



Our ref: 230/2021

Email: [foi+request-7911-72cd3fb3@righttoknow.org.au](mailto:foi+request-7911-72cd3fb3@righttoknow.org.au)

### **Freedom of Information Request Decision**

Dear Concerned Citizen,

I refer to your request for an internal review of the decision made on 14 October 2021 whereby DTA refused your request to:

*'any documents (including, but not limited to, emails, briefing notes, minutes, letters) sent to the office of Minister Stuart Robert and/or the Prime Minister which refer to Apple or Google's Exposure Notification APIs'*

In accordance with section 54C of the *Freedom of Information Act 1982 (FOI Act)*, I am authorised to conduct an internal review of a decision regarding access under the FOI Act. As the decision-maker for this internal review, I am in no way bound by the primary decision.

### **Decision**

I have decided to set aside the original decision and prepare a new decision on the basis that the DTA has now identified documents relating to your request.

The DTA has identified 5 documents and 11 attachments in relation to the scope of your FOI request. I have examined them and have decided to release the documents in part under sections 22, 33, 42, 47, 47E, 47F and 47G of the FOI Act as:

- The documents contain information which are subject to Cabinet Confidence
- The documents contain information that, if released, would cause harm to the operations of the DTA
- The documents contain information relating to personal privacy
- The documents contain sensitive information about the commercial or business affairs of a third party

Section 26 of the FOI Act requires the DTA to provide a statement of reasons in support of a decision. In-depth reasons for this decision are set out in **Attachment A**.

The FOI Act also provides a number of avenues for review, set out in **Attachment B**, if you are dissatisfied with any aspect of this decision.

If you have any questions or require further information, please contact the FOI Officer on 02 6120 8595 or via email at [foi@dta.gov.au](mailto:foi@dta.gov.au).

Yours sincerely,

George-Philip de Wet  
Authorised Decision Maker  
Digital Transformation Agency (DTA)  
19 May 2022

**ATTACHMENT A - STATEMENT OF REASONS****Decision**

I, George-Philip de Wet, am an officer authorised to make decisions under subsection 23(1) of the *Freedom of Information Act 1982 (FOI Act)*.

I have examined the document subject to this request and have decided to exempt it from release.

**Reasons for decision****Section 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.*

Subsection 22(2) of the FOI Act provides that, where an agency reaches the view that a document contains exempt information or material that is irrelevant to the request and it is possible for the agency to prepare an edited copy of the document with the irrelevant or exempt material deleted, then the agency must prepare such a copy.

This edited copy must be provided to the applicant. Further, the decision maker must advise the applicant in writing that the edited copy of the document has been prepared and of the reason(s) for each of the deletions in the document (subsection 22(3) of the FOI Act).

Exempt material is deleted pursuant to subparagraph 22(1)(a)(i) and irrelevant material is deleted pursuant to subparagraph 22(1)(a)(ii) of the FOI Act. For example: Document 1.1 is an attachment to document 1 and while document 1 is relevant its attachment is not.

I have decided that, either in part or in full, the documents would disclose information that could reasonably be regarded as irrelevant to your request because it contains information that is outside the scope of your request.

### Section 33 - documents affecting international relations

Section 33 of the FOI Act provides that:

*A document is an exempt document if disclosure of the document under this Act: would, or could reasonably be expected to, cause damage to:*

...

*(iii) the international relations of the Commonwealth; or*

Paragraph 5.28 of the Office of the Australian Information Commissioner Guidelines states that:

*'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency.'*

Paragraphs 5.36 to 5.37 of the FOI Guidelines also state that:

*The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them ...*

*The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance but vary according to the circumstances of each case.'*

I am satisfied that the material contained within the documents is exempt under section 33 of the FOI Act, on the basis that disclosure of the material in question would, or could reasonably be expected to, cause damage to Australia's international relations.

