



Our reference: FOIREQ25/00005

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

Dear Mr J.C. Hobbs

## **Internal review decision – FOIREQ25/00005**

I refer to your request for internal review of a decision of the OAIC relating to a request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The original FOI decision was made by Lachlan Smith-Marks on 24 December 2024 and identified 44 documents within the scope of your request. The decision maker decided to:

- grant full access to 31 documents, and
- grant access in part to 13 documents.

An internal review is a fresh decision made by a person other than the person who made the original decision (s 54C of the FOI Act). All materials available to the original decision maker have been made available to me in determining your internal review request and I am writing to inform you of my decision.

I have made a decision to affirm the decision of 24 December 2024. The reasons for my decision are outlined below.

### **Background**

#### Your original FOI request

Your FOI request dated 29 November 2024 sought access to the following information:

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

I note that in your original request, you also stated that you did not need “personal information or business information”.

On 24 December 2024, the decision maker advised you of their decision. Of the 44 documents identified as falling within the scope of your request, the decision maker:

- granted full access to 31 documents, and
- granted access in part to 13 documents.

This decision was made subject to the following exemption provisions of the FOI Act:

- Section 47E(d) of the FOI Act – proper and efficient conduct of the OAIC’s operations, and
- Section 47F of the FOI Act – personal privacy.

Your internal review request

On 1 January 2025, you wrote to the OAIC and stated:

*“...I am writing to request an internal review of Office of the Australian Information Commissioner's handling of my FOI request 'Commissioner briefs for senate estimates November 2024'. A full history of my FOI request and all correspondence is available on the Internet at this address:  
[https://www.righttoknow.org.au/request/commissioner\\_briefs\\_for\\_senate\\_e](https://www.righttoknow.org.au/request/commissioner_briefs_for_senate_e)”*

On 13 January 2025, I emailed you and requested that you confirm whether you were seeking an internal review of the decision that was made in FOIREQ24/00623 on 24 December 2024, or whether you wanted to lodge a complaint about the handling of your FOI request. I asked that you respond by COB 16 January 2025 and clarify your request and, in the event that you were seeking an internal review, you state the grounds upon which you considered that the original decision should be reviewed.

We did not receive a response to this request. Therefore, I have proceeded on the basis that you wish to request an internal review of the decision provided to you on 24 December 2024. A decision on your internal review request is due on 31 January 2025.

## **Decision**

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

I note that you have not provided any reasons as to why the original decision was defective, or not made in accordance with the law.

Subject to the following provisions of the FOI Act, I have made a decision to affirm the decision of 24 December 2024.

### Searches Undertaken

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

As part of the internal review process, I reviewed the searches performed in the course of processing your original request.

The Corporate Services team at the OAIC was consulted in relation to your request and conducted searches for documents relevant to your request. This included searching the OAIC's document holding system – Content Manager, in relation to the documents you were seeking.

Having 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 and that all relevant documents have been identified.

I note that the scope of your FOI request was narrow, and the relevant documents were all located together on the document management system given their content and the purpose of their creation.

The relevant officer also consulted other line areas in the agency who were responsible for the creation of the relevant documents within the scope of your request. I am satisfied that this was a reasonable step to take when responding to your request.

### Reasons for decision

#### Material taken into account

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

- your original FOI request dated 29 November 2024, including your note that you did not wish to receive personal or business information
- the original FOI decision dated 24 December 2024
- your internal review request dated 1 January 2025
- the FOI Act, in particular sections 3, 11, 11A, 15, 26, 47E and 47F of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 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 and their responses.

## **Section 47E(d) of the FOI Act – proper and efficient conduct of the OAIC’s operations**

Under s 47E(d) of the FOI Act, information can be exempted where the 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 6.14-6.16 of the FOI Guidelines explains that the test “would or could be reasonably expected to”:

*6.14 The test requires the decision maker to assess the likelihood of the predicted or forecasted 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 or 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 was exempted in the original decision dated 24 December 2024 related to open investigations at the OAIC, as well as specific allocations of funding that are not otherwise publicly available and may be subject to confidentiality orders.

