

**Australian Government****Department of Finance**

Our reference: FOI 22/54
Contact: FOI Team
e-mail: foi@finance.gov.au

C Drake
Right to Know

By email only: foi+request-9176-f4531aef@righttoknow.org.au

Dear Mr Drake

Freedom of Information Request – FOI 22/54

On 25 July 2022, the Department of Finance (Finance) received your email requesting access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to the following documents:

You operate the site <https://www.domainname.gov.au/about> which is the gov.au domain name registration portal.

This portal in turn supplies registration data to the .au registry operator (Afilias Australia Pty Ltd) who maintains a Master List of gov.au public domain names.

Please supply the current Master List, preferably in machine-readable format.

Note that F.o.I. rules require that you contact and/or negotiate with me if you encounter any hurdles with the above; please make sure you do this if for any reason you find it difficult to simply obtain (e.g. ask Afilias) and supply the above list. Note also that historical "A-Z" sites directories once existed in government, however, they were never complete, and all appear to be taken down at present - I'm not interested in old or incomplete lists, I'm after the current Master List as maintained by the registry.

On 8 August 2022, Finance sent you a request consultation notice, which set out that based upon the existence of a practical refusal reason, being that to process your request would involve a substantial and unreasonable diversion of resources from Finance's operations, I intended to refuse your request.

The same day, you responded stating:

Your refusal is nonsensical for the following reasons:

1. All the information requested is already public information, and is distributed freely in multiple databases on the internet (the "DNS" system) for the whole world to view.
2. The Master List in question is available directly from Affilias who are already waiting for you to tell them it's OK to send me the list - no more effort is required on your part besides that action.
3. Affilias already make this Master List available to every global business who is a registrar (as communicated to me by Affilias when I asked them to supply instructions for how to access this database).

4. According to the OAIC, because this information is already distributed to multiple Australian and global non-government organisations, and is public and not confidential in any way to begin with, no such requirement to perform any "consultation" does, or could legitimately exist.

I amend my request as follows:-

Please supply the Master List (as I defined earlier) that your department has supplied to (and is maintained by) the non-government organisation "Afilias Australia Pty Ltd" and which Afilias subsequently distribute to other registrars as well as make the entire contents of this Master List publicly available for anyone to query in the DNS.

I request you do this by using the ticket details I provided earlier to contact Afilias, who are standing by and happy to supply this information to me on your behalf as I requested.

Be aware that I will not accept "no" for an answer, that I will pursue this request through every possible means until it's fulfilled, and that the last time I got your style of reply to an FoI, the OAIC ordered the information be released on account of the information in question already being public.

On 16 August 2022, you stated:

To be crystal clear - EVERY SINGLE DOMAIN in the list I'm asking for has been appropriately deemed suitable for public release, and deliberately placed into the Afilias Master List as the final process by the departments in question for making this information freely available to everyone in the world.

This is why your suggestion that you might have to ask their "permission" to let me have this public information is so inappropriate: They have ALREADY GRANTED the entire world access to this information - that is the ENTIRE POINT of them putting this information into the list in the first place.

The purpose of this letter is to provide you with notice of my decision under the FOI Act.

Decision

The Master List does not exist in a discrete form, and could be produced in response to your FOI request, as at 25 July 2022.

I have decided to refuse to release the Master List as its disclosure would found an action, by .au Domain Administration Ltd (auDA) and Identity Digital Australia Pty Ltd (Identity Digital) (formerly known as Afilias Australia Pty Ltd) for breach of confidence.

In making my decision, I have had regard to the following:

- the terms of your FOI request and subsequent correspondence;
- the content of the document that fell within the scope of your request;
- the Sponsorship Agreement between auDA and Finance;
 - the Registry-Registrar Agreement between Identity Digital and Finance;
 - consultation with auDA and Identity Digital and the joint submissions made by those parties;
- the relevant provisions of the FOI Act;
- relevant FOI case law (referenced throughout the decision):
 - 'XF' and Australian Radiation Protection and Nuclear Safety Authority [2021] AICmr 21 (4 June 2021) (XF)
 - 'WW' and Australian Sports Commission (Freedom of information) [2021] AICmr 11 (9 April 2021).
 - 'WS' and Australian Securities and Investments Commission (Freedom of information) [2021] AICmr 6 (18 February 2021).

