



Australian Government

Department of Communications and the Arts

Mr Josh Rowe

Right to Know

(via email: foi+request-3459-xxxxxxx@xxxxxxxxxx.xxx.xx)

4 July 2017

Dear Mr Rowe

Freedom of Information Request FOI 28-1617 – Notice of Access Decision

I refer to your request on 2 May 2017 for access to documents under the *Freedom of Information Act 1982 (FOI Act)* (our ref FOI 28-1617).

I am an officer authorised by the Secretary under subsection 23(1) of the FOI Act to make decisions about requests for access to documents under the FOI Act.

I have made a decision on your request for access, and provide you with notice in writing of my decision in accordance with section 26 of the FOI Act.

A. BACKGROUND

1. On 2 May 2017, the Department received an email from you requesting access to the following documents under section 15 of the FOI Act:

“1. a copy of all public auDA board agendas, minutes and reports which have been published previously

2. a copy of all future auDA board agendas, minutes and reports which would have been suitable to be published publicly previously”.

2. On 2 May 2017, the FOI Coordinator initiated document searches in conjunction with the Strategy and Projects Division of the Department.

3. On 4 May 2017, the Department acknowledged your request, and advised you that “the FOI Act gives an applicant a right of access only to documents in existence at the time a request is lodged with an agency. An applicant cannot request access to documents created after the request is received”. On this basis, the Department advised you that your request will be processed on the basis that the scope is limited to “a copy of all public auDA board agendas, minutes and reports which have been published previously”.

4. On 4 May 2017, you agreed to this amendment of the scope of your request.

5. On 8 May 2017, the First Assistant Secretary Strategy and Projects advised the FOI Coordinator that hard copy/paper file and electronic document searches had been conducted over the period 3 - 5 May 2017, and had located 18 files with 723 pages in 129 documents potentially within the scope of your request.

6. On 12 May 2017, the Department sent you a notice that you are liable to pay a charge under section 29 of the FOI Act. On 15 May 2017, you advised the Department that you agreed to the estimate of charges, and had paid the deposit. On 22 May 2017, the Department sent you Invoice No. 8019745 and Receipt No. 8811249 confirming receipt of the deposit.

7. Further searches identified additional documents potentially within the scope of your request, bringing the total number of documents under consideration to 153 documents.

8. On 22 May 2017, the Department advised you that “examination of the documents relevant to your request has identified that consultation is required under section 27 of the FOI Act. As such, the statutory timeframe for the processing of your request has been extended by 30 days”; that is, until 4 July 2017.

9. On 23 May 2017, the Department initiated section 27 consultation. In response to submissions received on 8 June 2017, the Department undertook further section 27 consultation and on 29 June 2017 and 3 July 2017 received further submissions in response to that consultation.

10. Taking into account these submissions, and advice from officers within the Department’s Strategy and Projects Division, the Department’s FOI Coordinator identified 37 documents as not being the version of a document published previously on the “.au Domain Administration Limited” (auDA) website, and one document as currently accessible on that website. As these documents are not within the scope of your request, they were removed from the Schedule of Documents, leaving 115 documents within the scope of your request.

11. On 3 July 2017, the FOI Coordinator provided me with a copy of the 115 documents within the scope of your request and in the possession of the Department, as identified by reasonable searches of the Department’s information management systems. A list of those documents is provided in the Schedule of Documents at [Attachment A](#).

B. DECISION

12. I have decided to give access in full to all 115 documents in the Schedule of Documents.

C. MATERIAL ON WHICH MY DECISION IS BASED

13. I base my decision on the following material:

- a. your request dated 2 May 2017 and revised request dated 4 May 2017;
- b. the relevant provisions of the FOI Act;
- c. the *Information Commissioner’s FOI Guidelines* made under section 93A of the FOI Act;
- d. the Department’s *FOI Policy*;
- e. submissions made in response to consultation;
- f. information and advice from the Department’s FOI Coordinator; and
- g. information and advice from officers within the Department’s Strategy and Projects Division.

