



Australian Government

Department of Communications and the Arts

our reference: FOI 29-1415

FOI REQUEST NO. 29-1415

Mr Jackson Gothe-Snape of Right to Know

**INTERNAL REVIEW OF ACCESS DECISION
STATEMENT OF REASONS**

I, Angela Flannery, General Counsel, Office of the General Counsel:

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982 (FOI Act)* to make internal review decisions about access to documents under the FOI Act;
- (b) being required under section 26 of the FOI Act to provide a Statement of Reasons for my decision; and
- (c) having conducted a review, following a request made under subsection 54(1) of the FOI Act, of a decision made by Trudi Bean, Deputy General Counsel, Office of the General Counsel on 25 August 2015, at **Attachment A (Original Decision)**,

make the following statement setting out my decision, findings on material questions of fact, referring to the evidence or other material upon which those findings were based and the reasons for my decision.

A. INTERNAL REVIEW DECISION

- 1. The documents covered by the request that are held by the Department of Communications and the Arts (**Department**) are listed in **Attachment B**.
- 2. On internal review of this matter under subsection 54(1) of the FOI Act, I affirm the Original Decision. That is:
 - (a) parts of documents 1, 2 and 3 are exempt from disclosure under sections 45 and 47 of the FOI Act;
 - (b) the whole of documents 1, 2 and 3 are exempt from disclosure under paragraph 31B(b) of the FOI Act on the basis they are conditionally exempt under section 47C of the FOI Act and it would be contrary to the public interest to release the documents under subsection 11A(5) of the FOI Act; and
 - (c) parts of documents 1, 2 and 3 are exempt from disclosure under paragraph 31B(b) of the FOI Act on the basis they are conditionally exempt under section 47G(1) of the FOI Act and it would be contrary to the public interest to release those documents under subsection 11A(5) of the FOI Act.

B. BACKGROUND

3. On 25 June 2015, the Department received a request from Mr Jackson Gothe-Snape of Right to Know (**Applicant**) under the FOI Act, requesting access to 'the Draft Merit List for the Mobile Black Spots Programme (Round 1) (**Programme**) including the scores for each Proposed Base Station under the seven Criteria set out in the Guidelines'.
4. On 21 July 2015, the Department wrote to the Applicant advising that it was required to consult with third parties in relation to the release of certain documents falling within the scope of the Applicant's request, and that the statutory time frame for processing the request would therefore be extended by a further 30 days.
5. On 3 August 2015, in accordance with section 27 of the FOI Act, the Department notified Telstra Corporation Limited (**Telstra**) and Vodafone Hutchinson Australia Pty Limited (**VHA**) of the FOI request and invited them to make submissions in relation to the FOI request. On 12 August 2015, the Department received submissions from Telstra and VHA in relation to the FOI request.
6. On 25 August 2015, Trudi Bean, Deputy General Counsel, exercising the delegated power under subsection 23(1) of the FOI Act, made an access decision in relation to the FOI request. In a letter dated 25 August 2015, the Department advised the Applicant of this decision.
7. On 31 August 2015, the Applicant requested an internal review of the Original Decision. In a letter dated 4 September 2015, the Department acknowledged the Applicant's request for internal review of his FOI request.

C. MATERIAL ON WHICH MY FINDINGS OF FACT ARE BASED

8. I based my findings of fact on the following material:
 - the relevant provisions of the FOI Act;
 - the Freedom of Information Guidelines made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (**OAIC**);
 - the Department's *Guidelines for Processing Freedom of Information Requests* dated 13 July 2011;
 - the applicant's internal review request dated 31 August 2015;
 - the submissions of Telstra and VHA in relation to the information contained in the documents within the scope of the FOI request;
 - the Original Decision; and
 - the content of the documents falling within the scope of the applicant's internal review request (that is, documents 1, 2 and 3, as described in Attachment B).

D. REASONS FOR DECISION ON INTERNAL REVIEW

9. My findings of fact and the reasons for my decision are set out below.
10. The Department consulted with Telstra and VHA in making the Original Decision, as the documents contained commercial and confidential information provided by Telstra and VHA. I am satisfied that Telstra's and VHA's submissions are still applicable in relation to these documents.

