

OFFICIAL



Australian Government
Department of Finance

Agency reference: FOI 22/085
Contact: FOI Team
E-mail: foia@finance.gov.au

C Drake

By email only: foi+request-9394-d71a9986@righttoknow.org.au

Dear Mr Drake,

Decision and Statement of Reasons issued under the *Freedom of Information Act 1982* – FOI 22/085

On 24 September 2022, 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:

1. the Sponsorship Agreement between auDA and Finance;
2. the Registry-Registrar Agreement between Identity Digital and Finance;
3. the outbound consultation with auDA and Identity Digital;
4. the joint submissions made by auDA and Identity Digital;
5. all outbound correspondence in which I am mentioned (by name or otherwise) and/or which my FoI 22/54 is mentioned or related to;
6. all inbound correspondence in response to items 3 and 5 above, or in which I am mentioned (by name or otherwise) and/or which my FoI 22/54 is mentioned or related to;
7. The "information" cited in your statement "inconsistent with the information that has been provided directly to Finance by Identity Digital."

On 10 October 2022, Finance notified you of the \$164.42 preliminary assessment of the charges payable by you for Finance to process your request, pursuant to section 29(1) of the FOI Act.

On 12 October 2022, you outlined your contention of the preliminary assessment of charge and sought waiver of the charges. You stated that some of the information requested relates to your personal information, also that the charge had been wrongly assessed and that there is public interest in disclosure of the documents requested.

On 1 November 2022, I, as the decision maker affirmed the preliminary charge assessment of \$164.42.

On 13 November 2022, you sought internal review of the Department's decision. On 13 December 2022, the decision maker affirmed the original decision.

On 16 February 2023, you sought Information Commissioner (IC) review of the internal review decision under section 54L of the FOI Act.

During the IC review, Finance notified the Office of the Australian Information Commissioner (OAIC) that it no longer considers that you are liable to pay a charge to process your request.

On 24 October 2024, the Acting Deputy Commissioner substituted their decision that you are not liable to pay any charge in respect of your request.

On 20 November 2024, Finance notified you that it will be processing your request, that third party consultation would be undertaken and that the processing period has been extended by 30 calendar days to allow for this consultation. As such, a decision is currently due to you by Monday 23 December 2024. Finance also notified the Office of the OAIC that a decision is now due on this date.

Authorised decision-maker

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

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

My Decision

I have identified nine documents falling within the scope of your request.

I have decided to:

- release six documents with some information redacted as the documents contain material subject to legal professional privilege (section 42 of the FOI Act), documents subject to deliberative process (section 47C of the FOI Act), documents that would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (section 47E) and irrelevant information (section 22).
- refuse to release one document 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 (section 45 of the FOI Act). That same document is also exempt on the grounds of national security (section 33 of the FOI Act).
- not release two documents to you at this time as third parties have objected.

Locating and identifying documents

The documents were identified by conducting searches of Finance's information management systems including SharePoint and Outlook using all reasonable search terms that could return documents relevant to your request.

Relevant Finance staff able to identify documents within the scope of the request were also consulted.

The documents are identified in the Schedule at **Attachment A**.

Material taken into account

In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based, and the reasons for my decision to grant access to the documents follows.

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

- 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, including sections 3, 11 and 11A; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines)¹.

Reasons for decision

I have decided to grant part access to the material within the scope of your request, subject to the following provisions of the FOI Act.

Section 45 – Breach of confidence

Section 45 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.

[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.

I consider that the five criteria listed in the FOI Guidelines at 5.159 are satisfied, for the same reasons as providing in Finance's decision letter for your request 22-54 (**Attachment A**). Given that I support the reasoning provided in that letter, I do not consider it necessary to repeat that information here.

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

¹ <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>

Section 33 – National Security

As stated in the decision letter for your request 22-54 (**Attachment A**) I 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. At the time I did not consider the application of these or any other applicable exemptions in detail. However, I will now also consider the application of section 33.

Section 33 provides:

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:
 - (i) the security of the Commonwealth;
 - (ii) the defence of the Commonwealth; or

...