D. FINDINGS ON MATERIAL QUESTIONS OF FACT

Scope of the request

14. On the basis of advice from the FOI Coordinator, based on communication with officers from the Strategy and Projects Division and section 27 submissions, I find that the documents in the Schedule of Documents:

- a. are all 'public auDA board...minutes...published previously' on the auDA website and are therefore within the scope of your request; and
- b. were obtained by departmental officers downloading the documents over the course of a number of years from a publicly available website maintained by the originator of the documents on which the documents were lawfully published by their originator.

E. REASONS FOR DECISION

Section 15: documents of an agency

15. Section 15 of the FOI Act enables a person to request access to a document of an agency.

16. The documents within the scope of your request originated with auDA, which I am advised is an Australian public company limited by guarantee, and is the administrator of the domain name system in Australia. As such, I have considered whether the requested documents are 'documents of an agency' within the meaning of section 15.

17. Section 4 of the FOI Act relevantly provides that a document is a 'document of an agency' if "the document is in the possession of the agency, whether created in the agency or received in the agency".

18. The *FOI Guidelines* at paragraph 2.36 state that "any record of information which an agency has downloaded from a shared database or any other database and stored on hard disks or file servers in its physical possession should be treated as a 'document' of that agency".

19. The documents within the scope of your request were not created by the Department but were downloaded by departmental officers and stored in the Department's information management system, and as such are documents in the Department's possession. Accordingly, the documents are 'documents of an agency' within the meaning of section 4 of the FOI Act, notwithstanding that the documents were not created by the Department.

Section 33 – Exemption – National security, defence or international relations

20. I have considered whether disclosure of the documents within the scope of your request would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. If so, the documents would be exempt documents under section 33 of the FOI Act.

21. I have done so because the documents within the scope of your request relate to the administration of Internet domain names. The 2015-16 auDA annual report states that .au domain administration is an element of the Internet's international policy and management network, and that auDA works closely with the Australian Government.

22. However, the documents have been lawfully published previously by their originator on a publicly available website maintained by the originator over the course of a number of years. Therefore, disclosure under the FOI Act would not, or could not reasonably be expected to, cause damage to the international relations of the Commonwealth.

Section 45 – Exemption – Material obtained in confidence

23. I have considered whether disclosure under the FOI Act of the documents within the scope of your request would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence. If so, the documents would be exempt documents under section 45 of the FOI Act.

24. The *FOI Guidelines* at paragraphs 5.155-5.172 set out the requirements for this exemption to apply. These include that the information must: be specifically identified; have the necessary quality of confidentiality; have been communicated and received on the basis of a mutual understanding of confidence; have been disclosed or threatened to be disclosed without authority; and cause detriment if disclosed without authorisation (see paragraph 5.159).

25. For the section 45 exemption to apply, the information must have a quality of confidentiality. The *FOI Guidelines* state at paragraph 5.162 that information that is “in the public domain will not have the quality of confidentiality” and at paragraph 5.163 that “the quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain. Thus can occur if the person whose confidential information it is discloses it”.

26. Further, the *FOI Guidelines* state at paragraph 5.164 that the information must have been communicated and received on the basis of a mutual understanding of confidence.

27. The submissions dated 8 June 2017 claimed that the Department receives unredacted versions of minutes that contain confidential information. However, subsequent consultation established that the documents within the scope of your request were obtained by departmental officers downloading the documents over the course of a number of years from a publicly available website maintained by the originator on which the documents were lawfully published previously by the originator.

28. It is not possible to characterise documents obtained in these circumstances as having either a quality of confidentiality or being subject to a mutual understanding of confidence.

29. The submissions dated 3 July 2017 claimed that two of the documents contained material that a third party had claimed “were covered by confidentiality”. No further evidence was provided. While section 45 does not require that the hypothetical action is brought against the Commonwealth, it does require that the document’s disclosure under the FOI Act would found that action. On the limited information provided, it appears that any cause of action for breach of confidence in respect of these two documents would have arisen at the time of original publication on the publicly available website, and not as a result of any subsequent disclosure under the FOI Act.

