



OFFICIAL

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2024/269

To Mr James Stevens MP

Email: James.Stevens.MP@aph.gov.au

Dear Mr Stevens

I refer to your request of 13 August 2024 to the Department of the Prime Minister and Cabinet (the Department), for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

Scope of request

You set out your original request in the following terms:

This request is an application for the purposes of the FOI Act 1982.

Please provide the invoice and documents relating to: Advertising, Advertising: Mediabrands Australia Pty Ltd- AusTender Contract Notice: CN4081648.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- the FOI Act
- the Guidelines issued by the Information Commissioner¹ (the FOI Guidelines)

¹ s 93A of the FOI Act

- views of a third party consulted by the Department under section 27 and 27A of the FOI Act.

Documents in scope of request

The Department has identified four (4) documents that fall within the scope of your request.

These documents are set out in the Schedule of Documents at **Attachment A**.

Decision

I have decided to grant access in part to four documents, with exempt material deleted, on grounds the documents contain information exempt under:

- section 47 (Commercially valuable information) of the FOI Act
- section 47F (Personal privacy) of the FOI Act
- section 47G (Business information) of the FOI Act.

Information considered to be irrelevant to the request has been deleted under section 22 of the FOI Act.

Reason for decision

My findings of fact and reasons for deciding that certain information is exempt or irrelevant is set out below.

1. Section 47 – Commercially valuable information

Section 47(1)(b) of the FOI Act provides:

- (1) *A document is an exempt document if its disclosure under this Act would disclose:*
 - (b) *Any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

The FOI Guidelines² relevantly provide that to be exempt under section 47(1)(b), a document must satisfy two criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body and;
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

The FOI guidelines further provide that 'commercial value' need not necessarily have an 'exchange value' in the sense that it can be sold as a trade secret or intellectual property.³ To determine whether information has commercial value requires consideration of:

² FOI Guidelines [5.159]

³ FOI Guidelines [5.235]

- whether the information is known only to the agency or person to whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value;
- whether the information confers a competitive advantage on the agency or person to whom it relates – for example, if it lowers the cost of production or allows access to market not available to competitors;
- whether a genuine ‘arm’s-length’ buyer would be prepared to pay to obtain that information;
- whether the information is still current or out of date;
- whether disclosing the information would reduce the value of a business operation or commercial activity – reflected, perhaps, in a lower share price.

The documents contain sensitive commercial information and details on the business, commercial, strategic and financial affairs of a third party that is not in the public domain. Having consulted the relevant third party, they advised documents 1 to 4 contain information of a commercial value which is reasonably expected to be diminished by its disclosure.

In determining whether the identified material is exempt, I have taken into consideration that the information is known only to a limited group, and such knowledge does not detract from the intrinsic commercial value of the information. Further, the information confers a competitive advantage and remains valuable to the third party. Disclosure of this information could reasonably be expected to diminish its value and to provide an advantage to competitors.

Accordingly, I am satisfied that the identified material in each document is exempt from release under section 47(1)(b) of the FOI Act.

2. Section 47F – Personal Privacy

Section 47F(1) of the FOI Act provides:

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

For the purposes of the FOI Act, I note that ‘personal information’ has the same meaning as in the *Privacy Act 1988*.

Having identified third party ‘personal information’ within documents 1 and 2 I have considered the provisions of section 47F(2), which require me to have regard to:

- (a) the extent to which the information is well known;*
- (b) whether the person is known to be associated with the matters in the document*
- (c) the availability of the information from a public source; and*
- (d) any other matters relevant, for example if it is reasonable to suspect the person would expect their information to be released as part of an FOI request.*

These documents have been identified as containing the staff names and contact details of a third party. I have considered the circumstances and find that the identified personal information is not well known and not currently available through a public source. I am also satisfied that certain individuals are likely not known to be associated with the matters in the documents.

I am satisfied parts of documents 1 and 2 are conditionally exempt under section 47F(1) of the FOI Act. I have considered the public interest factors below at section 4.

