



Mr Fraser Tweedale

By email only: frase@frase.id.au

Contact officer: Denise Lux-Bridges
Reference: 1-RL0CJ9F

19 November 2021

Dear Mr Tweedale

Decision in respect of your Freedom of Information (FOI) Internal Review request

I refer to your request for an internal review under the *Freedom of Information Act 1982* (FOI Act), which I received on 19 October 2021.

I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

Your request

By email dated 13 July 2021 via the Right to Know website, you requested the following documents:

- (1). Source code of the MyGovID iOS and Android apps, and server applications that form part of the MyGovID system, including build scripts, manifests, software license terms, and media assets (icons, audio files, etc).
- (2). Technical documentation about the MyGovID system, such as API documentation, architecture diagrams, security assessments, technical presentation slides, "whitepapers" and similar documents.

On 27 July 2021, you were issued with a notice pursuant to section 24AB of the FOI Act, which stated that the work involved in processing your request would substantially and unreasonably divert the resources of the ATO from its other operations.

On 28 July 2021, you advised that you wished to revise the scope of your request to the following:

Source code of the most recent public release of the MyGovID Android client application, including program source files, build scripts, manifests, software license terms, and media assets (icons, audio files, etc).

On 10 August 2021, the original decision-maker, S Sword, advised you that they had decided to refuse your request, on the grounds that the information within the documents you had requested were exempt from production under sections 47 (trade secrets or commercially valuable information) and 47E(d) (operations of agencies) of the FOI Act.

By letter dated 8 September 2021, which I received on 19 October 2021, you requested an internal review of the original decision-maker's decision. As a high level summary, you made the following submissions in support of your request:

- The MyGovID source code is not a trade secret, and thus exempt under section 47(1)(a) of the FOI Act, because:
 - It is not used in a trade or business, as it is provided without charge and does not generate revenue or relate to a particular income stream; and

- There is no commercial competition in providing authentication mechanisms for government services, and thus the disclosure to a competitor would not likely cause real or significant harm;
- The MyGovID source code is not commercially valuable information, and thus exempt under section 47(1)(b) of the FOI Act, because:
 - The information does not offer a competitive edge to the ATO;
 - It is not reasonable to expect that a third party buyer would pay to obtain the information; and
 - The disclosure of the information would not reduce the value of a business operation or commercial activity of the ATO;
- You accept that information obtained from third parties under commercial license containing terms that prohibit distribution would be exempt, but maintain that this information should be easily severable from the remainder of the source code;
- Release of the information would not cause a substantial adverse impact on the operations of the ATO, and thus be conditionally exempt under section 47E(d) of the FOI Act, because:
 - Access to source code is not a prerequisite for developing a counterfeit application;
 - The 'app store' distribution model provides significant safeguards and recourse against counterfeit applications, and those users minded to download MyGovID from places other than the app store would likely take steps to verify the authenticity of an app before doing so; and
 - Access to source code is not a prerequisite for finding vulnerabilities in a software system. While access to source code could reveal vulnerabilities to those minded to exploit them, equally it could allow ethical people to find and report those vulnerabilities so that they can be mitigated or fixed.

My decision in respect of your request

I have reviewed the original decision and have decided to affirm it.

Reasons for my decision

Section 11 of the FOI Act provides that you have a legally enforceable right to obtain access to a document of the ATO. Under section 11A of the FOI Act, the ATO must give you access to a document upon your request.

However, access to a document or part of a document need not be provided where:

- The document is exempt from production, on the grounds that its disclosure would reveal trade secrets or other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed (section 47 of the FOI Act); and
- The document is conditionally exempt from production, on the grounds that its disclosure would have a substantial and adverse effect on the operations of an agency (section 47E(d) of the FOI Act), and, on balance, it would be contrary to the public interest to disclose the document.

In my view, the documents you have requested are exempt from production in full, under section 47(1)(a) of the FOI Act. In the alternative, the documents are conditionally exempt from

production in full under section 47E(d) of the FOI Act, and it would be contrary to the public interest to disclose the documents.

As such, I have decided to affirm the original decision, and refuse your request for documents in full.

The reasons for my decision are set out below.

Section 47(1)(a) of the FOI Act – Trade Secrets

Section 47 of the FOI Act provides:

A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

(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.

Within the original decision, the original decision-maker considered that the document you have requested, being MyGovID source code, was exempt under subsections 47(1)(a) and 47(1)(b) of the FOI Act, either collectively or in the alternative.

In your internal review application, you made submissions as to why the MyGovID source code did not constitute a trade secret, or other information having a commercial value.

In my view, the MyGovID source code does constitute a trade secret for the purpose of section 47(1)(a) of the FOI Act.

As you have identified, the Office of the Australian Information Commissioner (OAIC) has published guidelines pursuant to section 93A of the FOI Act (the Guidelines). The ATO is required to have regard to the Guidelines when making a decision under the FOI Act.

Paragraphs [5.196] to [5.208] of the Guidelines set out the OAIC's position on the application of section 47 of the FOI Act. Relevantly, paragraphs [5.199] to [5.203] state:

5.199 The term 'trade secret' is not defined in the FOI Act. The Federal Court has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.

