

15 May 2024

FN

By email: foi+request-11228-345b599c@righttoknow.org.au

Reference number: IA-2101

Notice of Decision – Freedom of Information request

Dear FN

I refer to your request submitted to the office of the Fair Work Ombudsman (**OFWO**) on 14 March 2024 under the *Freedom of Information Act 1982 (FOI Act)*.

This letter sets out my decision in relation to the documents relevant to your request which I am authorised to make under section 23 of the FOI Act.

Scope of Request

“1. High level evaluations, reviews or reports on the App+IBk-s performance and user feedback from its launch in March 2017 to the present.

2. Correspondence between the Fair Work Ombudsman and then Minister for Employment, Senator Michaelia Cash, regarding the app's development, updates, maintenance, operational concerns, and the strategy for both iOS and Android platforms.

The FOI applicant has clarified that this extends to correspondence between the offices of the Fair Work Ombudsman and Senator Michaelia Cash, rather than being limited solely to direct exchanges between the Ombudsman and Senator Cash. This would include any communications exchanged by staff or representatives of both offices concerning the app's development, updates, maintenance, and operational concerns, as well as strategy for both iOS and Android platforms.

3. Documentation detailing the rationale and decision-making process for the discontinuation of updates for the iOS app after November 2017, including any discussions regarding challenges or considerations that influenced this decision.

4. Information on the removal of the Android version of the App from the Google Play Store including discussions on technical, regulatory, budgetary or operational challenges that led to its removal.”

Timeframe for processing the request

The statutory period for processing Freedom of Information requests under the FOI Act is 30 days. The original decision date for processing this request was 15 April 2024.

On 4 April 2024 the OFWO notified you of a requirement to consult with third parties in accordance with section 27 of the FOI Act. This consultation requirement extended the processing timeframe by a further 30 days in accordance with s 15(6) of the FOI Act, and the due date for a notice of decision on access is 15 May 2024.

Third party consultation

The OFWO consulted with two third parties under section 27 of the FOI Act on the basis that they may reasonably wish to make a contention that certain information pertaining to their business and personal affairs should be exempt.

Matters taken into account in making this decision on access

In making my decision, I took the following matters into account:

- the scope of the request
- the documents
- the FOI Act
- the Australian Information Commissioner's FOI Guidelines
- internal consultation
- case law
- consultation with relevant third parties.

Searches

I arranged for searches of OFWO records to identify any documents falling within the scope of the FOI request. Records searched included those held by Technology Branch, Policy Team, BISC Committee, Records Team and the Behavioural Economics Team. The search identified 23 relevant documents with attachments (125 pages in total).

DECISION

I have determined that the documents include conditionally exempt material under sections 47F and 47E(d) of the FOI Act and can be released to you in part.

The relevant documents are outlined in the schedule at **Attachment A** to this letter. Attachment A lists exemptions relied upon under the FOI Act, and detailed reasons for my decision follow.

Section 22 – Irrelevant information

On 18 March 2024 you confirmed the following types of information as irrelevant to the scope request:

- duplicate documents, including duplicate emails. The OFWO will provide emails where they form a final email chain and the authors/recipients are contained within the final email and
- names of OFWO staff members, direct telephone numbers, email addresses and signatures of OFWO staff (other than Senior Executives).

Information that does not fall within the scope of the request has been redacted from the documents under section 22 of the FOI Act as irrelevant information.

The types of information redacted under section 22 include OFWO staff member names and contact details as well as information relating to other technology projects or matters not included in the scope of your request.

Exemptions applied and reasons for decision

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

Section 47E(d) of the FOI Act conditionally exempts a document if disclosure would, or could, reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of agency operations. The exemption has been applied to certain cybersecurity information, to the OFWO's Google Play Account number and to SES staff phone numbers and internal mailboxes.

SES staff contact details and internal group mailboxes

I consider the release of SES staff phone numbers and internal group emails would have a substantial adverse effect on the proper and efficient conduct of the OFWO's operations. The public disclosure of direct telephone numbers and work mobile numbers of staff which fall outside of the OFWO's integrated service platform could lead to enquiries and requests for assistance not being electronically recorded, adversely affecting accountability, transparency, quality assurance and the provision of support in relation to those calls¹.

