



Australian Government
Department of Communications

FREEDOM OF INFORMATION REQUEST NO. 42-1314

Mr Robert Candelori

**ACCESS DECISION
STATEMENT OF REASONS**

I, Elizabeth Lawler, Manager FOI, Legal Division of the Department of Communications (**the 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

1. The documents covered by the applicant's request that are held by the Department are listed in a Schedule of documents attached to this Statement of Reasons at **Attachment A**.
2. I hereby decide that:
 - parts of document 1 are irrelevant to the request and are to be released with the irrelevant parts deleted under section 22 of the FOI Act;
 - document 2 is to be released in full;
 - parts of document 3 are exempt under sections 47C and 47F of the FOI Act and parts of the document are irrelevant to the request under section 22 of the FOI Act; and
 - parts of document 4 are exempt under section 47G of the FOI Act and parts of the document are irrelevant to the request under section 22 of the FOI Act.

B. BACKGROUND

3. On 19 March 2014, the Department received a request from Robert Candelori (**the applicant**) via the Right To Know website under section 15 of the FOI Act, requesting access to the following documents:

“Could the department please supply any and all communications, plans, file notes, memos, or roadmaps pertaining to a transition to DVB-T2 and MPEG-4 broadcasts so as to allow broadcasters to more efficiently use their available spectrum by way of more content and higher quality transmissions.”

4. On 25 March 2014, the Department emailed the applicant seeking telephone contact to discuss the scope of the request.
5. On 27 March 2014, the applicant replied by email advising that he preferred to only liaise via email and asked that the Department submit a list of concerns, via email.
6. On 1 April 2014, the Department wrote to the applicant, by email, advising that the scope of the request would be unmanageable and represent an unreasonable diversion of resources. The applicant was advised that the processing timeframe under the FOI Act would not commence until the scope of the request was revised.
7. On 10 April 2014, the applicant revised the scope of the request and advised:

“I would like to confine my request to any and all substantial documents relating to a discussion of a pathway to DVB-T2 and MPEG-4 between 8 September 2013 and 10 April 2014, including but not limited to ministerial briefing papers and correspondence between the Department of Communications and the [Australian Communications and Media Authority (ACMA)].

8. On 15 May 2014, the Department wrote to the applicant advising that the FOI processing time would be extended due to the third party consultation required.
9. On 15 May 2014, in accordance with sections 27 and 27A of the FOI Act, the Department wrote to Australian Industry Group (**AIG**) seeking AIG’s view on the release of certain documents relating to AIG’s business activities and personal information of AIG staff members. On 3 June 2014, the Department again wrote to AIG seeking views on the release of information contained in the documents. The AIG did not respond to the Department.

C. FINDINGS ON MATERIAL QUESTIONS OF FACT

10. MPEG-4 and DVB-T2 technologies have been available for several years. For example, these technologies were discussed in the ACMA public discussion paper “Beyond switchover – the future of technical evolution of digital terrestrial television in Australia – Discussion Paper” that is available on the ACMA’s website.
11. On 17 June 2013, representatives of the Department met with representatives of the AIG to discuss, relevantly, broadcasting technologies. I find that parts of a meeting

file note and a PowerPoint presentation relate to MPEG-4 broadcasting technology (documents 1 and 2).

12. On 22 December 2013, the Department lodged a Ministerial Submission with the Minister for Communications (**the Minister**) relating to regulation of digital television. I find that parts of the Submission relate to MPEG-4 broadcasting technology (document 3).
13. The Department subsequently prepared further background information on emerging broadcasting technologies for the Minister. I find that parts of the document relate to MPEG-4 and DVB-T2 broadcasting technologies (document 4).

D. MATERIAL ON WHICH MY FINDINGS OF FACT ARE BASED

14. I based my findings of fact on the following material:

- the applicant's FOI request (as revised);
- the content of the documents falling within the scope of the applicant's request (as revised);
- 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 (**the OAIC**); and
- the Department's *Guidelines for Processing Freedom of Information Requests*.

