



Australian Government
Department of Finance

Reference: FOI 20/32
Contact: FOI Team
Telephone: (02) 6215 1783
e-mail: foi@finance.gov.au

Mr John Smith

via email: foi+request-6343-99fd16cf@righttoknow.org.au;

Dear Mr Smith,

Freedom of Information Request – FOI 20/32

Thank you for your email to the Department of the Treasury (Treasury), dated 5 June 2020, in which you sought access to the following under the *Freedom of Information Act 1982* (FOI Act).

I request a copy of the contract signed between the department of the Treasury, and Ernst & Young; associated with tender ID CN3681381.

On 20 June 2020, you were notified that your request would be processed by Finance, in part, on the basis that the subject-matter of the document identified was more closely connected with the functions of Finance.

The purpose of this letter is to provide you with my decision.

Authorised decision-maker

I am authorised by the Secretary under subsection 23(1) of the FOI Act to grant or deny access to documents under the FOI Act.

Decision

I have decided to refuse access to (1) document, in part under section 22, section 45, section 47, section 47E and section 47F of the FOI Act.

The document is identified in the Schedule at Attachment A.

Material considered in making decision

In making my decision, I have had regard to the following:

- the scope of your FOI request dated 5 June 2020;
- the content of the documents that fall within the scope of your request;
- the relevant provisions of the FOI Act; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Reasons for decision

Section 22 – Access to an edited copy with irrelevant matter deleted

Section 22 of the FOI Act provides that where I have decided to give access to a document that would disclose information that would reasonably be regarded as irrelevant to your FOI request, I am able to prepare a copy of the document with modifications or deletions that ensure that irrelevant information is not disclosed.

Having regard to the above, I note that on 30 June 2020 Finance acknowledged your FOI request and advised that unless you otherwise objected, junior officer (non-SES) names and contact details would be redacted from relevant documents under section 22 of the FOI Act as irrelevant to your request. Finance also advised you that signatures would be excluded from any documents released, unless publicly available. As we did not receive any objections from you, we have redacted this material from the document.

Section 45 - Documents containing material obtained in confidence

Section 45 of the FOI Act provides:

(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

For a document to be exempt in part under section 45, I must be satisfied that full disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence.

The FOI Guidelines, at paragraph 5.159, state 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*
- *unauthorised disclosure of the information has or will cause detriment*

Document 1 includes confidential commercial information, namely an agreed pricing structure relating to the provision of business advisory services by Ernst & Young (EY) to the Commonwealth. This information has been communicated by EY on the basis of a mutual understanding of confidence between EY and the Commonwealth and unauthorised disclosure of that information would cause detriment to the Commonwealth and EY. For this reason, I am satisfied that the document is exempt in part under section 45(1) of the FOI Act.

Section 47 - Documents disclosing trade secret or commercially valuable information

Section 47 of the FOI Act provides:

- (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.*

For a document to be exempt in part under section 47, I must be satisfied that it contains trade secrets, or commercially valuable information which would be, or could reasonably be expected to be, destroyed or diminished by disclosure.

The FOI Guidelines, at paragraph 5.204, state that:

It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property.

Further, the FOI Guidelines (at paragraph 5.204) also provide a list of factors that may assist in deciding whether information has commercial value. These are:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.*

Document 1 contains trade secrets and commercially valuable information which would, or could reasonably be expected to, be destroyed or diminished by disclosure, specifically the agreed pricing structure between Finance and EY for the provision of business advisory services as well as agreed terms specific to the arrangement between Finance and EY. This information is commercially sensitive, is not available in the public domain and is known only to a limited group of people. In addition, the Business Advisory Panel, which is the arrangement through which Document 1 was executed, will expire and any replacement would be expected to be subject to a competitive tender process.

In light of the specific arrangements between Finance and EY, and the potential for a competitive tender process relating to the general provision of the Commonwealth's business advisory services, I consider that disclosure in full of the commercially sensitive

Document 1 would have a detrimental effect on the tender process and the Commonwealth's future ability to negotiate with tendering parties. I also consider that full disclosure of Document 1 would provide a competitive advantage to parties who may wish to tender for future business advisory services, and place EY at a competitive disadvantage should they wish to tender for future services of this kind.

