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Australian Government

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

Our reference: FOI 25-168

Mr Hank Scorpio

By email: foi+request-12286-8af016d9@righttoknow.org.au

Dear Mr Scorpio

Decision on your Freedom of Information Request

On 5 November 2024, you submitted a request to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department), seeking access to documents under the *Freedom of Information Act 1982* (FOI Act).

1 Your request

You requested access to:

Reports, including drafts, briefing materials, and other documents related to the contract CN4040766 (Wagering Advertising Reforms Impact Analysis), undertaken by Nicholls.MMC.

The documents I am seeking should include, but are not limited to:

- Any reports prepared under this contract, including all draft and final versions.
- Briefing materials generated for internal use or for external stakeholders relating to this contract.
- Any correspondence between the Department and the contractor regarding the scope, methodology, or findings of the impact analysis conducted under this contract.

2 Authority to make decision

I am authorised by the Secretary to make decisions in relation to Freedom of Information requests under section 23(1) of the FOI Act.

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3 Decision

3.1 Parts 1 and 3 of your request

With respect to your request for “reports prepared under this contract” and “correspondence between the Department and contractor”, I have identified 5 documents that I consider contain information that is relevant to your request. These documents were in the possession of the Department when your request was received.

I have decided to:

- grant access in full to relevant information in one document, and
- grant partial access to 4 documents.

A schedule setting out the documents relevant to your request, with my decision in relation to these documents, is at **ATTACHMENT A**.

3.2 Part 2 of your request

The right of access under the FOI Act is limited to a ‘document of an agency’, being a document in the possession of the Department, whether created in the Department or received in the Department (section 4 of the FOI Act refers).

Section 24A of the FOI Act provides that an agency may refuse a request for access to a document if:

- (a) all reasonable steps have been taken to find the document, and
- (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency's or Minister's possession but cannot be found, or
 - (ii) does not exist.

Regarding your request for “briefing materials for internal use or for external stakeholders,” the business area responsible for the subject matter of your request has conducted searches of the Department’s information holdings. No documents matching the description in your request were identified as being in the possession of the Department.

I am satisfied that all reasonable steps have been taken to find documents which would be relevant to this part of your request and that the documents cannot be located or do not exist in the possession of the Department.

I have decided, in accordance with section 24A of the FOI Act, that the Department does not hold a document in its possession that meets the terms of part two of your request, referring to briefing materials.

4 Finding of facts and reasons for decision

My findings of fact and reasons for deciding that exemptions apply to parts of the documents relevant to your request are set out below.

4.1 Section 45 - Documents containing material obtained in confidence

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure would found an action by a person for breach of confidence.

Paragraph 5.189 of the FOI Guidelines states that to found an action for breach of confidence, 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

The documents captured by your request contain information communicated to a third party by multiple stakeholders. We have consulted this third party, who has advised that this information was communicated under a strict understanding that it would be held in confidence and not communicated to anyone other than the Department.

I am satisfied that the parts of the documents marked 's45' consist of information:

- that is specifically identified within the documents as being confidential in nature
- that has the quality of confidentiality, is only known to a limited group and is not common knowledge nor in the public domain
- that was communicated and received on the basis of mutual understanding of confidence, and that this mutual understanding exists at the time of the communication
- in circumstances in which disclosure of the information will be without the authority of the affected third party, and
- in circumstances where disclosure of the information would cause detriment to the party who provided the confidential information to the Department. The detriment in this instance would involve financial loss to the affected third party.

For the reasons outlined above, I decided that the parts of the documents marked 's45' are exempt from disclosure under section 45 of the FOI Act.

4.2 Section 47C – Deliberative processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency; or a Minister; or the Government of the Commonwealth.

Deliberative process

Paragraph 6.54 of the FOI Guidelines states that deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

Deliberative matter

Paragraph 6.59 of the FOI Guidelines states that '*deliberative matter*' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words 'opinion, advice or recommendation, consultation or deliberation'.

