



## Attachment A

### DECISION RECORD

#### Request details

FOI Request: FA 15/10/00694  
File Number: ADF2015/57047  
Request date: 3 October 2015

#### Scope of request

1. You requested:

*Document(s) listing all interested parties, companies, and potential suppliers that tendered for either or both the 'Health Services' and 'Garrison and Welfare Services' service categories with the Department 'for the provision of services in Regional Processing Countries' under "DIBP RFT 28/14"*

2. There is no record of the scope of this request being varied by you.

#### Documents in scope

3. The Department has created a single page document comprising the information you have requested. It includes the names of the tendering businesses and any joint venture or subcontracted parties to those tendering businesses.

#### Authority to make decision

4. I am an officer authorised under s.23 of the FOI Act to make decisions in respect of requests to gain access to documents or to amend or annotate Departmental records.

#### Information considered

5. In reaching my decision, I have considered the following:
  - The *Freedom of Information Act 1982*;
  - Departmental files and/or documents (identified above); and
  - The Australian Information Commissioner's guidelines relating to access to documents held by government.

#### Decision

6. Section 11A(4) of the FOI Act states:

*The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.*

7. I have decided that the document is fully exempt and therefore refuse access to the document.

### **Reasons for decision**

8. I have decided the document is fully exempt from release on the following grounds:

### **Section 47(1)(b) - Document disclosing commercially valuable information**

9. Following consultation with the tendering organisations, I am satisfied that release of the document would disclose information of commercial value to one or more of the tenderers.
10. Release of the identity of any tenderer's joint venture or subcontracted parties would lessen the competitiveness of any current or future bids for similar services by those tenderers. For example, the information would allow competitors to assess the total capabilities of the tendering parties in respect of enterprise size, geographic location and operational processes. This would allow competitors to re-design their current tenders, or design their future tenders, in a way which would be to the detriment of those tenderers whose joint venture/subcontracter details have been released.
11. I note also that as of the date of this decision, tender process DIBP RFT 28/14 is ongoing and that it is open to the Department to ask tenderers to redesign elements of their bids while the process proceeds.
12. I therefore find that the document in scope is exempt entirely under s.47(1)(b) of the FOI Act.

### **Section 47D – Substantial adverse effect on the financial interests of the Commonwealth**

13. The confidentiality of tendering organisations and the contents of their tenders are central components of the Commonwealth's tendering processes. Paragraph 7.21 of the *Commonwealth Procurement Rules* states:

*Submissions must be treated as confidential before and after the award of a contract. Once a contract has been awarded the terms of the contract, including parts of the contract drawn from the supplier's submission, are not confidential unless the relevant entity has determined and identified in the contract that specific information is to be kept confidential in accordance with the guidance on Confidentiality Throughout the Procurement Cycle at [www.finance.gov.au/procurement](http://www.finance.gov.au/procurement).*

14. While the *Commonwealth Procurement Rules* do not prevent the release of tendering information under the FOI Act, they serve as evidence of the importance the Commonwealth places in such confidentiality. The *Commonwealth Procurement Rules* support procurement processes which ensure the Commonwealth receives value for money.
15. I find that release of the document would be contrary to the aims of the *Commonwealth Procurement Rules* and therefore detrimental to the Commonwealth's aim of achieving value for money in procurement processes. I therefore find that release of the document would have a substantial adverse effect on the financial interests of the Commonwealth and I find the document to be conditionally exempt from release in entirety under s.47D.

*Application of the public interest test*

16. While I have found that the conditional exemption in s.47D of the FOI Act applies to the entire document, s.11A(5) of the FOI Act requires me to disclose the information unless access at this time would, on balance, be contrary to the public interest. I will now consider whether disclosure would be contrary to the public interest.
17. In determining whether disclosure would be contrary to the public interest, s.11B(3) sets out a number of relevant factors which point in favour of release. These factors are:
  - a) whether release would promote the objects of the FOI Act;
  - b) whether release would inform debate on a matter of public importance;
  - c) whether release would promote effective oversight of public expenditure; and
  - d) whether release would allow a person to access his or her own personal information.
18. I acknowledge that release of the document without the exemptions made under s.47D would promote the objects of the FOI Act, through facilitating and promoting public access to information.
19. However, I consider that the release of the information would make a negligible further contribution to public debate, would not promote effective oversight of public expenditure or allow a person to gain access to his or her own personal information.
20. In contrast, I consider that the ability of the Department to conduct procurement operations, consistent with the *Commonwealth Procurement Rules* and its aim of achieving value for money for the Commonwealth, to be strongly in the public interest.
21. Taking into account the above matters, on balance, I consider that disclosure of the information in the document exempted under s.47D to be contrary to the public interest. Accordingly, I have decided that the document is exempt in full under s.47D of the FOI Act.

**Section 47G(1)(a) – business information which would or could adversely impact a person's business affairs**

22. Release of the document would place into the public domain the identity of all tendering parties for this tendering process.
23. I am satisfied that release of this information could adversely impact the commercial and financial affairs of the businesses/business owners to which the information relates. The release of such material could allow competitors an unfair advantage during the current or any future tendering processes in which the businesses/business owners may wish to engage.
24. I am therefore satisfied that the entire document is conditionally exempt under s.47(G)(1)(a).

*Application of the 'public interest' test*

25. I acknowledge that release of the document would promote the objects of the FOI Act, through facilitating and promoting public access to information.
26. However, I consider that the release of the information would make a negligible further contribution to public debate, would not promote effective oversight of public expenditure or allow a person to gain access to his or her own personal information.

27. I note also the following factors against disclosure of the information:

- preserving a competitive business environment, including in relation to businesses seeking to gain Australian Government business;
- preserving reasonably held expectations of confidentiality held by businesses and business owners; and
- preserving the ability of the Australian Government to procure services from the business community.

28. Taking into account the above matters, on balance, I consider that disclosure of the information in the document to be contrary to the public interest. Accordingly, I have decided that the document is exempt in full under s.47(G)(1)(a).



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2 May 2016





Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD  
FOI Request FA 15/10/00694

No.	Date of document	Pages	Description	Decision on release	Applicable part/s of the FOI Act
1.	Created by DIBP April 2016	1	List of tenderers and joint venture and subcontracted parties – DIBP tender 28/14	Exempted in full	s.47(1)(b) s.47(D) s.47G(1)(a)



## Attachment C – Extract of relevant legislation (FOI Act)

### 11A Access to documents on request

#### *Scope*

- (1) This section applies if:
  - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

#### *Mandatory access—general rule*

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

#### *Exemptions and conditional exemptions*

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

## 11B Public interest exemptions—factors

### *Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

### *Factors favouring access*

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
  - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

### *Irrelevant factors*

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
  - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
  - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
  - (d) access to the document could result in confusion or unnecessary debate.

### *Guidelines*

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

## **47 Documents disclosing trade secrets or commercially valuable information**

(1) A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

(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.

(2) Subsection (1) does not have effect in relation to a request by a person for access to a document:

(a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or

(b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or

(c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.

(3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.

### **47D Public interest conditional exemptions--financial or property interests of the Commonwealth or Norfolk Island**

A document is conditionally exempt if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth, of Norfolk Island or of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

### **47G Public interest conditional exemptions—business**

(1) A document is conditionally exempt if its disclosure under this 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, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.



- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.
- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
- (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
  - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
  - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).