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24 July 2017

Our ref: FOI 2017/16

Mr Denham Sadler

Via Email: foi+request-3562-d84502d4@righttoknow.org.au

Dear Mr Sadler,

FREEDOM OF INFORMATION REQUEST – DECISION FOI 2017/16S

Your request

On 24 May 2017, you sought access under the *Freedom of Information Act 1982* (FOI Act) to:

... any correspondence documents between the Department of Social Services and Data61 over Data61's involvement with the government's planned trial program of drug testing new welfare recipients, along with any internal communication within the Department on Data61's involvement.

On 22 June 2017, your request was transferred to CSIRO. CSIRO notes, in relation to the subject matter of your FOI request, no contract has been executed with the Department of Social Services.

I have identified 10 documents relevant to your FOI request.

Decision maker

I am an authorised decision maker under section 23 of the FOI Act. This letter sets out my decision and reasons for the decision in relation to your application.

Decision

I have decided that parts of documents 3, 5 and 7 - 10 are exempt in part pursuant to s 47.

I have decided that parts of documents 2, 3, 5 and 7 - 10 are exempt in part pursuant to s 47C.

I have decided that parts of documents 2, 3, 5 and 7 – 10 are exempt in part pursuant to s 47E(d).

I have decided that parts of documents 2, 4, 5, 8, 11, 12 and 14 are exempt in part pursuant to s 47F.

Please refer to the schedule of documents at **Attachment B**.

Reasons for decision

My findings of fact and reasons for deciding that the exemption provision applies to a document or part of a document are set out below.

Materials taken into account

The materials, information and advice to which I have had reference in making this decision are:

- i. the terms of your FOI request;*
- ii. the content of the document in issue;*
- iii. the relevant provisions of the FOI Act;*
- iv. guidelines issued by the Office of the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines) and*
- v. relevant case law.*

Reasons for decision

My findings of fact and reasons for deciding that the exemption provision applies to a document or part of a document are set out below.

Exemptions Claimed

Section 47 - Commercially valuable information

Section 47 provides that a document is exempt from disclosure if its disclosure would disclose a trade secret or, pursuant to s 47(1)(b), the information is has a commercial value “that would be, or could reasonably expected to be, destroyed or diminished if the information was disclosed”.

I find that parts of documents 3, 5 and 7 - 10 contain information that has a commercial value and that commercial value would be destroyed or diminished if that information was disclosed.

Commercial value

The parts of documents 3, 5 and 7 - 10 exempt under s 47 relate to CSIRO commercial activities. The information does not have exchange value as it is not a trade secret, nor does it relate to CSIRO’s or third parties’ intellectual property. However, the information relates to the profitability or commercial activities in which CSIRO is involved and is therefore of value to CSIRO.

All the information over which s 47 has been applied, is current information and is not out of date.

Diminished or destroyed

I have had regard to whether the value of the information, including the financial information described above, would be diminished or destroyed if disclosed. I am satisfied that the disclosure of the information would result in more than mere criticism or embarrassment for CSIRO and related third parties. I have determined that the intrinsic value of the information would be diminished if it were disclosed. I have had regard to the decision by the Information Commissioner in *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 and am satisfied that disclosure of the information would affect more than just the business affairs of the third party.

Having satisfied the two essential criteria of s 47(1)(b), I find that the parts of documents 3, 5 and 7 - 10 over which s 47 is claimed, is exempt from disclosure.

I have considered whether any of the documents contain information about your business or professional affairs. I understand that the documents do not contain such information.

Section 47C - Deliberative processes

Section 47C provides that a document is conditionally exempt from disclosure if the document includes a deliberate matter.

I find that documents 2, 3, 5 and 7 – 10 held by CSIRO contain material in respect of which a claim for exemption under subsection 47C(1) of the FOI Act is claimed.

Subsection 47C(1) of the FOI Act states 'A document is conditionally exempt if its disclosure under the 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 process involved in the functions of ...an agency...or a Minister.' Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

In my view, documents 2, 3, 5 and 7 - 10 contains matters which are still being considered and deliberated upon by the Department and CSIRO. There is a risk, if documents 2, 3, 5 and 7 - 10 was released intact, there would be a resultant detrimental impact on the planning and negotiation of future contracts and projects. The commercial and service function of CSIRO, is a statutory function pursuant to s 9 of the *Science Industry and Research Act 1949* (Cth).