Section 45 – Documents containing material obtained in confidence

11. As noted in the Original Decision, parts of documents 1, 2 and 3 contain information that was sourced from Telstra's and VHA's respective funding applications under the Programme. This information (**Third Party Information**) was designated by each party as commercially sensitive information. Each funding applicant also provided confidentiality statements accompanying the provision of the information, and consistent with section 12.6.1 of the Programme Guidelines, the Department undertook to treat the funding applicant's commercially sensitive information as genuinely confidential information.
12. As outlined above and in the Original Decision, on 3 August 2015 the Department contacted Telstra and VHA in relation to the potential disclosure of the information contained in the documents referred to in the immediately preceding paragraph. Telstra and VHA both objected to disclosure of the information on the basis that the information is confidential and commercially sensitive. Telstra and VHA each advised it is under obligations of confidence to State governments in relation to information about State government co-contributions which is part of the Third Party Information.
13. I am satisfied that the statement made in the Original Decision, that is, that the Third Party Information contained in documents 1, 2 and 3 has always been treated as, and remains, genuinely confidential is correct. Given the basis upon which the Third Party Information was provided to the Department and the nature of the information disclosure under the FOI Act would constitute an unauthorised disclosure. Further, I am satisfied that disclosure would cause detriment to Telstra and VHA and would be a breach of the obligations that the Department owes to Telstra and VHA.
14. Given the above, I am satisfied that disclosure of the Third Party Information in parts of documents, 1, 2 and 3 would found an action by a person, namely Telstra or VHA, for breach of confidence.
15. I therefore find that parts of documents 1, 2 and 3 are exempt from disclosure under section 45 of the FOI Act.

Section 47 – Documents disclosing trade secrets or commercially valuable information

16. Documents 1, 2 and 3 contain details of the cost of each base station and details of how much each funding applicant was willing to invest in a particular base station. I

am of the view that this information is commercially valuable information for the purposes of section 47 of the FOI Act.

17. I am satisfied that the information is not known to Telstra's or VHA's competitors and that disclosure of the information would significantly lessen its worth to Telstra and VHA respectively. As noted in the Original Decision, the information is still current. I believe that the information would therefore still have significant commercial value to Telstra and VHA.
18. Given the above, I am satisfied that parts of documents 1, 2 and 3 contain information that would be considered to be commercially valuable information, the value of which to Telstra and VHA would be, or could reasonably be expected to be, destroyed or diminished if access to those parts of the documents was granted.
19. I therefore find that the parts of documents 1, 2 and 3 that contain details of the total cost of each base station and details of how much each funding applicant was willing to invest in a particular base station are exempt from disclosure under paragraph 47(1)(b) of the FOI Act.

Section 47C – Public interest conditional exemption - Deliberative processes

20. As noted in the Original Decision, document 1 is a Draft Merit List created by the Department as part of its evaluation of the applications for funding for proposed base stations under the Programme. It records the Department's advice and recommendations concerning the decision whether to award funding under the Programme to each proposed base station. Given document 1 contains material in the nature of advice and recommendations of an agency (that is, the Department), in the course of the deliberative processes involved in the functions of the Department and the Minister of the Department, I am satisfied the deliberative process exemption in section 47C applies to the document.
21. Document 2 represents the Department's assessment of Telstra's proposed base stations against the assessment criteria and document 3 represents the same document with respect to VHA's proposed base stations. Documents 2 and 3 were used as inputs into the Department's Draft Merit List (document 1). Documents 2 and 3 therefore fall within the scope of section 47C of the Act as they relate to advice or recommendations recorded in the course of the deliberative processes involved in the functions of the Department.
22. Whilst documents 1, 2 and 3 do contain some factual material, having reviewed the contents of the documents, I agree with the view in the Original Decision that the factual material is inextricably intertwined with the deliberative material, such that it is impracticable to separate the two without enabling a reader to infer the content of the deliberative material from the purely factual material.
23. For the reasons set out above I am satisfied that disclosure of documents 1, 2 and 3 would disclose deliberative matter in the nature of, or relating to, advice or recommendations that have been prepared in the course of, or for the purposes of, the deliberative processes involved in the functions of the Department as well as the

Minister. I therefore find documents 1, 2 and 3 are conditionally exempt under section 47C of the FOI Act.

Section 47G – Public interest conditional exemption - Business information

24. As discussed above in relation to the application of the exemption under section 45 of the FOI Act, parts of documents 1, 2 and 3 contain sensitive commercial information provided to the Department by VHA and Telstra, being the Third Party Information. The Third Party Information was designated as confidential information and the Department undertook not to disclose that information.
25. Telstra and VHA in their submissions in relation to the Original Decision raised concerns regarding the harm that could be caused by the potential release of the Third Party Information, including a concern that disclosure would adversely affect their commercial affairs.
26. I consider that the release of this confidential information could reasonably be expected to prejudice the future supply of commercially sensitive information of a substantially similar nature to the Commonwealth or government agencies under future funding programmes. In particular, it may dissuade mobile network operators, State governments and local councils from participating in future rounds of the Mobile Black Spots Programme.
27. In making this finding, I have had regard to submissions and evidence provided by VHA and Telstra in accordance with section 27 of the FOI Act. Details of the submissions made are set out in paragraphs 41 and 42 of the Original Decision. Having regard to Telstra's and VHA's submissions and the contents of the documents concerned, I am satisfied that documents 1, 2 and 3 contain material which is conditionally exempt under section 47G.

