



John Smith

Email: foirequest-6420-88fb2846@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request No. FOI 200603
Decision on Access

I refer to your request of 22 June 2020 to the Department of Agriculture, Water and the Environment (the **Department**) under the *Freedom of Information Act 1982* (the **FOI Act**). Your request seeks access to:

I seek to obtain a copy of all heritage assessments that have been made by the department, in association with the Shenhua open cut coal mine in NSW.

Additionally, I seek to obtain copies of all documents that contain written reasons by the Environment Minister Sussan Ley, for all approvals that have been made by her in association with this site; since she has taken office.

Please exclude written reasons for approvals, unless those approvals were made by Sussan Ley as minister or a delegate of the minister.

Authority

I am authorised by the Secretary of the Department under section 23 of the FOI Act to make a decision in relation to your request.

Decision

The Department has identified two documents relevant to the scope of your request. I have decided to:

- **grant access** to Document 1 in part, as it contains material that I consider exempt pursuant to sections 45 and 47F of the FOI Act; and
- **grant access** to Document 2 in full.

A schedule describing these documents and my decision in respect of each is at **ATTACHMENT A**.

ATTACHMENT B contains information regarding your review rights, should you wish to seek review of my decision.

The documents are at **ATTACHMENT C**.

Material considered in making my decision

I had regard to:

- the scope of the FOI request
- the content of the documents subject to your request
- the relevant provisions in the FOI Act
- advice from subject matter experts within the Department
- the *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982* (the **FOI Guidelines**).

Reasons for decision

Material exempted under section 45

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 (other than an agency or the Commonwealth), for a breach of confidence.

Document 1 in part, consists of culturally sensitive material that was provided by a third party to the Department on the agreement that the material be kept confidential. To determine whether its disclosure would found an action in confidence (attracting an exemption under section 45), it must meet the following criteria (*Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443]):

- a) the information must be specifically identified;
- b) the information must have the necessary quality of confidence about it;
- c) the information must have been communicated and received on the basis of a mutual understanding of confidence;
- d) the information must have been disclosed or been threatened to be disclosed without authority; and
- e) the unauthorised disclosure has or will cause the individual to suffer detriment.

Against this criteria, I consider:

- a) The information is specifically identified, being the material that forms Document 1 in part.
- b) The information has the necessary quality of confidence as it was communicated only to a known or limited group, namely the Department. The information is not common knowledge or otherwise in the public domain and the quality of confidentiality has not been lost over time.
- c) The information was communicated and received on the basis of a mutual understanding of confidence. The Department agreed that the material within the documents was to be treated with confidentiality.
- d) The provider of the material has not authorised the Department to disclose the document to third parties.
- e) The provider of the information will suffer detriment if the document were to be released, as their relationship of trust with third parties, to whom the material pertains to, will be damaged.

I have therefore made a decision to exempt Document 1, in part, under section 45 of the FOI Act.

Material exempted under section 47F

Personal privacy

Section 47F(1) of the FOI Act provides that where the disclosure of document would result in an unreasonable disclosure of personal information about any person (including a deceased person), that document is conditionally exempt. The conditionally exempt document may then be withheld from release to the applicant only if giving access to it would be against the public interest.

Unreasonable disclosure of information

Document 1 contains personal information, relevant to Indigenous communities. I am satisfied that this information is “personal information” for the purposes of the FOI Act.

To determine whether the disclosure of this personal information was unreasonable, I had regard to the following criteria under 47F(2) of the FOI Act:

- 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; and
- d) any other matters that I considered relevant.

Against these criteria, I consider that:

- a) the information is not well known;
- b) the persons are not known to be associated with the matters dealt with in the document; and
- c) the information is not available from publicly accessible sources.

Against criteria (d), and consistent with the decision in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437, I considered all relevant circumstances, including the nature of the information, the purpose for which the information was obtained, the likelihood of the information being information which the person concerned would not wish to have disclosed, and whether the information has any current relevance.

With reference to my findings above, I consider that any disclosure of personal information of Indigenous communities contained within Document 1 would be unreasonable, and therefore that this personal information is conditionally exempt.

