



Our ref. 233/2020

Concerned Citizen

foi+request-8061-d13e2b11@righttoknow.org.au

Dear Concerned Citizen

1. I refer to your request for an internal review of the decision made 30 November 2021 to your application requesting access to:

'Ministerial Brief MB20-000013: Implementation of the Apple and Google Exposure Notification Framework (ENF)'
2. In accordance with s 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

3. I affirm the primary decision made by Anthony Warnock on 30 November 2021 on the basis that this document was created for the purpose of informing the Minister and if disclosed, in full, would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Reasons for my decision

4. Section 47E(d) of the FOI Act – Certain operations of agencies

Section 47E(d) of the FOI Act provides as follows:

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

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

5. The FOI Guidelines relevantly provide as follows:

An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.

...

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

6. In relation to the test 'would or could reasonably be expected to', the FOI Guidelines provide as follows:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

7. The FOI Guidelines provide that the term 'substantial adverse effect' broadly means

... 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

8. As stated in the initial decision, the information which has been removed from the documents under this section contains confidential information on the negotiation position and intentions for the procurement of goods and services by the Digital Transformation Agency (DTA). Revealing this information would adversely affect the ability of DTA to enter into commercial arrangements as it would reveal opinions and other information which would be of advantage to potential vendors and put the Commonwealth and competitors at a disadvantage.
9. In reviewing the document, I agree with the initial statement and would add the release of this information would impact on DTA's ability to provide frank, candid advice, opinions, comments and recommendations, touching on complex sensitive relationships and dealing with complex legal, technical, practical, logistical issues relating to the Apple and Google Exposure Notification Framework (ENF).
10. For these reasons I uphold the original decision.

Material taken into account

- The primary decision
- Searches conducted
- Your contentions dated 30 November 2021
- Advice provided by the subject matter experts
- The Commonwealth *Freedom of Information Act 1982*
- Guidelines issued by the Office of the Australian Information Commissioner.

Review by the Australian Information Commissioner

11. Under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner. Your application must be made within 30 days of you receiving this notice.
12. 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 at www.oaic.gov.au.
13. You can contact the Information Commissioner to request a review of a decision online (www.oaic.gov.au), by email to enquiries@oaic.gov.au 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

14. You may complain to the Australian Information Commissioner about action taken in relation to your request.
15. Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)
Email enquiries@oaic.gov.au
16. 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 DTA as the relevant agency.

Contacts

17. If you have any queries regarding this notice, please contact the FOI team by email to foi@dtg.gov.au.

Yours sincerely,

Ben Smith
Acting Head of Corporate
Digital Transformation Agency (DTA)