



Our reference: FOIREQ24/00623

Mr John Hobbs,

By email: [foi+request-12412-356f24e6@righttoknow.org.au](mailto:foi+request-12412-356f24e6@righttoknow.org.au)

## Freedom of Information Request – FOIREQ24/00623

Dear Mr Hobbs,

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 29 November 2024.

I am writing to inform you of my decision.

I have identified 44 documents within the scope of your request. I have made a decision to:

- grant full access to 31 documents
- grant access in part to 13 documents

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:

*... a copy of the final Commissioner briefs prepared for the senate estimates hearing on 27 November 2024*

## Request timeframe

Your request was made on 29 November 2024.

On 10 December 2024 we requested an extension by agreement under section 15AA of the FOI Act. We did not receive a response to this request.

This means that a decision on your request is due by 29 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 full access to 31 documents, and
- grant access in part to 13 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:

- Corporate Services

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

- the OAIC's document holding system – Content Manager

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 29 December 2024.
- the FOI Act, in particular including sections 3, 11, 11A, 15, 26, 47E and 47F 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)
- consultation with line areas of the OAIC in relation to your request

### Section 47E(d) – Proper and efficient conduct of the OAIC’s operations

In accordance with section 47E(d) of the FOI Act, I have 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 particulars related to open investigations, including specific funding allocations, that may not be publicly known or may be subject to confidentiality orders.

In undertaking an assessment of this conditional exemption, I have had regard to relevant and recent AAT and Information Commissioner decisions including *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66, *Paul Farrell and Department of Home Affairs (Freedom of information) (No 2)* [2022] AICmr 49 (8 April 2022) and *Knight v Commonwealth Ombudsman* [2021] AATA 2504.

In *Seven Network Operations Limited and Australian Human Rights Commission* [2021] AICmr 66, a document was found not to be conditionally exempt under section 47E(d) of the FOI Act in circumstances where the agency argued that disclosure of the relevant material would or could reasonably be expected to have result in stakeholders declining to work with the Australian Human Rights Commission. The decision found that there was not sufficient evidence to support the conclusion that such harm would occur. Similarly in *Paul Farrell and Department of Home Affairs (Freedom of information) (No 2)* [2022] AICmr 49 (8 April 2022), whilst the material found within the documents related to the Department of Home Affairs' operations, the Commissioner determined that the Department had failed to provide sufficient evidence as to why disclosure would have a substantial and adverse effect on its operations. These decisions further reinforce the position that this provision requires a high threshold as to the substantial and adverse effect that disclosure would have on an agency's operations.

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.

The OAIC is an independent statutory agency within the Attorney-General's portfolio, established under the *Australian Information Commissioner Act 2010* (Cth). The OAIC comprises the Australian Information Commissioner, the Privacy Commissioner, the FOI Commissioner and the staff of the OAIC. Relevant to this case, the OAIC is responsible for investigating privacy complaints, made by members of the public.

I consider that the disclosure of the material would or could reasonably be expected to have an adverse effect on this function for the following reasons:

#### *Confidentiality*

Disclosing this information could result in the breach of confidentiality orders relating to one or more open privacy investigations.

#### *Ongoing Matters*

Disclosing this information is likely to compromise the ability of the agency to conduct investigations in their preliminary stages with the relevant tact and objectivity. Additionally, disclosure is likely to cause operational difficulties for investigators in matters where the respondents are not currently aware of the number or nature of complaints against their organisations.

*Specific funding apportionments.*

There is material within the documents that detail expenditure related to ongoing privacy investigations conducted by the OAIC. While I have decided to release the total expenditure figures, I consider that disclosing information relating to specific funding apportionments would have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC. Disclosing this information is likely to prejudice the ability of the Commissioner to confidentially engage with the Department of Finance and other relevant stakeholders on matters relating to the ongoing funding of specific privacy investigations.

Paragraph 6.122 of the FOI Guidelines provide:

*The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations. [footnotes omitted].*

In the decision of *Knight v Commonwealth Ombudsman* [2021] AATA 2504, the Tribunal upheld the application of section 47E(d) to material relating to the Defence Abuse Response Taskforce (DART) which was an administrative body established in 2012. The Ombudsman contended that release of certain material would have a substantial adverse effect on its functions. In respect of the application of section 47E(d) the Tribunal found as follows (emphasis added):

[40] I consider that the ongoing maintenance of confidentiality is critical to the effective management of the defence abuse response program. Individuals may be discouraged from participating in meaningful engagement with the respondent if the documents sought were disclosed. A failure to protect confidentiality would undermine the reputation of, and the trust in, the respondent. The operations of the respondent would be compromised.

I further note that the importance of protecting information collected during an investigation process was upheld in the recent Information Commissioner (IC)

decision of 'YU' and Bureau of Meteorology (*Freedom of Information*) [2021] AICmr75 (YU). Whilst the decision of YU was in relation to an investigation of under the *Public Interest Disclosures Act 2013* (Cth), YU also highlighted other relevant case law that confirms the important of agencies being able to undertake confidential investigative processes.

I consider these decisions to be of relevance to the material subject to this FOI request which comprises of confidential material obtained in the course of one of the OAIC's investigations. As part of its investigative function, it is vitally important that investigations are able to be undertaken in a timely and efficient manner and that participants fully engage in this process which at times is often because of an understanding of confidentiality.

I consider that release of material relating to an investigation part way through the investigation itself would likely undermine or interfere with the outcome of the investigation. I consider that release of this material would also likely mean that individuals are less inclined to fully engage with the OAIC and its investigative functions.

