



Australian Government  
Department of Industry, Science,  
Energy and Resources

Our ref: LEX 67797

Mr Denis Jakota  
Right to Know

By email: [foi+request-6986-50007515@righttoknow.org.au](mailto:foi+request-6986-50007515@righttoknow.org.au)

Dear Mr Jakota

**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 20 December 2020 for access under the *Freedom of Information Act 1982 (FOI Act)* as follows:

*"all documents created as a result of my inquiry to Erin Higuchi on 22 September 2020 at 3:14 PM regarding the Department's stance on whether it condones regional incubator (ISI grant program) facilitators engaging in private incubator business (an inquiry which the Department has failed to address to date)."*

**Background**

On 20 January 2020, the statutory processing timeframe in which to process your request expired.

On 1 February 2021, the Office of the Australian Information Commissioner granted the department an extension under section 15AC of the FOI Act for the processing of your FOI request until 24 February 2021.

**Decision**

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

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 20 documents that are relevant to your request. These documents are described in the Schedule of Documents at **Attachment A**.

I have decided to:

- grant access to 1 document in full; and
- grant access to 19 documents in part.

I have found that the requested documents contain material which is exempt under:

- section 42 of the FOI Act, as the information is of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege;
- 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; 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



Deborah Miliszewski  
General Counsel  
Legal, Audit & Assurance  
24 February 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: Denis Jakota – 20 December 2020 (LEX 67797)**  
**Decision Maker: Deborah Miliszewski, General Counsel, Legal, Audit & Assurance**

**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; 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 5 January 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 42 – Legal Professional Privilege**

3.1 Section 42(1) of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

3.2 Legal officers within the department's Legal, Audit & Assurance Branch act in their capacity as qualified legal practitioners, and provide professional, independent and confidential legal advice to staff and business areas within the department. A legal adviser-client relationship therefore exists between the department's legal officers and internal clients.

3.3 I am satisfied that certain documents contain confidential communications made by department legal officers, and staff in client business areas, for the dominant purpose of giving, receiving or obtaining legal advice. I therefore find that the material is of such a nature that it is exempt under section 42(1) of the FOI Act and will not be released. In accordance with subsection 22(1) of the FOI Act, I have deleted exempt material so that the remaining material in the documents can be released to you.

**4. Section 47E(d) – The Conduct of the Operations of an Agency**

4.1 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.*

- 4.2 I have decided that certain material contained in the documents is conditionally exempt under subsection 47E(d) of the FOI Act. This material is the email address of an internal point of contact mailbox. The release of this information would have a substantial adverse effect on the conduct of the Department's operations, specifically the Department's ability to ensure that enquiries from departmental personnel and external stakeholders to whom the email has been provided can be dealt with expediently. If the email address were to be released, members of the public may attempt to make contact with Department officers the mailbox, circumventing dedicated avenues of contact that are properly equipped manage and direct public enquiries. This would result in the diversion of departmental resources away from handling legitimate and relevant enquiries in the mailbox to responding to unsolicited correspondence received via the email address.
- 4.3 I am satisfied that the documents are conditionally exempt because release of the documents would involve the disclosure of information that would have a substantial adverse effect on the proper and efficient conduct of the operations of the department. However 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.
- 4.4 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.
- 4.5 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.
- 4.6 I have considered each of the factors favouring access listed above and I have decided that disclosure of the material in question would not go towards promoting the object of the FOI Act, inform debate on a matter of public importance, assist in the scrutiny of government decisions, or promote effective oversight of public expenditure.
- 4.7 I consider that the public interest factors in favour of disclosure, if any were to exist, are outweighed by the public interest factors against disclosure, namely that:
- the information is not well known and is not available from publicly-accessible resources;
  - no public purpose would be achieved through the release of the internal email address and phone number; and
  - if the information were to become more widely known and used by members of the public to contact the department ,rather than through the proper public-facing communications, this would unreasonably interfere with the department's ability to direct enquiries to the appropriate area for response.

- 4.8 I have considered the irrelevant factors listed in 11B(4) of the FOI Act, and none of these factors have been taken into account in deciding whether access to the documents would, on balance, be contrary to the public interest.
- 4.9 Following consideration of these factors, I have decided that giving access to the information at this time would be contrary to the public interest. Accordingly, I have deleted the exempt material in the document and have decided to release the remaining material in accordance with subsection 22(1) of the FOI Act.

## **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 document being released to you contains personal and business information that would be unreasonable to publish. As a result, the documents 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](mailto: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](http://www.oaic.gov.au)  
Post: GPO Box 5218, Sydney NSW 2001  
Fax: +61 2 9284 9666  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

An application form is available on the website at [www.oaic.gov.au](http://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](http://www.oaic.gov.au).



**Request for Access under the Freedom of Information Act 1982 (Cth)**

Department of Industry, Science, Energy and Resources

FOI Applicant: Denis Jakota

**SCHEDULE OF DOCUMENTS**

Doc No	Description of document	Pages	Decision	Reasons
1.	Email	1-4	Release in part	Pages 1-4: Deleted material exempt under section 42
2.	Document titled "Mr Jakota response"	5	Release in part	Page 5: Deleted material exempt under section 42.
3.	Email	6-9	Release in part	Pages 5-8: Deleted out of scope material under section 22
4.	Email	10-12	Release in part	Pages 10-12: Deleted out of scope material under section 22
5.	Email	13	Release in part	Page 13: Deleted out of scope material under section 22
6.	Email	14-18	Release in part	Page 14: Deleted material exempt under section 42 Pages 14-18: Deleted out of scope material under section 22
7.	Email	19-23	Release in part	Page 19: Deleted material exempt under section 42 Pages 1-23: Deleted out of scope material under section 22
8.	Email	24-28	Release in part	Page 24: Deleted material exempt under section 42 Pages 24-28: Deleted out of scope material under section 22
9.	Document titled "Mr Jakota"	29	Release in full	Nil
10.	Email	30-33	Release in part	Pages 30-31: Deleted material exempt under section 42 Pages 31-33: Deleted out of scope material under section 22
11.	Email	34-35	Release in part	Pages 34-35: Removed operational information under section 47E(d) Page 34: Deleted out of scope material under section 22

Doc No	Description of document	Pages	Decision	Reasons
12.	Email	36-37	Release in part	Pages 36-37: Deleted material exempt under section 42
13.	Email	38-39	Release in part	Pages 38-39: Deleted material exempt under section 42
14.	Draft email	40	Release in part	Page 40: Removed operational information under section 47E(d)
15.	Email	41-45	Release in part	Pages 41-45: Deleted material exempt under section 42
16.	Email	46-48	Release in part	Pages 46-48: Deleted material exempt under section 42
17.	Email	49-50	Release in part	Pages 49-50: Deleted material exempt under section 42
18.	Email	51-55	Release in part	Pages 51-52: Deleted material exempt under section 42 Pages 52-55: Deleted out of scope material under section 22
19.	Conversation history	56	Release in part	Page 56: Deleted material exempt under section 42
20.	Conversation history	57	Release in part	Page 57: Deleted material exempt under section 42