Public interest considerations for conditional exemptions under 47C and 47G

28. The Original Decision considered whether disclosure of the documents, to the extent the exemptions in sections 47C and 47G of the FOI Act apply, is in the public interest, as required under subsection 11A(5) of the FOI Act. This included a weighing of the public interest factors for and against disclosure.
29. I have considered the factors in favour of disclosure, as set out in subsection 11B(3) of the FOI Act. I have also considered the factors identified in paragraph 48 of the Original Decision, which I agree are relevant public interest factors in respect of disclosure of documents 1, 2 and 3.
30. I consider that the public interest factors against disclosure, in respect of disclosure of the documents conditionally exempt under sections 47C and 47G of the FOI Act, are appropriately described in paragraphs 50 and 51 of the Original Decision, respectively.
31. Having weighed up the public interest factors for and against disclosure, I consider that the public interest factors against disclosure are stronger than the factors favouring disclosure. In particular, there is a strong public interest in ensuring that:

- the successful completion of the Programme and any future round of the Mobile Black Spots Programme are not jeopardised; and
 - the Department's ability to obtain business and commercially valuable information from third parties in future is not jeopardised.
32. Additionally, I consider that a number of the public interest factors in favour of disclosure are diminished by the fact that the documents contain deliberative material.
33. In reaching my decision as to whether disclosure of documents 1, 2 and 3 is in the public interest, I have ensured that I have not taken into account the irrelevant factors set out under subsection 11B(4) of the FOI Act.
34. Given the above, I find that documents 1, 2 and 3 (or the relevant parts of those documents, where applicable) that are conditionally exempt under sections 47C and 47G of the Act are exempt under paragraph 31B(b) of the FOI Act because:
- the documents are conditionally exempt under Division 2 of the FOI Act; and
 - disclosure of the documents (or parts of the documents, where applicable), would, on balance, be contrary to the public interest for the purposes of subsection 11A(5) of the FOI Act.

REVIEW RIGHTS

35. This decision is subject to review under s 54M of the FOI Act by the Information Commissioner. The Office of the Australian Information Commissioner's *FOI Fact Sheet 12 – Your review rights* is attached for your information.



Angela Flannery
General Counsel
Office of the General Counsel

28 September 2015

ATTACHMENT A

FOI REQUEST NO. 29-1415

Mr Jackson Gothe-Snape of Right to Know

ACCESS DECISION

STATEMENT OF REASONS

1. I, Trudi Bean, Deputy General Counsel, Office of the General Counsel, Department of Communications (**Department**):
 - (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982* (the **FOI Act**) to make decisions about access to documents under the FOI Act, and
 - (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision,make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based and giving the reasons for my decision.

A. DECISION

2. The three documents covered by Mr Jackson Gothe-Snape of Right to Know (**Applicant's**) FOI request that are held by the Department, are listed in the Schedule attached to this Statement of Reasons at Attachment A.
3. In respect of Documents 1, 2, and 3, I hereby decide that:
 - (a) parts of each document are exempt from disclosure under sections 45 and 47 and those parts are not to be released under subsection 11A(4) of the FOI Act;
 - (b) the whole of each document is exempt from disclosure under paragraph 31B(b) of the FOI Act on the basis each document is conditionally exempt under section 47C of the FOI Act and it would be contrary to the public interest to release each of the three documents under subsection 11A(5) of the FOI Act; and
 - (c) parts of each document are exempt from disclosure under paragraph 31B(b) of the FOI Act on the basis they are conditionally exempt under sections 45 and 47G(1) and it would be contrary to the public interest to release those parts under subsection 11A(5) of the FOI Act.

B. FINDINGS ON MATERIAL QUESTIONS OF FACT

4. On 25 June 2015, the Department received a request from the Applicant under the FOI Act, requesting access to 'the Draft Merit List for the Mobile Black Spots Programme (Round 1) (the **Programme**) including the scores for each Proposed Base Station under the seven Criteria set out in the Guidelines'.
5. On 21 July 2015, the Department wrote to the Applicant advising that it was required to consult with third parties in relation to the release of certain documents falling within the scope of the Applicant's request, and that the statutory time frame for processing the request would therefore be extended by a further 30 days.
6. On 3 August 2015, in accordance with section 27 of the FOI Act, the Department notified Telstra Corporation Limited (**Telstra**) and Vodafone Hutchison Australia Pty Limited (**VHA**) of the FOI request and invited them to make submissions in relation to the FOI request as it pertained to their commercial and confidential information. On 12 August 2015, the Department received submissions from Telstra and VHA in relation to the FOI request.

