

6/09/2021

**CONFIDENTIAL**

**Via Email**

Vanessa Teague

Email: [foi+request-7511-4e78c120@righttoknow.org.au](mailto:foi+request-7511-4e78c120@righttoknow.org.au)

Dear Ms Teague

**RE: REVIEW OF FOI DECISION – REFERENCE NUMBER ABC FOI 202021-055**

I refer to your email dated 16 July 2021 requesting an internal review of ABC FOI 202021-055 Decision. This was a decision by the ABC's Head of Corporate Governance and FOI Coordinator, Pamela Longstaff, who has authority to make decisions in respect of requests made under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

**Background**

Your information request dated 15 June 2021 sought

*Documents containing:*

*All data sharing agreements signed with all third parties who will be given access to iView data, including*

- Google*
- Facebook*
- Tealium*

*and any others to whom the ABC has granted access to iView viewing data.*

On 16 July 2021, Ms Longstaff determined that the documents within the scope of your request (**Identified Documents**) were subject to an exemption (under section 45 of the FOI Act – material obtained in confidence), and not required to be released (**Original Decision**).

In your email dated 16 July 2021, you requested an internal review of the Original Decision.



On 24 August 2021, the Office of the Australian Information Commissioner (**OAIC**) granted an extension of time for the ABC to provide you with its internal review decision; the date by which the decision must be provided to you is 9 September 2021.

I am authorised by the Managing Director under section 23 of the FOI Act to make decisions on requests for internal review.

I have reviewed your request in accordance with section 54C of the FOI Act.

In undertaking my review, I have reviewed the Identified Documents, relevant sections of the FOI Act, and the FOI Guidelines published by the Office of the Australian Information Commissioner (**FOI Guidelines**).

## **Decision**

Having reviewed your request, I have decided to:

- Release to you one document, being the DTA Terms of Service, redacted in part;
- Provide you with additional information relevant to your request, as set out below; and
- Otherwise affirm the Original Decision that the Identified Documents are not required to be released on the ground that they constitute material communicated in confidence.

## **Reasons**

My starting point is the general right of access set out in section 11(1) of the FOI Act that:

*Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to: a document of an agency, other than an exempt document...*

Having reviewed the Identified Documents, I observe that many of them are agreements reached between the ABC and a third party which contain confidentiality clauses, preventing the parties from being able to release the information contained in the document, and other confidential information.

Section 45 of the FOI Act provides as follows:

***Documents containing material obtained in confidence***

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

In light of the confidentiality clauses contained in many of the documents and the potential application of section 45 of the FOI Act, it is necessary for me to turn to the relevant paragraphs of the FOI Guidelines, which provide as follows:

*5.158 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.*

*5.159 To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:*

- it must be specifically identified*
- it must have the necessary quality of confidentiality*
- it must have been communicated and received on the basis of a mutual understanding of confidence*
- it must have been disclosed or threatened to be disclosed, without authority*
- unauthorised disclosure of the information has or will cause detriment*

*5.160 A breach of confidence will not arise, and the exemption will not apply, if the information to be disclosed is an 'iniquity' in the sense of a crime, civil wrong, or serious misdeed of public importance which ought to be disclosed to a third party with a real and direct interest in redressing such crime, wrong, or misdeed.*

[references omitted]

Having regard to the five criteria above, I consider that the section 45 exemption applies. The terms of the documents are specifically identified, covered by the confidentiality clauses, were communicated in the context of a confidential commercial transaction, were understood to remain confidential, and unauthorised disclosure could foreseeably cause detriment to the parties. Put another way, if the ABC were to release the information in these documents that is requested, the ABC would foreseeably be subject to legal proceedings brought by the other party, for breach of confidence.

Accordingly, these documents are not required to be released. I note that this is consistent with paragraph 5.9 of the FOI Guidelines, which provides as follows:

*The exemptions in Division 2 of Part IV are not subject to an overriding public interest test. If a document meets the criteria to establish a particular exemption, it is exempt. There is no additional obligation to weigh competing public interests to determine if the document should be released.*

There is one document that does not meet the test of "material obtained in confidence". I have determined that this should be released to you in redacted form



to protect the commercially valuable information<sup>1</sup> contained in the document; please find enclosed the DTA Terms of Service.