- 'VO' and Northern Australia Infrastructure Facility (Freedom of information) [2020] AICmr 47 (11 September 2020).
- 'RG' and Department of the Prime Minister and Cabinet (Freedom of information) [2019] AICmr 69 (9 October 2019).
- Paul Farrell and Department of Home Affairs (Freedom of information) (No. 4) [2019] AICmr 40 (13 June 2019).
- Callejo and Department of Immigration and Citizenship [2010] AATA 244 (8 April 2010).
- Petroulias and Ors and Commissioner of Taxation [2006] AATA 333; (2006) 62 ATR 1175 (30 March 2006).
- B and Brisbane North Regional Health Authority [1994] QICmr 1 (B)
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Authorised decision-maker

I am authorised by the Secretary for Finance to grant or refuse access to documents.

Background

Master List

The Master List is a unique compilation of all gov.au domain names, which are unique identifiers consisting of alphanumeric characters registered in the Designated Namespace.

The three key entities in relation to the Master List are:

- auDA.
- Finance, on behalf of the Commonwealth.
- Identity Digital.

The interconnection of the above entities and the terms that set out their roles and responsibilities are set out in the Sponsorship Agreement and the Registry-Registrar Agreement.

auDA

auDA is a non-profit organisation that is the administrator of the .au country code Top Level Domain under an agreement with the Internet Corporation for Assigned Names and Numbers (ICANN). auDA is endorsed by the Commonwealth to administer the .au ccTLD as a secure, accessible and trusted Australian public asset for all internet users. The .au domain name system is designated as critical infrastructure under the *Security of Critical Infrastructure Act 2018*.

Finance

Finance represents the Commonwealth and operates as the registrar for gov.au names which involves processing the data on behalf of registrants in the Registry.

Identity Digital

Identity Digital is the Registry Operator who provides Domain Name System (DNS) services for domain names, which includes the receipt of data from registrars concerning registration of domain names and name services. Identity Digital is responsible for making the WHOIS registration data (WHOIS Data) accessible via the WHOIS website – <https://whois.auda.org.au/>, which contains a 'WHOIS Lookup' function.

WHOIS

The WHOIS Data contains a list of registered domain names together with the following information:

- registrar of record for the domain name;
- registrant of the domain name;
- registrant contact name and email address;
- technical contact name and email address;
- name servers for the domain name.

The WHOIS website provides a lookup service, this is distinguishable from a search engine. A search engine, such as Google provides a search service, which will identify results both based upon the literal words used, but will also suggest results. For example, if you searched for 'fince.gov.au', the Google search engine produces a large number of results, with the top result being a link to fincen.gov. This function of suggesting results does not exist in a lookup tool.

A lookup tool requires an exact data match. Using the same example, searching for 'fince.gov.au' will return a 'NOT FOUND' result. This means the user of the WHOIS Lookup must type in the domain exactly as it is registered to return any result. In addition, there is no option to obtain a compiled list of domain names. To obtain multiple search result, the user would have to manually enter in multiple different domain names. Effectively, the user has to already know the name of the domain name in order to return results.

Further, the WHOIS lookup service contains a Completely Automated Public Turing test to tell Computers and Humans Apart (CAPTCHA). A CAPTCHA requires someone to correctly evaluate and enter a sequence of letters or numbers perceptible in a distorted image displayed on their screen. A CAPTCHA prevents automated software systems from running repeated searches by creating a problem that is extremely difficult for software to decipher.

To use the WHOIS look up service, you are required to agree to the following terms and conditions of use:

Afilias Australia Pty Ltd (Afilias), for itself and on behalf of .au Domain Administration Limited (auDA), makes the WHOIS registration data directory service (WHOIS Service) available solely for the purposes of:

- (a) querying the availability of a domain name licence;
- (b) identifying the holder of a domain name licence; and/or
- (c) contacting the holder of a domain name licence in relation to that domain name and its use.

The WHOIS Service must not be used for any other purpose (even if that purpose is lawful), including:

- (a) aggregating, collecting or compiling information from the WHOIS database, whether for personal or commercial purposes;
- (b) enabling the sending of unsolicited electronic communications; and / or
- (c) enabling high volume, automated, electronic processes that send queries or data to the systems of Afilias, any registrar, any domain name licence holder, or auDA.

The WHOIS Service is provided for information purposes only. By using the WHOIS Service, you agree to be bound by these terms and conditions. The WHOIS Service is operated in accordance with the auDA WHOIS Policy (available at <https://www.ada.org.au/policies/index-of-published-policies/2014/2014-07/>).

Preliminary matter

On 4 August 2022, you stated:

The best way to fulfil my request is to get in touch with Afilias Australia Pty Ltd. I've opened a case with them, and all they need from you is the approval to send me the list.

I understand that you consider that Identity Digital (formerly Afilias) is supportive of Finance releasing the Master List to you. This is inconsistent with the information that has been provided directly to Finance by Identity Digital.

