



13 August 2020

JS

By email: [foi+request-6168-973e1c57@righttoknow.org.au](mailto:foi+request-6168-973e1c57@righttoknow.org.au)

Dear JS

### Freedom of Information – Internal Review Decision

I refer to your email dated 9 June 2020 in which you sought an internal review of the decision issued on 17 April 2020 (**FOI decision**). Access to five documents described in the FOI decision were provided to you on 18 May 2020.

The FOI decision relates to a request from you dated 17 February 2020 to the Australian Building and Construction Commission (**ABCC**) in which you sought access to documents under the *Freedom of Information Act 1982* (**FOI Act**).

The access was sought in the following terms:

*‘Under FOI I seek access to the document (or documents) that contains the detail of the arrangement(s) between the ABCC and the promoter of the IBenefit program. I also seek access to the document (or documents) that contains the detail of the significant savings, convenience and preferential treatment through around 400 providers and additional dining offers that employees of the ABCC obtain through membership of the IBenefit program.’*

(FOI request)

On 12 June 2020, the ABCC notified you that your request for internal review was outside the statutory time limit set out in section 54B of the FOI Act and invited you to outline the basis on which you believed the ABCC should exercise its discretion to allow a further period for making an application for internal review. You responded to the ABCC on 19 June 2020.

To assist with the ABCC’s assessment as to whether it should exercise its discretion to extend the time to apply for internal review, another search for relevant documents was conducted. As a result of this search, a further 33 documents that were not located during the preparation of the FOI decision were identified as falling within the scope of the FOI request (in addition to the 5 documents originally located).

Accordingly, on 14 July 2020, you were notified that the ABCC had decided to exercise its discretion to allow a further period for making an application for internal review, and that it would treat your existing request for internal review as being made on 14 July 2020.

This internal review decision should be read in conjunction with the FOI decision.

The effect of your request for an internal review is that the ABCC is required to re-consider the FOI decision generally.

## **FOI internal review**

I am authorised to make a decision under the FOI Act.

## **Internal review decision**

### Material considered

In reaching my decision, I have had regard to:

- your FOI request;
- the ABCC's FOI decision dated 17 April 2020;
- the documents relevant to the FOI request (being the 5 documents which were the subject of the FOI decision and an additional 33 documents that have been located: a total of 38 documents listed in Attachment A);
- relevant provisions of the FOI Act;
- consultations with affected third parties; and
- the relevant guidelines issued by the Office of the Australian Information Commissioner (**OAIC**).

I have considered each of the 38 documents set out in Attachment A of the FOI decision. Based on my review of the material, I have formed the view that all of these documents relevantly fall within the scope of your FOI request.

### Internal review decision

I have considered all 38 documents within the scope of the request (which includes the 5 documents that were subject to the original decision).

In relation to the 5 documents the subject of the FOI decision, I have reviewed the content of the documents and the exemptions applied by the original decision-maker. I have also reviewed the contentions made by affected third parties in relation to those documents. For the reasons below, I consider the original decision was correct in its application. In undertaking my review, I have come to the same decision for Documents 1 to 5 and I affirm the decision made by the original decision maker on 17 April 2020.

In relation to the additional 33 documents, my decision is as follows:

- I consider that 2 documents listed in Attachment A should be released in full.
- I consider that 31 documents listed in Attachment A contain information which is exempt and/or conditionally exempt in part under the FOI Act.
- Most of the documents are exempt in part under section 47F (personal privacy), and two documents (Documents 5 and 6) are exempt in part under section 47G(1) (business affairs) of the FOI Act.
- I am satisfied that some of the documents contain information that is irrelevant

to the terms of the FOI Request. These documents are Documents 3, 14, 20, 22, 28 and 29. Accordingly, I have decided to give access to all documents in edited form pursuant to section 22 of the FOI Act with exempt and/or irrelevant information deleted.

- I am also satisfied that (a) it is both possible and reasonably practicable to prepare edited copies of the requested documents; and (b) it is not apparent that you would decline access to the edited copies of the requested documents.

#### Section 22: irrelevant information

Section 22 of the FOI Act allows irrelevant information to be deleted from the edited copies of requested documents prepared to provide access to the remaining (disclosable) information to an applicant.