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 original decision cited three reasons why this conditional exemption would apply in the circumstances: ongoing matters, confidentiality and specific funding apportionments. I will deal with each of these in turn.

### **Confidentiality and ongoing matters**

The original decision stated that disclosure of the relevant information could result in a breach of confidentiality orders relating to one or more open investigations and that disclosing the information may compromise the OAIC’s ability to conduct investigations at the preliminary stages with relevant tact and objectivity.

Paragraph 6.122 of the FOI Guidelines provide that this 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].”*

Where a complaint is made to the OAIC, it is generally made on the understanding that the facts of that investigation will remain confidential. This understanding means that the OAIC can investigate in a full and frank manner and ensures that agencies provide information which assists the OAIC to perform its role and function as an investigative body and regulator.

The OAIC takes regulatory action to encourage and support compliance by regulated entities and to address high-risk matters with the greatest potential of harm. The agency’s preferred regulatory approach is to work with entities to facilitate voluntary compliance with privacy and information access legislation. This includes engaging with regulated entities to provide guidance, promote best practice compliance, and identify and seek to address privacy or information access concerns as they arise. Engagement with regulated entities and the investigative work of the OAIC is essential for addressing serious and systemic issues within the agency’s regulatory remit.

It is my view that if this information were to be released and made publicly available, individuals and entities would be less willing to provide full and frank disclosure to the OAIC in future investigations, therefore undermining the effectiveness of the Office, and its ability to perform its statutory functions under the *Privacy Act 1988* (Privacy Act), FOI Act and *Australian Information Commissioner Act 2010*.

Releasing information relating to an ongoing investigation may have the effect of prejudicing the outcome of that investigation and compromising the integrity of the investigation where it is still underway.

Further, releasing this information might breach confidentiality orders in place with the relevant agencies. Releasing the information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the OAIC’s operations if entities do not provide full and frank disclosure to the agency on the basis of such agreements moving forward.

#### Specific funding apportionments

As to specific funding apportionments, the original FOI decision stated that there is material within the documents that detail expenditure related to ongoing privacy investigations conducted by the OAIC. The decision maker stated that 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 allocation of funding for specific privacy investigations.

I consider that the Commissioner's ability to engage on how funding is allocated to specific matters and through the course of those investigations could be compromised if this information is released. I consider that release of this information would therefore have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC.

For these reasons, I affirm the decision to find the relevant materials to be conditionally exempt under s 47E(d) of the FOI Act.

This conditional exemption requires me to also consider the public interest test. I have dealt with this at the end of the decision after I have discussed other relevant conditional exemptions.

#### **Section 47F of the FOI Act – personal privacy**

The decision maker also decided to exempt material from the relevant documents on the basis that disclosure would constitute an unreasonable disclosure of personal information in accordance with s 47F of the FOI Act.

This decision was made on the basis that personal information, as defined in s 6 of the Privacy Act, is included in the documents in the form of mobile phone numbers of OAIC employees, as well as personal information relating to those outside the OAIC.

Whilst the OAIC does not generally exempt public servant names at the OAIC and work phone numbers, personal mobile phone numbers relate to the personal matters of an individual. Releasing this information has the potential to interfere with their personal privacy. This exemption is intended to protect the personal privacy of individuals.

I also note that personal information of those who do not work at the OAIC would in my view also constitute an unreasonable disclosure of personal information in accordance with s 47F of the FOI Act.

The decision maker advised you that where the names and contact information of people is otherwise publicly available, it has not been exempted. This is consistent with the FOI Guidelines which state at paragraph 6.140 that a decision maker should consider the extent to which information is well known is determining whether disclosure would be unreasonable.

The FOI Guidelines state that there needs to be a balancing exercise conducted between the public interest in disclosing government-held information and the private interest in maintaining the privacy of an individual.<sup>1</sup>

I am satisfied that the original decision that the weight of the privacy of the individuals in this case, outweighs the public interest in disclosing this information, is correct.

