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AUSTRALIA

Request for Review FOIREQ21/00093

1. The decision maker limited the request to a single document, when the FOI request related to all documents related to FOI 1221. FOI 1221 was considered by the OAIC in 2019 in relation to charging by the Department of Health and was finalised by the department in 2019. The OAIC has therefore narrowed the scope of the request without consultation or agreement.
2. The OAIC decision maker has relied on s 47(E)(d) as the basis for their decision not to release the single document identified as relevant to this FOI request, presumably involving correspondence related to the undertaking made by the Department of Health in relation to the publication of the Opiate Dependency Treatment Program instrument.

Better Access Australia questions how an undertaking referred to and relied on by the Minister for Health in his correspondence with the Senate Standing Committee on Delegated Legislation could have an "adverse effect on the proper and efficient conduct of the operations of an agency." Better Access Australia appreciates that the publication of these documents may be uncomfortable for the department involved, but this is not and should not be grounds for withholding access. If the Minister for Health is prepared to rely on and make public reference to this undertaking, Better Access Australia believes that the OAIC has erred in its application of s 47(E)(d).

Furthermore, the OAICs assessment of public importance is superficial and displays no understanding of the scope or significance of Department of Health's undertaking to the OAIC to register and instrument. As such, the decision maker has underestimated the impact of the release of this information, which has a direct bearing on the lawfulness of the Opiate Dependency Treatment program instrument, which discriminates against 50,000 Australians' access to Medicare entitlements and the payment of millions of dollars per year in uncapped fees to access their medicines. As such, there is significant public interest and relevance in relation to the proper and efficient conduct and operations of the Department of Health.

Furthermore, this matter is currently being considered by Parliament at the request of Better Access Australia, with the documents sought being relied on by a Minister, who made the issue public and relied on the undertaking between the OAIC and the Department of Health in his response to the Delegated Legislation Parliamentary Committee.

3. In making their decision, the decision maker has provided no evidence of either the actual or likely impact of releasing the documents. In considering the impact of release, I note the Information Commissioner's findings in the matter of *Asylum Seeker Resource Centre and Department of Home Affairs* [Asylum Seeker Resource Centre and Department of Home

Affairs (Freedom of information) [2020] AICmr 7 (25 February 2020), paragraphs 37 and 38.] that:

The FOI Guidelines explains the term 'substantial adverse effect' as follows:

The term 'substantial adverse effect' 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'.

A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons in order to show their deliberations in determining the extent of the expected effect.

The FOI Guidelines further explain:

... the predicted effect needs to be reasonably expected to occur... There must be more than merely an assumption or allegation that damage may occur if the document were to be released. ...

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.

As the decision maker has provided no assessment as to the impact the release of the documents would have, they have failed to meet the Information Commissioner's standard that "...the Department bears the onus of establishing that its decision is justified or that I should give a decision adverse to the applicant (s 55D(1))." [Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information) [2020] AICmr 7 (25 February 2020), paragraph 39.]

4. The assessment of factors against disclosure are essentially, that the Department of Health won't abide by the law if the OAIC release the requested documents. The OAIC stated that factors, such as, when disclosure could:
 - reasonably be expected to impede the flow of information to the Information Commissioner and OAIC in its capacity as an FOI regulator
 - reasonably be expected to prejudice the Information Commissioner's and OAIC's ability to obtain information in the future
 - reasonably be expected to prejudice the Information Commissioner's and OAIC's ability to obtain and deliberate regarding sensitive information.

Better Access Australia questions this assessment of factors on grounds that the likelihood that the Department of Health would not abide by Commonwealth legislation and proper administration of government in its dealings with the OAIC should it release a document specifically referred to by its Minister would have to be assessed as extremely low to zero, and that in the extreme circumstance that it did occur, the OAIC could rightly exercise its

regulatory powers under the FOI Act, for instance s 55R.

Given this, Better Access Australia believes that the decision maker has failed to appropriately apply and as a result has erred in their decision of the Public Interest test under s 11A(5).

Better Access Australia formally requests that this FOI decision be reviewed.