



20 January 2023
IR FOI ref: 3226

Ms Dale Webster
By email: foi+request-9646-c0a2ddf3@righttoknow.org.au

Dear Ms Webster

FREEDOM OF INFORMATION REQUEST – INTERNAL REVIEW DECISION

I am writing to advise you of my decision following your internal review request of 21 December 2022 concerning the access refusal decision under the *Freedom of Information Act 1982 (FOI Act)* of Ms Nghi Luu dated the same day (**original decision**).

Original decision

On 3 December 2022, you requested access to the following:

A copy of the draft Regional Banking Taskforce report as it stood at the change of government in May 2022. I understand you would not normally release draft copies of reports but as this taskforce spanned two governments I believe it is in the public interest to release the document.

Ms Luu refused access to the requested document under section 47E(d) of the FOI Act on the grounds that release of the document would likely have a substantial adverse effect on the operations of the Treasury.

Internal review decision

I am authorised under section 23 of the FOI Act to make decisions.

My internal review was a fresh consideration of the matter. I was not involved in, nor consulted about, the making of the original decision. I find there is one document relevant to your request. I have decided to affirm Ms Luu's decision on the grounds that the document relevant to your request is exempt under section 47E(d) of the FOI Act. My reasons for decision follow.

In making my internal review decision, I have considered the original decision and your submissions on internal review, the document relevant to your request, the FOI Act and Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**), consultation responses from stakeholders and advice from subject matter experts within the Treasury.

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Internal review submissions

You submitted the following in support of your internal review application:

Section 47E - Certain Operations of Agencies

It is the normal, stated protocol not to release draft reports. This is accepted so the agency does not have to cite a reason for refusing a standard request, so your statement that granting of this FOI would hamper detail in future reports is moot.

The application for this document is an exceptional circumstance that will rarely arise again. It concerns a Coalition report that should have been tabled by a previous government but for reasons unknown this did not happen. Instead, it was released almost a year after the consultation period for the inquiry ended by another political party that had won government, Labor.

Public Interest Test

The status of the report at the change of government is in the public interest because it contains a recommendation that offers a solution for legal problems for both the banks and APRA.

If recommendation 7 was included before the change of government it means that banks, who were under pressure to remove sites that they had withdrawn teller services from and were instead making customers use ATMS at from their branch lists because they no longer met the legal definition under the Financial Services (Collection of Data) Act 2001, had abused their position on a government taskforce to put in a recommendation that they would legally benefit from;

Or,

Recommendation 7 was inserted after the change of government by the new Treasury in response to the pressure it and APRA were under to make the 'big four' banks obey the law and stop reporting sites that did not meet the legal definition of a bank branch as "branches". (An offence that attracts large fines that banks have never been prosecuted on despite misreporting for years.)

Recommendation seven, which calls for a review of how APRA data is collected and reported, makes the problem go away.

The report was released in questionable circumstances at 4.52pm on a Friday evening before a long weekend by Assistant Treasurer Stephen Jones.

Mr Jones refused to do any media interviews on the report but when Treasury was questioned about its failure to apply laws under the Financial Services (Collection of Data) Act 2001 consistently (banks sites that had been mentioned in parliament had been downgraded in APRA's latest data release, while others that were not but had identical formats were left as submitted by the banks) Treasury made a questionable legal interpretation of the law that was inconsistent with its own previous actions/statements and pointed to recommendation seven.

The recommendation appeared to have been tacked on to the others (on a separate page) and was inconsistent with the terms of reference of the taskforce.

I have been in contact with the office of attorney general Mark Dreyfus to report that:

- The failure to disclose the correction of hundreds of errors that go back decades means APRA has colluded with the Bendigo and Adelaide Bank to cover up the misreporting.

- APRA has taken no action against the Bendigo and Adelaide Bank (or any of the other banks) for misreporting of service channels, which carries significant penalties under the Financial Service (Collection of data) Act 2001.
- Former APRA chairman Wayne Byres appears to have misled Senator Malcolm Roberts and, by extension, parliament, about his knowledge of the long-standing errors in the APRA database.
- APRA – in its latest data publication released on October 19 2022 – has applied the legislation inconsistently, for the most part letting larger banks off the hook but cracking down on smaller and foreign institutions.

The response from the Attorney was that until a time when a Federal ICAC is established, responsibility for the matter lay with the Treasury Department.

I therefore submit that the refusal by Treasury to provide the copy of this document is obstructionist and an attempt to evade scrutiny.