C. MATERIAL ON WHICH MY FINDINGS OF FACT ARE BASED

7. I based my findings of fact on the following material:
- (a) the terms of the Applicant's FOI request dated 25 June 2015;
 - (b) content of the documents falling within the scope of the Applicant's FOI request;
 - (c) the Department's Mobile Black Spot Programme Guidelines (version 1.1) issued on 8 December 2014 (Programme Guidelines); and
 - (d) the submission of Telstra in relation to the documents to which the Applicant sought access dated 12 August 2015; and
 - (e) the submission of VHA in relation to the documents to which the Applicant sought access dated 12 August 2015.

D. REASONS FOR DECISION

8. In considering the application of the exemptions discussed below, I have had regard to the relevant provisions of the FOI Act and the following relevant guidelines:
- (a) the Freedom of Information Guidelines made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (the OAIC); and
 - (b) the Department's Guidelines for Processing Freedom of Information Requests.
9. Furthermore, where the Schedule of documents at Attachment A indicates an exemption claim has been applied to a document or part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document or part of the document are set out below.

E. SECTION 45 – DOCUMENTS CONTAINING MATERIAL OBTAINED IN CONFIDENCE

10. Section 45 of the FOI Act provides:

'(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.'

11. For an exemption under section 45 of the FOI Act to apply, the person who provided the confidential information must be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure. To found an action for breach of confidence, the following five criteria must be satisfied in relation to the information, it must:
- (a) be specifically identified;
 - (b) have the necessary quality of confidentiality;
 - (c) have been communicated and received on the basis of a mutual understanding of confidence;
 - (d) have been disclosed or threatened to be disclosed without authority; and
 - (e) any unauthorised disclosure of the information has or will cause detriment.

12. Parts of Documents 1, 2 and 3 which are within the scope of the FOI request contain information that was sourced from Telstra and VHA's respective funding application under the Mobile Black Spot Programme (the *Programme*). This information comprises:
- (a) total cost of base station;
 - (b) total cash co-contribution;
 - (c) funding applicant co-contribution;
 - (d) total cash co-contribution by third party, State/Territory government, local council;
 - (e) total in-kind monetised co-contribution by third party;
 - (f) third party details; and
 - (g) net cost. (*Third Party Information*)
13. The Third Party Information was provided to the Department by VHA and Telstra in each of those parties' funding applications and was designated by each party as commercially sensitive information (confidential information). Each funding applicant also provided confidentiality statements accompanying the provision of the information. Consistent with the section 12.6.1 of the Programme Guidelines, the Department undertook to treat any of the funding applicant's commercially sensitive information provided in the funding applicant's application as confidential information if the information was designated as such. To-date, the Department, in its dealings with Telstra and VHA, has treated the information as confidential. The parties, in their submissions to this FOI request, have stated that they consider that the Department owes obligations of confidence to them in respect of this information and disclosure would be a breach of these obligations.
14. The Department has consulted Telstra and VHA in relation to the potential disclosure of the above information contained in the documents. Telstra and VHA in their respective submissions have also advised that they are also under obligations of confidence to the State governments covering information about State government co-contributions. The publication of details of the co-contributions or information that would enable the co-contributions to be calculated may cause Telstra/VHA to breach its obligations with the State governments and could expose Telstra/VHA to an action for breach of confidence by the State governments.
15. I consider that each of the elements of a breach of confidence set out in the AIC's FOI Guidelines are satisfied in respect of the contents of this document which are not otherwise publicly available. The information contained within documents 1, 2 and 3 has always been treated as, and remains genuinely confidential. A large portion of the information was given to the Department by Telstra and VHA on a confidential basis, and accepted in confidence by the Department. Disclosure under the FOI Act would be unauthorised and for the reasons noted above, it also would cause detriment to both Telstra and VHA.
16. I find that specific parts of Documents 1, 2 and 3 containing the Third Party Information are partially exempt from disclosure under section 45 of the FOI Act, as their disclosure would be unauthorised and would found an action against the Department for breach of confidence, and also for the reasons noted above, would cause detriment to Telstra and VHA.

F. SECTION 47 – DOCUMENTS DISCLOSING TRADE SECRETS OR COMMERCIALLY VALUABLE INFORMATION

17. Section 47 of the FOI Act relevantly provides:

'(1) A document is an exempt document if its disclosure under this Act would disclose:..., (b) 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.