Taking the above into consideration, I have decided to exempt parts of documents 2, 3, 5 and 7 - 10 under subsection 47C(1) of the FOI Act.

The public interest: 47C

Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest under section 11 of the FOI Act. In considering this issue, I have taken into account the following public interest factors in favour of and against disclosure:

In balancing the public interest in this case, I have considered the following factors in favour of disclosure:

- i. promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b) FOI Act)

I have considered the following factors against disclosure:

- i. The interest in preserving the efficient and proper functioning of government;
- ii. The interest in protecting the integrity of the decision making process by separating the final decision making from the opinions and advice of the officials who contributed to the consideration;

In my view, the disclosure of the deliberative matters (not yet subject to a final decision) would not increase public participation in Government processes nor would it, in my view, increase scrutiny or discussion of Government activities. I note, given the information relates to project descriptors and work which has not yet been finalised, the premature release would adversely affect the decision making process and critically does not add to the transparency of the decision-making.

Accordingly, I considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure. Therefore, I am satisfied for the above reasons that it would be contrary to the public interest to release the information considered exempt under subsection 47C(1) of the FOI Act.

Section 47F personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt from disclosure to the extent that it contains personal information; the disclosure of which would be unreasonable.

'Personal information' is defined in s 4 of the FOI Act to include information or an opinion, whether true or not...about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion. I am satisfied that the information over which the exemption is claimed under s 47F, is personal information in the relevant sense.

In considering whether disclosure would be unreasonable s 47F(2) requires me to take into account:

- i. The extent to which the information is well known
- ii. 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
- iii. The availability of the information from publicly accessible sources
- iv. Any other matter I consider relevant.

The information is not well known but does relate, in some instances, to work related information (names of agency employees). Personal information of this type usually is considered to be reasonable to disclose. However, as you have consented to the redaction of this information I have removed the names of officers pursuant to s 47F.

In relation to the other personal information within the documents redacted pursuant to s 47F, I have also considered whether the disclosure of the personal information would shed light on the workings of CSIRO or enhance accountability or transparency; given the nature of the information, release would have a minimal effect on these factors.

Weighing all these things up, I have concluded that disclosure of individuals' personal information in the documents would be unreasonable. I am therefore satisfied that parts of documents 2, 4, 5, 8, 11, 12 and 14 are conditionally exempt.

The public interest test: s 47F

Conditionally exempt matter must be released unless, in the circumstances, access to that document would, on balance, be contrary to the public interest under s 11A(5) of the FOI Act. As the Guidelines state at 6.8 - 6.9:

The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

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.

In balancing the public interest in this case, I have considered the following factors in favour of disclosure:

- ii. promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b) FOI Act)

I have considered the following factors against disclosure:

- iii. protecting individuals from unreasonable interferences with their privacy

In this case, I have formed the view that the disclosure of the personal information will make no contribution to those factors in favour of disclosure. By contrast the interference with the privacy of other individuals is in my view unreasonable, as outlined above. Accordingly, I have concluded that disclosure would, on balance, be contrary to the public interest.

Rights of Review

In accordance with section 26(1)(c) of the FOI Act, a statement setting out your rights of review under the Act is at ***Attachment A***.

Yours sincerely

Beth Maloney
Legal Counsel
CSIRO

Review rights

You are entitled to seek review of this decision.

Internal Review

Firstly, under section 54 of the FOI Act, you may apply for an internal review of the decision. Your application must be made by whichever date is the later between:

30 days of you receiving this notice; or 15 days of you receiving the documents to which you have been granted access.

An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be addressed to:

FOI@csiro.au

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

External review by the Australian Information Commissioner

Alternatively, under 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner without first going to internal review. Your application must be made within 60 days of you receiving this notice.

The Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Information Commissioner's website www.oaic.gov.au.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commissioner at:

GPO Box 2999
Canberra ACT 2601

Complaints to Ombudsman or Information Commissioner

You may complain to either the Commonwealth Ombudsman or the Information Commissioner about action taken by CSIRO in relation to the application. The Ombudsman will consult with the Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au

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 Ombudsman or 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 CSIRO as the relevant agency.