



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ24/00552

U.P.

By email: [foi+request-12081-74eb542f@righttoknow.org.au](mailto:foi+request-12081-74eb542f@righttoknow.org.au)

Dear U.P

## Freedom of Information Request – FOIREQ24/00552

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act). Your Freedom of Information (FOI request) was received by the Office of the Australian Commissioner (OAIC) on 24 October 2024.

I am writing to inform you of my decision.

I have identified 4 documents within the scope of your request. I have made a decision to:

- grant access in part to 4 documents; and

In accordance with section 26(1)(a) of the FOI Act, the reasons for my decision and findings on material questions of fact are provided below.

### Background

#### Scope of your request

Your FOI request sought access to the following information:

*I seek the following documents (dated between January 2024 to current):*

*- documents held which contain information relating to how the OAIC can appoint an EL2 with a permanent IFA (individual financial agreement/arrangement) in place or whether IFA'S would be temporary and reviewed at regular intervals?*

- documents held which discuss the proposed salary or salary range of IFA'S for principal directors -documents that outline how the OAIC has ensured principal director duties align to the EL2 duties in the ILS published by the APSC, or alternatively how their duties sit above or outside of the EL2 ILS and how EL2 classification is still appropriate in that circumstance
- documents that outline how it is good use of public money to pay an EL2 more than other EL2's if their duties meet the description of an EL2 in the ILS
- documents which describe which other agencies "commonly" place EL2's on IFA'S, the previous document release indicates there are no documents held by the agency that actually recorded which agencies have these arrangements, so it does not appear that OAIC actually sought advice or undertook consultation before drawing this conclusion.
- the remainder of the contents of the document partially released to me in my previous request.

#### Request timeframe

Your request was made on 24 October 2024. Consultation with third parties was required and as such the time frame for processing your request was extended by 30 days.

This means that a decision on your request is due by 24 December 2024.

#### **Decision**

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests on behalf of the OAIC.

Subject to the following provisions of the FOI Act, I have made a decision to:

- grant access in part to 4 documents

#### 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:

- Transformation team
- Executive

Searches were conducted across the OAIC's various document storage systems including:

- 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 FOI request dated 24 October 2024
- the FOI Act, in particular sections 3, 11, 11A, 15, 26, 24A and 47E of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act to which regard must be had in performing a function or exercising a power under the FOI Act (FOI Guidelines)
- third party submissions in relation to the release of the documents
- consultation with AGD, PM&C and relevant areas of the OAIC.

### 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:

- information that does not relate to the creation of the Principal Director role, the Principal Director role duties and the use of an Individual Flexibility Arrangement (IFA).

Accordingly, I have made an edited copy of the documents which removes this irrelevant material and otherwise grants you access to the material in scope of your request.

### **Documents cannot be found, do not exist or have not been received – Section 24A of the FOI Act**

Section 24A(1) of the FOI Act provides that an agency may refuse a request for access to a document requested under the FOI Act if all reasonable steps have been taken to find the document and the agency is satisfied that the document cannot be found or do not exist. You request documents containing *documents which describe which other agencies "commonly" place EL2's on IFA'S.*

Details of searched undertaken are set out above, and 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. No documents containing information relating to the arrangements of other agencies regarding IFA's.

As such, I have made the decision to refuse this part of your request under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find the documents you have requested and no documents could be found.

### **Section 47E(c) – Management or assessment of personnel**

In accordance with section 47E(c) of the FOI Act, I have made a decision to exempt material on the basis that disclosure would or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel.

Paragraph 6.14-6.16 of the FOI Guidelines explains that the test “would or could reasonably be expected to”:

*6.14 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.*

*6.15 The use of the word ‘could’ is less stringent than ‘would’ and requires analysis of the reasonable expectation rather than the certainty of an event,*

*effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.*

*6.16 The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation. There must be, based on reasonable grounds, at least a real, significant or material possibility of prejudice, 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 includes meeting notes that consider and plan for the departure of staff at the OAIC.

The FOI Guidelines provide at 6.103 that:

*For this conditional exemption to apply, the document must relate to either:*

- *the management of personnel – including broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and work health and safety*

I note that the OAIC has undergone a restructure in 2024. As part of this restructure, a number of staff have departed the OAIC. The APSC has publicly available information about SES staff departing the public service [Senior Executive Service - ending employment | Australian Public Service Commission](#). However, its application to SES staff in particular circumstances is a confidential process between the agency head and the relevant staff. The documents include material that relates to the management of personnel.