18. Under the FOI Act, information is commercially valuable if it is valuable for the purposes of carrying on a commercial activity and it is important or essential to the profitability or viability of a business operation, and another person such as a competitor would be prepared to pay to obtain that information.
19. For a document to be exempt under paragraph 47(1)(b), I must be satisfied that disclosure would, or could reasonably be expected to, destroy or diminish the commercial value of the information. In making this determination, I have considered the following factors:
- (a) the extent to which the information is known;
 - (b) whether the information gives a competitive advantage to the person against competitors;
 - (c) whether a genuine 'arms-length' buyer would pay to obtain the information;
 - (d) whether the information is still current or is out of date;
 - (e) the impact of disclosure of the information on the value of the business.
20. Documents 1, 2 and 3 contain material that would be considered to be commercially valuable information for the purposes of section 47 of the FOI Act. Specifically, data about the total cost of each base station and details of how much each funding applicant was willing to invest in a particular base station.
21. Telstra has, in its submission, asserted that the information is the product of a significant investment by it and is extremely confidential "know how" of Telstra. Even though VHA has not expressly stated this, with regard to the nature of the information and the submissions made by VHA in respect of the application of section 47G, I am able to infer that VHA would similarly argue that the information is important commercial "know how". Telstra assert that disclosure of this information to the public at large would cause a significant reduction in the commercial value of this information to Telstra.
22. In my view, the nature and extent of the information has commercial value to Telstra and VHA and I consider that disclosure of the information would significantly lessen its worth to Telstra and VHA respectively. Furthermore, release of the base station costing information contained in Documents 1, 2 and 3 would enable Telstra/VHA's competitors to estimate costs for particular base station designs, specifications and build at particular locations and potentially be used to estimate the funding applicant's overall network costs. The information is still current and is considered to be valuable information to Telstra and VHA.
23. I therefore find that parts of Documents 1, 2 and 3 which contain details of the total cost of each base station and details of how much each funding applicant was willing to invest in a particular base station are exempt under subsection 47(1)(b) of the FOI Act as they contain the commercially valuable information of Telstra/VHA, the value of which would be destroyed or diminished if released.

G. SECTION 47C – PUBLIC INTEREST CONDITIONAL EXEMPTION - DELIBERATIVE PROCESSES

24. Section 47C of the FOI Act is a conditional exemption provision, and relevantly provides:

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative 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:

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth...*

25. Subsection 47C(2) of the FOI Act provides an exception from the scope of subsection 47C(1), stating that deliberative matter under subsection 47C(1) of the FOI Act does not include operational information (as defined in section 8A) or purely factual material. Subsection 47C(3) excludes certain reports, such as scientific reports, from the scope of subsection 47C(1).

26. For the section 47C conditional exemption to apply in these circumstances, it must be shown that the document the subject of the FOI request would, if released under the FOI Act, disclose deliberative processes involved in the functions of, relevantly, the Department of Communications, as well as the Federal Communications Minister.

27. Paragraph 6.62 of the OAIC Guidelines explains that the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or course of action.

Document 1

28. The evaluation was conducted using a number of documents and Document 1 was created by the Department as part of its evaluation of the applications for funding for proposed base stations under the Programme. It was prepared during the detailed evaluation process, in accordance with the processes set out in the Programme Guidelines. Document 1 represents a list of all proposed base stations from the funding applicants that had progressed to the detailed evaluation stage, with the proposed base stations ranked in order from the base station with the highest score to the base station with the lowest score. This nature of the Draft Merit List and its purpose was reflected in the Programme Guidelines (sections 7.3.3, 7.3.4 and 7.3.16-18). It recorded the Department's advice and recommendations concerning the decision of whether to award funding under the Programme to each proposed base station; the latter being a decision made by the Minister. After considering the Department's and the Parliamentary Secretary's recommendations, the Minister selected the proposed base stations which were approved for funding.

29. Document 1 includes the seventh criterion relating to 'MP Priority Locations'. The scoring for this criterion was allocated during the Department's deliberative process. Also, in establishing the Draft Merit List, the Department exercised its own judgement in determining if any changes were required to the scoring to apply the equitable principles set out in sections 7.3.6 to 7.3.10 of the Programme Guidelines. These principles were designed to allow for an equitable distribution across Australia of base stations awarded funding under the Programme. The departmental officers undertaking the assessment formed a view about the application of the equitable principles to their formulation of the Draft Merit List and to consider what ranking gave effect to the Programme's objectives regarding improved coverage and competition.

