



Australian Government
**Department of Industry, Science,
Energy and Resources**

Our ref: LEX68742

Mr Harry Witherspoon

By email: foi+request-6588-67560742@righttoknow.org.au

Dear Mr Witherspoon

Freedom of Information Act 1982 – Notice of Decision

I refer to your correspondence, received by the Department of Industry, Science, Energy and Resources (**the department**) on 4 May 2021, and subsequent correspondence to clarify the scope of your request, for access under the *Freedom of Information Act 1982* (**FOI Act**) as follows:

I would like to see the email message sent by Erin Higuchi to Ben Fairless on September 7, 2020, 3:02 PM GMT+8 in which she outright defames me by asserting that I had made false and defamatory statements in this correspondence:

<https://protect-au.mimecast.com/s/eXn-CGvm0mhYYMJrtKAWTd?domain=righttoknow.org.au>

Release IN FULL what was said about me as my being maligned is unfortunately still my personal information.

FURTHER, in relation to the public interest, please note that my complaint of over 7 months ago (above) was never addressed. It is rather telling that Erin and Ben have plenty of time and resources to conspire, defame and censor the flabbergasted public but not the time to openly address referenced and irrefutable facts.

Link to my complaint is here:

<https://protect-au.mimecast.com/s/e4I4CJypBpCrrY8klGqxmM?domain=righttoknow.org.au>

Background

On 14 May 2021, you were advised of the need to conduct a third party consultation in relation to your request. Subsequently, in accordance with section 15(6) of the FOI Act the time limit was extended by 30 days to allow for third party consultation until 3 July 2021.

Decision

I am an authorised decision maker under section 23 of the FOI Act.

On the outset, I have decided not to impose any charges for the processing of your request.

industry.gov.au

Industry House - 10 Binara Street, Canberra City, ACT 2601
GPO Box 2013 Canberra ACT 2601 ABN: 74 599 608 295

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I am satisfied that all reasonable searches have been undertaken for documents relevant to your request. I am advised that the department has in its possession one document that is relevant to your request. This document is described in the Schedule of Documents at **Attachment A**.

I have decided that the document is exempt in full, as it material which is exempt under:

- section 47E(d) of the FOI Act, as disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency;
- section 47F(1) of the FOI Act, as disclosure of the information would be an unreasonable disclosure of an individual's personal information; and
- section 22 of the FOI Act, as the documents contain material that is irrelevant to your request.

The reasons for my decision are set out below, as required by section 26 of the FOI Act, in Part A of the Annexure.

If you are dissatisfied with my decision, your review rights are set out in Part B of the Annexure.

Yours sincerely



Rebecca Lannen
General Manager
Entrepreneurs' Programme

21 June 2021

Enclosures

Annexure (Part A – Statement of Reasons and Part B – Review Rights)
Attachment A – Schedule of Documents

Annexure
Part A – Reasons for Decision (section 26 FOI Act)
Request: Harry WITHERSPOON – 14 April 2021 (LEX 68742)
Decision Maker: Rebecca Lannen, General Manager, Entrepreneurs' Programme

1. Evidence/Material on which my findings were based

1.1 In reaching my decision, I relied on the following information and documentary evidence:

- the FOI Act;
- the contents of the documents described in Attachment A;
- your correspondence setting out the particulars of your request;
- consultation with departmental officers as to the nature of the documents;
- consultation with a third party in accordance with sections 27 and 27A of the FOI Act; and
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

2. Section 22 – Deletion of irrelevant material

2.1 Under section 22 of the FOI Act, the department may delete material from documents that it considers irrelevant to the scope of your request.

2.2 As per our correspondence of 6 May 2021, the department considers the names and contact details of APS staff below the SES level to be irrelevant unless informed otherwise. Accordingly, this information has been deleted under section 22 of the FOI Act.

2.3 Further, I have identified material within the documents that does not relate to the scope of your request. This information has also been deleted as irrelevant under section 22 of the FOI Act.