3. Section 47G – Business information

Section 47G(1)(a) of the FOI Act provides:

- (1) A document is conditionally exempt if its disclosure under this Act 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;*

The FOI Guidelines explains that 'reasonably be expected' requires a decision maker assess the likelihood of the predicted or forecast effect following disclosure.⁴ This analysis is made on what is reasonably expected rather than the certainty of an effect,⁵ and be based on reasonable grounds that there is at least a real, significant or material possibility of prejudice.⁶

Documents 1 to 4 includes information that relates to the commercial and financial affairs of a third party that is not in the public domain, nor readily discernible from public sources. The FOI Guidelines provide that the term 'business or professional affairs' has been interpreted to mean the totality of the money-making affairs of an organisation.⁷

Having consulted the third party, they advise disclosure of the relevant material would or could reasonably be expected to have an adverse impact on their ability to conduct their business, commercial and financial affairs, particularly with regards to their ability to negotiate fees and terms for future services.

Considering the above factors, I find release of the identified conditionally exempt material is reasonably expected to have an unreasonable adverse effect on the third party.

Accordingly, I am satisfied that parts of documents 1 to 4 are conditionally exempt under section 47G(1)(a) of the FOI Act.

⁴ FOI Guidelines [6.13]

⁵ FOI Guidelines [6.15]

⁶ FOI Guidelines [6.16]

⁷ FOI Guidelines [6.191]

I have considered the public interest factors below at section 4.

4. Public interest

The FOI Act provides that a conditionally exempt document must nevertheless be disclosed unless its disclosure would, on balance, be contrary to the public interest⁸. In determining whether its disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors.

As I have decided that parts of the documents are conditionally exempt, I am now required to consider the public interest factors, in doing so I have not taken into account the irrelevant factors as set out in s 11B(4) of the FOI Act, this includes:

- a) *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in 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 documents 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*

In applying the public interest, I have noted the objects of the FOI Act⁹ and the factors favouring access as listed in s 11B(3) of the FOI Act. Having regard to the material before me and the circumstances of the documents found to be conditionally exempt I am satisfied of the following:

- access would promote the objects of the FOI Act¹⁰
- access may inform debate on a matter of public importance
- access may promote effective oversight of public expenditure

The FOI Act does not set out any public interest factors against disclosure and require that agencies are to have regard to the FOI Guidelines in order to work out if disclosure would, on balance, be contrary to the public interest¹¹.

The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the documents found to be conditionally exempt, may weigh against disclosure. I am satisfied that disclosure could reasonably be expected to:

- prejudice the protection of an individual's right to privacy,
- prejudice the protection of a business, or organisation's legitimate professional affairs.

⁸ s 11A(5) of the FOI Act

⁹ s 3 of the FOI Act

¹⁰ s 11B(3)(a) of the FOI Act

¹¹ s 11B(5) of the FOI Act

After careful consideration of all relevant factors, I have decided that, on balance, the factors against disclosure outweigh those favouring disclosure. Accordingly, I am of the view that disclosure of the requested document would be contrary to the public interest.

5. Deletion of irrelevant matter

Section 22 of the FOI Act authorises the Department to give access to an edited copy of a document if giving access to a document would disclose information that would be reasonably regarded as irrelevant to the request, and it is possible for the Department to prepare an edited copy, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

On 21 August 2024, the Department advised you of its policy to exclude the personal and direct contact details of officers not in the Senior Executive Service (SES) and any Ministerial staff, as well as any person's signature, and the mobile or direct numbers of SES officers, which are contained in documents that fall within the terms of an FOI request. This category of information is identified as irrelevant and documents can be modified by the Department to delete the irrelevant material.

I am satisfied that parts of the documents are irrelevant under section 22(1)(a)(ii) of the FOI Act. The remaining parts of the documents have been released to you as they are relevant to your request.

Review rights

If you disagree with my decision, you may apply for Information Commissioner review of the decision.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days after the date of this letter.

More information about Information Commissioner review is available [here](#).¹²

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. More information about complaints is available [here](#).¹³

¹² <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>

¹³ <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints/make-an-foi-complaint>

If you wish to discuss any aspect of your requests, you can contact the FOI Section by email at foi@pmc.gov.au.

Yours sincerely

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a smaller loop and a dot.

Ingrid Lundberg
Assistant Secretary
Policy Projects and Taskforce Office
Department of the Prime Minister and Cabinet
28 October 2024