I am satisfied that the parts of Documents 2 and 4 marked 's47C' contain material that meets the criteria of deliberative matter. I consider that the material discloses consultation and related deliberations in the course of a deliberative process.

Purely factual material

Paragraph 6.70 and 6.71 of the FOI Guidelines states that:

- 6.70 'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.
- 6.71 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt. If the two elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.

I am satisfied that factual information contained within Document 4 is an integral part of the deliberative content.

For the reasons outlined above, I decided that the parts of the documents marked 's47C' are conditionally exempt from disclosure under section 47C of the FOI Act.

Where information is found to be conditionally exempt, I must give access to that information unless access at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

4.3 Section 47F – Documents affecting personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Personal Information

Personal information has the same meaning as in the *Privacy Act 1988* (the Privacy Act). Specifically, section 6 of the Privacy Act provides that *personal information* means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

Paragraph 6.126 of the FOI Guidelines states that for particular information to be personal information, an individual must be identified or reasonably identifiable.

Paragraph 6.125 of the FOI Guidelines states that personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.

An individual is a natural person rather than a corporation, trust, body politic or incorporated association.

I am satisfied that the parts of Documents 4 and 5 marked 's47F', being the names of a number of individuals involved in consultation with private entities, consists of personal information.

Unreasonable Disclosure of Personal Information

Section 47F(2) of the FOI Act provides that, in determining whether the disclosure would involve the unreasonable disclosure of personal information, I must have regard to the following matters:

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources
- (d) any other matters that the agency or Minister considers relevant.

Paragraph 6.133 of the FOI Guidelines states that:

The personal privacy conditional exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

I note that the AAT, in *Re Chandra and Minister for Immigration and Ethnic Affairs [1984]* AATA 437 at paragraph 259, stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...

Paragraphs 6.137-6.139 of the FOI Guidelines state:

6.137 Key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release

6.138 As discussed in the IC review decision of *'FG' and National Archives of Australia [2015]* AICmr 26, other factors considered to be relevant include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information

- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity

6.139 The leading IC review decision on s 47F is 'BA' and Merit Protection Commissioner in which the Information Commissioner explained that the object of the FOI Act to promote transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy.

I am satisfied that the disclosure of personal information contained within the documents would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the conditionally exempt personal information is not well known
- the person to whom the personal information relates is not known to be (or to have been) associated with the matters dealt with in the document
- the conditionally exempt personal information is not available from publicly accessible sources
- the individuals whose personal information is contained in the documents are identifiable
- release of this information would cause stress to the individuals concerned
- no further public purpose would be achieved through the release of the personal information
- the information is current and has not lost its sensitivity through the passage of time
- the individuals would not expect the information to be placed in the public domain, and detriment may be caused to the individuals to whom the information relates, and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

For the reasons outlined above, I decided that the parts of the documents marked 's47F' are conditionally exempt from disclosure under section 47F of the FOI Act.

Where information is found to be conditionally exempt, I must give access to that information unless access at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

4.4 Section 47G – Business information

Section 47G of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Business information

Paragraph 6.181 of the FOI Guidelines states that the conditionally exempt information must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking.

Paragraph 6.191 of the FOI Guidelines further states that the use of the term 'business or professional affairs' distinguishes an individual's personal or private affairs and an organisation's internal affairs. The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.

The parts of the documents marked 's47G' contain business affairs information that is relevant to the business, commercial or financial affairs of a number of organisations or undertakings. This information is relevant to the profitability and financial viability of an organisation or undertaking, and does not relate to its private or internal affairs.

As such, I am satisfied that this information is business information.

Unreasonable adverse effect of disclosure

Paragraph 6.184 of the FOI Guidelines states that the presence of 'unreasonably' in section 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. I must therefore balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of section 47G(1)(a); but this does not amount to the public interest test of section 11A(5) which follows later in the decision process.

Paragraph 6.185 of the FOI Guidelines goes on to state that the test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. I must balance the public interest against a private interest of the affected third parties, preserving the profitability of a business.

