



Australian Government

Department of Finance

Reference: FOI 22-23/020
Contact: FOI Team
E-mail: foi@finance.gov.au

C Drake

By email only: foi+request-9948-95222d4b@righttoknow.org.au

Dear Mr Drake

Freedom of Information Request – FOI 22-23/020

On 16 February 2023, the Department of Finance (Finance) received your email, in which you sought access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to the following:

On 4 Aug 2022, I received both telephone and written confirmation that the .au registrar was "happy to send" a report I requested, for my access.

Later, your department refused that accesses based on the following claim:

"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."

which, as you can see, is in direct contradiction to the written confirmation I received beforehand.

I do not believe any such legitimate objection was in fact raised, accordingly, I seek access to the actual alleged objection you claim was made, including all dates associated with this alleged objection.

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

Authorised decision-maker

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

Decision

I have identified one (1) document as falling within the scope of your request.

I have decided to refuse to release the one (1) document, as it contains information that is subject to legal professional privilege, as well as material that was obtained in confidence.

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

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- the terms of your FOI request;
- the content of the documents that fall within the scope of your request;
- consultations with third parties in accordance with the FOI Act and submissions made by those third parties;
- the relevant provisions of the FOI Act; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Documents subject to legal professional privilege

Section 42 of the FOI Act provides:

- (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.

Under subsection 42(1) of the FOI Act, a document is exempt from release if it is subject to legal professional privilege. Legal professional privilege is a common law concept and is not defined in the FOI Act.

The FOI Guidelines provide the following guidance on whether a document attracts legal professional privilege:

[5.219] 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.

Document 1 is a covering email and submission from auDA to Finance in response to Finance's third party consultation request in relation to FOI 22/54. Document 1 contains legal advice in relation to the consultation request. auDA sought legal advice prior to providing their response.

As demonstrated by auDA's email to Finance that they were seeking legal advice prior to sending the submission, it is clear that auDA intended for legal professional privilege to apply over the document.

Importantly, both auDA and Finance have treated Document 1 as confidential, as the content of the document has not been discussed or shared beyond specific authorised individuals who require access to perform their work responsibilities. As such, legal professional privilege over Document 1 has not been waived, because the document has not been widely distributed, its legal advice has not been disclosed, and a person has not announced their reliance on the legal advice in the documents in a manner that discloses the substance of the legal advice.

I consider that Document 1 is exempt in full from release under subsection 42(1) of the FOI Act, as it is privileged from production in legal proceedings on the grounds of legal professional privilege.

Document obtained in confidence

Subsection 45(1) of the FOI Act provides:

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- (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.

A document is exempt from release under subsection 45(1) of the FOI Act, if its disclosure would form the basis of legal action for breach of confidence. In other words, this exemption applies if a person who provided confidential information would be able to bring an action for breach of confidence to prevent disclosure, or to seek compensation for loss, or damage arising from disclosure.

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.

[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.

As mentioned above, Document 1 is a covering email and submission from auDA to Finance in response to Finance's third party consultation request in relation to FOI 22/54. At the time of the communications, it was understood by both parties that the correspondence was confidential in nature as it contains legal advice.

I consider that the information contained in Document 1 is specifically identifiable, being information contained in the email correspondence and submission.

The information has the necessary quality of confidentiality as the information is only known to those individuals at auDA and Finance that are required to know to fulfil their role. Access to the information in Document 1 is otherwise restricted. I am not aware of any party having acted inconsistently with their obligations to uphold confidentiality over the information.

The information was communicated and received on the basis of an implied mutual understanding of confidence.

It is vital that Finance is able to assure third parties making submissions for the purposes of FOI that information communicated in confidence will remain confidential. If Finance were unable to assure third parties, then they would be discouraged from having full and frank conversations with Finance. These transparent discussions are necessary to ensure Finance can perform our function under the FOI Act.

Therefore, I consider that Documents 1 is exempt in full from release under subsection 45(1) of the FOI Act, as it contains material that was obtained in confidence.

Charges

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

Third party consultation

Finance consulted with third parties, auDA and Identity Digital– and provided them with a copy of Document 1. auDA objected to release of the document to you, and further agreed with the exemptions applied by Finance over Documents 1.

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**.

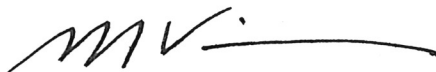
Publication

As documents were not released to you, Finance will not this publish this decision. Additionally, Finance will not publish any documents on our [Disclosure Log](#).

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

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 | ICT Division
Department of Finance
13 April 2023



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If, Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 17 February 2023 it is \$1,011).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.