Contrary to the public interest

To determine whether access to the conditionally exempt personal information would be contrary to the public interest, I must consider those public interest factors favouring access to the personal information and weigh them against those public interest factors against access. I did not consider any of the irrelevant factors set out in section 11B(4) of the FOI Act.

Section 11B(3) sets out the public interest factors that favour access to information:

- 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; and
- d) allow a person to access his or her own personal information.

Against these factors, I consider that access to the personal information of Indigenous communities contained within Document 1:

- a) would promote the objects of the FOI Act in respect of providing access to information held by the Government (promoting section 3(1)(b)) and that the information is a national resource (section 3(3)).

However, I do not consider that this specific personal information would allow for greater insight into Government decision making (section 3(2)(a)) or that their release would allow for increased discussion or scrutiny of Government activities (section 3(3));

- b) would not inform debate on a matter of public importance;
- c) would not promote effective oversight of public expenditure; and
- d) would not allow a person, being the applicant, further access to his or her own personal information.

Paragraph 6.22 of the FOI Guidelines provides a non-exhaustive list of public interest factors against access. Of these factors, I consider that access to the personal information of Indigenous communities contained within Document 1 could reasonably be expected to prejudice the protection of an individual's right to privacy.

I also consider that releasing the personal information of Indigenous communities, would not provide you with any further context in understanding the information that you have requested.

After considering the public interest factors favouring access and those against access, I consider that the factors against access to outweigh those favouring access, and that access to the personal information discussed above to be contrary the public interest.

I have therefore decided to withhold access to the conditionally exempt the personal information of Indigenous communities contained within Document 1 pursuant to section 47F of the FOI Act.

Disclosure Log

Pursuant to section 11C of the FOI Act, the Department will publish on its website details of how the documents at **ATTACHMENT C** may be obtained within 10 days of providing you with this decision.

Further assistance

The FOI Contact Officer in the Department can be contacted by telephone on 02 6274 2098 or by email at foi@environment.gov.au.

Yours sincerely



James Barker
Assistant Secretary
Heritage Branch

21 August 2020

ATTACHMENTS:

- A. Schedule of documents
- B. Information sheet "Your Review Rights"
- C. Documents subject to your request



FOI 200603 Schedule of Documents

No	Description	Decision
1	Statement of Reasons for a decision under section 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, dated 26/6/2019	<i>Release in part</i> Section 45 – material obtained in confidence Section 47F – personal information of Indigenous communities
2	Statement of Reasons for a decision under section 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, dated 1/07/2019	<i>Release in full</i>



YOUR REVIEW RIGHTS

You may seek review of this primary decision either internally by the Department (internal review), or externally by the Information Commissioner (Information Commissioner review).

Internal review

An internal review is a review of the decision conducted by a senior officer within the Department. The reviewing officer will not be the same person whom made the primary decision.

If you wish to seek an internal review, you must submit a written application to the Department within 30 days after the day you are notified of this decision. Whilst there is no required form for the written internal Review application, it is recommended that you include your reasons as to why the primary decision should be reviewed.

The decision on the internal review will be provided to you within 30 days of the Department receiving your application.

You can submit your written internal review application to the below addresses:

Email: foi@environment.gov.au

Post: FOI Contact Officer
Commercial, Information and Agriculture Legal Branch
Department of Agriculture, Water and the Environment
GPO Box 858
Canberra ACT 2601

Information Commissioner review

An Information Commissioner review is a review undertaken by the Information Commissioner (IC). The IC will make a decision on the disclosure of the documents, giving regard to any submissions from the Department, yourself as the applicant, and any third parties consulted as part of this decision.

There is no statutory timeframe for a decision on an IC request.

If you wish to request a review by the IC, you must apply to the IC within 60 days after the day you received it. Further details on how to request an Information Commissioner review can be obtained from the Office of the Australian Information Commissioner:

Online: <https://www.oaic.gov.au/freedom-of-information/foi-review-process>

Post: GPO Box 5218, Sydney NSW 2001

Fax: 02 9284 9666

Phone: 1300 363 992

Email: enquiries@oaic.gov.au