



31 May 2018

Our reference: LEX 34976

Mr David Brown

Only by email: foi+request-4380-37ad534d@righttoknow.org.au

Dear Mr Brown

Decision on your Freedom of Information request

I refer to your request, dated 16 February 2018 and received by the Department of Human Services (**department**) on that same date, for access under the *Freedom of Information Act 1982 (FOI Act)* to the following:

'...all the documents published on AusTender website under RFT 1000401959 in relation to the Systems integrator panel for the WPIT program. The RFT was issued on 1 August 2016.'

My decision

The department holds 37 documents (totalling 400 pages) that relate to your request.

I have decided that:

- the documents are conditionally exempt, in full, under section 47D of the FOI Act, on the basis that disclosure of the documents would have a substantial adverse effect on the financial interests of the department, and is not in the public interest; and
- parts of the documents are conditionally exempt, under section 47G(1)(a) of the FOI Act, on the basis that they contain information concerning the business, commercial or financial affairs of one or more organisations, the disclosure of which would or could reasonably be expected to unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs, and is not in the public interest.

Please see the schedule at **Attachment A** to this letter for a list of the documents and the reasons for my decision, including the relevant sections of the FOI Act.

Charges

Regulation 3 of the *Freedom of Information (Charges) Regulations 1982 (Charges Regulations)* provides that an agency has a discretion to impose a charge for providing

access to a document. Regulations 9 and 10 of the Charges Regulations set out how the charges are to be calculated.

Section 29 of the FOI Act sets out the process for an agency to follow where it has decided to impose charges. Paragraph 4.63 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**) provide that, after making a decision on a request where a charge was estimated, the department is required to calculate the final charges, in accordance with the Charges Regulations.

On 7 March 2018, the department notified you of its preliminary estimate of charges to process your request, in the amount of \$465.55 and calculated in accordance with regulation 9 of the Charges Regulations.

On 8 March 2018, you requested that the department reconsider the preliminary estimate.

On 9 April 2018, the department notified you that it had decided to reduce the amount of charges to process your request to \$232.78.

On 20 April 2018, the department received your payment of \$232.78.

I have considered the actual cost of processing your request, for the purpose of considering whether to adjust the amount of the charge under regulation 10 of the Charges Regulations.

I have decided that the amount of \$232.78 is a fair and accurate reflection of the time taken to process your request. On this basis, I have decided not to adjust the assessment of charges (paid by you), and have fixed the charge under regulation 10 of the Charges Regulations.

You can ask for a review of my decision

If you disagree with any part of my decision, you can ask for a review. There are two ways you can do this. You can ask for an internal review from within the department, or an external review by the Office of the Australian Information Commissioner. You do not have to pay for reviews of decisions. See **Attachment B** for more information about how arrange a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@humanservices.gov.au.

Yours sincerely

Isabella

Authorised FOI Decision Maker
Freedom of Information Team
FOI and Litigation Branch | Legal Services Division
Department of Human Services



LIST OF DOCUMENTS

BROWN, David - LEX 34976

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1-37	1-400	Various	Documents formerly available on the AusTender website under RFT 1000401959 <i>Request for Tender for the Procurement of a Systems Integrator Panel</i>	Exempt in full Exempt in part	s 47D s 47G(1)(a)	Pages 1-400: contain information, the disclosure of which would have a substantial adverse effect on the financial interests of the Commonwealth or the department, and is not in the public interest. Various: contain information concerning the business, commercial or financial affairs of one or more organisations, the disclosure of which would or could reasonably be expected to unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs, and is not in the public interest.



ATTACHMENT A

REASONS FOR DECISION

What you requested

On 16 February 2018, you requested access, under the FOI Act, to documents in the following terms:

'I would like to obtain all the documents published on AusTender website under RFT 1000401959 in relation to the Systems integrator panel for the WPIT program. The RFT was issued on 1 August 2016.'

On 19 February 2018, the department acknowledged your request.

What I took into account

In reaching my decision I took into account:

- your request dated 16 February 2018;
- other correspondence between the department and you in relation to your request;
- the documents that fall within the scope of your request;
- consultation with third parties about their business information contained in the documents;
- consultations with departmental officers about:
 - the nature of the documents;
 - the department's operating environment and functions;
- the FOI Act and the Guidelines.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that the documents you have requested are exempt under the FOI Act, as identified in the Schedule. My findings of fact and reasons for deciding that the exemptions apply to those documents are discussed below.

Section 47D of the FOI Act

I have decided that the exemption in section 47D of the FOI Act applies to all the documents within the scope of your request.

Section 47D of the FOI Act provides:

'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 or of an agency.'

Paragraph 6.90 of the Guidelines provides:

'The financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities.'

I consider that the information contained within the documents you have requested concerns the financial interests of the Commonwealth as represented by the department, on the basis that it relates to expenditure activities, namely the procurement of systems integrator services to support the delivery of the department's Welfare Payment Infrastructure Transformation Programme (**WPIT Programme**).

A substantial adverse effect

Paragraph 6.92 of the Guidelines provides:

'A substantial adverse effect may be indirect. For example, where disclosure of documents would provide the criteria by which an agency is to assess tenders, the agency's financial interest in seeking to obtain best value for money through a competitive tendering process may be compromised.'

