



**Statement of reasons made under the *Freedom of Information Act 1982***

Decision and reason for decision of Dr Stephen Arnott PSM, First Assistant Secretary, Arts

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**Applicant:** Mr Ron Andruff  
**Decision date:** March 2018  
**FOI reference number:** 30-1718  
**Documents:** Documents relating to auDA, Chris Disspain and Joshua Rowe

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## Summary

1. I have made a decision not to release any documents subject to your request.

## Authority to make this decision

2. I, Dr Stephen Arnott PSM, First Assistant Secretary, Arts, am an officer authorised by the Secretary of the Department of Communications and the Arts (the Department) to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982* (the FOI Act).

## Background

3. On 25 November 2018 you made a request for access to documents in the possession of the Department. Your request sought access to:

- “... 1. *All documents evidencing payments made by Chris Disspain and or auDA to Joshua Luke Rowe (Josh Rowe), Sanctum Internet Pty Ltd ACN 076 596 104 and Stephen John Moulton relating to the Proceeding or otherwise;*
2. *All documents issued to auDA, Chris Disspain, Joshua Luke Rowe (Josh Rowe), Sanctum Internet Pty Ltd ACN 076 596 104, Stephen John Moulton including from Maddocks Lawyers where auDA funds were used to pay for the defense or legal costs of Josh Rowe, Sanctum Internet Pty Ltd ACN 076 596 104 or Stephen John Moulton;*
3. *All documents evidencing any other secret (non-member approved) payments made by auDA or Chris Disspain to Josh Rowe or the other Respondents in the Proceeding;*
4. *All documents detailing any advice or investigation (including by ASIC) about whether the payments received by Josh Rowe were in contravention of the Corporations Act, or whether they amounted to offenses under the Commonwealth Criminal Code or other laws of the Commonwealth. ...”*

## Charges for providing access

4. On 11 December 2017 the Department provided you with an estimate of a charge in the amount of \$124.92.
5. On 11 January 2018 you agreed to pay the charge and paid a deposit of \$31.25.
6. As no documents will be provided to you in relation to your request, I have decided to waive the remaining charges associated with the processing of your request.

## Documents subject to this request

7. The Department has undertaken a search of its records and has identified two documents that fall within the scope of your request. Documents are listed in the schedule of documents at Schedule 1.
8. During the processing of your request we consulted third parties potentially affected by the release of the documents.

## Decision

9. I have made a decision to refuse access to the documents relevant to your request. The documents that I have chosen to refuse access to are set out in Schedule 1, together with applicable exemption provisions.
10. During the processing of your request we consulted third parties potentially affected by the release of the documents. Those third parties will be notified of my decision.

## Reasons for decision

11. In accordance with section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to refuse access to the documents follow.
12. I have taken the following material into account in making my decision:
  - the content of the documents that fall within the scope of your request;
  - sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth.
  - the following provisions of the FOI Act relevant to my decision:
    - section 11B public interest exemption – factors
    - section 42 legal professional privilege
    - section 47G business (other than documents to which s47 applies)
  - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines); and
  - the views of third parties consulted by the Department under section 27 and 27A.
13. A full extract of all FOI Act provisions used to make my decision are provided in Schedule 2.

## Statement of reasons

14. I have decided to refuse access to documents within the scope of your request in accordance with the following exemptions in the FOI Act:

### ***Documents subject to legal professional privilege (section 42)***

15. Section 42 of the FOI Act relevantly provides:
  - (1) *A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
  - (2) *A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.*
16. Legal professional privilege (LPP) protects confidential communications between a lawyer and a client from compulsory production.
17. The Australian Information Commissioner Guidelines explain that, at common law, determining whether a communication is privileged requires a consideration of the following:
  - whether there is a legal adviser-client relationship

- whether the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation legal advice or for use in connection with actual or anticipated litigation
  - whether the advice given is independent
  - whether the advice given is confidential.<sup>1</sup>
18. During the processing of your request the Department consulted with a number of parties to which these documents relate. These third parties confirmed that the relationship between them is a legal adviser-client relationship in relation to this matter, the communications were for the purpose of giving or receiving legal advice, the advice given is independent and the advice given is confidential.
19. Accordingly, I have decided that document 1 meets the criteria for exemption and are exempt in full in accordance with section 42(1) of the FOI Act.