In my view, it would have a substantial and adverse impact on the management of personnel if documents around these individual processes were disclosed. It would undermine the confidential nature of these processes and both management and individual SES would be less willing to engage with a process if these documents were released. This would impact on the ability of the OAIC to make such offers when appropriate and of staff to consider such offers.

For the reasons given above, I consider the relevant documents identified in the schedule are conditionally exempt under section 47E(c) of the FOI Act.

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, in respect of all the material subject to conditional exemption in this document is discussed below.

## Section 47E(d) – Operations of an agency

### Litigation funding arrangements

As a Commonwealth agency, the OAIC is required to comply with the *Legal Services Directions 2017* (the Directions). Part 5 of the Directions only allows the use of in-house lawyers for litigation in certain circumstances with the approval of the Attorney-General. In general, the OAIC engages external legal providers for litigation in compliance with the Directions.

In my view, if the material about the litigation budget is made publicly available, of the Commissioner to confidentially engage with Government and other relevant stakeholders on matters relating to the ongoing funding. This would have a substantial and adverse impact on the ability of the OAIC to determine the engage most funding option for litigation.

### Mobile phone number of an APS employee

In the IC review decision of *'PX' and Australian Federal Police (Freedom of information) [2019] AICmr 8* at [64], it was found that, since the agency in this matter had in place "...procedures in place to manage their contact with members of the public", the release of direct contact details of staff "...would have a substantial adverse effect on the proper and efficient conduct..." of the relevant agency.

Similarly, in *In 'WN' and Inspector General of Taxation [2020] AICmr 70* at [34] the Information Commissioner accepted that:

*...unsolicited calls to IGT employees' direct telephone numbers and work mobile telephone numbers will fall outside will fall outside the integrated service platform and would not be electronically recorded, adversely affecting accountability, transparency, quality assurance and the provision of support to employees in relation to those calls...on balance I find that this circumstance could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the IGT's operations.*

Noting the above, the direct contact details, including the mobile phone number of an employee of the Attorney General's Department, is not publicly available. I therefore consider that release of the direct contact details would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the department's operations. This is on the basis that the release of this information is likely to result in a high volume of unsolicited communications

to the staff, which would divert resources from the ordinary functions of the department.

For the reasons given above, I consider the relevant documents identified in the schedule are conditionally exempt 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.

#### Application of the public interest test – (section 11A and 11B)

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

Section 11A(5) provides that where a document is considered to be conditionally exempt, an agency **must** give the person access to that document unless the FOI decision maker would, on balance, would be contrary to the public interest.

This means that I must balance factors for and against disclosure in light of the public interest.

In Chapter 6, the FOI Guidelines provide the following guidance:

*6.225 It is not necessary for an issue to be in the interest of the public as a whole. It may be sufficient that the issue is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. An issue of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.*

In the AAT case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, at paragraph 133 of the Decision Deputy President Forgie explained that:

*... the time at which I make my decision for section 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.*

The FOI Act sets out four factors favouring access, which must be considered if relevant. Of these factors, we consider the following to be relevant:

- promote the objects of the FOI Act, and
- promote effective oversight of public expenditure.

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 would have an adverse effect on the OAIc's proper and efficient operations relating to the management of litigation work.
- disclosure of the direct contact details of an APS information contained in the documents would divert resources from the ordinary operations of the department.
- disclosure could reasonably be expected to prejudice the management function of the Agency

I have had regard to the recent decision in *Jonathan Sequeira and Australian Broadcasting Corporation (No. 3) (Freedom of information) [2023] AICmr 30* which stated that:

*Access must be provided unless the degree of that harm is such that it outweighs the public interests in disclosure that underpin the FOI Act and apply in the particular case . The test is not whether disclosure would be positively in the public interest. Rather it is whether, on balance, disclosure would be contrary to the public interest, that is, that some harm or damage to the public interest which outweighs the benefit to the public in disclosure would ensue*

In balancing these factors for and against, I acknowledge the importance of promoting the objects of the Act and the effective oversight of public expenditure. However, I have balanced this with the need to manage the agencies litigation funding and personnel matters. I consider that in relation to the material I have found to be exempt, the disclosure would not significantly contribute to providing you additional access to your own personal information or promoting effective oversight of public expenditure but would significantly harm the operations of the agency.

On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.



## **Disclosure log decision**

Section 11C of the FOI Act requires agencies to publish online document 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.

Release of document

The documents 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.

Yours sincerely,

Sarah Forrester

A/g Director (FOI)

Governance, Risk and Compliance

24 December 2024

## **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 5288  
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 Reviews Tribunal (ART).

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 ART, 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 ART 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](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 5288  
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 [foi@oaic.gov.au](mailto:foi@oaic.gov.au). More information is available on the Access our information page on our website.