The business affairs information relates to the nature of these third parties' business relationships with advertisers. I am satisfied that the disclosure of this information would result in an adverse effect on the business, commercial or financial affairs of a number of organisations or undertakings.

I have also had regard to the public and private interest factors, and I am satisfied that the preservation of the profitability and ongoing viability of the affected third-party business outweighs the public interest in the disclosure of this information.

Prejudice future supply of information

Paragraphs 6.197-6.199 of the FOI Guidelines state:

- 6.197 This limb of the conditional exemption comprises two parts:
- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
 - the reduction will prejudice the operations of the agency
- 6.198 There must be a reasonable likelihood that disclosure would result in a reduction in either the quantity and quality of business information flowing to the government. In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information. Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be

given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.

- 6.199 Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information in issue is routine or administrative (that is, generated as a matter of practice).

I am also satisfied that the disclosure of the business affairs information would be expected to prejudice the future supply of information to the Commonwealth. The information was provided to a contractor to the Commonwealth on the understanding that it would be held in confidence. Disclosure of this information would reasonable be expected to diminish the future willingness of these parties to share information. I am satisfied that the inability to source similar information in the future would prejudice the operations of the Department in developing policy options and providing effective and well-informed advice to the Government.

I have consulted with an affected third party and in making my decision, I have considered submissions made by that third party regarding the relevant business affairs information of additional stakeholders.

For the reasons outlined above, I decided that the parts of the documents marked 's47G' are conditionally exempt from disclosure under section 47G of the FOI Act.

Where information is found to be conditionally exempt, I must give access to that information unless access at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

4.5 Public interest considerations

Pursuant to section 11A(5) of the FOI Act, I must give access to conditionally exempt information unless access to that information at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the conditionally exempt information would be contrary to the public interest.

I note that paragraph 6.224 of the FOI Guidelines states that the public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest
- not something of interest to the public, but in the interest of the public
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests
- necessarily broad and non-specific and
- relates to matters of common concern or relevance to all members of the public, or a substantial section of the public.

Factors favouring disclosure

Having regard to section 11B of the FOI Act, which provides the factors favouring access to conditionally exempt information in the public interest, I consider that disclosure of the conditionally exempt information at this time:

- 1) would provide access to documents held by an agency of the Commonwealth, which would promote the objects of the FOI Act by providing the Australian community with access to information held by the Australian Government
 - I note that paragraph 6.230 of the FOI Guidelines suggests it would be a rare case in which disclosure would not promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the government's activities.

- 2) would inform debate on a matter of public importance
- 3) would not promote effective oversight of public expenditure
- 4) would not allow you access to your own personal information.
 - o I note you are not seeking access to your own personal information and this factor is mute in my considerations.

Factors weighing against disclosure

I consider that the following factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

- 1) could reasonably be expected to prejudice the early developmental stages of forming opinion, advice and recommendations during deliberative processes by creating an environment in which there is a chilling effect on the open consideration of all options that have potential to be put forward
- 2) could reasonably be expected to prejudice the protection of a number of individuals' right to personal privacy
 - o The Department is committed to complying with its obligations under the Privacy Act, which sets out standards and obligations that regulate how we must handle and manage personal information. I consider it is firmly in the public interest that we uphold the rights of individuals to their own privacy and meet our statutory obligations under the Privacy Act.
 - o I note that the substance of the information that is relevant to your request has been released to you and disclosure of the conditionally exempt personal information would not provide you with any further insight into the workings of government beyond that substantive information.
- 3) could reasonably be expected to negatively impact the commercial relationships of third parties
- 4) could reasonably be expected to prejudice an agency's ability to obtain information in the future, and that this would

In making my decision, I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act.

Conclusion – disclosure is not in the public interest

For the reasons set out above, after weighing all public interest factors for and against disclosure, I decided that, on balance, disclosure of the conditionally exempt information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure of the conditionally exempt information is outweighed by the benefit to the public of withholding that information.