E. REASONS FOR DECISION

15. 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.
16. Documents 1, 3 and 4 cover a range of issues associated with digital television, including discussion of the broadcast technologies covered by this request. Matters discussed that do not relate to MPEG-4 and DVB-T2 are considered to be out of scope of this request and therefore irrelevant to the processing of the request.
17. In making my decision, I have had regard to section 22 of the FOI Act in order to determine whether a copy of the document, modified by deletions, may be prepared and access given to that modified copy.

Section 47C – Public interest conditional exemption - Deliberative processes

18. 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 an agency or Minister or of the Government of the Commonwealth.'

Conditionally exempt material

19. Pursuant to subsection 47C(1) of the FOI Act, I must determine whether any of the documents contain material that would, if released under the FOI Act, disclose the deliberative processes of an agency, a Minister or the Government.
20. Document 3 is a Ministerial Submission to the Minister on the regulation of digital television. Parts of the document contain deliberative material.
21. I find that document 3 contains material that is conditionally exempt under section 47C of the FOI Act. Parts of the document canvass deliberative thinking of policy matters for the Minister and the Department for the regulation of the broadcasting industry.

Section 47F – Public interest conditional exemption – Personal Privacy

22. Section 47F of the FOI Act relevantly provides:

'(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

(2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

- (a) the extent to which the information is well known;*
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- (c) the availability of the information from publicly accessible sources;*
- (d) any other matter that the agency or Minister considers relevant.'*

23. 'Personal information' is defined under section 4 of the FOI Act as follows:

'...information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'

24. Document 3 contains information about an individual (i.e. a natural person) which is not well known and would enable direct access to the individual if the information, the mobile telephone number, were disclosed. This information is 'personal information' for the purposes of subsection 47F(1) of the FOI Act, and is not publicly available..

Conditionally exempt material

25. In determining whether disclosure of the above information would involve the unreasonable disclosure of personal information, I have considered the following matters, consistent with subsection 47F(2) of the FOI Act:
- the information contained in the documents is not widely known or publicly available;
 - in the case of mobile telephone numbers, release would enable the relevant individual to be contacted outside business hours, which would be an unreasonable intrusion on their private life; and
 - disclosure would not shed light on the workings of government.
26. I have determined that document 3 contains personal information, namely a mobile telephone number of a departmental officer, which is not publicly available. In contrast, I consider the disclosure of the officer's name and business telephone number not to be an unreasonable disclosure of personal information.
27. The fact that release of the document would be an unreasonable disclosure of personal information is further supported by the fact that information released under FOI is not subject to any confidentiality conditions. Disclosure of information under FOI is effectively disclosure to the world at large.
28. I therefore find that the abovementioned document contains material which is conditionally exempt under section 47F of the FOI Act.
29. In relation to personal information that I have found to be conditionally exempt under section 47F of the FOI Act, such information is not material to understanding the subject matter contained in the documents. Withholding the personal information would not diminish the ability to understand the documents, or detract from the ability of those documents to promote the objects of the FOI Act. In the circumstances, the protection of privacy of the individuals concerned as a factor against disclosure should be given considerable weight.

Section 47G – Public interest conditional exemption - Business information

30. Section 47G 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 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.'*

31. As noted above, document 4 is a background paper on emerging broadcasting technologies. Parts of the document contain business information relating to third party organisations, including commercially sensitive information of participants in the broadcasting industry. I am satisfied that there is a level of specificity in the document which is both commercially sensitive; and not in the public domain.

Conditionally exempt material

32. I find that disclosure of parts of the document could reasonably be expected to unreasonably affect the third parties' lawful business affairs.

33. I am satisfied that for the purposes of paragraph 47G(1)(b) of the FOI Act:

- the information is 'business information', as it relates to the third party organisations' commercial operations;
- the information is in respect of specific companies in the broadcasting sector;
- the information is not routine or administrative – it is specific commercial proposals for broadcasting technologies.

34. In making this finding, I have had regard to the circumstances in which the information was provided to the Department.

35. I am satisfied that the abovementioned documents contain material that is conditionally exempt under section 47G of the FOI Act.

Application of the public interest test

Public interest considerations

36. Subsection 11A(5) of the FOI Act requires that access to a conditionally exempt document must be given to the 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:

- weigh the public interest factors for and against disclosure; and
- decide, on balance, whether disclosure is in the public interest.