For these reasons, I am satisfied that the document is also exempt, in part, under section 47(1)(a) and (b) of the FOI Act.

Section 47E – certain operations of agencies conditional exemption

Section 47E(d) of the FOI Act provides:

A document is conditionally exempt if 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.

I consider that full disclosure of Document 1 would have a substantial adverse effect on the capacity of Finance to properly manage the Business Advisory Panel and any future tender process. Specifically, full disclosure would be likely to negatively impact Finance's ability to effectively and competitively negotiate future pricing structures, and the terms for business advisory services for both Finance and other Commonwealth agencies accessing the current and any future related panel arrangements. Further, the full disclosure would have the effect of undermining Finance's relationships with its stakeholders, including other agencies involved and current and future tenders.

I therefore consider that full release of Document 1 would, or could reasonably be expected to, have a substantial adverse effect on an agency's proper and efficient conduct of operations and I am therefore satisfied that the documents are exempt in part under section 47E of the FOI Act.

Section 47F – personal privacy conditional exemption

Section 47F of the FOI Act provides that:

(1) 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).

Consistent with section 4 of the FOI Act and section 6 of the *Privacy Act 1988*, personal information means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual who is reasonably identifiable.

For information to be conditionally exempt under section 47F, I must first be satisfied that the information is personal information. I am satisfied that Document 1 contains personal information as it identifies information about individuals who are not known to be associated with the matters dealt with in the document, and which is not available from publicly accessible sources.

To that end, the personal privacy exemption is designed to prevent the unreasonable invasion of privacy. Subsection 47F(2) of the FOI Act provides that:

(2) In determining whether the disclosure of a document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

- (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;*
- (d) any other matters that the agency or Minister considers relevant.*

I am satisfied that the relevant information contained in Document 1 is not well known. Specifically, the details of the relevant officer from Finance and the authorised signatory from EY, is not available from publicly accessible sources.

In considering other matters that are relevant, I have also had regard to the following factors identified in paragraph 6.143 of the FOI Guidelines and the decision of *'FG' and National Archives of Australia* [2015] AICmr 26 (13 April 2015):

- the nature, age and current relevance of the information;
- any detriment that disclosure may cause to the person to whom the information relates;
- any opposition to disclosure expressed or likely to be held by that person;
- the circumstances of an agency's collection and use of the information;
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information; and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

I am of the view that disclosure of the personal information identified in the document may cause detriment to the individual concerned. I have considered the third party submissions received and the circumstances of Finance's collection and use of the relevant information within Document 1, as well as the nature, age and relevance of the information in question. Where the relevant officers are no longer employed by either of the contracting parties, and these officers are not known to be associated with the matters dealt with in Document 1, I consider that the detriment that disclosure may cause to the individuals to whom the information relates outweighs the advance in government transparency and integrity that would arise from the disclosure of the relevant information within the document.

Noting the above, I have formed the view that it would be an unreasonable disclosure of personal information to release Document 1 in full and I am therefore satisfied that the conditional exemption under section 47F of the FOI Act applies.

Public interest test

Having formed the view that the document within the scope of your request is subject to the conditional exemptions under section 47E and section 47F of the FOI Act, I am now required to consider the public interest test for the purposes of determining whether access to this conditionally exempt document would, on balance, be contrary to the public interest.

Subsection 11B(3) of the FOI Act provides:

(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; [and]*
- (c) promote effective oversight of public expenditure;*

In addition to the above I have also had regard to paragraph 6.19 of the FOI Guidelines which provide a non-exhaustive list of further factors that may favour disclosure.

In my view, the factors favouring disclosure in this case include that it would promote the objects of the Act and would further promote effective oversight of public expenditure. Full disclosure may also inform debate on a matter of public importance.

The FOI Act does not list any factors weighing against disclosure, however the FOI Guidelines provide a non-exhaustive list of factors against full disclosure at paragraph 6.22. These factors, like those favouring disclosure, will depend on the circumstances. I have considered these factors and have determined that the following are relevant considerations:

- could reasonably be expected to prejudice the agency's ability to obtain confidential information;
- could reasonably be expected to prejudice the agency's ability to obtain similar information in the future;
- could reasonably be expected to prejudice the competitive commercial activities of the agency;
- could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- could reasonably be expected to prejudice the management function of the agency.

