



Our ref: LEX 68371

Mr Alby P

By email: foi+request-6946-65bc325d@righttoknow.org.au

Dear Mr P

Freedom of Information Act 1982 (Cth) (FOI Act) – Notice of Decision

I refer to your correspondence, received by the Department of Industry, Science, Energy and Resources (**the department**) on 15 March 2021 for access under the *Freedom of Information Act 1982 (Cth) (FOI Act)* as follows:

"I'm requesting under the FOI Act the date of the tender submission that led to this contract - <https://protect-au.mimecast.com/s/3ScJCGvm0mhGIGEMSKjyeD?domain=tenders.gov.au>

I'm only interested in the date of the tender submission (not the content of the tender proposal) and no personal or third-party information at all.

I'm happy for this to be dealt with administratively if more expedient."

Background

On 16 April 2021, the Office of the Australian Information Commissioner granted the department an extension under section 15AB of the FOI Act for the processing of your FOI request until 28 April 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 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 and therefore access is refused.

I have found that the requested document comprises 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;

- section 47G(1)(a) of the FOI Act, as disclosure of the information would be an unreasonable disclosure of an individual's or an organisation's business information; and
- section 22 of the FOI Act, as the document contains 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

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned below the text 'Yours sincerely'.

Rebecca Lannen
General Manager
Entrepreneurs' Programme

22 April 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: Alby P – 15 March 2021 (LEX 68371)
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 document described in Attachment A;
- your correspondence setting out the particulars of your request;
- consultation with departmental officers as to the nature of the document; 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 on 24 March 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 redacted under section 22 of the FOI Act.

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

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

3.1 Section 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 document contains information about a tender for the provision of services to the department, including:

- a) the business name of the tenderer;
- b) the email address of an individual associated with and/or representing the tenderer;
- c) the name of an individual associated with and/or representing the tenderer; and
- d) the date that the tenderer lodged their tender response.

3.3 The department engages contracted services providers to assist it in carrying out its functions and activities as required. As part of the tender process, tenderers are required to submit certain information about their business, pricing structure and ability to deliver the required services.

- 3.4 Tenderers have a reasonably held expectation of confidentiality in relation to tender responses submitted to the department, particularly given the commercially sensitive nature of the information contained within. Tenderers submit this information on the understanding that it will only be shared within the department on a need-to-know basis, and would only be used for the purposes of assessing their tender response. Tenderers would not reasonably expect that information concerning their tender response (including date of submission) to be disseminated beyond necessary parties, particularly to third parties external to the department who are unknown to them and for purposes unrelated to the tender submission and evaluation process.
- 3.5 Additionally, the information sought under this FOI request is in relation to a tender response for the provision of services required for the Incubator Support program. Maintaining the confidentiality of tenderers and their tender responses is particularly important, given that successful tenderers for Regional Incubator Facilitator (**RIF**) roles, have been contacted directly by members of the public unrelated to the program and have been the subject of targeted public campaigns.
- 3.6 I am of the view that if this information were to be disclosed under the FOI Act (and noting that the FOI Act does not restrict the use or further dissemination of released material), this could discourage potential service providers from tendering to provide services to the department, particularly (but not necessarily limited to) services relating to the Incubator Support program, due to concerns that their information may not be kept confidential. This decreased engagement in the department's tender process would have an adverse effect on the ability of the department to source suitable external service providers who are essential to the effective delivery of the department's programs, such as the Incubator Support program. Further, a reduced pool of providers willing to submit tenders would adversely impact on the department's ability to obtain best value for money.
- 3.7 For the reasons stated above, I am satisfied that the relevant information contained in the document is conditionally exempt under section 47E(d), because release 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 section 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 further below.

Public interest test

- 3.8 Section 11B(3) of the FOI Act sets out the following factors favouring access to a document:
- a) promote the objects of the FOI Act;
 - b) inform debate on a matter of public importance;
 - c) promote effective oversight of public expenditure; and
 - d) allow a person access to his or her own personal information.
- 3.9 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.
- 3.10 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 objects of the FOI Act, other than insofar as it would promote access to government information in the general sense. In addition, disclosure of the material would not inform debate on a matter of public importance, nor would it allow you or another person to access his or her own personal information. As the information in question is non-financial nor indicative of financial information, disclosure of that material would not promote effective oversight of public expenditure.

