



Our reference: FOIREQ22/00423

Attention: Verity Pane

By Email: foi+request-9647-a2f68d7b@righttoknow.org.au

Your Freedom of Information Request – FOIREQ22/00423

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:

“I apply for copy - s 17 - of all emails received by Commissioners of the OAIC in their OAIC email accounts in November 2022 that contain the word "Snapshot" or "snapshot".

Attachments to those emails are irrelevant - s 22

Any personal information of persons not employed or hired by the Federal Government are irrelevant - s 22

Any email address, phone number, network or street address, or the last name of any person is irrelevant - s 22

Any independent legal advice that is privileged within those emails is also irrelevant - s 22

In the event a practical refusal consultation notice is issued by the OAIC in respect of this foi I record and give the response that I do not vary or withdraw my foi and given that any practical refusal consultation period concludes on the same day as the notice is issued.”

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

- grant you access to 32 documents in full; and
- grant you access to 7 documents in part.

Reasons for decision

Material taken into account

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

- your freedom of information request dated 4 December 2022;
- the documents at issue;
- relevant case law;
- consultation with other Commonwealth agencies and third parties;
- the FOI Act, in particular ss 3, 11, 11A, 15, 22, 26 and 47E(d); and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

Access to edited copies with irrelevant and 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.

Exempt material

I have determined that exemptions under the FOI Act apply to material in 7 documents. Accordingly, I have made edited copies of the documents (other than the document which I have found to be exempt in full) which removes the exempt material in accordance with section 22(1)(a)(i).

Irrelevant material

In your request dated 4 December 2022, you state that:

Any personal information of persons not employed or hired by the Federal Government are irrelevant - s 22

Any email address, phone number, network or street address, or the last name of any person is irrelevant - s 22

Accordingly, I have also identified material in all 39 documents to be irrelevant or out of scope of your request in line with the terms of your FOI request and the material that you have agreed to exclude. The material that I have identified as irrelevant consists of:

- personal information of persons not employed by the Commonwealth Government, including the names of applicants in Information Commissioner (IC) reviews along with the OAIC reference numbers and terms of request for those IC reviews; and
- email addresses, phone numbers and street addresses and surnames of any persons.

I consider that giving access to these documents without the redactions applied 'would disclose information that would reasonably be regarded as irrelevant' to your request, based on your statements above where you specifically identify particular kinds of material to be irrelevant.

I consider '*personal information of persons not employed or hired by the Federal Government*' to include the names of applicants in IC reviews, as well as the OAIC reference numbers and terms of request for those IC reviews.

Section 4 of the FOI Act provides that the definition of personal information in the *Privacy Act 1988* (Cth) also applies to the FOI Act. The term personal information is defined in section 6 of the Privacy Act to be:

... 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;*
- (b) *whether the information or opinion is recorded in a material form or not.*

As the relevant individuals are reasonably identifiable from this information I have treated it as personal information which is therefore irrelevant.

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)).

It is possible, and reasonably practicable, for the OAIC to prepare edited copies of these particular documents by redacting the information which would reasonably be regarded as irrelevant to the request. Further, nothing in your FOI request suggests that you would decline access to edited copies of the documents.

On this basis, I have edited the documents to remove the irrelevant material in accordance with section 22(1)(a)(ii) and otherwise grant you access to the material in scope of your request.

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

I have found material in 7 documents exempt under section 47E(d) of the FOI Act.

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 under section 47E(d) comprises of:

- Information concerning open IC reviews;
- Summaries of assessments of Consumer Data Right (CDR) entities conducted by the OAIC; and
- Policy discussions regarding the Consumer Data Right.

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 agencies, I have taken into consideration the functions and activities of the relevant agencies.

Information regarding current Information Commissioner review matters

Two documents contain information regarding IC reviews that are currently open and are still being determined by the OAIC. The release of this information at this time would, or could reasonably be expected to, adversely impact on both 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 their reviews 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. Further, disclosing information concerning open IC reviews would be contrary to the OAIC's [FOI Regulatory Action Policy](#), which at point 73 provides that '*The Information Commissioner will generally not comment publicly about ongoing IC review applications or the exercise of investigative powers.*'

In my view, the OAIC's ability to carry out its regulatory functions in conducting IC reviews would be substantially and adversely affected if the information concerning open IC reviews is released, as this would undermine both the confidence of parties in the process, and the OAIC's own policy.

Information regarding CDR assessments

Two documents contain information about assessments carried out by the OAIC which has not been published. This material names various businesses which are participants (targets) in the CDR and findings about their performance in assessments conducted by the OAIC. Some of this information is in draft form and

was later updated following further consultation with the targets involved. These findings are also presented in the documents in a way which compares different businesses, lists the number of findings against them and which omits context regarding why the targets performed differently, which is vastly different to the final summaries that the OAIC publishes in relation to these assessments. Similar to the information concerning IC reviews discussed above, the release of this information at this time would be likely to undermine the confidence of targets in the confidentiality of the CDR process. It is likely that both these current targets, and any future participants in the CDR, would be less willing to cooperate and provide information to the OAIC for assessments if they cannot be confident that only the final findings will be published.

Therefore, I consider that the release of this information at this time would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in administering the CDR.

Discussion of CDR policy

I have also considered policy material in 3 documents to be conditionally exempt under section 47E(d). This material is contained in the internal OAIC emails and emails from the Treasury to the OAIC and the ACCC and consists of summaries of discussions with Ministers and updates on policy proposals and the status of particular projects.

In considering this material, I have had regard to the functions of all 3 agencies in administering the CDR scheme. All 3 agencies collaborate in managing this scheme, which involves the sharing of confidential information and carrying out discussions to inform and plan policy and procedures in managing the scheme. In particular, the sharing of this information is essential to develop Ministerial advice as a precursor to submissions to Cabinet in relation to various proposals concerning the CDR. Release of this material may inhibit the full canvassing of issues in the development of Cabinet and policy material in the future, constituting a substantial adverse effect on the proper and efficient conduct of their operations.

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

The public interest test (s 11A(5))

As provided above, I have considered that material within the documents is subject to conditional exemption under section 47E(d) of the FOI Act.

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. 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. 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 are that disclosure could reasonably be expected to prejudice:

- the management functions of the OAIC, Treasury and ACCC;
- the OAIC's ability to obtain confidential information; and
- the OAIC's ability to obtain similar information in the future.

I have given particular weight to the effect that disclosure of all of the exempt material would have on the OAIC's ability obtain information in the future. In carrying out its functions in undertaking IC reviews, and in administering the CDR, it is crucial that the OAIC be able to obtain information, including confidential information, from various parties, such as parties to IC reviews, CDR participants and other agencies. The parties that the OAIC relies upon to provide information do so on the assumption that their information will only be shared or published in the ways the OAIC has advised them of. I consider that publishing the exempt material would undermine these processes and prejudice the ability of the OAIC to obtain information in future.

This in turn would prejudice the functions of the OAIC in managing IC reviews, and the functions of the OAIC, Treasury and ACCC in jointly managing the CDR regime.

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.

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 47E(d) 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 documents) and the remainder of the documents have been provided to you.

Conclusion

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

Yours sincerely

Molly Cooke

Lawyer

2 February 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.

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