of disclosure. I have therefore decided that it would be contrary to the public interest to give you access to the information that I have found to be conditionally exempt under s 47E(d) of the FOI Act.

Conclusion

The documents and schedule of documents are enclosed for release.

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

Yours sincerely

Molly Cooke

Lawyer

31 October 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 would be unreasonable to publish.

I have made a decision to publish the documents subject to your request on the OAIC's disclosure log.