The OFWO maintains two main channels for contacts from the Australian public (MyAccount and Infoline). The two channels are published on the OFWO's website. The OFWO does not publish the phone numbers of individual staff. As a public agency providing advice and assistance as well as investigating workplace compliance, it is vital that the OFWO can track all communications and transactions with members of the public. The disclosure of Senior Executive Staff member's phone numbers could result in the escalation of requests and enquiries to those staff resulting in certain requests not being tracked within the integrated service platform. This would have a substantial and adverse impact on the ability of the OFWO to conduct its operations effectively and efficiently.

"Would or could reasonably be expected to"

Paragraph 5.15 of the FOI Guidelines provides that, there must, based on reasonable grounds, be at least a real, significant or material possibility in order to satisfy the test for 'would or could reasonably be expected to'. Not all Senior Executive Staff have access to the integrated service platform and/or have received the training to allow them to do so. I consider there is a real, significant possibility that the publication of SES phone numbers could lead to those channels receiving public enquiries and requests for assistance and that this could lead to matters not being captured in the integrated service platform. This would have a substantial and adverse impact on the OFWO's ability to respond to requests for advice and assistance and to monitor the compliance of workplaces in Australia.

Public interest test

Where documents are found to be exempt under this section s11A(5) of the FOI Act requires that access be granted to the personal information unless access would, on balance, be contrary to the public interest.

The disclosure of the SES phone numbers would promote the objectives of the FOI Act by informing the community of the OFWO's operations. Against this I have balanced the fact that to operate effectively the OFWO must be able to channel enquiries and requests for assistance through an integrated service platform. This allows the OFWO to effectively and efficiently carry out its core functions of providing

¹ 'WN' and Inspector-General of Taxation (Freedom of Information) [2020] AICmr 71 (22 December 2020).

education, assistance, advice and guidance and to promote and monitor compliance with workplace laws.

I am satisfied that the publication of SES phone numbers would provide an alternative pathway for enquiries and requests for assistance which would have a substantial adverse effect on the proper and efficient conduct of agency operations and accordingly, this information is exempt under section 47E(d).

Certain cybersecurity information and Google Play Account number

The documents you requested contain the OFWO's Google account ID which is used by the OFWO to access the app developer account. The disclosure of such information would have an adverse effect on the security of the OFWO's apps and information security systems, and could reasonably be expected to have a substantial impact on the proper and efficient conduct of the agency's operations.

The documents contain information relevant to the OFWO's information security posture, including information on cybersecurity risks, vulnerabilities and risk treatments associated with the Record My Hours app. They also include information on a third party supplier providing current cybersecurity advisory services to the OFWO. I have determined that this information is conditionally exempt as the disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the OFWO.

As part of the agency's cybersecurity program, the OFWO regularly and systematically tests its ICT infrastructure so that any vulnerabilities are identified and mitigated before they can be exploited. It is vital that the OFWO can undertake this program without fear of public disclosure of identified vulnerabilities and the actions the FWO takes to mitigate threats to its systems. This information could be used by adversaries to exploit vulnerabilities and conduct cyber attacks which would have a substantial adverse effect on the proper and efficient conduct of the operations of the OFWO.

"Would or could reasonably be expected to"

Paragraph 5.15 of the FOI Guidelines provides that, there must, based on reasonable grounds, be at least a real, significant or material possibility in order to satisfy the test for 'would or could reasonably be expected to'.

Commonwealth Government agencies are operating in a heightened risk environment due to the increasing prevalence of cybersecurity threats. The Australian Signals Directorate reported that in the 2023-2024 financial year, one in five vulnerabilities were exploited within 48 hours despite patching or mitigation advice being available². Public disclosure of certain cybersecurity information could increase the entity's threat level by assisting adversaries to understand:

- vulnerabilities in FWO's systems and applications
- actions the FWO routinely takes or proposes to take to address vulnerabilities
- third parties currently engaged by the FWO to advise on information security.