### **Additional information**

For your information, I note that there is no contract between the ABC and Facebook, Google or YouTube that covers sharing of personal data. Individual users agree to the platform's Terms of Service; and the ABC agrees to the platform's Terms of Service when creating a branded channel.

You may wish to review the following, which are publicly available and hyperlinked:

- [https://payments.google.com/payments/apis-secure/get\\_legal\\_document?ldi=31212](https://payments.google.com/payments/apis-secure/get_legal_document?ldi=31212)
- [Terms of Service | Google Analytics – Google](#)
- [Google APIs Terms of Service | Google Developers](#)
- [FIREBASE CRASHLYTICS AND FIREBASE APP DISTRIBUTION TERMS OF SERVICE \(google.com\)](#)
- [Google Cloud Platform Terms Of Service](#)
- [Facebook](#)

### **Response to your specific contentions**

In your email of 16 July 2021, you stated the following:

*I do not accept that the documents are covered by a "necessary quality of confidentiality" merely because they contain confidentiality clauses, i.e. the parties agreed to keep them secret. If this line of reasoning were valid, then any agreement made by a public authority could remain confidential, no matter how gravely opposed to the public interest, only because the parties to that contract had undertaken to keep it so. Public authorities and corporations making arrangements against the public interest are most likely to want to keep them confidential.*

*I do not believe the information could have been exchanged with an "understanding of confidence" when the ABC is constrained by APPI - 'to manage personal information in an open and transparent way.' It is not credible to suggest that the receiving parties, Google, Facebook and others, did not realise that the people whose data was being given to them would wish to know the nature of the data sharing arrangement.*

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<sup>1</sup> Under section 47 of the FOI Act, documents containing commercially valuable information are not required to be released.

*Finally, I question the overly broad use of the term 'cause detriment.' While I agree that exposure of inappropriate, irresponsible or corrupt behaviour may cause detriment to specific individuals or corporations, I do not believe that is the intended interpretation of that clause. Publication of these contracts would not cause detriment unless there is something embarrassing to hide - even then, it would not cause detriment to the community as a whole.*

*The publication of these data sharing arrangements has tremendous public benefits. First, it informs ordinary iView viewers of how their data is being shared, hence giving them some opportunity to protect themselves from some of its harmful consequences. Second, it allows technical experts like me to examine the accuracy of the privacy policy. I am concerned that there may be misconceptions about the strength of technical privacy protections. For example, the privacy policy's mention of a 'hash of the email address' suggests that the inadequacy of hashing as a technical privacy protection has not been understood. If the technical protections promised in the data sharing contracts do not in fact meet the promises of the ABC's privacy policy, then the ABC needs to find out urgently. Opening the data sharing contracts for independent review would be one way to do so.*

I have considered the points that you have made. I note that the ABC is governed by various legislation, such as the *Public Governance, Performance and Accountability Act 2013* (Cth) that mitigates against arrangements being entered into against the public interest. Publishing copies of agreements entered into between the ABC and another party is not a necessary measure to protect against inappropriate arrangements. The ABC has a robust privacy framework in place to ensure compliance with its privacy obligations. I have also set out above the detriment that may flow to the ABC if it were to disclose the terms of its agreements with other parties.

## **Right of review**

If you are dissatisfied with this decision, you can apply for review by the Australian Information Commissioner, whose contact details are:

Office of the Australian Information Commissioner  
GPO Box 5218 Sydney NSW 2001  
Tel: 1300 363 992 Fax 02 9284 9666  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
Website: [www.oaic.gov.au](http://www.oaic.gov.au)

In making your application to the Information Commissioner, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. You may also wish to inform the Information Commissioner of the reasons for seeking review.



Yours sincerely

*Vanessa MacBean*

Vanessa MacBean  
Head, Employee Relations and a/Chief People Officer  
FOI Internal Reviewer, authorised pursuant to s 23 FOI Act  
Australian Broadcasting Corporation