



Our reference: FOIREQ22/00241

**Attention: Julie**

**By email:** [foi+request-9143-8cd5d561@righttoknow.org.au](mailto:foi+request-9143-8cd5d561@righttoknow.org.au)

Your Internal Review Application - FOIREQ22/00241

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the decision made on **17 August 2022** (FOIREQ22/00181).

### Original FOI Decision

On 13 July 2022, you applied to the OAIC for access to the following:

*"I want copy of every letter the OAIC sent in FY2021/22 that states "The purpose of this letter is to advise you of my intention to recommend the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application".*

*Personal information of any person to be redacted under s 22, as well as the FOI and IC review references numbers.*

*Transparency of reasoning as to why ic reviews are not recommended by OAIC staff is important in showing what confidence can be had in the Office's primary statutory functions."*

On 15 August 2022, after entering into a consultation period with you, you were advised in light of the short timeframe remaining to process your request, you were informed that, the original decision maker would interpret your scope as follows, if we did not receive a response from you:

*"ITD letters from the first 100 IC Review matters received by the OAIC in the 2022 Financial Year".*

We did not receive a response prior to the decision made on 17 August 2022. The decision granted access to 90 documents in part and 10 documents in full. The documents were provided to you in two tranches, with the first provided on 24 August 2022 and the second on 1 September 2022.

## Internal review

On 29 August 2022 you sought internal review of this decision stating:

*I write for an internal review of Office of the Australian Information Commissioner's handling of my FOI FOIREQ22/00181 's 54W decline review recommendation letters'.*

*A full history of my FOI request and all correspondence is available on the Internet at this address:*

*[https://www.righttoknow.org.au/request/s\\_54w\\_decline\\_review\\_recommendation\\_letters](https://www.righttoknow.org.au/request/s_54w_decline_review_recommendation_letters)*

*This improper decision proclaims it is exercising two powers beyond the scope of the FOI Act - deferring access (which outside of s 21, which was not invoked, the OAIC has no power to do) and substituting a clear and unambiguous scope without consent (s 15(2)(b) does not allow for an FOI agency to substitute its preferred scope for an applicant's scope) - that is improper, unethical and ultra vires.*

*The claim that the OAIC is also keeps no reasonable records as would be expected of an adequate record keeping system for Commonwealth records of the dates it issues correspondence to third parties is one that flies in the face of the Commissioner's guidelines that:*

*"it is implicit in the objectives [of the FOI Act] that there is a requirement for sound record keeping so that an agency's documents can be readily identified and found when an FOI request is received... In summary, applicants cannot be disadvantaged by poor or inefficient record keeping by agencies or ministers... Poor record keeping or an inefficient filing system would not of themselves provide grounds for a claim that identifying or locating documents would be a substantial and unreasonable diversion of resources. See 'AP' and Department of Human Services [2013] AICmr 78 [38]."*

*as the Guidelines explain:*

*Given the objectives in the FOI Act that information held by government is a national resource and that public access to information should be facilitated, agencies must ensure that appropriate resources are allocated to dealing with FOI matters. This may include assigning additional temporary resources to handle a peak in the number or complexity of requests or to overcome inadequate administrative procedures. Poor record keeping or an inefficient filing system would not of themselves provide grounds for a claim that identifying or locating documents would be a substantial and unreasonable diversion of resources.*

*As the Information Commissioner stated: "I think that poor record keeping or an inefficient filing system can also not in themselves provide grounds for a claim that the*

*preparation of documents (for decision and editing) would be a substantial and unreasonable diversion of an agency's resources."*

*In this case, the fact that the OAIC claims its databases/registries cannot extract its outgoing correspondence in date order and by type amounts to an inadequate administrative procedure. As the Guidelines explain, an foi agency cannot rely on the inadequacy of its systems to act as a barrier to access.*

*The exemption claims, especially the "certain operations of agencies" claim on the dates of such correspondence, is wholly untenable as these claims rely on generic and broad template text claims that amount to a class specific claim, and not one based on the material redacted or any reasonable evidence of a substantial adverse effect if release occurred. They are blanket claims.*

### **Deferred access**

You state that the fact the documents were provided to you in two separate tranches amounted to deferred access to the documents outside of s 21 of the FOI Act. The FOI Act requires that a decision be provided to the applicant with the statutory timeframe provided. I note that in relation to your request a decision was provided within the statutory timeframe. The OAIC acknowledges the importance of timely access to documents under the FOI Act. However, at times, given the number of FOI on hand and the size and complexity of the documents, it can take additional time to prepare documents for release in accordance with the FOI Act. This is what occurred in relation to your request.

### **Scope of your request**

I note that correspondence dated 15 August 2022 set out how your request was to be interpreted. You were provided an opportunity to respond to that correspondence and clarify the terms of your request. As you did not respond, I consider it was open to the original decision maker to interpret the scope of your request as being *"ITD letters from the first 100 IC Review matters received by the OAIC in the 2022 Financial Year"*. Nonetheless, based on your request for internal review, I accept that your request is for the first 100 *'s 54W decline review recommendation letters'*.

### **Searches**

Based on the terms of your request, additional searches of outgoing emails from the FOIDR inbox, were undertaken and the first 100 *'s 54W decline review recommendation letters'* have been identified. I have made a decision in relation to these letters.

## Material taken into account

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

- your original freedom of information request FOIREQ22/00181 dated 13 July 2022
- Request consultation undertaken with you dated 8 August 2022
- Your response to the request consultation dated 12 August 2022
- the decision of the delegate dated 17 August 2022 the subject of this review
- your request for internal review dated 29 August 2022
- the FOI Act, in particular s 22 and s47E(d)
- relevant case law
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

## Internal Review Decision

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

An internal review decision is a ‘fresh decision’ made by a person other than the person who made the original decision (section 54C of the *Freedom of Information Act 1982* (the FOI Act)). I have had regard to, but not relied on, the delegate’s original Freedom of Information (FOI) decision.