5.200 The Federal Court referred to the following test in considering whether information amounts to a trade secret:

- the information is used in a trade or business
- the owner of the information must limit its dissemination or at least not encourage or permit its widespread publication
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the information.

5.201 Factors that a decision maker might regard as useful guidance but not an exhaustive list of matters to be considered include:

- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner's business
- measures taken by the owner to guard the secrecy of the information
- the value of the information to the owner and to his or her competitors
- the effort and money spent by the owner in developing the information
- the ease or difficulty with which others might acquire or duplicate the secret

In their decision, the original decision-maker relied on the decision of the AAT in the matter of *Cordover and Australian Electoral Commission* [2015] AATA 956 (*Cordover*), in which source code had been found to be a trade secret.

In your response, you maintained that the MyGovID source code could be distinguished from the source code in *Cordover* (being source code for an application known as EasyCount) because the Australian Electoral Commission (AEC) issued licences on commercial terms to use EasyCount in complied form. It is your view that it is therefore necessary to consider the requirements of paragraph [5.200] of the Guidelines. While you have conceded that the ATO has taken steps to limit the dissemination of the source code, it is your view that the MyGovID source code fails points 1 and 3 of paragraph [5.200] of the Guidelines.

I concur that *Cordover* is instructive rather than determinative, however, I also concur with the original decision-maker that the decision in *Cordover* clearly indicates that it is possible for source code to constitute a trade secret.

I consider that the factors at paragraph [5.200], as taken from the decision of the Federal Court in *Re Searle Australia Pty Ltd v. Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241 (*Re Searle*), are to be considered when determining whether information is a trade secret for the purposes of section 47(1)(a) of the FOI Act.

However, I cannot concur with your assessment that the MyGovID source code is neither used in a trade or business, or would cause significant harm if disclosed to a competitor.

Under the Trusted Digital Identity Framework (TDIF), the ATO is an accredited digital identity service provider in respect of the MyGovID application. This means that MyGovID meets specific requirements for accessibility, privacy and protection, security and fraud control, risk management, and technical integrity, and has been assessed as such. Because of accreditation, the MyGovID system is trusted to identify individuals for the purposes of access to government services and private information.

It is my understanding that the Federal Government has recently consulted on a draft of the *Trusted Digital Identity Bill* (TDI Bill), and that this Bill is intended to be introduced into Parliament in the foreseeable future¹. It is further my understanding that, presuming that the TDI Bill is passed through Parliament and becomes legislation, it will open the TDIF accreditation system to other State and Local Government agencies as well as private providers. This means that, while the MyGovID app currently does not have competition, it is being developed with the knowledge and understanding that a proposal to extend the scheme in which it is a flagship participant is in an advanced stage of development.

Furthermore, it is my understanding that, while individual users will not pay to use MyGovID or another application developed by a TDIF accredited digital identity services provider, there is a charging framework proposed to accompany the TDI Bill that would charge government and private providers to use the system. In this way, the source code for the MyGovID application would become commercially valuable for the ATO, and is being developed with the knowledge and understanding that the charging proposal is in an advanced stage of development.

For the reasons given below in respect of paragraph 47E(d), I consider that disclosure of the source code could cause significant harm, whether disclosure is to prospective competitors or to other entities.

It is therefore my view that the MyGovID application is used in trade or business, and that it has a commercial application where disclosure of the source code to prospective competitors could reasonably be expected to cause significant harm.

I therefore consider that the documents you have requested, being the MyGovID source code, is exempt from production under section 47(1)(a) of the FOI Act.

¹ [Digital Identity legislation: What is it?](#)

Section 47E(d) of the FOI Act – Substantial and adverse effect

Section 47E(d) of the FOI Act provides:

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.

In their decision, the original decision-maker advised that they considered that the release of the MyGovID source code would allow malicious individuals to create apps that masquerade as MyGovID for nefarious purposes, or to find and exploit vulnerabilities in MyGovID.

In your internal review request, you have conceded that the release of the source code could reveal vulnerabilities to those who are minded to exploit them. However, it is your view that the release of the source code would also allow those who are minded to report them and cause the vulnerabilities to be rectified, thus increasing the security of the MyGovID app. Furthermore, it is your view that the release of the source code is not a prerequisite for a person with the skills to find vulnerabilities to be able to do so.

You have expressed the view that, if a person was minded to develop a counterfeit app, they would be able to do so without access to the source code. Furthermore, it is your view that the average user would either download the app from the App Store, or otherwise verify the source of the app before downloading it.

I understand and appreciate these views. However, in my view, it is not required for section 47E(d) purposes that the release of the source code be the only way in which individuals with malicious intent could create a counterfeit app or find and exploit vulnerabilities. In my view, it is sufficient that the release of the source code would be reasonably expected to make it easier for such individuals to do so, or open up avenues for them to do so that would otherwise be closed. In my view, it is reasonably expected that, if the source code is released, this would increase the likelihood that such malicious actions may be undertaken, or that they may be successful.