Documents 2 and 3

30. Document 2 represents the Department's assessment of Telstra's proposed base station against the assessment criteria and the scoring against six of the seven assessment criteria and related data/information. It also records the advice and recommendations of technical advisors in respect of several of the technically-based criteria relating to new coverage and coverage benefits. Document 3 represents the same document in respect of VHA's proposed base stations.
31. Both Documents 2 and 3 were inputs into the Department's Draft merit List (Document 1) and reflected the Department's assessment of the applications for funding for the proposed base stations against six of the seven assessment criteria. These documents recorded the Department's thinking processes in this regard and formed a significantly large basis for its recommendations in respect of which of the proposed base stations should be awarded funding.
32. Based on my review and assessment of the content of these two documents, it is evident that they form part of a 'deliberative process', which involved the evaluation of material and considerations that had a direct bearing upon the Department's recommendations for the award of funding.

Further comments regarding Documents 1, 2 and 3 and section 47C

33. Documents 1, 2 and 3 are in a confidential form and provide information in the nature of advice, opinions, and recommendations for consideration by the Minister as part of his decision to award funding. The contents of these documents do not represent a conclusive position about which proposed base stations would be guaranteed funding, its final ranking or any amount of any funding offered. The Minister had absolute discretion to reject the Department's recommendations.
34. The Department provided the list to the Parliamentary Secretary to the Minister for Communications for review, as part of his responsibility for implementing the Programme, and then subsequently to the Minister in his capacity as the decision maker under the Programme. The Minister was still required to formulate his own views on the matter with regard to the Department's recommendations and any views of the Parliamentary Secretary.
35. All three documents form part of the Department's evaluation (in part informed by the assessment of third party technical expert on some of the criteria), and did not necessarily reflect the Minister's views.
36. Section 47(2) excludes from 'deliberative matter' operational information and purely factual material. Documents 1, 2 or 3 do not contain operational information within the meaning of s 8A of the FOI Act. Documents 1, 2 and 3 contain some purely factual material for the purpose of paragraph 47C(2) (eg names of the Applicants and geographical locations). However, in my view, it is not possible to separate such factual material from the deliberative material contained in each document, for example, by redacting the deliberative material. This is because much of the purely factual material is inextricably intertwined or in some cases, embedded, with the deliberative material, such that it is wholly impracticable to separate the two without enabling a reader to infer the content of the deliberative material from the purely factual material.
37. Given the content of Documents 1, 2 and 3 and the intended audiences, I am satisfied that disclosure of each of them would, for the purposes of s 47C(1) of the FOI Act, reveal deliberative processes involved in the functions of the Department, as well as the Minister and therefore these three documents in their entirety are conditionally exempt.

H. SECTION 47G – PUBLIC INTEREST CONDITIONAL EXEMPTION - BUSINESS INFORMATION

38. Section 47G (1) relevantly provides that a document may be conditionally exempt if it discloses information concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of the information:

'(a) would or could reasonably be expected to, unreasonably affect ... adversely ... that organisation or undertaking in respect of its lawful business, commercial or financial affairs;

could reasonably be expected to prejudice the future supply of information to the Commonwealth...or an agency for the purpose of the administration of ...matters administered by the agency'

39. Parts of Documents 1, 2 and 3 contain extensive information about the total cost of the proposed base stations and the Applicant's co-contribution, the names of third parties with whom a funding applicant had entered into commercial arrangements for co-contributions (the value of those co-contributions, cash and/or in kind) and the proposed location of the base station. This is the same material contained in Documents 1, 2 and 3 for which a section 45 exemption claim is made, as discussed below. The information sourced from Telstra and VHA's funding applications under the Programme was designated as confidential information and has not been made publicly available.
40. Telstra and VHA have raised significant concerns regarding the harm that could be caused by the potential release of the information in the documents, including the concern that disclosure would adversely affect their commercial affairs as the information to be released was provided by Telstra, VHA and third parties on the assumption that the costings would be kept confidential.
41. In respect of the Third Party Information pertaining to Telstra, I agree with the views presented in Telstra's submission, namely that the information (which Telstra has invested significant time and resources in preparing), if disclosed, would result in Telstra's lawful business, commercial or financial affairs being adversely affected in the following ways:
- (a) in respect of the cost of each proposed base station:
 - the information could be used to estimate Telstra's costs to build a mobile station, costs for builds in particular locations with particular specifications and could also be used to estimate Telstra's overall network costs;
 - if the information was accessed by Telstra's competitors, it may significantly prejudice Telstra's current negotiations with suppliers and subcontractors for the construction of the mobile base stations, diminish the competitive tension between suppliers and contractors;
 - Telstra's competitors could use this information in their own network design and rollout, which would cause Telstra to lose a significant competitive advantage in terms of its networks, and also in terms of future rounds of the Programme;
 - (b) in respect of Telstra's cash and in-kind contributions towards each particular base station and the location of each base station:
 - the information shows the commercial value Telstra attributes to a base station at each site, which is highly sensitive commercial information of Telstra;
 - Telstra's competitors could use this information in the rollout of their networks and in particular could use it to "cherry-pick" sites that Telstra identified as particularly valuable;