Upon examining the documents, I have identified user statistics and related information in Documents 3, 14, 20, 22, 28 and 29 which I consider are irrelevant to the scope of the FOI Request. Accordingly, this information has been deleted from the edited copy of these documents.

The remainder of the content in these documents (relating to the savings received by ABCC employees through the iBenefit program) has been considered for release as it is relevant to the FOI Request.

#### Exemption – Section 47F: personal privacy

Section 47F of the FOI Act conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person. Personal information includes any information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not.

Upon examining the documents, I am satisfied the documents contain personal information about individuals, including current employees of the ABCC, as well as third parties. The personal information comprises of names, contact details and signatures.

Personal information will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known;
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- the availability of the information from publicly accessible sources;
- any other matter I consider relevant.

The personal information relating to the third parties and ABCC staff is not well known. The individuals concerned are not generally known to be associated with the matters discussed in the documents.

In relation to ABCC employees, the FOI Guidelines set out that details of public servant's names should ordinarily be released unless there are 'special circumstances' for them to be exempted. I am aware that threats and statements have been made against ABCC employees by building industry participants. In this context I find that special circumstances do exist in relation to the personal information of the ABCC employees akin to a FOI review decision.<sup>1</sup> As with any FOI request, there are no restrictions to the use or dissemination of such material once provided to an applicant. The ABCC takes the safety of its employees very seriously, and I find it would be unreasonable to disclose their personal information.

In relation to third parties, I consider that disclosure of the personal information of third parties without restriction would expose those individuals to an inappropriate interference with their privacy. When forming this view, I have taken into account the consultation responses received from third parties and any harm that may be caused if personal information was released.

I consider that the disclosure of the personal information within the documents would be an unreasonable disclosure of personal information about the relevant individuals. Accordingly, I find that each of the documents is conditionally exempt under section 47F of the FOI Act. Nonetheless, I must give access to the documents unless, in the circumstances, access would on balance be contrary to the public interest (considered below).

#### Exemption – Section 47G(1)(a): business affairs

Section 47G of the FOI Act permits conditional exemption of documents that, relevantly, contain 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 disclosure of the information: would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs (s 47G(1)(a)).

I find that documents 5 and 6 contain information concerning the business affairs of a commercial entity, specifically, the annual program fee. The information is not publically known and is of a sensitive commercial nature. Disclosure of this information would show potential competitors the iBenefit provider's pricing over a series of agreements, who may potentially use this information in their own offers and negotiations in the future. This may cause detriment to the organisation's commercial affairs by having an adverse impact on its future competitiveness.

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<sup>1</sup> See *Construction, Forestry, Mining and Energy Union and Australian Building and Construction Commission (Freedom of information)* [2017] AICmr 125 at [97]-[107].

I consider that this would, or could reasonably be expected to, unreasonably affect the organisation in respect of its lawful business/commercial affairs. Accordingly, I have decided that this information in documents 5 and 6 is conditionally exempt under section 47G of the FOI Act. Nonetheless, I must give access to the document unless, in the circumstances, access at this time would on balance be contrary to the public interest.

#### Public interest: Sections 47F & 47G

I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest. I acknowledge that there is a public interest in documents of the ABCC being made available to the public for the purpose of encouraging public debate and to promote oversight of its activities. However, I do not consider that disclosure of the conditionally exempt information would inform debate on a matter of public importance or promote effective oversight of public expenditure.

In relation to personal information (section 47F), I consider that disclosure of the names and contact details of the individuals would not shed any light on the workings of the ABCC or enhance public accountability or transparency. I am satisfied that disclosure of the information of both ABCC employees and third parties would unreasonably interfere with the privacy of the individuals concerned. In relation to the personal information of ABCC employees, I consider that disclosure would prejudice the management function of the ABCC because agency employees would not expect their personal information to be made publicly available.

Taking into account the above matters, on balance, I find that disclosure of the information in the documents is contrary to the public interest. Accordingly, I have decided that the documents are exempt under section 47F of the FOI Act.