### Section 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.*

In addition to section 42 of the FOI Act, the Office of the Australian Information Commissioner Guidelines provide the following commentary in relation to this exemption at paragraphs 5.128 and 5.129:

*The underlying policy basis for legal professional privilege is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice...*

*At common law, determining whether a communication is privileged requires a consideration of:*

- *whether there is a legal adviser-client relationship;*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;*
- *whether the advice given is independent;*
- *whether the advice given is confidential.*

The Office of the Australian Information Commissioner Guidelines at paragraph 5.135 provides:

*For the purpose of the privilege, 'advice' extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context. However, it does not apply to internal communication that is a routine part of an agency's administrative functions. The communication must relate to activities generally regarded as falling within a lawyer's professional functions.*

Did a legal adviser-client relationship exist?

To the extent that the document contains material that is subject to Legal Professional Privilege (LPP), I am satisfied that a legal adviser-client relationship exists. I am satisfied that there is the necessary level of independence between the creator and the recipient of the legal advice.

Does the document attract privilege?

I am satisfied that the document was created for the dominant purpose of providing legal advice.

Has privilege been waived?

Subsection 42(2) of the FOI Act provides that a document is not exempt where privilege is waived. At the time of this decision, I have no evidence before me to suggest that the contents of the legal advice have been disclosed more broadly than required to brief relevant to the DTA management. Accordingly, I am satisfied that LPP has not been waived in this instance.

In reviewing the document, I am satisfied that the information in the document is covered by LPP. Therefore, I have decided not to release the document under section 42 of the FOI Act.

#### **Section 47 - Documents disclosing trade secrets or commercially valuable information**

- (1) *A document is an exempt document if its disclosure under this Act would disclose:*
  - (a) *trade secrets; or*
  - (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.*
- (2) *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.*
- (3) *A reference in this section to an undertaking includes a reference to an undertaking that is carried on by:*
- (a) *the Commonwealth or a State; or*
  - (b) *an authority of the Commonwealth or of a State; or*
  - (c) *a Norfolk Island authority; or*
  - (d) *a local government authority.*

In assessing whether section 47 the FOI Act applies, I have considered:

- whether the information contained in the documents are jointly the concern trade secrets or valuable commercial information of another individual or organization;
- whether the information if disclosed to a competitor would be liable to cause real or significant harm to the owner of the information; and
- the extent to which the information is already a matter of public knowledge.

I consider this information is not publicly available and is known only to the parties concerned. Disclosure of this information would, or could reasonably be expected to, reduce the value of the business, and the business relationship with the Department would also be diminished. Therefore, I am satisfied this material consists of commercially valuable information that would be, or could reasonably be expected to be, destroyed or diminished if it were publicly disclosed.

#### **Section 47E – Public interest conditional exemptions – certain operations of agencies**

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

- (a) *prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
- (b) *prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;*
- (c) *have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

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

In assessing whether subsections 47E(a) and 47E(d) of the FOI Act apply, I have considered:

- whether the information contained in the documents would prejudice the effectiveness of a procedure or method for the conduct of a test or examination;
- whether the information if released would have substantial adverse effect on the proper and efficient conduct of the operations of an agency; and

- the extent to which the information is already a matter of public knowledge.

I have also taken the below factors against disclosing the information into consideration:

- the information contained in the documents would prejudice the effectiveness of a procedure or method for the conduct of a test or examination;
- the information contained in the documents, if released, would have substantial adverse effects on the proper and efficient conduct of the operations of an agency; and
- the information is not a matter of public knowledge.

DTA must always be mindful of the interest of powerful criminal in obtaining insight into COVIDSafe app operations. If too much insight is given into the app, it heightens the risk that COVIDSafe app operations could be compromised or sabotaged.

I consider that the disclosure of this level of detailed information would give too great an insight into how COVIDSafe app operates and would result in prejudice to the proper and efficient conduct of the DTA's operations.