Your submissions appear confined to **Recommendation 7** of the *Regional Banking Taskforce report* published in September 2022. Recommendation 7 provides as follows:

There are gaps in current points of presence data collection and reporting arrangements

Currently APRA collects and publishes points of presence data annually for Authorised Deposit-taking Institutions (ADIs or banks). The APRA Points of Presence publication provides information on the physical banking service channels provided to Australians by ADIs, including:

- *face-to-face points of presence offering a branch level of service*
- *other face-to-face points of presence*
- *ATMs*
- *eftpos machines.*

The publication includes how many branches and ATMs are in regional areas and each branch's geospatial location. It currently provides helpful information on the decline in physical points of presence over time. However, the report does not include data on banking services provided online or via mobile banking applications, a key issue in an increasingly digital world.

To better understand and plan the transition away from branches, it is important to know what banking options are available and where (including virtual options). In light of this, the Taskforce recommends APRA review its Points of Presence collection to better capture indicators of how banking services are accessed, including through digital channels. This should be undertaken in consultation with industry and data users and include consideration of how to assess how banking services are accessed in different ways.

Recommendation 7 – Review the APRA Points of Presence collection

Australian Prudential Regulation Authority (APRA) to commence in 2022 a review of its Authorised Deposit-taking Institutions (ADI) Points of Presence collection to better capture indicators on how banking services are accessed, with public consultation in early 2023.

Reasons for decision

As indicated in the original decision, section 47E(d) of the FOI Act conditionally exempts a document where its disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of an agency. The operations of the Treasury include the provision of policy advice and economic analysis on significant issues such as those canvassed by the Regional Banking Taskforce. The Taskforce comprised representatives from Australian banks, peak industry bodies from the financial and business sector, Australia Post and the Australian Local Government Association, the Reserve Bank of Australia, and several government agencies and regulatory authorities.

I find the public release of deliberative material of such a body, including the relevant document in this instance, would discourage future participation and candid contribution by stakeholders in advisory bodies of this nature convened by the Treasury. This reluctance could be expected because of fear of potential reputational damage and adverse public commentary arising from the disclosure of confidential information through the FOI process. It follows this unwillingness to participate and contribute would have a substantial adverse effect on the Treasury's consultative and advisory operations. After considering third party consultation responses, I am satisfied the document is conditionally exempt in full under section 47E(d) of the FOI Act.

Public interest

On the question of disclosure of the requested document being contrary to the public interest, I have noted the factors in the FOI Guidelines for and against releasing conditionally exempt material. I have not taken into account any prohibited factors under section 11B(4) of the FOI Act.

In favour of access, I find release of the conditionally exempt report would promote the objects of the FOI Act and increase scrutiny of Government activities. Against release, I consider there is an overriding public interest in not impeding the process of stakeholder consultation in the development of new policy proposals designed to support agency advice to portfolio ministers. I agree with Ms Luu the public interest is sufficiently served in this case by publication of the Taskforce's final report in September 2022. I have therefore decided to affirm the original decision by refusing access to the draft Taskforce report under section 47E(d) of the FOI Act.

Consideration of your submissions

I am not satisfied by your submission the change of government on 21 May 2022 is an exceptional circumstance warranting release of the requested information. I am also not persuaded there is any public interest in speculation about the existence or otherwise of Report Recommendation 7 as at the election date, as outlined in your submissions.

Rights of Review

Your review rights regarding my internal review decision are attached.

Yours sincerely



Robert Jeremenko
A/g Deputy Secretary
Markets Group

INFORMATION ON RIGHTS OF REVIEW

1. APPLICATION TO AUSTRALIAN INFORMATION COMMISSIONER (INFORMATION COMMISSIONER) FOR REVIEW OF DECISION

Section 54L of the FOI Act gives you the right to seek a review of the decision from the Information Commissioner. An application for review must be made within 60 days of receiving the decision.

An application for review must be in writing and must:

- give details of how notices must be sent to you; and
- include a copy of the notice of decision.

You should send your application for review to:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

AND/OR

2. COMPLAINTS TO THE INFORMATION COMMISSIONER

Section 70 of the FOI Act provides that a person may complain to the Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Information Commissioner must be in writing and identify the agency the complaint is about. It should be directed to the following address:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

The Information Commissioner may decline to investigate the complaint in a number of circumstances, including that you did not exercise your right to ask the agency, the Information Commissioner, a court or tribunal to review the decision.