



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

Our ref: LEX68737

Denis Jakota

By email: foi+request-7105-3f656849@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 30 April 2021, and subsequent correspondence to clarify the scope of your request, for access under the *Freedom of Information Act 1982* (FOI Act) as follows:

Under the Freedom of Information Act, please release all enquiries and responses made for the purposes of:

- this request 68411 - enquiries with the Fraud Audit Team as noted in the decision, and
- the request 67800 - enquiries yielding no data "in electronic format" to denote 0 (zero) fraud audits.

I'm also requesting all personal information in these documents in the spirit of scrutiny as per the objects of the Act.

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.

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

I have decided to exempt all three documents in full. Accordingly, no documents have been released to you.

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 47C of the FOI Act, as disclosure would reveal deliberative processes involved in the functions of the agency;

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GPO Box 2013 Canberra ACT 2601 ABN: 74 599 608 295

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- 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



Deborah Miliszewski
General Counsel
Legal, Audit & Assurance

28 May 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 – 30 April 2021 (LEX68737)

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 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 The legal advice I have identified within the documents was provided by an external legal services provider in their capacity as a qualified legal practitioner, and as such a legal adviser-client relationship existed between the external legal service provider and the department.
- 3.3 I am satisfied that certain documents contain confidential communications made by an external legal services provider for the dominant purpose of giving, receiving or obtaining legal advice.
- 3.4 The exemption under section 42(1) does not apply to the extent that privilege has been waived. Privilege can be waived if the privilege-holder has acted inconsistently with the maintenance of the privilege, such as disclosing the substance or gist of legal advice.
- 3.5 I have reviewed the legal advice and I do not consider there to be any indication of a waiver of privilege in respect of the legal advice. There is no other evidence to suggest that the department has acted in a manner inconsistent with the maintenance of confidentiality and privilege, nor has the department disclosed the substance or gist of the advice. As such, I am satisfied that privilege with respect to the documents relating to your request has not been waived.
- 3.6 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.

4. Section 47C – Deliberative Matter

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

A document is conditionally exempt if disclosure under the FOI Act would disclose a 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 processes involved in the functions of an agency or Minister or of the Government of the Commonwealth.

4.2 I have decided that material contained in certain documents, as identified in the Schedule of Documents, is conditionally exempt under subsection 47C of the FOI Act. This material discloses opinions, advice and recommendations of departmental officers regarding the processing of FOI requests, and internal consultation that took place between departmental officers in the course of FOI processing. The material was prepared and recorded during the course of, and for the purposes of, the deliberative processes involved in discharging the department's legal obligations arising under the FOI Act.

4.3 In considering the documents, I have had regard to subsection 47C(2) of the FOI Act which provides that "deliberative material" does not include operational information or purely factual material. I am satisfied the relevant material is not operational or purely factual.

4.4 The opinions, advice and recommendations relating to processing the FOI request were reached by considering the facts relevant to the FOI request, along with the officer's own knowledge of relevant legal principles to form a judgement and is therefore is not excluded under subsection 47C(2) of the Act. To the extent that certain material could be considered of a factual nature, such material forms an integral part of, or is otherwise embedded in, the deliberative content of the documents.

4.5 For these reasons, I have decided that the relevant deliberative material is conditionally exempt under section 47C(1) of the FOI Act. 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.

4.6 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.

4.7 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.

4.8 I have considered each of the factors favouring access listed above and I have decided that while the disclosure of the information in question may assist in the scrutiny of government decisions, it would not go towards promoting the object of the FOI Act, informing debate on a matter of public importance, or promoting effective oversight of public expenditure.

4.9 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:

- if such material were disclosed, it would have the likely effect of inhibiting staff from expressing their opinions directly, freely and confidentially during the formation of advice prior to the making of a final FOI decision; and
- the disclosure of such material would prejudice the department's ability to effectively fulfil its legal obligations, including:
 - its ability to obtain candid advice, feedback and information from legal officers and line areas alike to inform FOI decisions; and
 - the integrity of decision-making processes in relation to legal issues, including facilitating candid discussions and consultation that support informed decision-making.

4.10 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.

4.11 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, the information that I have found to be exempt under subsection 47C will not be released to you.

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

5.1 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.

Processing of FOI requests:

5.2 The documents contain material relating to the department's approach to the management and processing of FOI requests, including 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.

5.3 Currently, such opinions, advice and recommendations are 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 opinions, advice and recommendations are provided (e.g. by tailoring recommendations and language for a potentially wider audience), or be reluctant to provide such material altogether, out of concern that their opinions and recommendations 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.

5.4 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.

FOI requests:

- 5.5 The documents contain information about FOI requests made by applicants other than yourself, including applicant names and the contents/nature of their FOI requests. Applicants have a reasonable expectation of confidentiality in relation to FOI requests submitted to the department, particularly where they relate to their own personal information, business information, or anticipated or ongoing legal proceedings. Applicants would not reasonably expect that information concerning their request would be disseminated beyond necessary parties in order to process their request, and particularly to third parties external to the department who are unknown to them. 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 future genuine FOI applicants from seeking documents from the department, due to concerns that information about their request may not be kept confidential (beyond the extent to which disclosure is required by the FOI Act). This decreased engagement would have an adverse effect on the proper and efficient conduct of the department, in particular, the fulfilment of its obligations under the FOI Act.
- 5.6 For the reasons stated above, I am satisfied that the relevant information contained in the documents is conditionally exempt under subsection 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 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 further below.

Public interest test:

- 5.7 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.
- 5.8 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.
- 5.9 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.
- 5.10 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.
- 5.11 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.

6. Section 47F – Personal Information

6.1 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).

6.2 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.

6.3 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.

6.4 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.

6.5 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 details of personal leave taken by an employee, and the identification number and description of requests made by other FOI applicants, amongst 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).

6.6 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.

6.7 I have considered each of the factors favouring access listed at 4.6 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.

6.8 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.

- 6.9 Further, I have considered the previous effects of releasing information about other departmental employees and contractors in response to similar FOI requests, as discussed at **Error! Reference source not found..**
- 6.10 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.
- 6.11 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.
- 6.12 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.

7. Publication

- 7.1 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.
- 7.2 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: Denis Jakota

SCHEDULE OF DOCUMENTS

Doc No	Description of document	Pages	Decision	Reasons
1.	Email	1-5	Exempt in full	Pages 1-5: Whole document exempt under section 47E(d) Page 1: Removed material subject to legal professional privilege under section 42 Page 1: Removed deliberative material under section 47C Pages 1-5: Removed personal information under section 47F
2.	Email	6-8	Exempt in full	Pages 6-8: Whole document exempt under section 47E(d) Page 6: Removed deliberative material under section 47C Pages 6-8: Removed personal information under section 47F
3.	Messages	9	Exempt in full	Page 9: Whole document exempt under section 47E(d) Page 9: Removed personal information under section 47F