I have considered all factors for and against disclosure of the relevant information and decided to exempt the documents in full under subsections 47E(a) and 47E(d) because the factors against release outweigh the consideration for disclosure, particularly given the detailed of the information.

## **Section 47F - Public interest conditional exemptions – personal privacy**

### *General rule*

- (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 matters that the agency or Minister considers relevant.*

Section 4 of the FOI Act provides that 'personal information' has the same meaning as in the Privacy Act 1988 (**Privacy Act**).

Section 6 of the Privacy Act provides that:

*Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) *whether the information or opinion is true or not; and*
- (b) *whether the information or opinion is recorded in a material form or not.*

The Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act in paragraphs [6.116] – [6.117] explain:

6.116 *Personal information means 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 (4 4(1)). In other words, personal information:*

- *identifies, or could identify, a person*
- *says something about a person*
- *may be opinion*
- *may form part of a database*
- *may be true or untrue*
- *relates to a natural person.*

6.117 *Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.*

In assessing whether section 47F of the FOI Act applies, I have considered:

- the definition of the personal information under section 4 of the FOI Act;
- the nature of the information, for example whether the disclosure would cause serious consequences;
- the object of the FOI Act, which encourages a right of access to documents held by government agencies, subject to certain exemptions; and
- the extent to which the information is already a matter of public knowledge and/or well known.

I have also taken the below factors against disclosing the information into consideration:

- release of the information could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- the information is not a matter of public knowledge and/or well known.

Having examined the documents, I am satisfied that some of the information is personal information as it identifies a person(s) and provides personal information about an individual(s).

After considering all the relevant factors, I consider that the importance of maintaining the individual's right to privacy outweighs the factors in favor of disclosure. Accordingly, I have decided that parts of the information contained within documents is conditionally exempt under section 47F of the FOI Act.

#### **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 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.*



In assessing whether section 47G of the FOI Act applies, I have considered:

- the nature of the information and whether the disclosure would cause no serious consequences;
- the object of the FOI Act, which encourages a right of access to documents held by government agencies, subject to certain exemptions; and
- the extent to which the information is already a matter of public knowledge and/or well known.

I have also taken the below factors against disclosing the information into consideration:

- the disclosure of information relating to the business, commercial or financial affairs of the third party could be considered as unreasonable disclosure; and
- the information is not a matter of public knowledge and/or well known.

In examining the document, I am satisfied that releasing the information within the document could involve the unreasonable disclosure of the financial or business affairs of a third party.

Accordingly, I have decided that the information within the document is conditionally exempt under section 47G of the FOI Act.

### **Public interest considerations**

#### **Public interest conditional exemption considerations**

In relying on the public interest conditional exemptions under sections 47E, 47F and 47G of the FOI Act, I have considered the public interest factors under section 11A of the FOI Act – Access to documents on request.

### **Section 11A**

*(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).*

**Section 11B (3), (4) and (5) – Public interest exemptions – factors**

- (3) *Factors favoring 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.*
- (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.*
- (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.*

DTA considers the confidential arrangements and, in particular, the terms of those arrangements with the related third parties.

Considering those arrangements, I am satisfied that releasing the requested information would not be in the public interest.

## **ATTACHMENT B – REVIEW RIGHTS**

### ***Review by the Australian Information Commissioner***

Alternatively, under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner without first going to internal review. Your application must be made within 60 days of you receiving this notice.

The Australian Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Australian Information Commissioner's website [www.oaic.gov.au](http://www.oaic.gov.au).

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commission at:

Director of FOI Dispute Resolution  
GPO Box 5218  
SYDNEY NSW 2001

### ***Complaints to the Australian Information Commissioner***

You may complain to the Australian Information Commissioner about action taken in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:  
Phone 1300 363 992 (local call charge)  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the DTA as the relevant agency.

### ***Contacts***

If you have any queries about this notice, please contact the FOI team by email [foi@dta.gov.au](mailto:foi@dta.gov.au)