In *David Miles Connolly and Department of Finance* [1994] AATA 167 (**Connolly**), the Administrative Appeals Tribunal (**AAT**) considered the meaning of 'substantial' in the context of this exemption, and held that:

'There must be a degree of gravity before this exemption can be made out ... the effect must be "serious" or "significant" ... Normally a value judgment has to be made as to whether an adverse effect is or is not substantial when considering exemptions...'

In *Connolly*, Deputy President McMahon held that disclosure of documents regarding tenders and expressions of interest for certain services (in that matter, disposal of uranium stockpiles) would result in a substantial adverse effect on the Commonwealth's financial or property interests, on the basis that it would prejudice the Commonwealth's ability to develop and/or implement its strategy to dispose of its uranium stockpile so as to maximise the return to the taxpayer and ensure an orderly market. Deputy President McMahon stated:

'...I would have to find that access to the remaining documents would be virtual disclosure of the Commonwealth's strategy for selling that 4 million lbs in a thin, confidential and sensitive market and that this would inevitably affect the general spot price and the price which the Commonwealth might reasonably be expected to achieve if the present confidential strategy is maintained.'

I consider that disclosure of the documents you have requested would have a substantial adverse effect on the Commonwealth's financial interests. This is because the documents within the scope of your request include the criteria by which the department was to assess tenders for this particular Systems Integrator Panel. Although this particular tender has already been finalised, the WPIT programme is ongoing. It is reasonable to assume that the department may undertake further procurement activities relating to the WPIT programme, which would be compromised if the documents you have requested were disclosed.

I also note that *Connolly* is analogous to the current request, in that disclosure of the information contained in the documents you have requested would effectively disclose the department's strategy for obtaining certain services to support the implementation of the WPIT programme. The department is a significant purchaser of a wide range of IT services in a small market, such that there would be an immediate, direct and significant impact if the department's approach to market were disclosed.

For the reasons given above, I consider that the documents are conditionally exempt under section 47D of the FOI Act.

Public interest considerations

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act and promote effective oversight of public expenditure.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- prejudice the competitive commercial activities of the department; and
- harm the interests of an individual or group of individuals.

Based on these factors, I have decided that the public interest in disclosing the information in the above-mentioned documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Conclusion

In summary, I am satisfied that the documents are conditionally exempt under section 47D of the FOI Act. Furthermore I have decided that, on balance, it would be contrary to the public interest to release this information. Accordingly, I have decided not to release the documents to you.

Section 47G of the FOI Act - unreasonable disclosure of information - business

I consider that parts of the documents are conditionally exempt, in full, under section 47G(1)(a) of the FOI Act.

Section 47G of the FOI Act provides:

- ‘(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’.

Paragraph 6.192 of the Guidelines provides:

‘The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or professional affairs and an organisation’s internal affairs. The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.’

The documents within the scope of your request contain information regarding:

- certain commercial arrangements between the department and organisations; and
- certain product offerings or services of organisations.

Therefore, this information is 'information about the business, commercial or financial affairs of organisations' within the meaning of section 47G(1) of the FOI Act.

Whether disclosure is 'unreasonable'

In addition to the factors specified in section 47G(1) of the FOI Act, paragraph 6.187 of the Guidelines provides:

'The presence of 'unreasonably' in s 47G(1) implies a need to balance public and private interests, but this does not amount to the public interest test of s 11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance. This is inherent in the structure of the business information exemption'.

I am satisfied that the disclosure of this business information would be unreasonable for the following reasons:

- it relates to aspects of one or more organisation's business and professional affairs;
- the information is private and not available in full or in part from publicly-accessible sources; and
- the information was included in the documents for the purpose of a tender exercise, which has now concluded and which is no longer accessible on the Austender website as a matter of government policy.

On this basis, I have decided that the documents containing business information are conditionally exempt under section 47G(1) of the FOI Act.

Public interest considerations

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act and promote effective oversight of public expenditure.

I have also considered the following factors weighing against disclosure, indicating that access to the information would be contrary to the public interest, on the basis that:

- the information relates to aspects of the lawful business, commercial or financial affairs of one or more organisations;
- disclosure would reveal confidential information;
- disclosure of the information may inhibit the conduct of future negotiations for professional services by the department and/or the organisations; and

- the information is private and not available in full or in part from publicly-accessible sources.

I have decided that the public interest in disclosing the business information in the documents within the scope of your request is outweighed by the public interest against disclosure.

Conclusion

In summary, I am satisfied that parts of the documents are conditionally exempt under section 47G(1)(a) of the FOI Act, on the basis that they contain information concerning the lawful business, commercial or financial affairs of organisations which is unreasonable to disclose. I have decided that, on balance, it would be contrary to the public interest to release this information.

Summary of my decision

In conclusion, I have decided to refuse access to all 37 documents within scope of this request.

I have decided that:

- the documents are conditionally exempt, in full, under section 47D of the FOI Act, on the basis that disclosure of the documents would have a substantial adverse effect on the financial interests of the department, and is not in the public interest; and
- parts of the documents are conditionally exempt, under section 47G(1)(a) of the FOI Act, on the basis that they contain information concerning the business, commercial or financial affairs of one or more organisations, the disclosure of which would or could reasonably be expected to unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs, and is not in the public interest.



Attachment B

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an Internal Review Officer in the Department of Human Services (the department); and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

made in writing

- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the department within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application**:

Online: www.oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at **www.oaic.gov.au**.
- If you have one, you should include with your application a copy of the Department of Human Services' decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the department's decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

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. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman 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. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.