30. For the reasons above, disclosure under the FOI Act of the documents within the scope of your request would not found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

31. Therefore, I find that the documents within the scope of your request are not exempt under section 45.

Section 47 – Exemption – Trade secrets or commercially valuable information

32. I have considered whether disclosure under the FOI Act of the documents within the scope of your request would disclose trade secrets, or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed. If so, the documents would be exempt documents under section 47 of the FOI Act.

33. For the section 47 exemption to apply, the information must have a commercial value. The FOI Guidelines state at paragraph 5.202 that a document must satisfy two criteria (citing *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34).

34. First, the document must contain information that has a commercial value either to an agency or to another person or body. While the submissions of 8 June 2017 do not explicitly refer to section 47, or make specific claims in respect of identified documents, they refer to the redaction of confidential information from board minutes. This raises the possibility that the documents could contain information that has a commercial value either to an agency or to another person or body.

35. Second, the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed. However, the documents were downloaded from a publicly available website maintained by the originator on which the documents were lawfully published previously by the originator. Any destruction or diminution of the commercial value of information contained in these documents that would or could reasonably be expected to occur, would have occurred when the documents were lawfully published previously by the originator.

36. For this reason, disclosure under the FOI Act of the documents within the scope of your request would not disclose trade secrets, or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

37. Therefore, I find that the documents within the scope of your request are not exempt under section 47.

Section 47C – Public interest conditional exemption – Deliberative processes

38. I have considered whether disclosure under the FOI Act of the documents within the scope of your request would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency. If so, the documents would be conditionally exempt documents under section 47C of the FOI Act.

39. The conditional exemption does not apply to purely factual material: subsection 47C(2).

40. The documents within the scope of your request are auDA board meeting minutes, created for the governance of that company. They are not in the nature of opinion, advice or recommendation that has been obtained, prepared or recorded as part of the deliberative processes involved in the functions of an agency.

41. They were obtained by departmental officers downloading the documents over the course of a number of years from a publicly available website maintained by the originator on which the documents were lawfully published previously by the originator.

42. The *FOI Guidelines* state at paragraph 6.62 that the document does not need to be prepared for the sole purpose of a deliberative process. However, it is not sufficient that an agency merely has a document in its possession that contains information referring to matters for which the agency has responsibility: *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [93].

43. While the documents may contain information referring to matters for which the Department has responsibility, they do not relate to the deliberative processes involved in the functions of the Department. Indeed, it is more likely that they constitute 'purely factual material' within the meaning of subsection 47C(2).

44. For this reason, disclosure under the FOI Act of the documents within the scope of your request would not disclose deliberative matter.

45. Therefore, I find that the documents within the scope of your request are not conditionally exempt under section 47C.

46. As such it is unnecessary to apply the public interest test in sections 11A and 11B of the FOI Act.

Section 47F – Public interest conditional exemption – Personal privacy

47. I have considered whether disclosure under the FOI Act of the documents within the scope of your request would involve the unreasonable disclosure of personal information about any person (including a deceased person). If so, the documents would be conditionally exempt documents under section 47F of the FOI Act.

48. Under the FOI Act, personal information has the same meaning as in the *Privacy Act 1988*.

49. This conditional exemption has two threshold tests that must be satisfied.

50. First, there must be a disclosure of personal information about any person (including a deceased person). The documents within the scope of your request contain personal information, including names of people attending auDA board meetings, information about their employment as board members, and details of their opinions about board matters.

51. Second, the disclosure of personal information must be unreasonable. The *FOI Guidelines* at paragraph 6.138 make it clear that this threshold test does not amount to the public interest test of subsection 11A(5), which follows later in the decision making process. The *FOI Guidelines* provide a range of matters to which an agency must have regard in determining whether disclosure of a document would involve an unreasonable disclosure of personal information: see paragraphs 6.139-6.148.

52. The *FOI Guidelines* quote the Administrative Appeals Tribunal in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 that “whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance”.