I have not given any consideration to the irrelevant factors prescribed in subsection 11B(4) of the FOI Act.

I have therefore determined to give greater weight to the factors against full disclosure in this case and consider that it would be contrary to the public interest to provide access to the full document identified under the FOI Act. I am satisfied that the conditional exemptions under sections 47E and 47F of the FOI Act are satisfied and have therefore decided to exempt the document identified in part, consistent with the exemptions provided under these sections of the FOI Act.

Review and appeal rights

You are entitled to request an internal review or a review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and appeal rights is set out at Attachment B.

Publication

The FOI Act requires Commonwealth agencies to publish:

- information in documents to which the agency routinely gives access in response to FOI requests except where that information is exempt under the FOI Act; and
- information in documents released under the FOI Act.

Subject to certain exceptions, any documents provided to you under the FOI Act will be published on Finance's FOI Disclosure Log (www.finance.gov.au). Finance's policy is to publish the documents within one working day after they are released to you.

Further Information

If you have any questions in regards to this matter, please contact the FOI Team on the contact details provided.

Yours sincerely,



Cameron Jose
A/g Assistant Secretary
Commercial Policy and Advisory
Department of Finance
17 July 2020

SCHEDULE OF DOCUMENTS RELEVANT TO FOI REQUEST No. 20/32

| Document No. | No. of Pages | Description of Document | Decision |
|--------------|--------------|--|--|
| 1 | 46 | Document in relation to the contract signed between the Department of the Treasury, and Ernst & Young. | Release in part. Material exempted under section 45, section 47, section 47E and section 47F of the FOI Act. |



Australian Government
Department of Finance

Freedom of Information – Your Review Rights

If you disagree with the decision made by the Department of Finance (Finance) under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of documents that has not been agreed to by Finance, or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by Finance, or external review by the Australian Information Commissioner.

Internal Review

If Finance makes an FOI decision that you disagree with, you can ask Finance to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless Finance agrees to extend the application time. You should contact Finance if you wish to seek an extension.

Finance is required to make a review decision within 30 days. If Finance does not do so, the original decision is considered to be affirmed.

How to apply for internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points you are objecting and why. You can lodge your application in writing through one of the contact details provided at the end of this document.

Review by the Australian Information Commissioner (IC)

The IC is an independent office holder who can review the decisions of agencies and ministers under the FOI Act. The IC can review access refusal decisions (s 54L(2)(a) of the FOI Act), access grant decisions

(s 54M(2)(a)), refusals to extend the period for applying for internal review under s 54B (s 54L(2)(c)), and agency internal review decisions under s 54C (ss 54L(2)(b) and 54M(2)(b)).

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the IC within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

Do I have to go through Finance's internal review process first?

No. You may apply directly to the IC. However, going through Finance's internal review process gives Finance the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.

Do I have to pay?

No. Review by the IC is currently free.

How do I apply?

You must apply for IC review in writing and you can lodge your application in one of the following ways:

Post: Office of the Australian Information Commissioner
GPO Box 2999
CANBERRA ACT 2601
Email: enquiries@oaic.gov.au
Fax: 02 9284 9666
In person: Level 3
175 Pitt Street
SYDNEY NSW 2000

An electronic application form is also available on the OAIC's website (www.oaic.gov.au). Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Making a complaint

You may make a written complaint to the IC about actions taken by Finance in relation to your application. However, if you are complaining that a Finance decision is wrong, it is treated as an application for review. For further information, see [FOI fact sheet 13 – Freedom of Information: How to make a complaint](#).

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the FOI Act, you must seek external review through the IC prior to applying to the AAT for such a review. The fee for lodging an AAT application is currently \$932 (from 1 July 2019), although there are exemptions for health care and pension concession card holders and the AAT can waive the fee on financial hardship grounds.

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the IC, the Ombudsman will consult the Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

Applications to the Ombudsman should be directed to the following address:

Post: Commonwealth Ombudsman
PO Box 442
CANBERRA ACT 2601
Phone: 02 6276 0111
1300 362 072

Finance FOI contact details

FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603
Phone: 02 6215 1783
Email: foi@finance.gov.au
Website:
<https://www.finance.gov.au/about-us/freedom-information>