

18 October 2023

Ben Fairless

By email only: foi+request-10582-d950bb16@righttoknow.org.au

RE: FREEDOM OF INFORMATION REQUEST 2024-00111

Dear Ben,

The purpose of this letter is to give you a formal decision about access to documents that you requested under the *Freedom of Information Act 1982 (Cth)* (“**FOI Act**”).

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

Your request was received by Australia Post on 18 August 2023. You are seeking documents that relate to the use of the gTLD (.auspost), specifically:

- requests to create domains on the gTLD;
- zone files for domains on the gTLD;
- applications from registrants (people who want a domain) to the Registrar for domains on the gTLD;
- all registry rules created by the Registry for the gTLD. (“**Request**”).

It is my view that documents matching the description of your request should not be released under the FOI Act. Further, I note that the documents matching the description of your request have not been listed in this section 26 notice.

The non-inclusion of a schedule of documents to an access decision is supported by the FOI Guidelines issued by the Office of the Information Commissioner (“**Guidelines**”), paragraph 3.176, Part 3 which says:

When a decision is made, the schedule (minus any exempt material considered during the process) can be attached to the statement of reasons.

As all the material or documents were considered exempt, they were not listed in a schedule of documents. Nor was an ‘empty’ schedule of documents attached, given this would be of no benefit.

My formal decision and information about that decision are set out below.

Decision and reasons for decision

Your Request is formally refused under section 7(2) – commercial activities, section 47D (conditional exemption – financial or property interests of the Commonwealth) and 47E (conditional exemption – certain operations of agencies) of the FOI Act.

The following material was considered in making my decision:

- documents matching the description of your request;

- the FOI Act (specifically section 7, 47D and 47E) and
- the Guidelines.

Insofar as your Request relates to applications from registrants and requests to create domains, the websites and infrastructure associated with the gTLD are maintained for commercial trading purpose and facilitating commercial activities and accordingly, are refused on the ground that these constitute commercial materials (section 7(2)).

Insofar as your Request relates to content (zone files and registry rules) within documents which are not commercial, the documents identified are conditionally exempt on the basis of section 47D and 47E.

Section 7(2)

Section 7(2) in conjunction with Schedule 2, Part II, of the FOI Act entirely exempts Australia Post from the operation of the FOI Act in respect of documents relating to its commercial activities.

The Guidelines confirm this at paragraph 2.14, Part 2 which state:

*Exemptions applying to commercial activities, security and defence intelligence documents, and other matters Section 7(2) (supplemented by Schedule 2, Part II) lists agencies that are exempt from the operation of the FOI Act in relation to particular types of documents. The list includes amongst others; the Attorney-General's Department in relation to documents in respect of activities undertaken by the Australian Government Solicitor and various bodies such as **Australia Post**, Comcare, Commonwealth Scientific and Industrial Research Organisation (CSIRO), NBN Co and Medicare, in relation to documents in respect of commercial activities.*

Section 7(3) of the FOI Act defines commercial activities in Part II of Schedule 2 as being:

- a) activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments; or
- b) activities carried on by an agency, that may reasonably be expected in the foreseeable future to be carried on by the agency on a commercial basis in competition with persons other than governments or authorities of governments.

For this exemption to apply, the commercial activity must be carried out in competition with persons other than governments and government authorities.

Also, section 7(4) provides that a reference to documents in respect of particular activities (commercial activities) should be read as '*documents received or bought into existence in the course of, for the purposes of, the carrying on of those activities*'.

I believe that documents matching the aspects of your request described as applications from registrants and requests to create domains, have been bought into existence in the course of and for the purposes of carrying out commercial profit seeking activities, as described in section 7(3) of the FOI Act. Australia Post's Digital ID and retail business competes against private enterprise in the services it offers. Australia Post's online retail shop faces intense competition from major and boutique entities such as Officeworks, Big W, Kmart, JB HiFi, mobile phone retailers, newsagencies, to name a few. Australia Post's Digital ID services also competes against other entities. For example, when it comes to Police Checks, Australia Post competes with crimecheckaustralia.com.au, cvcheck.com, nationalcrimecheck.com.au among others.

In summary, I believe that Australia Post's intellectual property has predominately been brought into existence in the course of and for the purposes of carrying on commercial profit seeking activities and the activities carried on Australia Post's websites and infrastructure associated with the gTLD in a competitive basis in competition with persons other than governments or authorities of governments.

