



Our reference: FOIREQ22/00371

Attention: Julie

By Email: foi+request-9535-cda942b6@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00371

Dear Julie

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 5 November 2022.

In your request you seek access to the following:

“A recent foi released documents referring to numerous seconded external law firm employees working embedded in the OAIC. These are law firms also working as representatives for agencies and organisations that are respondents in matters before the OAIC.

I request copy of any document that refers to how such conflicts of interest are managed.

I also request copy of a document listing cost of expenditure of external legal services (including the cost of seconding of external lawyers) for the financial years 2012-2022, by financial year.

I also request a list of external legal firms who have had seconded their employees to the OAIC, by number of employees seconded, in FY2021-2022 and FY2020-2021.”

Consultation

I consulted with the following parties in relation to documents falling within scope of your request:

- Australian Government Solicitor (AGS); and
- 2 third parties in relation to third party business and personal information contained within the documents.

I do not agree with the views of a third party in relation to the personal information contained within 1 document and I have decided to grant access in part to that document.

Subsection 27(7) of the FOI Act provides that access is not to be given to the documents until the third party's review or appeal opportunities have been exercised or expire.

As a result, this document will not be released to you until all opportunities for review or appeal in relation to this decision have been exercised or expire. If the third party applies for internal review with the OAIC, or IC review, the OAIC cannot release the document until the review is concluded and the time for instituting a review or appeal has expired.

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

- grant access in full to 2 documents; and
- grant access in part to 1 document.

Searches Undertaken

Section 24A of the FOI Act 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 areas of the OAIC conducted reasonable searches for documents relevant to your request:

- People and Culture
- Finance
- Legal Services
- Executive

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.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 5 November 2022;
- the documents at issue;
- relevant case law;
- advice from line areas within the OAIC, and submissions made by third parties and AGS;
- the FOI Act, in particular ss 11, 17, 24A and 47F; and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

Access to edited copies with exempt matter deleted (s 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 an exemption under the FOI Act applies to material in 1 document. Accordingly, I have an edited copy of that document which removes the exempt material in accordance with section 22(1)(a)(i).

Document created under s 17 of the FOI Act

Your FOI request contained the following:

“I also request copy of a document listing cost of expenditure of external legal services (including the cost of seconding of external lawyers) for the financial years 2012-2022, by financial year.

I also request a list of external legal firms who have had seconded their employees to the OAIC, by number of employees seconded, in FY2021-2022 and FY2020-2021.”

Under section 17 of the FOI Act, if an FOI request is made for a document that could be produced by using a computer ordinarily available to the agency for retrieving or collating stored information, an agency is required to deal with the request as if it was a request for written documents to which the FOI Act applies.

The FOI Guidelines at [3.212] state that the obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a ‘computer or other equipment that is ordinarily available’ to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s 17(2)).

I have consulted with the relevant line areas to determine whether production of written documents containing the requested information is possible. The Finance team of the OAIC confirmed that a written document could be produced addressing the second point mentioned above (the list of external legal firms) and advised as follows regarding the first point:

- In the Finance team’s view, production of a document listing expenditure for the last 10 financial years would substantially and unreasonably divert the OAIC’s resources from its other operations. The Finance team was able to produce a document listing the requested information for the financial years 2020-2021 and 2021-2022, which took a full day to produce.
- In the OAIC’s financial statements and internal systems, the cost of seconding external lawyers is not treated as part of the OAIC’s expenditure on legal services, but rather as a labour cost. This cost has therefore been provided as a separate figure to the total expenditure on legal services.

Based upon the OAIC’s Finance team consisting of just 3 staff members, and the broad range of functions the team is responsible for in the day to day operation of

the OAIC, I consider that producing the requested document, being a document listing expenditure on external legal services and seconding of external lawyers by financial year for the financial years 2012-2022, would substantially and unreasonably divert the resources of the OAIC from its other operations. Instead, I have granted access to the document created by the Finance team which lists the requested information for the 2020-2021 and 2021-2022 financial years.

Therefore, pursuant to section 17 of the FOI Act, I have made a decision to create 2 documents in response to your request. I have made a decision to grant full access to these 2 documents. I note that while not including the cost of seconded lawyers, further information about our legal expenditure is available on our website at [Legal services expenditure - Home \(oaic.gov.au\)](https://www.oaic.gov.au/legal-services-expenditure-home). This may provide you with additional information you are seeking.

As the document listing external law firms contains the information of private businesses and another Commonwealth entity, we consulted with those parties regarding the release of the information. No objections were raised to this document being released, however the Australian Government Solicitor (AGS) clarified that the agreement between AGS and the OAIC relating to the relevant financial years was for lawyers to be outposted to the OAIC on a temporary basis, rather than seconded. Nonetheless, we have included the AGS information in the document as we consider this arrangement to fall within the definition of 'seconded' for the purpose of your FOI request.