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.

My consideration of the public interest test, in respect of all the material subject to conditional exemption in this document is discussed below.

#### Public interest conditional exemptions--personal privacy (section 47F)

In accordance with section 47F of the FOI Act, I have made a decision to redact material on the basis that disclosure would constitute an unreasonable disclosure of personal information.

A document is conditionally exempt under section 47F(1) of the FOI Act where disclosure would involve the unreasonable disclosure of personal information of any person, including a deceased person. This exemption is intended to protect the personal privacy of individuals.

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.*

The documents contain mobile phone numbers of individual OAIC employees, as well as personal information of individuals outside of the OAIC.

I am satisfied that this material meets the definition of personal information because the material relates closely to the personal matters of an individual and disclosure of this information would reasonably identify that individual.

In particular, the release of OAIC employee mobile phone numbers has the potential to compromise the individual's privacy rights outside of their role at the OAIC and could increase the likelihood of undue contact and/or harassment in their personal lives. OAIC staff report using their mobile phones for both work and personal purposes, and typically will only use their mobile phone numbers for work purposes when contacting other OAIC staff, and not for contacting individuals outside of the agency. I consider this information distinct from OAIC work telephone numbers, which I have decided to release.

I have decided to remove personal information of individuals outside of the OAIC. The personal information contained in the documents could reasonably be used to identify the individual, as well as associate the individual with one or more OAIC matters which may not be known to the public and may not be in the interest of the individual to disclose. I have made a decision to release the names and contact information of persons that are otherwise publicly available.

In determining whether disclosure of other personal information in the documents would involve an unreasonable disclosure of personal information, the FOI Guidelines provide the following considerations at paragraph 6.140:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be associated with the matters in the document
- the availability of the information from publicly accessible sources

- any other matters the agency or Minister considers relevant.

The FOI Guidelines further describes the key factors for determining whether disclosure is unreasonable at paragraph 6.143:

- *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.*

The FOI Guidelines explain at paragraph 6.138 that the test of ‘unreasonableness’ in section 47F ‘implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.

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*

Inconsideration of these factors and the material contained within the documents, I am satisfied that the release of this personal information would be unreasonable because the information is personal in nature, and relevant to current working environment of the OAIC. I consider that disclosure would be sufficiently detrimental to OAIC employees by publicising their contact information that was made available internally for instances requiring urgent contact. I also have regard to your initial request, which provides that disclosure of personal information is not of particular interest or value in this instance.

I am satisfied that the personal information relating to individuals outside of the OAIC is not public information and is not well known. I am also satisfied that the individuals to whom the information relates is not known to be associated with the



matters dealt with in the document. If this information were disclosed publicly, it would unreasonably impact on the privacy of the individual.

The recent decision of *Knight v Commonwealth Ombudsman* [2021] AATA 2504 discusses personal information collected in the course of a complaint or investigation. At paragraph [32] the Tribunal found that:

*In the circumstances where the information is highly sensitive and has been disclosed on a confidential basis, it would be unreasonable to disclose that information to the applicant.*

I consider the collection of the material contained in this document to be of a similar nature, and that it would be unreasonable to disclose this information.

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

As section 47F 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.

#### 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(d) and 47F of the Act.

Section 11A(5) provides that where documents are considered to be conditionally exempt, an agency **must** give the person access to those documents 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:

6.4 *There is a **single public interest test to apply to each of the conditional exemptions**. This public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account.*

6.5 *The public interest test is considered to be:*

- *something that is of serious concern or benefit to the public, **not merely of individual interest***
- ***not something of interest to the public, but in the public interest***
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

6.6 *It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of public 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,
- inform debate on a matter of public importance,
- 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 investigation of privacy complaints, and specifically

in relation to the disclosure of individual complaints that may have not yet been appropriately verified, or where the respondent may not yet have been informed of their existence. I consider the public interest is better served by ensuring that OAIC investigations are not unduly compromised by the untimely disclosure of sensitive information. I understand that these investigations can attract significant public interest, and providing access to information would assist in informing public debate, however I consider that this factor is more appropriately addressed by the provision of timely, and fully informed media releases on the subject matter.

- Disclosure of the personal information contained in the documents could reasonably be expected to interfere with the privacy rights of individuals outside of the OAIC, particularly where personal information was obtained on a confidential basis. I consider it is in the public interest to maintain the confidentiality of individuals who engage with the OAIC on a voluntary basis to ensure ongoing relations with the community and the Agency. Similarly, I consider that disclosure of OAIC employee mobile phone numbers is unreasonable in the circumstances. I consider that there is no identifiable public benefit in their release, and on the contrary, there is public interest in ensuring that public servants are not subject to unwarranted communications or harassment that could reasonably interfere with their ability to conduct their duties efficiently.
- I consider that there is public interest in the transparency of government expenditure, however I consider that disclosing information relating to specific funding apportionments for ongoing investigations is contrary to the public interest, as it may prejudice the agency's ability to confidentiality and impartially engage with relevant stakeholders including the Department of Finance. I consider the public interest in promoting effective oversight of public expenditure is sufficiently addressed by releasing material detailing total expenditure, without identifying specific apportionments.

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,

Lachlan Smith-Marks

Governance, Risk and Compliance Officer (FOI)

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://webform.oaic.gov.au/prod?entitytype=ICReview&layoutcode=ICReviewWF>

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.