3. Section 47E(d) - The Conduct of the Operations of an Agency

3.1 Subsection 47E(d) of the FOI Act permits an agency to conditionally exempt material in a document in circumstances where:

... 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.

3.2 The documents contain material relating to the department's approach to the management and processing of FOI requests, including the handling of requests made via third party platforms, as well as advice, opinions and recommendations made by departmental officers. The release of this information would have a substantial adverse effect on the conduct of the operations of the department, particularly with respect to the willingness of departmental officers to provide comprehensive and candid opinions and recommendations.

- 3.3 Currently, such information is disclosed within the department on a 'need-to-know' basis only. Therefore, it would be reasonable to expect that, should the material be disclosed, departmental officers may in future become more cautious about the form in which such information is provided (e.g. by tailoring information for a potentially wider audience), or be reluctant to provide such material altogether, out of concern that any opinions and recommendations contained within the information may be disclosed outside the department to third parties under the FOI Act. This would have an adverse effect on the proper and efficient processing of FOI requests made to the department.
- 3.4 I am satisfied that the documents are conditionally exempt because their disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the department. As noted above, I am required under subsection 11A(5) of the FOI Act to give access to the information unless it would, at this time, on balance, be contrary to the public interest. My consideration of the public interest test is set out below.
- 3.5 Subsection 11A(5) of the FOI Act sets out the following factors favouring access to a document:
- promote the objects of the FOI Act;
 - inform debate on a matter of public importance;
 - promote effective oversight of public expenditure; and
 - allow a person access to his or her own personal information.
- 3.6 The FOI Guidelines state that the public interest test is necessarily broad and is something that is of serious concern or benefit to the public, not merely of individual interest. Access to documents should not be given if, in the particular circumstances, there is, on balance, countervailing harm which offsets the inherent public interest of giving access.
- 3.7 I have considered each of the factors favouring access listed above. In my view, disclosure of the material in question would not go towards promoting the object of the FOI Act, other than insofar as it would promote access to government information in the general sense. As the information in question relates to unsuccessful grant applications, disclosure of that material would not promote effective oversight of public expenditure, allow you or another person to access his or her own personal information, or inform debate on a matter of public importance.
- 3.8 However, as discussed above, disclosure of the document would likely have a substantial and unreasonable adverse effect on the effective administration of the department's FOI functions, including engagement with applicants during FOI processes. I am satisfied that this outweighs the limited public benefit that would flow through the disclosure of the document, and that giving access to the information at this time would be contrary to the public interest.
- 3.9 I have therefore decided that the relevant material in the documents is exempt under section 47E(d) of the FOI Act. In accordance with subsection 22(1) of the FOI Act, I have redacted the exempt material so that the remaining non-exempt material in the document can be released to you.

4. Section 47F – Personal Information

- 4.1 Subsection 47F(1) of the FOI Act provides that:

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).

4.2 The term 'personal information' is defined in section 4 of the FOI Act to mean:

information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

4.3 When determining whether the disclosure of personal information would be unreasonable, subsection 47F(2) of the FOI Act requires me to consider:

- (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 consider relevant.

4.4 I have decided that material contained in certain documents, as identified in the Schedule of Documents, is conditionally exempt under subsection 47F(1) of the FOI Act.

4.5 The information which I have determined would be unreasonable to disclose comprises personal information about departmental employees, and individuals (other than yourself) who have made requests for access to documents under the FOI Act. This personal information includes the names and contact details of employees, as well as the names of other individual FOI applicants, among other information of a personal nature. This information is not well known or publicly available. I also do not consider that any public purpose would be achieved through the release of the personal information of these third parties. I am therefore satisfied that the third party personal information is conditionally exempt under subsection 47F(1).

4.6 However, I am required under subsection 11A(5) of the FOI Act to give you access to this conditionally exempt material unless in the circumstances it would be, on balance, contrary to the public interest to do so.

4.7 I have considered each of the factors favouring access listed at 3.5 above. I do not consider that disclosure of the personal information in question would go towards promoting the objects of the FOI Act, as the FOI Act recognises the need to protect unreasonable intrusions on the privacy of individuals. Nor do I consider that disclosure would materially inform debate on a matter of public importance, or promote effective oversight of public expenditure. As the personal information relates to third parties and not yourself, the fourth public interest factor is not relevant.