I have decided to exempt 33 documents in part and 7 documents in full under s47E(d) of the FOI Act. In addition, I have removed irrelevant material under s 22 of the FOI Act. Details of my decision are included in the attached schedule and the reasons for my decision are set out below

### Irrelevant material (s 22)

I have found material in 93 documents contain irrelevant material, or material outside the scope of your request.

Section 22(1)(b)(ii) of the FOI Act provides that an agency may prepare an edited copy of a document by deleting information that is exempt or that would reasonably be regarded as irrelevant to the request.

The FOI Guidelines explain at [3.54] that a request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.

In your FOI request you excluded as irrelevant from your request personal information of any person, as well as the FOI and IC review references numbers. Consistent with your request, I have deleted irrelevant material, including material that you have expressly excluded in your request. I have released documents in part with personal information of private individuals deleted as irrelevant to your request in accordance with section 22 of the FOI Act.

Certain operations of agencies exemption – s 47E(d)

I have found 40 documents to be exempt in full or in part under section 47E(d) of the FOI Act.

The documents that I have found to be exempt contain material that relates to current IC reviews being considered by the OAIC. I have also found exempt material that relates to closed IC reviews where that material details departmental submissions provided to the OAIC in the course of considering the IC review and the OAIC's assessment of those submissions. I note that you are not a party to any of the IC reviews identified as relevant to your request.

Under s 47E(d) of the FOI Act, a document is conditionally exempt if its disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Section 47E(d) of the FOI Act states:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

...

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines at [6.101] provides:

*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 term 'substantial adverse effect' explained in the Guidelines [at 5.20] and it broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'.

The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

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.

In particular, I have had regard to the Australian Information Commissioner's privacy powers, freedom of information powers and regulatory powers, under the *Australian Information Commissioner Act 2010* (Cth) (AIC Act), the Privacy Act and the FOI Act. Under the AIC Act and the FOI Act, the Information Commissioner has a range of functions and powers promoting access to information under the FOI Act, including making decisions on IC reviews and investigating and reporting on freedom of information complaints, as well as assessing and making decisions on vexatious applicant declarations.

The AAT has recognised in *Telstra Australian Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000) 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 investigative process. Similarly, in this instance, the OAIC's ability to carry out its regulatory functions would be affected if there was a lack of confidence in the confidentiality of this process.

I have refused access in full to a number of documents that relate to IC reviews that are current and ongoing. Given that these IC reviews remain open, I consider that while consideration is ongoing, disclosure of the relevant material at this stage can impede the efficient conduct of the case. Specifically, the relevant OAIC officers are still in the process of formulating their views, and gathering facts and evidence, and no decisions or findings have been made regarding these IC reviews. Parties to the IC

review are provided an opportunity to respond if an adverse finding is likely to be made, for procedural fairness reasons. Further, if an IC review is made, it is appropriate for the parties to the IC review to be advised of that outcome. An IC review is only considered for publication once the matter has been finalised.

In addition to open IC reviews, I have considered exempt a small amount of material in closed IC reviews, where it relates to submissions provided to the OAIC from the relevant department and the OAIC's assessment of those submissions. Whilst submissions are generally shared between the parties, they are not made public, and can include sufficient detail to identify particular individuals. In addition, departments are less likely to provide fulsome submissions if those submissions are not treated confidentiality between the parties. I again, note that you are not a party to any of these IC reviews.

Accordingly, I consider that at this time, disclosure of this IC review material to you via the Right to Know website, would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the OAIC's operations in conducting IC reviews.

#### **Public interest (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 documents at this time would be contrary to the public interest. I must consider whether disclosure of the documents at this time would be contrary to the public interest.

The FOI Guidelines provide a non-exhaustive list of factors favouring disclosure (see [6.19]). These factors include when disclosure will reveal the reason for a government decision and any background or contextual information that informed the decision and when disclosure will enhance the scrutiny of government decision making. I consider that the material that has been identified as exempt under s47E(d) would enhance the scrutiny of government decision making. I also acknowledge that disclosure would promote the objects of the FOI Act generally through promoting access to government held information. Other factors are not relevant.

Against these factors, I must balance the factors against disclosure. The FOI Act does not specify factors against disclosure, however the FOI Guidelines at paragraph [6.22] provides a non-exhaustive list of factors against disclosure.

I consider that the relevant factors against disclosure in this instance are as follows:

- that disclosure could reasonably be expected to prejudice the OAIC's ability to obtain confidential information
- that disclosure could reasonably be expected to prejudice the OAIC's ability to obtain similar information in the future, and
- that disclosure could reasonably be expected to prejudice the conduct of IC reviews.

I have given significant weight to these factors, given the important role of the OAIC as regulator for the FOI Act, and the need to work cooperatively with applicants and agencies to ensure access to information to the public under the FOI Act. I am satisfied that the public interest factors against disclosure outweigh the public interest factor in favour of disclosure.

I have decided that at this time, giving you full access to the documents, which I have found to be conditionally exempt under s 47E(d) of the FOI Act, would, on balance, be contrary to the public interest. The documents are being prepared for release. They will be provided to you no later than 28 September 2022.

#### 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 it would be unreasonable to publish.

The documents I have decided to release to you contains exempt material. As a result, an edited version of the documents be published on our [disclosure log](#) within 10 days of providing you access.

Yours sincerely

**Emma Liddle**

Director Legal

26 September 2022



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

### **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 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. 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.

s 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>  
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Alternatively, you can submit your application to:

Office of the Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Or by email to [foi@oaic.gov.au](mailto:foi@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.