It follows that I believe that the disclosure of the applications from registrants and requests to create domains sought is not required.

Section 47D

Under section 47D, the FOI Act provides that a document is conditionally exempt if its disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

Paragraph 6.90, Part 6 of the Guidelines states that an agency's property interests may be broader than buildings and land, and include intellectual property.

The documents you seek were created as part of Australia Post's intellectual property and therefore relate to 'financial or property interests' within the meaning of section 47D.

For this exemption to apply, the Guidelines state at paragraph 6.91, Part 6 that the potential effect that would be expected to occur following disclosure must be both substantial and adverse.

Substantial adverse effect

Australia Post has devised and implemented intellectual property which best support the efficient and effective discharge of its responsibilities and enhance and support its commercial, reserved activities and operations. Part of the value in the intellectual property is established in the proper maintenance of websites and content relied on for Australia Post to conduct its commercial and statutory functions and in public trust in the security and veracity of Australia Post's online infrastructure and systems.

In the course of considering and responding to this application I have consulted and taken advice from the Australia Post cyber security team who on review of the documents identified and advised the disclosure of documents comprise a significantly increased cyber-security risk which risk is mitigated by these documents comprising trade secrets.

Disclosure of the documents would result in an increased risk of cyber-intrusion on Australia Post websites that would cause risk of illegal activity and interference including domains hosting online commerce and the collection of information vital for Australia Post's operations. The increase cyber risk is likely to cause cost for Australia Post's online operations. Further, the disclosure of the documents would disclose domains used by secure functions of Australia Post's intellectual property in respect of products such as Australia Post's MyPost application, Digital ID and other online services offered by Australia Post.

I believe that Australia Post's financial and property interests could be substantially and adversely hindered if Australia Post customers were aware that Australia Post's intellectual property could become publicly disclosed through the FOI channel. This would affect the confidence Australia Post's customers may have with their dealings with Australia Post. Customers may be reluctant to use Australia Post as they be apprehensive that any information disclosed to Australia Post may be illegally interfered with.

It follows that I believe that the zone files and registry rules described in your request are exempt from disclosure.

It is also my belief that section 47E(d) supports the non-disclosure of the documents you seek for the same reasons listed above.

Under section 47E(c), the FOI Act provides that a document is conditionally exempt if its disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the agency.

I believe that disclosure of the documents that disclose the mapping of domains under gTLDs would make it difficult for Australia Post to maintain domains for secure services such as Digital ID and agency services. This could reasonably affect the willingness of people to transact with Australia Post. This would have a substantially adverse effect on the proper and efficient conduct of Australia Post's operations.

In summary, disclosure of the documents would have a substantial adverse effect on Australia Post's property interests and its operations resulting in its inability to meet its statutory requirements.

Public Interest

Under the FOI Act, access to documents covered by a conditional exemption must be given unless it would be contrary to the public interest. As both section 47D and section 47E are conditional exemptions, the public interest must be considered.

The public interest is considered to be:

- something that is of serious concern of benefit to the public, not merely of individual interest;
- not something of interest to the public, but in the interest of the public;
- not a static concept, and where it lies in a particular matter will often depend on the balancing of interests;
- necessarily broad and non-specific – what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered; and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.

My view is that there are several public interest factors weighing against disclosure of the documents sought, including that such disclosure:

- could reasonably be expected to discourage the use of Australia Post's services;
- could reasonably be expected to harm the interests of persons using Australia Post's digital services;
- could reasonably be expected to prejudice the commercial activities of Australia Post;
- could reasonably be expected to prejudice Australia Post's ability to obtain and retain confidential information; and
- no public purpose would be achieved through release.

Conclusion

It follows that I believe that disclosure of the documents you seek is not required under the FOI Act.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision.

Internal Review

Under section 54 of the FOI Act, you may apply in writing to Australia Post for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by the FOI Review officer within 30 days.

Please send your review request in writing or email to:

FOI Review Officer or to foi@auspost.com.au
Australia Post
GPO Box 1777
MELBOURNE VIC 3001

Information Commissioner Review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10
email: foidr@oaic.gov.au
post: GPO Box 5218 Sydney NSW 2001

More information about an Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1
email: foidr@oaic.gov.au
post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you are sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Yours sincerely

Anna

Anna
Freedom of Information Officer
Australia Post