4.8 I have taken into account the extent to which disclosure would prejudice individuals' personal privacy, and also consider that the release of personal information could cause stress to the persons to whom the information relates, particularly having regard to the subject matter of the documents and nature of the information contained therein.

4.9 Further, I have considered the previous effects of releasing information about other departmental employees and contractors in response to similar FOI requests. In particular, I am mindful that those releases has resulted in those employees being directly contacted on their phone numbers and being targeted by public campaigns. It is reasonably foreseeable that such harm will continue to occur if I were to release the personal information of these individuals.

4.10 I am also of the view that disclosure could reasonably be expected to prejudice the effective administration of the department's FOI functions. As noted above, FOI applicants have a general expectation that material relating to their requests will be treated in a confidential manner and not shared more broadly (other than where this is required by law, such as meeting disclosure

log obligations). If the relevant material were to be released, this could have the wider effect of deterring members of the public from engaging with the department in relation to access requests.

- 4.11 Following consideration of these factors, I have decided that in the circumstances of this particular matter, the public interest in disclosing the personal information is outweighed by the public interest against disclosure.
- 4.12 Therefore, I am satisfied that certain material in the documents are of such a nature that it is conditionally exempt under subsection 47F(1) of the FOI Act. Furthermore, I have decided that on balance it would be contrary to the public interest to release this information, such that access is refused.

5. Publication

- 5.1 Section 11C of the FOI Act requires agencies to publish documents released through an FOI request on our website within 10 days of release, except in certain circumstances including when the documents contain personal or business information that would be unreasonable to publish.
- 5.2 The documents being released to you do contain personal or business information that would be unreasonable to publish. As a result, they will not be published on our disclosure log.

Part B – Review Rights

Application for Internal Review

Section 54 of the FOI Act gives you the option to apply for a departmental internal review of my decision. If you make an application for internal review it will be conducted by an officer of the department (other than me) appointed by the Secretary of the department to conduct a review and make a completely fresh decision on the merits of the case.

Application for a review of the decision must be made within 30 days after the day of receipt of this letter, or within 15 days of receipt of the documents to which this decision relates (whichever is the longer period). You do not have to pay any fees or processing charges for an internal review, except for charges relating to the provision of any additional relevant material located as a result of the review (for example photocopying). While a specific form is not required, it would assist the decision maker if your application specifies the grounds on which you consider the decision should be reviewed.

Application for a review of a decision should be addressed to:

FOI Coordinator
Department of Industry, Science, Energy and Resources
GPO Box 2013
CANBERRA ACT 2601

or by e-mail to: FOI@industry.gov.au.

Review by the Australian Information Commissioner

If any decision on internal review were not satisfactory to you, section 54L of the FOI Act gives you the right to apply for review of my decision by the Information Commissioner.

An application for review by the Information Commissioner may be made regardless of whether the decision was the subject of a departmental internal review. An application for review by the Information Commissioner must be made within 60 days of receipt of this notice. There is no fee for review by the Information Commissioner.

You must apply in writing and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au

An application form is available on the website at www.oaic.gov.au. Your application should include a copy of this notice and your contact details. You should also set out why you are objecting to the decision.

Complaints to the Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Australian Information Commissioner will make a completely independent investigation of your complaint. A complaint to the Australian Information Commissioner must be made in writing and can be lodged online using the Information Commissioner Complaint Application form on the Australian Information Commissioner's website at www.oaic.gov.au.

Request for Access under the *Freedom of Information Act 1982* (Cth)
Department of Industry, Science, Energy and Resources
FOI Applicant: Harry Witherspoon
SCHEDULE OF DOCUMENTS

Doc No	Description of document	Pages	Decision	Reasons
1.	Email	1-5	Exempt in full	Whole document exempt under section 47E(d) Pages 1-3: Removed personal information under section 47F Pages 1-5: Removed out of scope information under section 22