In reviewing the matter, I am satisfied that the relevant material 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 documents and in the case of information related to OAIC staff members, does not relate to the individual's work, or role at the OAIC. I am of the view that disclosing this information would impact the individual's personal privacy and I have not identified how the release of this information would advance the public interest in government transparency and integrity.

I also note your own request that you did not need "personal information or business information", and I have given weight to this in making my decision.

For these reasons, I affirm the decision to find the relevant materials to be conditionally exempt under s 47F of the FOI Act.

In accordance with the obligation under the FOI Act, I am also required to consider the application of the public interest test in relation to the above conditional exemptions. I have considered the application of this test for both conditional exemptions below.

#### **Application of the public interest test (ss 11A and 11B)**

The original decision maker considered that material within the relevant documents was subject to conditional exemption under sections 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 determines that such access would, on balance, be contrary to the public interest.

This means that, in deciding whether this decision was correct, I must balance factors for and against disclosure in light of the public interest.

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<sup>1</sup> FOI Guidelines paragraph 6.138.

The FOI Act sets out four factors favouring access, which must be considered if relevant. I agree that the following factors are relevant to this decision:

- promote the objects of the FOI Act
- inform debate on a matter of public importance, and
- promote effective oversight of public expenditure.

Section 11B(4) of the FOI Act provides factors which are not to be taken into account for which I have had regard to. Section 11B does not further prescribe the factors against disclosure to be considered.

I have considered the original decision, and the reasons provided in light of my own review of the documents. In my view, the following factors mean that not disclosing the relevant information is preferable in the circumstances, and is not outweighed by the public interest in disclosing the information:

- Disclosure would have an adverse effect on the OAIC's proper and efficient operations when investigating privacy complaints. There is public interest in ensuring the OAIC can effectively perform its function and role by investigating and resolving privacy complaints of Australians. It would not be in the public interest for this process to be compromised due to entities or individuals being unwilling to provide full and frank disclosure to aid investigations, in the fear that such information would be further disclosed. It is open to the OAIC to make information about an investigation publicly available at the appropriate time where it is considered to serve the public interest and not prejudice an investigation.
- Disclosure of personal information of OAIC staff could reasonably be expected to interfere with the privacy rights of those individuals outside their work responsibilities at the OAIC. In particular, the release of OAIC staff mobile numbers is not in the public interest as it does not relate to their role as a public servant. Further, they are still contactable using their work contact details where a matter relates to their official OAIC role. In my view, release of this information could result in harassment, or otherwise unsolicited contact, and interfere with their personal privacy. The same argument applies to the personal information of individuals outside the OAIC.
- Disclosure of specific funding apportionments for ongoing investigations is contrary to the public interest. The OAIC needs to be able to freely engage with relevant departments including the Department of Finance regarding specific apportionments and this may be compromised if there is an expectation that details of such discussions and decisions are released.



Further, the total expenditure has been released in order to add to debate about public expenditure.

On balance, I agree that the public interest factors against disclosure are in this instance, more persuasive than the public interest factors favouring disclosure. I affirm the decision that it is in the public interest to withhold the exempt material.

### **Disclosure log determination**

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

The documents were published on the OAIC's disclosure log on 7 January 2025.

### **Release of documents**

The documents and my decision on internal review are identified in the attached schedule of documents.

Given that I have not varied the original decision, I have not provided the relevant documents to you again, but please let the OAIC know if you require another copy of this material.

Please see the following page for information about your review rights.

Yours sincerely,

Penny Ryder  
Director, Governance, Risk and Compliance  
Office of the Australian Information Commissioner

31 January 2025

## **If you disagree with my decision**

### Further Review

You have the right to seek review of this decision by the Information Commissioner and the Administrative Reviews Tribunal (ART).

### ***Right to seek review of this decision by the Information Commissioner (IC review)***

If you wish to apply for IC review, you must do so in writing within 30 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.

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 post your application to:

Office of the Australian Information Commissioner  
GPO Box 5288  
SYDNEY NSW 2001

Or apply by email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au), or by fax on 02 9284 9666.