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6 September 2021

**Our ref: FOI 2021/25(a)**

Mr Graeme Sawyer  
Protect Country Alliance NT  
Via Email: [graeme@protectcountrynt.org.au](mailto:graeme@protectcountrynt.org.au)

Dear Mr Sawyer

### **FREEDOM OF INFORMATION REQUEST 2021/25 – INTERNAL REVIEW DECISION**

I refer to the above *Freedom of Information Act 1982* (Cth) (**FOI Act**) request (**the Request**) made on 12 May 2021 and the decision issued by Mr Stephen Jones (Legal Counsel, CSIRO) (**the Decision Maker**) in respect of such Request on 12 July 2021 (**the Decision**).

#### **Background**

The Request sought access under the *Freedom of Information Act 1982* (FOI Act) to:

*Correspondence any time during September 2018 to end May 2021 between representatives of GISERA/CSIRO and with representatives of APPEA, Santos and/or Origin Energy containing the terms:*

*Sulphide reducing bacteria, Sulphate reducing bacteria, Microbially induced concrete corrosion (MICC), sulfur-oxidizing bacteria (SOB), microbial corrosion. Or documents relating to corrosion in petroleum and gas well casings.*

On 12 July 2021, the Decision Maker advised you of the Decision, namely

- Twelve (12) documents were identified in response to the Request (**the Documents**);
- FOI Act exemptions apply to parts of the Documents, namely:
  - section 22 – Irrelevant material
  - section 45 – Material Obtained in Confidence
  - section 47 – Commercially valuable information
  - section 47E – Certain operations of agencies; and
  - section 47G(1)(a) – Business and professional affairs.

On 5 August 2021, you requested an internal review of the Decision under section 54 of the FOI Act (**the Internal Review Request**):

*I seek an internal review of this decision.*

*In reading through the decision letter, we don't agree with the exemptions you say apply to this information. However, we note that when faced with a set of almost entirely redacted documents, it is difficult to assess.*

*For example, in respect of documents 4 – 10 in the Schedule of Documents, these would appear, from their description in the schedule, to be no more than a list of chemicals. How is it that you say the exemptions in s45, s47, s47E, s47G(1)(a) apply to such a list.*

*In the event you think the substantive information in the documents has been appropriately denied, I seek further information to understand the process and rationale of the decision to redact the majority of the information identified in relation to the FOI request.*

From reviewing the Internal Review Request, I understand that you are seeking internal review of the application of sections 45, 47, 47E, 47G(1)(a) and 22 to the Documents.

### **Decision maker**

I am an authorised decision maker under section 23 of the FOI Act. This letter sets out my internal review decision in respect of the Decision and the reasons for it.

### **Decision**

After reviewing and considering the Request, the Decision and the Internal Review Request and Correspondence on their merits, I affirm the Decision.

### **Materials taken into account**

The materials, information and advice to which I have had reference in making this internal review decision are:

- the Request;
- the Documents;
- the Decision;
- the Internal Review Request;
- relevant case law;
- the relevant provisions of the FOI Act;
- guidelines issued by the Office of the Australian Information Commissioner (**OAIC**) under s 93A of the FOI Act (**the Guidelines**); and
- position paper issued by the OIAC available here: <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details/> (**Position Paper**).

### **Reasons for decision**

#### ***Section 22 Access to edited copies with exempt or irrelevant matter deleted***

Section 22 of the FOI Act provides:

(1) *This section applies if:*

- (a) *an agency or Minister decides:*
- (i) *to refuse to give access to an exempt document; or*
  - (ii) *that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and*
- (b) *it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:*
- (i) *access to the edited copy would be required to be given under section 11A (access to documents on request); and*
  - (ii) *the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and*
- (c) *it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:*
- (i) *the nature and extent of the modification; and*
  - (ii) *the resources available to modify the document; and*
- (d) *it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.*

#### *Access to edited copy*

- (2) *The agency or Minister must:*
- (a) *prepare the edited copy as mentioned in paragraph (1)(b); and*
  - (b) *give the applicant access to the edited copy.*

I consider that some of the information in the Documents is irrelevant to your request and it is reasonably practicable to prepare an edited copy of the Documents with the irrelevant material deleted under section 22 of the FOI Act. You have previously been provided with a copy of the Documents with the irrelevant material deleted. Further to this, I note that on 13 May 2021 CSIRO acknowledged your FOI request and noted that unless you advised otherwise employees names and contact details were assumed to be outside the scope of your request and would therefore be redacted under section 22 of the FOI Act. I am not aware of any correspondence from you advising CSIRO that this information was within the scope of the request.