53. Applying the *Chandra* considerations to the documents within the scope of your request, the personal information was obtained by departmental officers downloading the documents over the course of a number of years from a publicly available website maintained by the originator on which the documents containing the personal information were lawfully published previously by the originator. The people about whom the information relates were for the most part attending board meetings of the originator. These circumstances create a strong presumption that the people concerned were aware of the publication of the documents containing their personal information, and against any likelihood that the people concerned did not want this information disclosed at the time of publication.

54. The *FOI Guidelines* at paragraphs 6.140-6.141 provide further matters, drawn from subsection 27A(2) of the FOI Act. These include: the extent to which the information is well known; whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document; the availability of the information from publicly accessible sources; and any other matters that the agency considers relevant.

55. Applying these considerations, the personal information is well known in that it was published previously by the originator; associated with the matters in the document in that the names of directors are available on the auDA website, annual reports and minutes of annual general meetings for the periods in question; the information was available from a publicly accessible website administered by the originator; and the information was obtained by departmental officers downloading the documents from that website.

56. Finally, the *FOI Guidelines* at paragraphs 6.142-6.148 provide further considerations, including those arising from relevant jurisprudence. Applying these further considerations, there is no evidence that disclosure under the FOI Act would be unreasonable.

57. No argument was advanced, either in advice from officers within the Department's Strategy and Projects Division or the FOI Coordinator, or in consultation submissions, to suggest that further disclosure of this personal information under the FOI Act would be unreasonable in the circumstances.

58. For the reasons outlined above, disclosure under the FOI Act of the documents within the scope of your request would not involve the unreasonable disclosure of personal information about any person.

59. Therefore, I find that the documents within the scope of your request are not conditionally exempt under section 47F.

60. As such it is unnecessary to apply the public interest test in sections 11A and 11B of the FOI Act.

Section 47G – Public interest conditional exemption – Business information

61. I have considered whether disclosure under the FOI Act of the documents within the scope of your request would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking. If so, the documents may be conditionally exempt documents under section 47G of the FOI Act.

Unreasonably adversely affect a person, organisation or undertaking

62. A document may be conditionally exempt under section 47G of the FOI Act in a case in which the disclosure of the information "would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs".

63. During consultation, it was submitted that "disclosure of any of the documents as stated in the Schedule, would unreasonably and adversely affect the lawful business" of those consulted. It was further submitted that "As the Department receives unredacted versions of minutes, the publication of these documents would be severely detrimental to the ongoing effectiveness" of those consulted. Further, "there would be many examples of confidential information presented to the board and subsequently noted, which would go against the principles of sound and fair business practice".

64. It was also submitted that "publication of the board minutes would significantly limit the effectiveness of the board in the future to consider and act it [sic] the best interests of the company and for directors to meet their obligations under the Corporations Act (2001)".

65. I attach significant weight to the fact that the documents within the scope of your request were lawfully published previously by the originator on a publicly available website maintained by the originator. The documents within the scope of your request are not unredacted versions of minutes received by the Department, and any information presented to the board contained in the documents was published

previously by the originator. I have taken into account that the submission indicates the reasons why, after many years, the documents were removed from that website and similar documents are no longer published on that website.

66. Paragraph 6.186 of the *FOI Guidelines* states that the term ‘could reasonably be expected’ refers to an expectation that is based on reason, and that mere assertion or speculative possibility is not enough.

67. However, little or no evidence was provided to support the assertions in the submission and demonstrate the rational basis on which it is expected that disclosure under the FOI Act would, or could reasonably be expected to, unreasonably adversely affect a person, organisation or undertaking. Given the amount of time that the documents were published previously, there should have been little difficulty in demonstrating a rational basis for any such expectation, and the absence of such evidence weighs strongly against the submission.

68. Therefore, I find that disclosure under the FOI Act of the documents would not, and could not reasonably be expected to, unreasonably adversely affect a person, organisation or undertaking.

Prejudice the future supply of information

69. A document may be conditionally exempt under section 47G of the FOI Act in a case in which the disclosure of the information “could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency”.