I am satisfied that the information is conditionally exempt under section 47E(d) of the FOI Act.

² Australian Signals Directorate Cyber-Threat Report 2022-2023.

Public interest test

In balancing the public interest test I have considered the public interest in informing the community of the Government's operations and in particular, in informing the community of the steps which the OFWO takes to protect information. I have balanced this against the public interest in the OFWO maintaining an information security posture which prioritises the protection of information in the face of escalating cybersecurity threat, particularly given the types and quantities of personal information which the OFWO holds.

I have determined that the likelihood of damage that would arise to the OFWO's ability to effectively and efficiently carry out its legislative mandate as described in the *Fair Work Act 2009* were this information to be disclosed publicly outweighs any benefit that would attach to the release of these documents.

Accordingly, I have decided that the release of the OFWO's Google Play Account number and certain cybersecurity information contained in the documents would be contrary to the public interest in Commonwealth Government agencies securely managing the information of the Australian community and it is conditionally exempt under s 47E(d) of the FOI Act.

Section 47F – Personal privacy

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person. Personal information under the FOI Act has the same meaning as outlined in the *Privacy Act 1988*; that is information or an opinion about an identifiable individual, or an individual who is reasonably identifiable.

The section 47F exemption has been applied to the names and contact details of third parties. The information is about a readily identifiable individual so the information is clearly personal information within the meaning of s 47F.

In order for the personal privacy exemption to apply I must be satisfied that:

- a) disclosure would constitute the unreasonable disclosure of personal information; and
- b) access to the relevant information would be contrary to public interest.

Unreasonable disclosure

Whether a disclosure is 'unreasonable' requires a consideration of all the circumstances, including the nature of the relevant information, the circumstances in which the information was obtained, the likelihood that the person concerned would not wish to have the information disclosed without consent and whether the information has any current relevance.

The individuals identified in the documents did not provide consent to the OFWO to release their personal information. I am also not aware of any evidence suggesting that the information is available from publicly accessible sources.

In these circumstances I have formed the view that release of the documents could cause the relevant individuals some stress. I have therefore determined that disclosure of the relevant personal information would be unreasonable in this instance, and that the documents are conditionally exempt from release under section 47F.

Public interest test

In balancing the public interest test I have considered the public interest in informing the community of the Government's operations. I have balanced this against the public interest in an affected individual's rights to privacy in circumstances where the appropriate consent for disclosure has not been given.

Access to the documents

An affected third party is entitled to seek review of my decision to release the edited documents to you. As a result, I am unable to give you access to the edited documents for at least 30 days from the day I notify them of my decision.

In accordance with section 27(7) of the FOI Act, the documents will be released to you after the opportunities the third party has to seek review of the decision have run out, and the decision still stands or is confirmed.

Website Publication

Subject to certain exceptions, section 11C of the FOI Act requires agencies to publish any information released in response to FOI requests on the online Disclosure Log. Section 11C contains some exceptions to this general requirement. These exceptions include when the document contains business or personal information that it would be unreasonable to publish.

As the personal and business information have been redacted, I propose to release the material via the Fair Work Ombudsman's Disclosure Log.

Review rights

I have attached a document setting out your rights of review of this decision at **Attachment B**.

Contact details

For further information, please email foi@fwo.gov.au.

Yours sincerely



Nicola Forbes
Director Information Governance
Fair Work Ombudsman

Attachment A – Schedule of Documents

Document Number	Page	Date	Description	Decision	Applicable Provision (s)
1	001-006	06.07.2017	Internal briefing – Record My Hours App	Release in part	s.22
2	007	11.2018	Dashboard Report	Release in part	s.22
3	008-015	25.05.2018	Email thread regarding data export including attachment	Release in part	s.22 s.47F
4	016-022	07.08.2018	App testing FWO feedback	Release in part	s.47F
5	023-058	03.06.2021	Internal email correspondence- BISC papers including attachments	Withheld subject to third party review (53)	s.22 s.47F s.47E(d)
6	059-063	07.06.2021	BISC Paper (draft) – Record My Hours app	Release in part	s.22 s.47F
7	064	15.07.2021	Internal email correspondence – Apple Developer	Withheld subject to third party review	s.22 s.47F
8	065-069	22.12.2021	Internal email correspondence – App on Google Play store	Release in part	s.22 s.47F s.47E(d)
9	070-078	20.12.2021 to 08.02.2022	Email thread regarding Google play	Withheld subject to third party review	s.22 s.47F