Personal Privacy (s 47F)

Section 47F of the FOI Act conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any person. This exemption is intended to protect the personal privacy of individuals.

In the FOI Act, personal information has the same meaning as in the *Privacy Act 1988* (Cth) (Privacy Act). Under section 6 of the Privacy Act, personal information means:

... information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- a) whether the information or opinion is true or not; and
- b) whether the information or opinion is recorded in a material form or not

I have decided that 1 document within the scope of your request contains information which is conditionally exempt under section 47F of the FOI Act.

The FOI Guidelines at [6.131] discuss that what constitutes personal information will vary, depending on whether an individual can be identified or is reasonably identifiable in the circumstances. For particular information to be considered personal information, an individual must be identified or reasonably identifiable.

This document contains the name (and by extension, the email address) of an employee of a private law firm seconded to the OAIC.

I am satisfied that the information is personal information for the purpose of the FOI Act because the relevant individual can be identified from this information.

Because this information is personal information, I must also consider whether disclosure would be unreasonable, as set out in section 47F(2) of the FOI Act. In determining whether disclosure of personal information would be unreasonable, section 47F (2) of the FOI Act requires me to have regard to the following matters:

- 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 additional matters that are relevant.

The information in question is neither well known or publicly available, and the person to whom the information relates is not known to be associated with the matters dealt with in the documents (being the management of potential conflicts of interest arising under secondment arrangements).

The FOI Guidelines further describes key factors for determining whether disclosure is unreasonable at paragraph 6.142:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release.

Consistent with *FG and National Archives of Australia* [2015] AICmr 26, the FOI Guidelines at paragraph 6.143 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.

In consideration of these factors and the material contained within the documents, I am satisfied that the release of this personal information would be unreasonable due to the detriment and stress that disclosure may cause to the individual. As this individual is a secondee to the OAIC, and not a public servant, they would not ordinarily expect that information relating to their usual duties would be made publicly available.

Further, this individual was not involved in the creation of any policies regarding conflicts of interest, nor were they in a position responsible for managing any real or potential conflicts, and I therefore do not consider that disclosure of this information may advance the public interest in government transparency or provide you with any further insight into how real or potential conflicts of interests are managed by the OAIC.

The FOI Guidelines at paragraph 6.171 state:

An agency or minister must have regard for any submissions made before deciding whether to give access to the document (ss 27A(3) and 27A(4)). The third party does not, however, have the right to veto access and agencies should take care that the third party is not under such a misapprehension.

I have also had regard to the submissions of relevant third party in respect of the release of the personal information contained within the document. The third party raised concerns that disclosure may cause them stress as I have already discussed, while also identifying that disclosure is unlikely to advance the public interest in government transparency.

For the reasons given above, I consider that the relevant document identified in the schedule are conditionally exempt under section 47F of the FOI Act. As I do not agree

with the views raised by a third party in relation to some of the information contained in this document, this document will not be released to you until all opportunities for review or appeal in relation to this decision have been exercised or expire.

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

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 this case, I must consider whether disclosure of the document I have found to be conditionally exempt under section 47F 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 disclosure would promote the objects of the FOI Act in generally by informing the community of the Government's operations and enhancing the scrutiny of government decision making.

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 factor against disclosure in this case is that disclosure could reasonably be expected to prejudice an individual's right to privacy.

On balance, I consider that the factors against disclosure outweighs the factors in favour of disclosure. The conditionally exempt information (being the name of a secondee to the OAIC) would do little to advance the objects of the FOI Act. While disclosure of any information related to decisions made by government can generally advance the objects of the FOI Act, this information adds little utility or context to the information already provided by the document. The document I have decided to release to you already contains the information requested by you without this conditionally exempt material being provided.

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 section 47F of the FOI Act. As stated above, the information that I have found to be conditionally exempt has been deleted (as noted in the schedule and the document) and the remainder of the document will be provided to you once all opportunities for review or appeal by a third party in relation to this decision have been exercised or expire.

Release of documents

Because relevant third parties were consulted in the making of this decision and have objected to release of the material contained in 1 document, I am required under section 27A of the FOI Act to advise them of my decision and provide them with an opportunity to seek:

- Internal review of my decision, or
- Review of my decision by the Information Commissioner.

The third party has 30 days from the date they are notified of my decision in which to seek review.

As a result, the documents which are subject to third party consultation review rights cannot be released to you until this review period has expired, or any internal or external review proceedings have finalised.

The remainder of the documents not subject to third party objections are enclosed for release.

The documents are identified in the attached schedule of documents.

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

Yours sincerely

Molly Cooke
Lawyer

4 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_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.

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