4.6 Section 22 – deletion of material from documents released to you

Section 22 of the FOI Act applies to documents containing irrelevant and/or exempt material and allows an agency to delete such material from a document.

Exempt material

As I decided that some information you have requested is exempt from disclosure, I have prepared an edited copy of the documents released to you by deleting the exempt information under section 22(1)(a)(i) of the FOI Act.

Irrelevant material

I decided that the documents captured by your request contain material which can reasonably be regarded as irrelevant to your request. Some of the correspondence relevant to your request relates to quotations for services and details of engagement of the contractor. Your request for correspondence specifically relates to regarding the scope, methodology, or findings of the impact analysis conducted under the relevant contract. As such I have decided that any information contained within that correspondence that does not relate to these aspects of the work completed under the contract.

The documents also contain personal identifiers of public servants. When your request was acknowledged, we notified you that personal information of public servants below the SES level and all email addresses, signatures and direct telephone numbers would be considered irrelevant to the scope of your request unless you told us that you were expressly seeking access to that information. On the basis that you did not notify us otherwise, I decided this information is irrelevant to your request.

As such, an edited copy of the documents has been prepared in accordance with section 22(1)(a)(ii) of the FOI Act. This information is marked 's22' in the documents released to you.

5 Material taken into consideration

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

- the terms of your request
- the content of the documents captured by your request
- the provisions of the FOI Act
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- advice from departmental officers with responsibility for the subject matter contained in the documents captured by your request
- submissions from a third party consulted about the documents captured by your request.

6 Legislative provisions

The FOI Act, including the provisions referred to in my decision, are available on the Federal Register of Legislation website: www.legislation.gov.au/Series/C2004A02562.

7 Your review rights

If you are dissatisfied with my decision, you may apply for a review of it.

7.1 Internal review

You can request an internal review within 30 days of receiving this decision. An internal review will be conducted by a different departmental officer from the original decision-maker.

No particular form is required to apply for review although it will assist the Department if you are able to set out the grounds on which you believe that the original decision should be changed.

Applications for internal review can be sent to FOI@infrastructure.gov.au.

If you choose to seek an internal review, you will also have a right to apply for Information Commissioner review (IC review) of the internal review decision once it has been provided to you if you remain dissatisfied with the decision.

7.2 Information Commissioner review or complaint

An application for IC review must be made in writing to the Office of the Australian Information Commissioner (OAIC) within 60 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

More information about the Information Commissioner reviews and complaints is available on the OAIC website here: www.oaic.gov.au/freedom-of-information/foi-review-process.

8 Publication of material released under the FOI Act

Where I have decided to release documents to you, we may also publish the released material on our Disclosure Log. We will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference our Disclosure Log can be found here: www.infrastructure.gov.au/about-us/freedom-information/freedom-information-disclosure-log.

Further information

If you require further information regarding this decision, please contact the Department's FOI Section at FOI@infrastructure.gov.au.

Yours sincerely



Margaret Lopez
A/g First Assistant Secretary
Media Policy Division

Date: 14 January 2025

SCHEDULE OF DOCUMENTS FOI 25-168

Doc No.	Date of document	Description of document	Num of Pages	Decision on access	Provision of FOI Act
1.	19/12/2023	Email: RE: Request for Quote – Wagering Advertising Reforms	3	Access granted to relevant information	s22
2.	01/02/2024	Email: Re: Seeking Advice – Wagering Advertising Impacts	3	Partial access granted	s22 s45 s47C s47G
3.	12/02/2024	Wagering Advertising Reforms Impact Analysis Initial Report	13	Partial access granted	s45 s47G
4.	22/04/2024	Email: Re: Broadcasters discussions - Wagering Advertising Commercial in Confidence	10	Partial access granted	s22 s47C s47F s47G
5.	April 2024	Wagering Advertising Reforms Impact Analysis Final Report	12	Partial access granted	s45 s47F s47G