- Telstra's competitors may be able to reverse-engineer important confidential "know how" as to how Telstra calculates the commercial value of particular sites. This information would provide a strong advantage to Telstra's competitors in future rounds of the Programme; and
 - (c) details of Telstra valuing some sites more than others may also impact Telstra's relationships with State governments and local councils, many of whom are Telstra customers.
 - (d) in respect of Telstra's details of co-contributions from State governments and local councils for each base station (and the names of the third party co-contributors):
 - Telstra is in ongoing negotiations with State governments and local councils around the terms of funding agreements for the first round of the Programme; and
 - disclosure of the confidential co-contribution information will have a likely negative impact on the working relationship between Telstra and State governments/local councils. It is also likely to negatively affect Telstra's future projects including future rounds of the Programme; and impact Telstra's broader relationship with these State governments and local councils, many of whom are valued customers of Telstra.
42. In respect of the Third Party Information pertaining to VHA, I note and agree with VHA's submission that disclosure of the information would reasonably be expected to unreasonably affect VHA adversely in respect of its lawful business, commercial or business information in the following ways:
- (a) it would give VHA's competitors commercial insight into their costs for building base stations at various locations thereby enabling its competitors to submit a lower cost funding application in a future round of the Programme for the build of any site but not awarded funding, but which may be the subject of a future application and potentially cause detriment to VHA financially and in terms of its ongoing involvement in the Programme;
 - (b) adversely affect VHA's ability to negotiate any current or future inter-carrier roaming agreements, as knowledge of the build costs would assist them in pricing their roaming propositions and give them an unfair negotiation advantage;
 - (c) adversely affect VHA's ability to negotiate with other carriers in relation to any site sharing and site build arrangements or any network sharing arrangements;
 - (d) adversely affect VHA's existing and potential future relationships with co-contributors who have entered into arrangements with VHA for its funding on a confidential basis; and
 - (e) VHA's current and future negotiations with suppliers of goods and services necessary to build and operate base stations could be adversely prejudiced, and in addition, this could ultimately impact VHA's customers.
43. The information in question was provided in funding applications and the funding applicants made clear was provided on a strictly confidential basis, and if it were to be released, I am satisfied that release could reasonably be expected to prejudice the future supply of this commercially sensitive information to the Commonwealth or government agencies under future funding (or similar) programmes. It may also dissuade mobile network operators and State governments and local councils from participating in future rounds of the Programme altogether.
44. I therefore find that the release of specified commercial, business or financial information contained in Documents 1, 2 and 3:

- (a) would or could unreasonably affect each of them adversely in respect of their lawful business, commercial or financial affairs; and/ or
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth.

45. In making this finding, I have had regard to submissions and evidence provided by Telstra and VHA in accordance with section 27 of the FOI Act. I am therefore satisfied that Documents 1, 2 and 3 contain material which is conditionally exempt under section 47G(1) of the FOI Act.

I. APPLICATION OF THE PUBLIC INTEREST TEST

46. Subsection 11A(5) of the FOI Act requires that access to a conditionally exempt document must be given to a funding applicant unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. In these circumstances, the concept of public interest requires that I:
- (a) weigh the public interest factors for and against disclosure; and
 - (b) decide, on balance, whether disclosure is in the public interest.

Public interest considerations in favour of disclosure

47. In applying the public interest test, I have had regard to subsection 11B(3) of the FOI Act, which sets out factors favouring access in the public interest that apply to the conditional exemptions under sections 47C and 47G of the FOI Act. Such factors include whether access would:
- (a) promote the objects of the FOI Act;
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure; and
 - (d) allow a person to access his or her own personal information (not relevant in this instance).
48. I have identified the following additional public interest factors in favour of granting access to Document 1, 2 and 3, as they apply to the conditional exemptions under sections 47C and 47G(1) of the FOI Act:
- (a) increasing public scrutiny, discussion and review of actions and decision-making by the Department and the Minister;
 - (b) facilitating and promoting public access to information generally; and
 - (c) the benefit in making the public better informed, and promoting discussion of the activities of government agencies.

Public interest considerations against disclosure

49. Notwithstanding the public interest considerations in favour of disclosure that apply in relation to Documents 1, 2 and 3, it is important that the public interest be not inadvertently damaged through content of these documents being released without a proper assessment of the possible consequences. As such, it is important to consider public interest considerations against disclosure of Documents 1, 2 and 3.