#### ***Section 45 Material obtained in confidence***

Section 45(1) provides that a document is an exempt document if its disclosure would found an action by a person for breach of confidence.

The Guidance notes that to found an action for breach of confidence (which means s 45 would apply) the following five criteria must be satisfied in relation to the information:

- it must be specifically identified;
- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and

- unauthorised disclosure of the information has or will cause detriment.

I find that disclosure of the information in the documents exempted under section 45 would found an action for breach of confidence.

I consider that:

- the information is identified with specificity as the information within the Documents requested;
- the information is confidential in nature relating to a contract between CSIRO and its industry partners and is not common or public knowledge;
- the information was communicated between CSIRO and its contracted industry partners on a mutual understanding of confidence and the contract between CSIRO and its industry partner contains enforceable confidentiality clauses;
- the disclosure under FOI would constitute a misuse of the information as such disclosure would be inconsistent with the understanding that CSIRO would keep the information confidential; and
- the industry partners that communicated the information did not authorise CSIRO to disclose it.

Accordingly, I am satisfied the documents are exempt under section 45.

#### ***Section 47 Commercially valuable information***

Section 47 provides that a document is exempt from disclosure if doing so would disclose a trade secret or, pursuant to section 47(1)(b), 'any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed'.

To be exempt under section 47(1)(b) a document must satisfy two criteria:

- i. the document must contain information that has a commercial value either to an agency, person or body; and
- ii. the commercial value of the information would be, or could be reasonably be expected to be, destroyed or diminished if it were disclosed

In relation to the first criteria, I consider that the information in the Documents is information that is current and not out of date and that has a commercial value to both CSIRO and other third parties for the purposes of section 47(1)(b). The information relates to commercial activities and the information is known only to relevant third parties.

In relation to the second criteria, I consider that the commercial value of the information would be, or could reasonably be expected to be destroyed or diminished if that information was disclosed. In forming this view I am satisfied that the disclosure of the information would result in more than mere criticism or embarrassment for CSIRO and the third parties. I also note that consultation with third parties was undertaken under section 27 of the FOI Act and objections were made to the release of the Documents on the basis that the commercial value of the information contained in the Documents could be destroyed or diminished if that information was disclosed.

I therefore find that the parts of the Documents over which section 47 is claimed are exempt from disclosure, as both of the essential criteria of section 47(1)(b) have been satisfied.

### ***Section 47E Certain operation of agencies***

Section 47E(c) of the FOI Act relevantly provides that a document is conditionally exempt if its disclosure would, or could be reasonably expected to have a substantial adverse effect on the management or assessment of personnel by an agency.

The OAIC have written a Position Paper in relation to the disclosure of public servant's name and contact details in response to an FOI request. In the Position Paper the OAIC notes that in 'certain circumstances, the management of staff and the discharge of the Australian Government's legal responsibility to ensure the health and safety of its workforce may be substantially and adversely affected if public servants' names and contact details are routinely disclosed in response to FOI requests'. The Position Paper then goes on to provide that 'where an agency has identified that, because of the nature of the work it performs or because of the nature of its client base, disclosure of names and contact information may pose a risk to the health and safety of its staff, consideration may be given to whether the conditional exemption in section 47E(c) applies' as 'specific concerns about the health, safety and wellbeing of staff are most appropriately addressed under the conditional exemption in section 47E(c) of the FOI Act, which is subject to the public interest test'.

Given the information sought under this FOI request and the subject matter of the request, I consider that disclosure of the names and contact information of CSIRO staff may pose a risk to the health and safety of CSIRO staff. I also note that CSIRO staff members have previously been subject to intimidation and threats. In these circumstances, I consider that this information is conditionally exempt under section 47E(c).