In relation to business/commercial affairs of an organisation conditionally exempt under section 47G (documents 5 and 6), I do not consider that access to this information would inform debate on a matter of public importance. In circumstances where the value of each contract is already publicly available on the AusTender website, the additional disclosure of billing information would promote the effective oversight of public expenditure in only a limited way. Additionally, I consider that disclosure of this information could reasonably be expected to prejudice the competitive commercial activities of a third party organisation – which is a factor weighing against disclosure.

I find that, in the circumstances, on balance, disclosure of the conditionally exempt information in the documents would be contrary to the public interest and the information is accordingly exempt from disclosure under sections 47F and 47G of under the FOI Act.

#### No charges

I confirm that there are no charges for this FOI request.

### Third party review rights and release of documents

Sections 27(7) and 27A(6) of the FOI Act require that access must not be given to documents until the review rights of individuals and businesses concerned have been run out.

As I have set out above, I consulted relevant third parties on the release of their information and they made contentions in support of the application of exemptions. As such, documents over which third parties have made exemption contentions cannot be released until 30 days after the date of my decision, unless a third party exercises its review rights. You will be notified if this occurs.

Once the review rights have run out, we will provide the documents within the scope of the request.

### Review by the OAIC

If you are dissatisfied with this internal review decision, you may apply to the Office of the Australian Information Commissioner (**OAIC**) for a review of my decision.

An application for a review must by the OAIC must be made in writing and within 60 days of the date of this decision. More details are accessible from the OAIC's website: [www.oaic.gov.au](http://www.oaic.gov.au)

If you have any questions about this matter, please contact the **ABCC's FOI Section** at either of the following contact addresses:

By post: GPO Box 9927 MELBOURNE VIC 3001 Australia  
By email: [foi@abcc.gov.au](mailto:foi@abcc.gov.au)

Yours sincerely

Franz Baldo  
**Australian Building and Construction Commission**

## ATTACHMENT A – SCHEDULE OF DOCUMENTS

Reference	Date	Description	Review decision
<b>FOI decision – 5 documents</b>			
Document 1	25/11/2019	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 2	9/10/2019	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 3	8/7/2019	Annual Report	Partial disclosure (s 22): • Conditional exemption s 47F • Irrelevant matters s 22
Document 4	19/3/2015	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 5	15/7/2014	Program Agreement	Partial disclosure (s 22): • Conditional exemption s 47F • Conditional exemption s 47G
<b>Additional documents</b>			
Document 6	7/9/2012	Email attaching program agreement	Partial disclosure (s 22): • Conditional exemption s 47F • Conditional exemption s 47G
Document 7	15/4/2013	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 8	24/7/2013	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 9	6/11/2013	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 10	13/11/2013	Email	Partial disclosure (s 22): • Conditional exemption s 47F
Document 11	11/12/2013	Email	Release in full

Reference	Date	Description	Review decision
Document 12	19/12/2013	Email	Release in full
Document 13	23/1/2014	Email with attachments	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 14	28/5/2014	Email attaching annual report	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li><li>Irrelevant matters s 22</li></ul>
Document 15	18/7/2014	Email with attachments	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 16	8/10/2014	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 17	3/11/2014	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 18	16/3/2015	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 19	1/6/2015	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 20	17/9/2015	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Irrelevant matters s 22</li></ul>
Document 21	13/1/2016	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 22	27/6/2016	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li><li>Irrelevant matters s 22</li></ul>
Document 23	13/9/2016	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 24	20/9/2016	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 25	17/11/2016	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>



Reference	Date	Description	Review decision
Document 26	20/02/2017	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 27	21/03/2017	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 28	26/7/2017	Email attaching Annual Report 2017	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li><li>Irrelevant matters s 22</li></ul>
Document 29	9/7/2018	Email attaching Annual Report 2018	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li><li>Irrelevant matters s 22</li></ul>
Document 30	24/10/2018	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 31	23/11/2018	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 32	12/12/2018	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 33	19/12/2018	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 34	5/4/2019	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 35	9/10/2019	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 36	13/12/2019	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 37	6/2/2020	Email	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>
Document 38	11/2/2020	Email with attachment	Partial disclosure (s 22): <ul style="list-style-type: none"><li>Conditional exemption s 47F</li></ul>