



17 July 2018

Our reference: LEX 37628

Mr David Brown

By email only: foi+request-4380-37ad534d@righttoknow.org.au

Dear Mr Brown

Freedom of Information request – Internal Review Decision

You requested an internal review of the decision made by an authorised decision maker (**original decision maker**) of the Department of Human Services (**department**) under the *Freedom of Information Act 1982 (FOI Act)*, dated 31 May 2018 (LEX 34976) (**original decision**).

The department received your request for internal review on 17 June 2018.

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act, and my decision is set out below.

Internal review decision

As the authorised internal reviewer, I have made a fresh decision in relation to your request.

I have reviewed the 37 documents (totalling 400 pages) considered in the original decision and 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
- 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 disclosure of the documents would be contrary to the public interest.

The reasons for my decision, including the relevant sections of the FOI Act, are set out in **Attachment A**.

You can ask for a review of my decision

If you disagree with my decision, you can apply for 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

Bruce

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



Attachment A

REASONS FOR DECISION

Original decision

On 16 February 2018, you made a request for access under the FOI Act 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 31 March 2018, the original decision maker notified you of their decision to refuse access to all 37 documents within scope of your request on the basis 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 would be contrary to 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.

On 26 March 2018, you sought internal review of the original decision. In your request for internal review, you stated:

I am writing to request an internal review of Department of Human Services's handling of my FOI request 'Systems integrator panel for WPIT'.

The main points of my objection to the decision are:

- The decision attempts to exempt all 37 documents when the grounds for doing so could not apply to all documents.
- Since the documents have previously been published, the stated arguments for the risks of disclosure for DHS and commercial interests are weak.
- The argument for secrecy relies on the Connolly case, which was decided before the public interest tests in the FOI Act were strengthened, and in which a clear and direct case for risk to the Commonwealth was established through expert testimony the AAT, no such link has been made here.
- There is a general absence of any clear explanation for how the disclosure of the requested material could adversely effect the government or commercial interests involved in the tender or the project.
- The Senate was directed to these documents as being the only publicly accessible detailed description of the WPIT project and DHS' requirements, further strengthening the public interest case for releasing the documents.

What I took into account

In reaching my decision, I took into account:

- your original request;
- your revised request;
- the original decision;
- consultations with departmental officers about:
 - the nature of the requested documents; and
 - the department's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**); and
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act.

For the reasons that follow, I have decided to affirm the original decision.

Section 47D of the FOI Act

I have decided that the exemption in section 47D of the FOI Act applies to all of 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 am satisfied that the information contained within the documents you have requested concerns the financial interests of the Commonwealth, as represented by the department, as the documents relate to expenditure through the procurement of services for the delivery of the department's Welfare Payment Infrastructure Transformation Programme (**WPIT programme**). Relevantly, the department's financial interests include ensuring it obtains best value for money through competitive tendering processes, noting that the WPIT Programme will continue to run for a number of years.

A substantial adverse effect

The Guidelines relevantly provide:

5.20 The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned

reasonable person' [see *Thies and Department of Aviation* [1986] AATA 141]. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

- 6.92 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 AAT considered the meaning of 'substantial' in the context of what was then section 39 of the FOI Act (which was in substantially similar terms as the section 47D of the FOI Act is currently enacted, noting that section 47D of the FOI Act is now a conditional 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...

The AAT also considered whether the disclosure of documents relating to an expression of interest and correspondence associated with a tender process for the disposal of uranium stockpiles would result in a substantial adverse effect on the Commonwealth's financial or property interests. Deputy President McMahon disclosure would have a substantial adverse effect on the Commonwealth's financial interests, as 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.

...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.

The documents within the scope of your request reveal:

- detailed information and modelling about the structure and requirements of the department's software systems at that particular point in time;
- information and insights into the department's business, strategic and commercial objectives, and operational environment;
- tender assessment criteria which may be applied by the department in other procurement processes; and
- (when the documents are read together) the department's strategy for obtaining certain services to support the implementation of the WPIT programme.

Although the particular tender to which the documents relate has been finalised, the WPIT programme is ongoing. The department will likely undertake further procurement activities relating to the WPIT programme over the next few years, including the procurement of relevant systems, software and hardware, based on changed circumstances or new needs.

A properly informed reasonable person would be concerned that future procurement activities in relation to the WPIT programme would be compromised if the documents you have requested were disclosed. This is because:

- tenderers could use the documents to prepare for future approaches to market, and in doing so rely on information and specifications contained in the previous tender and which may no longer be current. As a result, the quality of future tender response in relation to the WPIT programme could potentially be diminished and undermined, which would impact on the procurement outcome; and
- in a scenario analogous to *Connolly*, if information relating to the department's procurement and purchasing strategy were to become more broadly known, certain tenderers could use that information to tailor their tender responses in a way that may give them an unfair advantage over other tenderers, or increase their bargaining position against the department.

The department is a significant purchaser of a wide range of IT services in a relatively small market, such that there would be an immediate, direct and significant impact if the department's approach to market were disclosed. In particular, the consequences of disclosure mentioned above would ultimately impact on the department's ability to get best value for money in relation to WPIT programme procurements.

For the reasons given above, I consider that the documents are conditionally exempt under section 47D of the FOI Act. As I have found that the documents are conditionally exempt, I have also considered the public interest in their potential release.

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 relevant factors weighing against disclosure, indicating that access would be contrary to the public interest:

- the extent to which disclosure could reasonably be expected to diminish the quality of future responses to tenders;
- the extent to which disclosure could reasonably be expected to inhibit the conduct of future negotiations for professional services by the department and/or the organisations; and
- prejudice the competitive commercial activities of the department, including achieving best value for money.

Based on these factors, I have decided that on balance, the public interest factors in favour of disclosing the information in the above-mentioned documents are outweighed by the public interest factors 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 you requested 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 have also decided that parts of the documents are conditionally exempt 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 would have an 'unreasonable adverse effect'

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 could reasonably be expected to have an unreasonable adverse effect on the business interests of the relevant organisations for the following reasons:

- it relates to aspects of one or more organisations' business affairs;
- the information not currently available in full or in part from publicly-accessible sources;
- the information was included in the documents for the specific 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; and
- if the information relating to the business activities, services and products of the relevant organisations were to become widely known, it may enable competitors to acquire knowledge that could be used to an organisation's competitive disadvantage.

On this basis, I have decided that the documents containing business information are conditionally exempt under section 47G(1) of the FOI Act. As I have found that the documents are conditionally exempt, I have also considered the public interest in their potential release.

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:

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

I have decided that on balance, the public interest factors in favour of disclosing the business information in the documents are outweighed by the public interest factors 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 parts of the documents that you requested 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 affirm the original decision to refuse access to all 37 documents within scope of 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.



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 an 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 section 54L of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

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 Australian 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.