Section 47C- Public interest facts against disclosure

50. Having regard to the nature of Document 1, 2 and 3, I have identified the following public interest factors against disclosure of those documents as they apply to the conditional exemption under section 47C of the FOI Act:

- (a) disclosure may damage the effective working relationship between the Department and the Minister and could be detrimental to the effective operations of the government in respect of the implementation of Round 2 of the Programme and similar funding programmes and also tendering activities;
- (b) disclosure may compromise the quality of decision-making by the Minister by increasing the propensity for the Department to provide verbal briefings instead of written, which can result in less well considered decision-making future;
- (c) it is important that the officers in the Department have the ability to consider options, suggestions and advice in respect of assessment of, and recommendation for, the award of funding, without having to their minds to the consequences of those things being made public;
- (d) release of preliminary material that may not reflect the final decision made by the Minister, has little public benefit as it only represents the advice of the Department;
- (e) disclosure of these documents, at a time when the Department is in negotiations with Telstra and VHA under Round 1 and the impending launch of a call for funding applications under Round 2 of Programme is more likely than not to reduce the quality and clarity value of future deliberations.
- (f) the release of business information and other commercially valuable information may deter organisations such as Telstra and VHA from providing such information to the Department in the future, which in turn would have an adverse impact on the Department's ability to effectively conduct its grant and tendering activities and/or negotiate outcomes with commercial parties.

Section 47G - Public interest facts against disclosure

51. Having regard to the nature and content of Documents 1, 2 and 3, I have identified the following public interest factors **against disclosure** of that document as they apply to the conditional exemption under section 47G(1) of the FOI Act:

- (a) disclosure of the commercial, financial and business information is likely to cause harm to the business interests of the third parties (Telstra and VHA), including their commercial interests and dealings, and negotiations with third parties for mobile network deployments, including negotiations with States and Territory governments in respect of funding applications under the next funding round of the Programme and potentially their suppliers;
- (b) disclosure may significantly prejudice the participation by Telstra, VHA and other carriers and third party contributors in future rounds of the Programme or similar funding programmes;
- (c) it is in the public interest to protect commercially sensitive or confidential information, which was provided to the Commonwealth by commercial parties on the basis that it would not be made publicly available; and
- (d) disclosure of the third party contributors details and the value of their contributions (cash or in-kind) will seriously jeopardise the ability for Telstra and VHA, the Commonwealth and the States to conclude the current negotiations for Round 1 funding under the Programme and would render the current negotiations difficult or frustrated with the risk that they are not concluded, resulting in some of the proposed base stations not proceeding – adversely affecting mobile communication coverage in the target locations and those communities;
- (e) if State governments or local councils become aware of details of Telstra's or VHA's funding arrangements with other State governments or local councils they may be reluctant to enter into future arrangements with those carriers under future funding rounds; and

- (f) disclosure of VHA's and Telstra's commercially sensitive and confidential information contained in the documents may have an adverse impact on the ability of the Department to obtain value for money outcomes in any negotiations with future funding application.

Irrelevant considerations in the application of public interest test

52. Under subsection 11B(4) of the FOI Act, I must not take into account the following irrelevant factors in applying the public interest test to the conditional exemptions under sections 47C and 47G(1)(a) in the case of this FOI request:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the Department; or
- (d) access to the document could result in confusion or unnecessary debate.

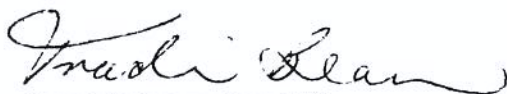
53. Accordingly, I have ensured that the irrelevant factors listed above have not been considered in reaching my decision in relation to the FOI request.

J. SECTION 22 – DELETION OF EXEMPT OR IRRELEVANT MATERIAL

54. Section 22 of the FOI Act provides that if the Department decides that granting access to a document would disclose information that would be exempt or reasonably be regarded as irrelevant to the request, then, where it is reasonably practicable to prepare a copy with deletions to exempt or irrelevant material, such a copy should be prepared. As Document 1, 2 and 3 in their entirety are exempt documents, section 22 is not applicable.

K. REVIEW RIGHTS

55. This decision is subject to review under section 54 or section 54L of the FOI Act. The Office of the Australian Information Commissioner's FOI Fact Sheet 12 – Your review rights is attached for information.



Trudi Bean
Deputy General Counsel
25 August 2015

Attachment B

Doc. No.	No. of Pages	Description of document
1.	10	Mobile Black Spot Programme Draft Merit List
2.	24	Draft Assessment worksheet (Assessment Criteria) for Telstra Corporation Limited's application
3.	5	Draft Assessment worksheet for (Assessment Criteria) Vodafone Hutchison Australia Limited's application