The FOI Guidelines provide:

[5.24] ... There must be ‘real’ and ‘substantial’ grounds for expecting the damage to occur which can be supported by evidence or reasoning. A mere allegation or possibility of damage is insufficient to meet the ‘reasonable expectation’ test. Davies J said in *Re Maher and Attorney-General’s Department* that ‘there must be a cause and effect that can be reasonably anticipated’: But if it can be reasonably anticipated that disclosure of the document would lessen the confidence which another country would place on the Government of Australia, that is a sufficient ground for a finding that the disclosure of the document could reasonably be expected to damage international relations. Trust and confidence are intangible aspects of international relations.”

[5.29] The term ‘security of the Commonwealth’ includes the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests.

[5.33] It is well accepted that securing classified government information forms part of the security of the Commonwealth. The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time. Where a request is received for classified government information, the documents must be considered both individually and collectively. The Information Commissioner believes that it might be safer for the FOI decision maker to err on the side of non-disclosure provided the interests of other citizens are able to be protected. Where there is doubt, this should be in favour of non-disclosure.

As set out under the ‘Detriment’ criteria of the Breach of confidence exemption in the decision letter for your request 22-54 (**Attachment A**), the disclosure of the Master List (Document 09) will cause detriment to auDA, Identity Digital and Finance as the Master List is kept intentionally confidential. 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. For example, release of the Master List could be 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 information within Document 09 in its totality would cause damage to the security of the Commonwealth. As set out in the decision letter for request 22-54 (**Attachment A**), Finance acknowledges that there is information that is already in the public domain such as individual domain names. 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. When considered collectively, the disclosure of the exempt information, that is, the Master List discloses material further than the details in the public domain and would pose a very real risk of damage to the security of the Commonwealth.

I have therefore decided that Document 09 is exempt from disclosure under section 33 of the FOI Act.

Section 42 – Material subject to legal professional privilege

Subsection 42(1) provides:

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.

The FOI Guidelines provide:

[5.128] LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

[5.129] 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

I have examined Document 07 and satisfied that it includes a third-party submission made by auDA regarding your request for access to the “master list” of gov.au public domain names as part of your original FOI request 22-54. The submission was prepared by outside Counsel for auDA. I am satisfied that the submission comprise confidential legal advice passing between the external legal advisers to auDA and then to Finance’s legal advisers, for the dominant purpose of giving or receiving independent legal advice in regards to the freedom of information request.

I have therefore decided that parts of the document are exempt from disclosure under section 42 of the FOI Act

Section 47C – Documents subject to deliberative process

Section 47C provides:

(1) A document is conditionally exempt if its disclosure under this Act 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:

- (a) an agency; or
- (b) a Minister; or
- (c) the Government of the Commonwealth

The FOI Guidelines provide:

[6.54] A 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.

The FOI Guidelines at [6.61] provide a list of recordings or exchanges that may be considered to be a deliberative process. These include:

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *interim decisions or deliberations.*

As explained above, Document 07 includes a third party submissions made by auDA regarding your request for access to the “master list” of gov.au public domain names as part of your original FOI request 22-54. This document contains information including opinion, advice and recommendations from auDA, and was provided to Finance in the process of considering the specific FOI request.

One of Finance’s functions as an agency is to consider and make access decisions for FOI requests. The relevant information was created as part of a consultation process to provide third parties with an opportunity to object to disclosure by setting out the specific exemption under the FOI Act that supports why that the document should not be disclosed, or parts of the document should be redacted before disclosure. The third-party submission does not represent Finance’s final position. As such, I consider this deliberative matter satisfies the requirements outlined in section 47C and the FOI Guidelines.

Accordingly, I have decided that this information in Documents 07 would disclose deliberative matter and is conditionally exempt under section 47C of the FOI Act.

Section 47E – Certain Operations of Agency

Section 47E provides:

(1) A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency

The FOI Guidelines provide:

[6.114] The conditional exemption may also apply to a document that relates to a complaint made to an investigative body. Disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body’s operations. Further, disclosure of information provided in confidence by parties to a complaint or investigation may reduce the

willingness of parties to provide information relevant to a particular complaint and may reduce their willingness to participate fully and frankly with the investigative process. In such cases the investigative body's ability to obtain all information would be undermined and this may have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.

[6.115] The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner...