Public interest considerations in favour of disclosure

37. In applying the public interest test, I am required to have regard to subsection 11B(3) of the FOI Act, which sets out factors favouring access in the public interest, including where access would:
- promote the objects of the FOI Act;
 - inform debate on a matter of public importance;
 - promote effective oversight of public expenditure; and
 - allow a person to access his or her own personal information (not relevant in this instance).
38. I have identified the following additional public interest factors in favour of granting access to documents 1, 3 and 4:
- the benefit in making the public better informed, promoting discussion of public affairs and informing debate on a matter of public importance;
 - informing the public in relation to technological developments in the broadcasting industry, being a matter of general public interest;
 - the extent to which disclosure would prejudice the protection of an individual's right to privacy;
 - facilitating and promoting public access to government held information generally.

Public interest considerations against disclosure

39. Notwithstanding the public interest considerations in favour of disclosure that may apply in relation to a document, it is important that the public interest is not inadvertently damaged because of information or 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.
40. Having regard to the nature of the documents, I have identified the following public interest factors against disclosure of documents 1, 3 and 4:
- disclosing the personal information of the individual in document 3 would prejudice the protection of an individual's right to privacy, is likely to cause harm or stress to the person concerned; and there is a public interest in the appropriate protection of personal information of Departmental officers;

- comparable contact information (during business hours) to the mobile telephone numbers of the departmental officer is available in other parts of document 3;
- document 4 contains information the disclosure of which would adversely affect the business, commercial or financial affairs of third party organisations;
- disclosure of the information in document 4 may prejudice the companies in relation to their respective competitors.

Balancing public interest considerations

41. Some of the factors in favour of disclosure that are set out above apply to documents and information generally. That is not to take away from their strength or relevance, as the information access regime established by the FOI Act recognises the strong public interest in public access to government-held information.
42. Bearing in mind the nature of the documents in question, I consider that the public interest factors in favour of disclosure are weak.
43. By contrast, I consider that the public interest factors against disclosure of the conditionally exempt material are stronger.
44. Having considered the relative strengths of the public interest factors for and against disclosure, I am therefore of the view that, on balance, the public interest factors against disclosing the deliberative material, personal information and commercially sensitive information outweigh those in favour of disclosure.

Disclosure would be contrary to the public interest (subsection 11A(5))

45. I therefore find that:

- parts of document 3 are conditionally exempt under sections 47C and 47F of the FOI Act; and
- parts of document 4 are conditionally exempt under section 47G of the FOI Act;

and that for the purposes of subsection 11A(5), it would be contrary to the public interest to release those documents. Accordingly, I have decided to redact all references to conditionally exempt information, in accordance with section 22 of the FOI Act.

Section 22 – Deletion of Exempt or Irrelevant Material

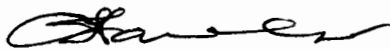
46. Section 22 of the FOI Act provides that if the Department decides that granting access to a document would disclose information that would be exempt or reasonably be regarded as irrelevant to the request, then, where it is reasonably

practicable to prepare a copy with deletions to exempt or irrelevant material, such a copy should be provided.

47. In deciding whether the documents contain information that could reasonably be regarded as irrelevant to the applicant's FOI request, I have considered the Department's general policy that where personal details of non-SES staff are not necessary to understand the context or subject matter of a document, those details will be considered irrelevant. I find that document 3 contains details of a non-SES staff member of the Department that are regarded as irrelevant to the FOI request.
48. I find that documents 1, 3 and 4 contain irrelevant information that falls outside the scope of the request.
49. For the reasons discussed above, I have also found that the following documents contain some material which is exempt under the FOI Act:
 - Document 3 contains material which is exempt under sections 47C and 47F of the FOI Act; and
 - Document 4 contains material which is exempt under section 47G of the FOI Act.
50. I have decided to apply section 22 of the FOI Act to delete irrelevant or exempt material in respect of the above documents, in order to facilitate the release of the remainder of those documents, as set out in the Schedule of documents at **Attachment A**.

F. REVIEW RIGHTS

51. This decision is subject to review under section 54 and/or 54L of the FOI Act. The OAIC's FOI Fact Sheet 12 – Your review rights is attached for information.



Elizabeth Lawler
Manager, FOI
Legal Division

25 June 2014