### **Conditional Exemptions**

20. Where a document is assessed as conditionally exempt, the agency or minister must give access to it unless in the circumstances access would, on balance, be contrary to the public interest (section 11A(5)). The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

### ***Business affairs (section 47G)***

21. A document is conditionally exempt if it discloses information (business 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, where the disclosure of the information:
- Would, or could reasonably be expected to, unreasonably affect... that organisation or undertaking in respect of its lawful business, commercial or financial affairs (s47G(1)(a)), or
  - Could reasonably be expected to prejudice the future supply of information to the Commonwealth... for the purpose of the administration of a law of the Commonwealth... of matters administered by an agency (s47G(1)(b)).<sup>2</sup>
22. Document 2 contains auDA board meeting documents. This information is not publicly known. If disclosed, this information would reveal internal business operations of auDA. I consider the release of this information could reasonably be expected to harm the business interests of auDA.
23. During the processing of your request the Department consulted with auDA on the release of the documents. During this consultation the affected third party indicated it would be hesitant to provide information to the Department in future, if these documents were to be disclosed. The Department relies upon information provided by stakeholders in order to undertake its regulatory functions, including administration of law and other matters administered by the Department. As such, I consider that if this information were disclosed it could reasonably be expected to prejudice the future supply of such information to the Department. The Department does not have a legally enforceable right to access this information, however, it relies on the provision of this information in undertaking its regulatory and management functions.

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982 (2010)*, [5.129].

<sup>2</sup> *Guidelines*, [6.197]

24. Accordingly, I have decided that document 2 meets the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5).

*Application of the public interest test:*

25. Section 11A(5) provides that an agency must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document would, on balance, be contrary to the public interest.
26. In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:
- (a) disclosure would promote the objects of the FOI Act;
  - (b) disclosure would inform debate on a matter of public importance;
  - (c) disclosure would promote effective oversight of public expenditure; and
  - (d) disclosure would allow a person to access his or her personal information.
27. I agree that disclosure would promote the objects of the FOI Act.
28. I do not consider that disclosure would inform debate on a matter of public importance, nor would it provide effective oversight of public expenditure. Further, the information does not relate to the applicant. These public interest considerations are therefore irrelevant in this circumstance.
29. I also considered the following factors which do not favour disclosure:
- (a) disclosure would, or could reasonably be expected to, unreasonably affect auDA adversely in respect of its lawful business, commercial or financial affairs;
  - (b) disclosure could reasonably be expected to prejudice the future supply of information to the Department for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by the Department.
  - (c) disclosure could reasonably be expected to prejudice the Department's ability to obtain similar information in the future;
  - (e) disclosure could reasonably be expected to prejudice the management function of the Department.
30. As set out in section 11B(4) of the FOI Act, the following factors must not be taken into account in deciding whether access to the document would on balance, be contrary to the public interest:
- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
  - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
  - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (c) the author of the documents was (or is) of high seniority in the agency to which the request for access to the document was made; or
  - (d) access to the document could result in confusion or unnecessary debate.
31. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

32. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

### **Your rights of review**

33. If you disagree with your FOI decision, you can ask for the decision to be reviewed. There are two ways you can ask for review of a decision: internal review by the Department, and external review by the Office of the Australian Information Commissioner (OAIC).