In *DZ and Commonwealth Ombudsman* [2014] AICmr 137, it was found that disclosure of certain material could adversely affect the willingness of agencies to cooperate with another investigative body. Furthermore, the Information Commissioner provided that:

"It is likely that a situation will arise in future that involves information held across more than one agency and that agencies will be less forthcoming about the issues this raises if the information is not treated confidentially. If agencies are less forthcoming and less willing to consider and consult on the proper course of action in this situation, the [Ombudsman's] investigations will be less efficient."

As above, Document 07 includes a third party submissions made by auDA regarding your request for access to the "master list" of gov.au public domain names as part of your original FOI request 22-54. I consider that disclosure of this information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of Finance.

The submission was provided by auDA on the assumption that it would be treated as confidential information and not disclosed. If sensitive information shared in confidence by third parties is exposed, it could reasonably be expected that those third parties would be less forthcoming with the breadth of material and views they provide in future submissions. If this occurred, this would materially impact the quality of Finance's decision making in relation to freedom of information requests.

If third parties only provide high level or incomplete information in their submissions, due to concerns that more fulsome submissions will not be kept confidential, then decision makers would not have all the relevant information to assess the access request. I consider this would substantially affect the ability of Finance's decision makers to make correct and preferable decisions about freedom of information requests, which may disadvantage freedom of information applicants.

Therefore, I consider that the disclosure of this information could have a material adverse effect on other third parties to Finance and have a substantial adverse effect on Finance's operations in making freedom of information access decisions in the future.

Accordingly, I have decided that information in Documents 07 is conditionally exempt under section 47E(d) of the FOI Act

Public interest test

Section 11A of the FOI Act relevantly provides:

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

In finding that the documents are conditionally exempt in part, I am required to consider whether it would be contrary to the public interest to give access to the information in the documents at this time.

Factors favouring disclosure

Section 11B of the FOI Act relevantly provides:

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

In considering the scope of your request and the content of the documents, I have taken into account the intention of the FOI Act to provide for open Government and that the release of the documents would promote transparency of Government activities. I consider that the release of the documents would promote the objects of the FOI Act in demonstrating the actions that agencies take and the matters considered in making decisions.

Further, I have balanced this consideration against the factors against disclosure below.

Factors against disclosure

Paragraph [6.233] the FOI Guidelines provides a non-exhaustive list of factors against disclosure. I consider that the following factors apply to these documents, in that the release of the information in the documents could reasonably be expected to:

- prejudice an agency's ability to obtain confidential information
- prejudice an agency's ability to obtain similar information in the future;
- prejudice the effectiveness of an agency's decision-making and deliberative processes; in particular, by:
 - discouraging full and complete sharing of opinions and recommendations; and
 - harming the development of sound decision-making.

I consider that the release of documents within the scope of your request would inhibit third party communications in considering freedom of information access decisions. Finance seeks submissions from other Commonwealth agencies and third parties, which are relied on as a prominent element of the decision-making process. Some information is provided on the assumption that it remains confidential. If the redacted material is released it would divulge information or matter communicated in confidence between auDA and Finance, which could adversely affect the level of trust and cooperation.

It could lead to auDA and other third parties losing trust in Finance's ability to handle confidential information about current and future freedom of information access requests, resulting in less comprehensive and frank submissions. Accordingly, disclosing this material would adversely affect Finance's ability to consider all relevant material relating to freedom of information access requests and substantially impact the quality of decision-making. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.

I consider, for the reasons above, that the release of the conditionally exempt material in the

documents would be contrary to the public interest and that the above factors weigh strongly against disclosure

Irrelevant factors

Section 11B of the FOI Act relevantly provides:

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

I have not taken into account any of these irrelevant factors.

Balancing public interest factors

The FOI Guidelines relevantly provide:

[6.238] To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.

I acknowledge that there is public interest in providing access to the information in the documents. However, on balance, I consider that the factors against disclosure outweigh the factors favouring disclosure.

I consider there is a public benefit in Finance being able to provide high quality decisions and advice in exercising its functions and powers in relation to the Commonwealth's freedom of information scheme. This involves, and can only be achieved through, the provision of comprehensive and frank submissions from third parties such as auDA, and agencies.