### ***The public interest test: s 47E***

Having concluded that aspects of the information in the Document are conditionally exempt under section 47E, I must consider whether the public interest test is satisfied.

In balancing the public interest in relation to conditional exemption of information contained in the Documents under section 47E, I have considered the following factors in favour of disclosure:

- promoting the objects of the FOI Act, including enhanced scrutiny of government decision making

In this regard, I refer to paragraphs 6.17 to 6.19 of the Guidelines.

I have considered the following factors against disclosure:

- the potential serious risk posed to public servants by the disclosure of their identity and contact information;
- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- disclosure could reasonably be expected to prejudice the management function of an agency.

In this regard, I refer to paragraphs 6.20 to 6.22 of the Guidelines and the Position Paper.

I have not considered any irrelevant factors.

On balance, having regard to paragraphs 6.24 to 6.27 of the Guidelines, I have formed the view in this case that the factor against disclosure outweighs the factors in favour of disclosure. I consider that the disclosure of the personal information poses a serious risk to the health and wellbeing of CSIRO staff members and is an unreasonable interference with the privacy of the individuals concerned. Moreover, I do not consider that the disclosure of the information would promote the objects of the Act, or increase scrutiny, discussion, comment and review of the Government's activities and enhanced scrutiny of government decision making. Accordingly, I conclude that the disclosure of the information conditionally exempt under section 47E would not be in the public interest and that the information should therefore not be released. The information is therefore exempt for disclosure under section 47E of the FOI Act.

### ***Section 47G(1)(a) Business and professional affairs***

Section 47G(1)(a) provides that a document is conditionally exempt if disclosure 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.*

In determining whether material contained within a document is conditionally exempt under section 47G(1)(a), part 6 of the Guidelines states that the consideration relating to the application of the exemption rests of the effect of the disclosure, rather than the precise nature of the information.

I confirm that, based on my review, the Documents contain information about the business, commercial or financial affairs of a third parties, noting your request was for correspondence between CSIRO and third parties. I consider that disclosing such information could adversely impact the business affairs of those third parties. I also note that consultation with third parties was undertaken under section 27 of the FOI Act and objections were made to the release of the Documents on the basis that the Documents could affect the third parties' business, commercial or financial affairs.

Accordingly, I am satisfied that the criteria for the conditional exemption of the Documents under section 47G(1)(a) has been met.

### ***The public interest test: s 47G(1)(a)***

Conditionally exempt material must be released unless, in the circumstances, access to that document would, on balance, be contrary to the public interest under section 11A(5).

I have considered whether disclosure of the information in the Documents would be in the public interest. In this regard, I have considered the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b)) and, in particular:

- informing debate on a matter of public importance; and
- promoting effective oversight of public expenditure.

On balance, I do not consider that any public interest in the disclosure of the information in the Documents is sufficiently strong to override the expected adverse effect on the third party's business affairs.

For these reasons, I am satisfied that the information in the Documents is exempt under section 47G(1)(a)

**Rights of Review**

In accordance with section 26(1)(c) of the FOI Act, a statement setting out your rights of review under the FOI Act is at **Attachment A**.

Yours sincerely,

A handwritten signature in black ink that reads "K. Maloney". The signature is written in a cursive, slightly slanted style.

Kate Maloney  
Legal Counsel  
CSIRO

### **Review rights**

You are entitled to seek review of this decision by applying to the Australian Information Commissioner for a review of this decision.

### **External review by the Australian Information Commissioner**

Your application must be made within 30 days of you receiving the decision.

The Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Information Commissioner's website [www.oaic.gov.au](http://www.oaic.gov.au).

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commissioner at:

GPO Box 2999  
Canberra ACT 2601

### **Complaints to Ombudsman or Information Commissioner**

You may complain to either the Commonwealth Ombudsman or the Information Commissioner about action taken by CSIRO in relation to the application. The Ombudsman will consult with the Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)  
Email [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

Your enquiries to the Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)  
Email [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

There is no particular form required to make a complaint to the Ombudsman or the Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify CSIRO as the relevant agency.