3.11 For the reasons discussed above, disclosure of the document would prejudice the department's ability to attract and engage potential service providers, and consequently to administer its operations and programs in an effective and efficient manner. I am satisfied that these factors outweigh 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.

3.12 I have therefore decided that the relevant material in the document is exempt under section 47E(d) of the FOI Act.

4. Section 47F(1) – Personal Information

4.1 Section 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, section 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 Certain material within the document contains personal information about an individual who is reasonably identifiable in the document (by his email address which reveals his name). The personal information included in the document includes:

- a) the individual's email address;
- b) the individual's name; and
- c) the fact that the individual is associated with and/or represents a certain business.

4.5 This information is not well known, is not publicly accessible and the individual is not known to be associated with the matters concerned in the document.

4.6 I have also considered that should this information be publicly released and further disseminated, the likelihood of the individual about which this personal information relates being directly contacted or targeted by public campaigns, as explained above at 3.5, is heightened. I am therefore satisfied that release of the material would involve an unreasonable disclosure of personal information.

4.7 In applying the public interest test, I have considered each of the factors favouring access listed above at 3.8. 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. In addition, disclosure of the material would not inform debate on a matter of public importance, nor would it allow you or another

person to access his or her own personal information. As the information in question is non-financial nor indicative of financial information, disclosure of that material would not promote effective oversight of public expenditure.

- 4.8 I have taken into account the extent to which disclosure would prejudice the individual's personal privacy, and also consider that the release of personal information could cause stress to the persons to whom the information relates, particularly given the circumstances explained at 3.5.
- 4.9 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.
- 4.10 I have therefore decided that the relevant material in the document is exempt under section 47F(1) of the FOI Act.

5. Section 47G – Business Information

- 5.1 Section 47G(1) of the FOI Act provides that:

A document is conditionally exempt if its disclosure under the FOI Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or*
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth”*

- 5.2 Certain material contained in the document concerns business information about a tenderer, including:

- a) their business name;
- b) the email address of an individual associated with and/or representing the business;
- c) the name of an individual associated with and/or representing the business;
- d) the date which they lodged their tender response; and
- e) the fact that they lodged a tender response.

- 5.3 Having regard to the context in which the information appears in the document, being a departmental tender process, I am satisfied that its disclosure would, or could reasonably be expected to, unreasonably adversely affect the tenderer in respect of its lawful business or professional affairs. This is particularly the case given the circumstances explained above at 3.5, being the likelihood that the business (and associated individuals) may be directly contacted or targeted by public campaigns. This could have a real detrimental impact on the business, professional and/or financial affairs of the tenderer.

- 5.4 Accordingly, I am satisfied that certain material contained in the document is conditionally exempt under section 47G(1)(a) of the FOI Act.

- 5.5 In applying the public interest test, I have considered each of the factors favouring access listed above at 3.8. 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 against unreasonable impacts to the business affairs of organisations and individuals. In

addition, disclosure of the material would not inform debate on a matter of public importance, nor would it allow you or another person to access his or her own personal information. Further, disclosure of that material would not promote effective oversight of public expenditure.

- 5.6 I consider that the public interest factors in favour of disclosure are outweighed by the public interest factors against disclosure, namely that disclosure of this information would reasonably be expected to unreasonably affect a person or organisation in respect of their lawful business affairs.
- 5.7 Having considered the strengths of the public interest factors for and against disclosure, I am of the view that, on balance, the public interest factors against disclosing the material in the document outweighs those in favour of disclosure.
- 5.8 I have therefore decided that the relevant material in the document is exempt under section 47G(1)(a) of the FOI Act.

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: Alby P
SCHEDULE OF DOCUMENTS

Doc No	Description of document	Pages	Decision	Reasons
1.	Report	1	Exempt in full	Page 1: Removed information regarding the operation of agencies under section 47E(d) Page 1: Removed personal information under section 47F(1) Page 1: Removed business information under section 47G(1)(a) Page 1: Removed out of scope information under section 22