I have been advised by senior officers from our Digital Identity Services team that it is the opinion of the ATO's security subject matter experts that sharing source code would substantially increase the likelihood of one or more security risks being realised. Given their knowledge of the MyGovID source code and their expertise in IT security risks, I have decided to accept this advice.

As such, I consider that the source code is conditionally exempt under section 47E(d) of the FOI Act. I therefore must consider whether, taking into account the public interest factors in section 11A of the FOI Act as well as the additional factors within paragraphs [6.17] to [6.22] of the guidelines, the public interest favours disclosure.

In their decision, the original decision-maker considered that, while there was some public interest in promoting the objects of the FOI Act, this was outweighed by a stronger public interest in protecting the security of the ATO's digital identity services as a Commonwealth agency.

In your internal review request, you have made submissions about further public interest factors that, in your view, apply to the release of the MyGovID source code. These include that release would:

- Promote the objects of the FOI Act;
- Inform debate on a matter of public importance;
- Promote effective oversight of public expenditure;
- Advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government;
- Contribute to innovation and the facilitation of research; and

- Other factors, including the requirement to review the source code in order to ensure that the software complies with local laws.

I have reviewed your submissions and, to varying degrees, I concur that they are relevant to the question of whether or not release of the MyGovID source code would be in the public interest. I accept, for example, your reasoning that release of the source code would promote the objects of the FOI Act, inform debate on a matter of public importance, and contribute to innovation and the facilitation of research. While I am less convinced that access to source code is required to advance the fair treatment of individuals in accordance with the law in their dealings with government, and that individual app users are required to review the source code to ensure that their software complies with local laws, I am still willing to accept your arguments on face value for the purposes of balancing the factors for and against the public interest.

However, there are also other factors against disclosure that were also not expressly considered by the original decision-maker. These include that disclosure:

- could reasonably be expected to prejudice the protection of an individual's right to privacy (paragraph [6.22(a)] of the Guidelines);
- could reasonably be expected to prejudice security, law enforcement, public health or public safety (paragraph [6.22(c)] of the Guidelines);
- could reasonably be expected to prejudice an agency's ability to obtain confidential information (paragraph [6.22(h)] of the Guidelines);
- could reasonably be expected to prejudice an agency's ability to obtain similar information in the future (paragraph [6.22(i)] of the Guidelines);
- could reasonably be expected to prejudice the competitive commercial activities of an agency (paragraph [6.22(j)] of the Guidelines);
- could reasonably be expected to harm the interests of an individual or group of individuals (paragraph [6.22(k)] of the Guidelines); and
- could reasonably be expected to discourage the use of agency's access and research services (paragraph [6.22(m)] of the Guidelines).

As stated above, it is the considered view of ATO security experts that the release of the source code would substantially increase the likelihood of one or more security risks being realised. Given that the purpose and function of the MyGovID app is to provide assurance as to the identity of individuals so that they can access government services and information – and, to that end, one of the functions of the app necessarily involves the individual users of the app uploading their identity documents for verification, it is my view that an individual's right to privacy would be significantly prejudiced should the source code be released. Further, given the particular information that could be accessed should the MyGovID app be compromised, in my view this would open individual users of the MyGovID app to risk of identity theft or other malicious actions. This would clearly harm the interests of those individuals.

It is my view that, if users became aware of these vulnerabilities, they would therefore be more reluctant to use MyGovID, and thus the ATO would be less able to obtain the information on the app that would allow them to verify the individual's identity.

For the reasons given in respect of section 47(1)(a) above, I further consider that release of the MyGovID source code would prejudice the ATO's competitive commercial activities. Furthermore, it is my view that the increasing risk of malicious attacks as a consequence of release of the source code may impact on the ATO's ability to maintain accreditation as a digital identity service provider.

I appreciate that there are cogent reasons that indicate that the public interest may favour release of the MyGovID source code. However, on balance, I consider the security risks from the release of the source code, and the significant impacts that could result should those risks be realised, outweigh the benefits of release.

As such, it is my view that it is in the public interest that the MyGovID source code not be released.

I therefore have decided to affirm the original decision, and not release the source code pursuant to section 47E(d) of the FOI Act.

Your rights of review

If you are unhappy with my decision, you can apply to the Office of the Australian Information Commissioner for an independent review.

A request for an independent review by the Office of the Australian Information Commissioner needs to:

- be sent within 60 days of being notified of my decision
- include a copy of this notice
- include an address where notices can be sent (eg your email address), and
- be sent to:

GPO Box 5218

Sydney NSW 2001

For further details regarding the Office of the Australian Information Commissioner, visit www.oaic.gov.au

Complaints

Any complaint about the processing of your FOI request or Internal Review can be forwarded to the Office of the Australian Information Commissioner. The complaint needs to be in writing and identify the agency against which the complaint is made. There is no particular form required to make a complaint, however using the online form is preferable.

online: https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1

email: enquiries@oaic.gov.au

post: GPO Box 5218, Sydney NSW 2001

in person: Level 3, 175 Pitt Street, Sydney NSW

The Office of the Australian Information Commissioner can be contacted on 1300 363 992 for the cost of a local call.

Yours sincerely



Denise Lux-Bridges

Senior Lawyer

General Counsel

Australian Taxation Office