To enable Finance to undertake a best practice approach in considering act of freedom of information requests, I consider it essential to maintain confidentiality in general over all submissions received about a freedom of information request. This will ensure that Finance continues to receive robust information and advice which, in turn, enables Finance to make robust and well-informed access decisions for freedom of information requests. Maintaining the confidentiality of material received for freedom of information decisions therefore benefits all current and future freedom of information applicants.

Therefore, I consider that on balance the release of the conditionally exempt material in the documents would be against the public interest and have decided to refuse the release of this material.

Section 22 - Irrelevant information removed from the documents

Section 22 of the FOI Act relevantly provides:

- (1) This section applies if:

- (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and

- (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request...

On 22 November 2024, Finance advised that subject to any objections raised by you, the names and contact details of junior staff (non-SES officers) and staff employed under the *Members of Parliament (Staff) Act 1984* (adviser level and below) would be redacted under subparagraph 22(a)(ii) of the FOI Act on the basis that these details are irrelevant to the request.

Documents 03, 04, 05, 06 and 07 within scope of your request contain information which is not relevant to your request under paragraph 22(a) of the FOI Act. Accordingly, this information is irrelevant to your request and Finance has prepared an edited copy of the documents that has removed this information in accordance with paragraph 22(b) of the FOI Act.

Charges

As set out above on 24 October 2024, the Acting Deputy Commissioner substituted their decision that you are not liable to pay any charge in respect of your request.

On 20 November 2024, Finance notified you that it will be processing your request.

Third party consultation

Finance consulted with third parties and provided them with a copy of the documents.

The third parties objected to our proposed decision to release Document 01 and 02 to you. This means we are not able to provide a copy of the documents in full to you at this time. The third parties have 30 calendar days to seek an internal review of our decision to release the documents to you, or to appeal to the Office of the Australian Information Commissioner. We will notify you if the third party seeks a further review. If no review is made, we will release the documents to you after 22 January 2024.

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 B**.

Information Publication Scheme

The Information Publication Scheme requires an agency to publish information released in response to individual requests made under the FOI Act, except in specified circumstances.

I am of the view that details of your request should be made available on the Department's FOI Disclosure Log, which can be accessed at <https://www.finance.gov.au/about-us/freedom-information/disclosure-log>.

Finance only publishes details of the FOI request and the documents released in response to the request, and does not publish details of FOI applicants.

If you have any questions about this request, please contact the FOI Team.

Yours sincerely,

Marc Vickers
Assistant Secretary
Governance and Procurement | Information and Communications Technology
Department of Finance
December 2024

SCHEDULE OF DOCUMENTS RELEVANT TO FOI 22-085

Document No.	Date of Document	No. of Pages	Description of Document	Decision
1			2LD Sub-Sponsorship Agreement for gov.au	Third Party Objection.
2			Registry-Registrar Agreement	
3	10/08/2022	1	Email from Finance to Afilias/ Identity Digital	Release in part - Irrelevant material redacted under section 22.
4	22/08/2022	4	Email correspondence between Finance and auDA – Third Party Consultation	
5	5/09/2022	4	Email correspondence between Finance and auDA – Third Party Consultation	
6	10/08/2022	1	Email from Finance to auDA	
7	02/09/2022	14	auDA and Identity Digital submissions	Release in part – Material subject to legal professional privilege redacted under section 42.
8	06/09/2022	4	Email from Finance to Afilias / Identity Digital – Third Party Consultation	Release in part - Irrelevant material redacted under section 22.
9	-	-	Master List	Refused – Exempt as document containing material obtained in confidence under section 45.



Australian Government

Department of Finance

Your Review Rights

Legislation

A copy of the FOI Act is available at: <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

Internal Review (IR)

If you disagree with this decision, you can seek a review of the original decision. The review will be conducted 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.

Your request for an IR should include:

- 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: foia@finance.gov.au

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

Information Commissioner review

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for an Information Commissioner review of this decision. You must apply in writing within **60** calendar days of this notice.

For further information about review rights and how to submit a request for a review to the OAIC, please see <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>.

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 Information Commissioner within **30** calendar days of being notified of our decision to release your information.

The OAIC asks that you commence a review by completing their online form which is available on their website.

Your review 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

Phone: 1300 363 992 (local call charge).

Making a complaint

You may complain to the Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Information Commissioner can be directed to:

Phone: 1300 363 992 (local call charge)

Email: enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Finance as the relevant agency.