70. During consultation, it was submitted that disclosure of the documents within the scope of your request could mean that those consulted “could not communicate freely with the Department for fear that any such communications would be subject to FOI requests”. Further, “if such information was to be released”, those consulted “would need to consider what information regarding board matters it would supply to the Commonwealth in the future. This would significantly harm the relationship” that those consulted enjoy “with the Department and would limit the Commonwealth’s ability to contribute to effective governance of the .au domain”.

71. The *FOI Guidelines* at paragraph 6.198 state that this limb of the conditional exemption comprises two parts.

72. First, there must be a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government.

73. In terms of prejudice to the future supply of similar information of similar provenance, submissions indicated that these and similar documents are no longer published on the website. This clearly indicates that any prejudice to the supply of information of this provenance to the Commonwealth has already occurred. Therefore, disclosure of the information under the FOI Act cannot reasonably be expected to prejudice the future supply of information of this provenance.

74. In terms of prejudice to the future supply of similar information of different provenance, any documents provided to the Commonwealth since the enactment of the FOI Act in 1982 are potentially subject to an FOI request. This situation is not materially altered by the current request, and would not be materially altered by any disclosure of documents as a result of this request.

75. Specifically, the current request is for documents that were published previously by their originator, and were obtained by departmental officers downloading the documents over the course of a number of years from a publicly available website maintained by the originator of the documents on which the documents were lawfully published by their originator.

76. It stands to reason that a future request for documents that were not published previously by their originator, and which came into the Department's possession by different means, would be decided by reference to those different factual circumstances and may result in a different decision.

77. As such, it cannot reasonably be expected that disclosure of documents as a result of a decision lawfully made under a long-standing enactment in response to a specific request for documents of one provenance could itself prejudice the future supply of information to the Commonwealth of documents with a different provenance.

78. Further, the documents within the scope of this request were previously published by their originator and subsequently downloaded from a publicly accessible website by departmental officers. Therefore, they are not in any case documents supplied 'to the Commonwealth...for the purpose of...the administration of matters administered by an agency'. The documents were supplied to the world.

79. Second, the reduction must prejudice the operations of the Department. The submission provided no evidence of any prejudice to the operations of the Department. Likewise, advice from officers within the Department's Strategy and Projects Division provided no evidence of any expectation of prejudice to the operations of the Department.

Application of the public interest test

80. For the reasons outlined above, disclosure under the FOI Act of the documents within the scope of your request would not involve the unreasonable disclosure of business information.

81. Therefore, I find that the documents within the scope of your request are not conditionally exempt under section 47G.

82. As such it is unnecessary to apply the public interest test in sections 11A and 11B of the FOI Act.

F. REVIEW RIGHTS

83. This decision may be subject to review under section 54, section 54A, section 54L or section 54M of the FOI Act. I have attached at [Attachment B](#) the Office of the Australian Information Commissioner's *FOI Fact Sheet 12 – Your review rights*.

G. ACCESS

84. During the processing of your request, the Department consulted third parties potentially affected by the release of the documents. Those third parties have **30 days** in which to apply for internal review of my decision or to seek review of my decision by the Information Commissioner, after which time (subject to the outcome of any such review) the Department will provide you with the documents.

H. CHARGES

85. Before the Department can provide you with access to the documents, you must pay the remaining charges of **\$493.02**. Please follow the instructions at [Attachment C](#) regarding the payment of the outstanding charges.

86. Please note the actual charges for processing of your request were calculated to be \$659.72. As this amount is greater than the estimated amount of the charge \$657.36, the amount payable is the difference between the deposit amount of \$164.34 and the (lower) estimated charge of \$657.36.

I. INFORMATION PUBLICATION SCHEME

87. In accordance with section 11C of the FOI Act, where the Department gives access to a document under section 11A of the FOI Act, the Department must publish that information on its website within 10 working days. Please see www.oaic.gov.au for more information about the Information Publication Scheme.

Yours sincerely

Legal Director
Office of the General Counsel
Position Number 112404

Attachment A Schedule of Documents

Attachment B *Australian Information Commissioner's Fact Sheet 12: Freedom of Information - your review rights*

Attachment C Payment instructions