Document Number	Page	Date	Description	Decision	Applicable Provision (s)
10	079-080	Undated	Record My Hours information – additional information	Release in part	s.22
11	081	Undated	Record My Hours Improvement Suggestions	Release in part	s.22
12	082-083	Undated	BISC paper – RMH app	Release in part	s.22
13	084-090	Undated	Record My Hours – Back Pocket Brief	Release in full	
14	091-093	01.10.20219	Email from Google Play store	Release in part	s.22
15	094	11.11.2020	Email from Apple developer	Release in part	s.22
16	095-100	2017	Ministerial briefing document	Release in part	s.22 s.47E(d) s.47F
17	101-102	23.05.2023	Signed Briefing	Release in part	s.22
18	103-105	17.12.2021	Email from Google play store	Release in part	s.22
19	106-108	16.12.2021	Email from Google Play store	Release in part	s.22
20	109	13.01.2022	Email regarding Google Play Developer account	Release in part	s.22 s.47F
21	110-116	22.12.2021	Internal email correspondence	Withheld subject to third party review (111-116)	s.22 s.47F

Document Number	Page	Date	Description	Decision	Applicable Provision (s)
22	117-123	06.03.2017	Internal briefing report	Release in part	s.22
23	124-125	28.11.2019	Email regarding risk assessment	Release in part	s.22 s.47F

Attachment B

INFORMATION ON RIGHTS OF REVIEW & COMPLAINTS

Rights of review

If you are dissatisfied with this decision, you can apply for internal review by this agency (Option 1 below) or external review by the Australian Information Commissioner (IC Review) (Option 2 below).

You do not have to apply for internal review before seeking IC review. However, the Information Commissioner has expressed the view that it is preferable for a person to seek internal review by the agency before applying for IC Review. If you choose Option 1 (internal review), you can also apply for IC review of the internal review decision within 60 days after receiving notice of our review decision.

Option 1 – Internal review

You can seek internal review of the decision. An application for internal review must be made in writing within 30 days after the date you were notified of the decision, or within such further period as the Fair Work Ombudsman allows. The internal review will be conducted by a senior officer who had no involvement in the initial decision.

There is no particular form required to make a request for internal review. However, it would help the reviewer if you said, in writing, why you think the decision should be reviewed. An application for an internal review of the decision should be sent to:

Email: foi@fwo.gov.au

FOI Manager

GPO Box 9887

MELBOURNE VIC 3001

Option 2 – Review by the Australian Information Commissioner

Alternatively, you can apply to the Australian Information Commissioner for IC review of the decision.

An application for IC Review must be made within 30 days after the day you were given notice of this decision and the decision relates to an access grant decision (s 54M(2)(a))³ or 60 days where the decision relates to an ‘access refusal decision’ (s 54L(s)(a)):⁴

In making your application, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. It would also help the Australian Information Commissioner if you set out the reasons for seeking IC review in your application.

To apply for IC review, you can file your application via the [Information Commissioner review application form](#).

Complaints

³ An “access grant decision” is defined in s 53B of the FOI Act to mean a decision to grant access to a document where there is a requirement to consult with a third party under ss 26A, 27 or 27A.

⁴ An “access refusal decision” is defined in s 53A of the FOI Act and Part 10 of the FOI Guidelines at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/>

You can complain to the Australian Information Commissioner about action taken by the Fair Work Ombudsman in relation to your freedom of information request. Your complaint must be in writing and it is the Information Commissioner's preference that an online complaint form is completed. You can lodge your complaint via the OAIC's [FOI complaint form](#).