In considering whether or not the Master List should be released to you, Finance consulted with both auDA and Identity Digital who jointly objected to the disclosure of the Master List.

Request consultation notice

On 8 August 2022, Finance sent you a request consultation notice that set out the reasons for why I intended to refuse your request, being that I considered the work involved in processing your request would substantially and unreasonably divert Finance's resources from its other operations. This was primarily on the basis that I considered that it was necessary to consult with each owner of a registered domain name. Given the very large number of consultations that this would require, I intended to refuse your request.

Subsequent to sending the request consultation notice, I considered that it was more appropriate to refuse this request on the basis that the Master List was exempt in full under section 45 of the FOI Act for breach of confidence.

EXEMPTIONS

Breach of confidence – section 45

Section 45 of the FOI Act provides:

- (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.

The FOI Guidelines provide:

[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.

The FOI Guidelines further provide:

[5.159] To found an action for breach of confidence (which means section 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.

Specifically identified

The FOI Guidelines provide:

[5.161] The alleged confidential information must be identified specifically. It is not sufficient for the information to be identified in global terms.

In ‘XF’ a confidentiality clause contained in a Memorandum of Understanding that specifically identified what information was confidential, was found to satisfy this criteria.

The Sponsorship Agreement and the Registry-Registrar Agreement specifically identify the information that is confidential, which includes the information that is contained in the Master List. Accordingly, I consider that this criteria is satisfied.

Quality of confidence

The FOI Guidelines provide:

[5.162] For the information to have the quality of confidentiality it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.

On 8 August 2022, you stated:

1. All the information requested is already public information, and is distributed freely in multiple databases on the internet (the "DNS" system) for the whole world to view.

Master List

The Master List is not in the public domain, evidenced by the existence of this FOI request.

The reason for the confidentiality of the Master List is to prevent the possibility of the list being used for malicious purposes such as systematically using vulnerability scanning tools against the list to identify security vulnerabilities, or compiling lists of email addresses for use in spear-phishing attacks.

The Master List can only be accessed by a limited number of people, who require access to perform their roles and have either a contractual, statutory or equitable duty of confidence:

- Finance for the purpose performing its functions as registrar;
- auDA as the administrator of the .au ccTLD; and
- Identity Digital, as the .au registry operator.

Finance can request reports for gov.au names from auDA or Identity Digital, such as the Master List, in its role as registrar under the Sponsorship Agreement. However, any such reports, are disclosed in confidence. Finance is also required to not do anything which may adversely affect or compromise integrity or stability of the internet domain name system. On this basis, access to the Master List is restricted within Finance, and only parties who have involvement in Finance performing its functions as Registrar have access.

Accessibility of individual domain names

Deputy President J Sosso in Francis considered the degree at which information has entered the public domain, being relevant to establishing whether a document possessed the quality of confidence. The Deputy President J Sosso referred to the following sections of the decision of Woon:

[at 107 citing Woon paragraph 35]

Ultimately, it is very much a common sense inquiry whether the information has become so accessible and/or accessed that it would not be just in all the circumstances to require the party against whom confidence is asserted to treat it as confidential.

[at 108 citing Woon paragraphs 36-37]

Further, it is important to focus not only on the extent to which the information in question has become accessible but also on the extent to which it has in fact been accessed by the general public. As we have said, the essence of a confidence or secret is that it is not publicly known. Potential, abstract accessibility is vastly different from access in fact. This is particularly so, given the proliferation of information in the globalised Internet age of today. Paradoxically, much of the information on the Internet, although accessible, is not in fact accessed by the public, whether from lack of interest or time or even ignorance.

Accordingly, the circumstances of each case must be examined. Consideration must be given to such factors as the likelihood of the information being accessed by the public, the degree to which the information has in fact been accessed and the extent to which the information may be appreciated and/or understood only with the specialised skills or expertise of the party seeking to make use of the information. Merely making confidential information technically available to the public at large does not necessarily destroy its confidential character. Public media, in particular the Internet, must not be the gateway through which all confidentiality is dissolved and destroyed.

Deputy President J Sosso went on to cite Woon with approval:

[at 124] As was highlighted by the Court of Appeal in *Woon*, even if information has entered into the public domain it does not necessarily follow that it has lost its confidential character. It is only if information has become public knowledge that, as a matter of common sense, the confidential character of the information disappears. The Court of Appeal, properly and eloquently, highlighted the practical and common sense nature of the inquiry required.

The WHOIS lookup tool enables users to access one domain name at a time that is registered on the WHOIS database, however, I consider that abstract accessibility is vastly different to access in fact to the domain names.