#### ***Internal Review***

34. You can ask the Department to review its decision in relation to access to documents. There is no charge for internal review. You must apply within 30 days of being notified of the decision, unless the Department extends the application time. You should contact the Department if you wish to seek an extension. The Department must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed. The review will be carried out by a different departmental officer, usually someone at a more senior level. You must apply in writing and you can lodge your application in one of the following ways:

**Post:** FOI Coordinator  
Department of Communication and the Arts  
GPO Box 2154, Canberra ACT 2601  
**Email:** <FOI@communications.gov.au>

#### ***Information Commissioner Review***

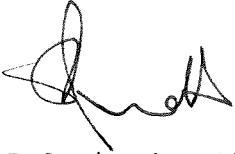
35. The OAIC is an independent office that can review the decisions of agencies and ministers under the FOI Act and investigates complaints about agency actions.
36. You can ask the OAIC to review the Department's decision. You do not need to seek an internal review from the Department before seeking a review from the OAIC. However, going through the Department's internal review process gives us the opportunity to reconsider the initial decision and your needs may be met more quickly without undergoing an external review process.
37. The OAIC's review is free. You must apply to the OAIC within 60 days of being given notice of the decision. You can ask the OAIC for an extension of time to apply, and this may be granted if it considers it is reasonable in the circumstances.
38. You must apply in writing and you can lodge your application in one of the following ways:

**Online:** <[www.oaic.gov.au](http://www.oaic.gov.au)>  
**Post:** Office of the Australian Information Commissioner  
GPO Box 5218, Sydney NSW 2001  
**Facsimile:** (02) 9284 9666  
**Email:** <[enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)>  
**In person:** Level 3, 175 Pitt Street, Sydney, NSW 2000

More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAIC: <[www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights](http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights)>.

## Contacts

39. If you wish to discuss this decision, please contact the Department's FOI coordinator on (02) 6271 1652 or via email at [FOI@communications.gov.au](mailto:FOI@communications.gov.au).



Dr Stephen Arnott PSM  
First Assistant Secretary  
Arts

| March 2018



**Australian Government**

**Department of Communications and the Arts**

FOI  
Schedule 1

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### Schedule of documents

**Applicant:** Mr Ron Andruff

**Decision date:** March 2018

**FOI reference number:** 30-1718

**Documents:** Documents relating to auDA, Chris Disspain and Joshua Rowe

Document reference	Document description	Decision	Exemption provision
Doc 1	Legal advice	Exempt in full	Section 42 – Legal Professional Privilege
Doc 2	Board meeting documents	Exempt in full	Section 47G – Business Affairs





## Schedule of relevant provisions in the FOI Act

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### 3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
  - (a) requiring agencies to publish the information; and
  - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
  - (a) increasing public participation in Government processes, with a view to promoting better informed decision-making;
  - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

### 11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
  - (a) a document of an agency, other than an exempt document; or
  - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
  - (a) any reasons the person gives for seeking access; or
  - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

### 11A Access to documents on request

#### *Scope*

- (1) This section applies if:
  - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);

- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

#### *Mandatory access—general rule*

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

#### *Exemptions and conditional exemptions*

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
  - (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

### **11B Public interest exemptions—factors**

#### *Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

#### *Factors favouring access*

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
  - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

#### *Irrelevant factors*

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
  - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;

- (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 agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

*Guidelines*

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

**22 Access to edited copies with exempt or irrelevant matter deleted**

*Scope*

- (1) This section applies if:
  - (a) an agency or Minister decides:
    - (i) to refuse to give access to an exempt document; or
    - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
  - (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
    - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
    - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
  - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
    - (i) the nature and extent of the modification; and
    - (ii) the resources available to modify the document; and
  - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

*Access to edited copy*

- (2) The agency or Minister must:
  - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
  - (b) give the applicant access to the edited copy.

*Notice to applicant*

- (3) The agency or Minister must give the applicant notice in writing:
  - (a) that the edited copy has been prepared; and
  - (b) of the grounds for the deletions; and
  - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

**23 Decisions to be made by authorised persons**

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

## **26 Reasons and other particulars of decisions to be given**

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
  - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
  - (c) give to the applicant appropriate information concerning:
    - (i) his or her rights with respect to review of the decision;
    - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
    - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.  
(see section 11A).

## **42 Documents subject to legal professional privilege**

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
- (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
  - (b) the information is operational information of an agency.

## **Public interest conditional exemptions**

### **47G Public interest conditional exemptions—business**

- (1) A document is conditionally exempt if its disclosure under this Act 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, in a case in which the disclosure of the information:

- (a) 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; or
  - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island 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.
- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.
- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
  - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
  - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
  - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

