



Our reference: FOIREQ21/00093

Mr David Mackay
Board Director and Company Secretary
Better Access Australia
Level 1, 18 National Circuit Barton ACT 2600

By email: dmackay@betteraccessaustralia.org.au

Your Freedom of Information Request – FOIREQ21/00093

Dear Mr Mackay

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act) and received by the Office of the Australian Information Commissioner (OAIC) on 24 June 2021.

Your have requested documents containing the following information:

“... I am seeking access under the FOI Act to all advice, documents or records (in any format), including interagency communications, held by the Office of the Australian Information Commissioner relating or associated with Department of Health FOI request 1221 – [Special arrangement for Opiate dependence treatment program](#), including that referred to by the Minister for Health in his [letter to the Senate Standing Committee on Delegated Legislation](#) of 10 May 2021 that:

Following a freedom of information request in July 2019, my Department released the ODTP special arrangement to the enquirer and made a commitment to the Office of the Australian Information Commissioner to progress work in 2020 to register a special arrangement for the ODTP. My Department consulted with key stakeholders on a draft legislative instrument for the ODTP from 30 November 2020 to 18 December 2020.”

On 26 July 2021 we sent you email asking your consent to an extension of time for 7 days allowing us to conduct further searches.

On the same date you responded and agreed with the extension of time as proposed. The new due date was 2 August 2021.

Decision

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



I have identified one document within the scope of your request. I have decided to refuse you access to this document in full.

Reasons for decision

Material taken into account

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

- your freedom of information request
- the content of the subject document
- the FOI Act
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act

Searches conducted (S 24A)

To find documents that fall within the scope of your request, I co-ordinated searches by writing to staff in the OAIC's Freedom of Information Regulatory Group, Regulatory and Strategy Branch, and the Information Commissioner. Searches were conducted for documents across the OAIC's document storage system, Content Manager, case management system, Resolve, and email accounts. One document was located as a result of these searches.

Based on the above search efforts, I am satisfied that all reasonable steps have been taken by the OAIC to find the documents within scope of your FOI request, and other than the one document that was identified, no further documents exist in accordance with s 24A of the FOI Act.

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

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).

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 and the Privacy Commissioner (both offices currently held by Angelene Falk), the FOI Commissioner (office currently vacant), and the staff of the OAIC.

Due to the nature of the subject document, I have had regard to the Australian Information Commissioner’s regulatory powers, under the FOI Act.

The OAIC has a range of powers and functions in relation to the FOI Act, including assessing and managing vexatious declaration applications made by Commonwealth agencies, making decisions on Information Commissioner reviews, and investigating and reporting on freedom of information complaints.

The subject document is currently being considered by the Information Commissioner in performing an FOI function. As the matter is currently on foot, releasing the document at issue would have a substantial adverse effect on the OAIC’s process, as it would have the effect of circumventing the consideration the matter.

Therefore, I consider that, at this time disclosure of conditionally exempt material in the document could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the OAIC. I find that the material in the document at issue is conditionally exempt under s 47E(d) of the FOI Act.

I have found it is not reasonably practicable to create an edited copy of the document with the exempt material removed.

I have decided that the entire document at issue is conditionally exempt from disclosure under s 47E(d) of the FOI Act.

The public interest test – s 11A(5)

An agency cannot refuse access to a conditionally exempt document unless giving access would, on balance, be contrary to the public interest (s 11A(5)).

The FOI Act sets out four factors favouring disclosure, which must be considered if relevant. They are that disclosure would:

- a. promote the objects of the Act
- b. inform debate on a matter of public importance
- c. promote effective oversight of public expenditure
- d. allow a person to access his or her personal information (s 11B(3))

The public interest factors favouring disclosure in this case are that disclosure would promote the objects of the FOI Act and inform debate on a matter of public importance.

Against these factors I must balance the factors against disclosure. The FOI Act does not specify any factors against disclosure; however the FOI Guidelines provide a non-exhaustive list of factors against disclosure. This includes 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.

On balance, I consider that the factors against disclosure outweigh the factors in favour of disclosure. I have therefore decided that it would be contrary to the public interest to give you access to the information that I have found to be conditionally exempt under s 47E(d) of the FOI Act.

If you are not satisfied with my decision, your review rights are contained in the following page.

Yours sincerely



Lawyer

2 August 2021

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 5218

SYDNEY NSW 2001

Alternatively, you can submit your application by email to 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 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 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 AAT, 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 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_10

Alternatively, you can submit your application to:

Office of the Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Or by email to 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. More information is available on the [Access our information](#) page on our website.