As discussed further above, the WHOIS lookup tool requires the user to already know the domain name to return a result. Further, the disclaimer listed underneath the WHOIS lookup tool contains terms and conditions of use, including:

The WHOIS Service must not be used for any other purpose (even if that purpose is lawful), including: (a) aggregating, collecting or compiling information from the WHOIS database, whether for personal or commercial purposes.

In the situation whereby a user disregarded the terms and conditions of use by attempting to aggregate, collect or compile information from the WHOIS database through the use of an automatic software to run multiple searches, would be frustrated by the existence of the CAPTCHA.

I consider that although each individual domain name is technically publicly accessible through the use of the WHOIS lookup tool, due to the prerequisite knowledge required to obtain access, I do not consider that the information is broadly publicly accessible in any real sense.

Quality of confidence - conclusion

The aggregate of the domain names, being the Master List, is not publicly accessible, and all parties have maintained the Master List has not been provided to any parties beyond those required to have access to perform their contractual obligations. Accordingly, I consider that this criteria is satisfied.

Mutual understanding of confidence

The FOI Guidelines provide:

[5.164] The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency needs to have understood and accepted an obligation of confidence. The mutual understanding must have existed at the time of the communication. The most obvious example is a contractual obligation of confidence.

In B the QIC F N Albietz reviewed the relevant legal authorities:

[84] ... the fundamental inquiry is aimed at determining, on an evaluation of the whole of the relevant circumstances in which confidential information was imparted to the defendant, whether the defendant's conscience ought to be bound with an equitable obligation of confidence. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication ...

The following factors are relevant to establishing that a mutual understanding of confidence existed at the time the information was communicated, and that this obligation of confidence continues to exist:

- The Sponsorship Agreement has confidentiality provisions.
- The actions of Finance, auDA and Identity Digital demonstrate that all parties accepted the obligation of confidence and have acted in accordance with the confidentiality.

I am satisfied that that the Master List can be produced by Finance under a mutual understanding of confidence that existed between the parties at the time the Master List was provided to Finance. Accordingly, I consider that this criteria is satisfied.

Unauthorised disclosure or threatened disclosure

The FOI Guidelines provide:

[5.169] For example, the agency may have told the person providing the information about the people to whom the agency would usually disclose such information. The law may require disclosure to third parties in the performance of an agency's functions, which will amount to authorised use and/or disclosure. Similarly, a person providing confidential information to an agency may specifically permit the agency to divulge the information to a limited group.

The prospect of confidential information being released under the FOI Act would constitute an unauthorised threatened disclosure. I am satisfied that disclosure of the Master List would be unauthorised. Accordingly, I consider that this criteria is satisfied.

Detriment

The FOI Guidelines provide:

[5.171] The fifth element for a breach of confidence action is that unauthorised disclosure of the information has, or will, cause detriment to the person who provided the confidential information.

In B the QIC F N Albietz reviewed the relevant legal authorities:

[111] ... It appears, however, that detriment is fairly easily established. In particular, it is not necessary to establish that threatened disclosure will cause detriment in a pecuniary sense: "detriment can be as ephemeral as embarrassment ... a loss of privacy or fear ... and indirect detriment, for example, the confidential information may gravely injure some relation or friend." (see Dean, p.177-8 and the cases there cited for these propositions). Moreover, in *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 AC 109, Lord Keith of Kinkel (with whom Lord Jauncey agreed) said (at p.256):

"I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons to whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."

The disclosure of the Master List will cause detriment to auDA, Identity Digital and Finance as the Master List is kept intentionally confidential, and its release puts the gov.au namespace at risk of targeted cyber-attacks and would adversely affect or compromise integrity or stability of the internet domain name system.

The release of the Master List would undermine Finance's reputation by having a deleterious effect on third parties' confidence in Finance honouring its obligations of confidentiality in the future.

I am satisfied that the disclosure of the Master List would have a detrimental effect on Finance, auDA and Identity Digital. Accordingly, I consider that this criteria is satisfied.

Conclusion

Based upon the above, I consider that the Master List is exempt in full under section 45 of the FOI Act.

Other applicable exemptions

I have found that the Master List is exempt in full under section 45 of the FOI Act. The consulted third parties considered that sections 33 and 47G of the FOI Act also apply to exempt the Master List in full. Given that I consider the document is exempt in full under section 45, I have not considered the application of these or any other applicable exemptions.

Charges

I have decided that a charge is not payable in this matter.

Review and appeal rights

You are entitled to request an internal review or an external review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and appeal rights is set out at **Attachment A**.

If you have any questions in regards to this request, please contact the FOI Team on the above contact details.

Yours sincerely,



Marc Vickers
Assistant Secretary
Governance and Procurement | Information and Communications Technology
Department of Finance
21 September 2022