

FOI-2022-10012

18 March 2022

Cynthia T

*By email:* foi+request-8320-53c86b26@righttoknow.org.au

Dear Cynthia

### **Freedom of Information request – access decision**

I refer to your request received on 16 January 2022 for access to documents held by the Office of the Commonwealth Ombudsman (the Office) under the *Freedom of Information Act 1982* (the FOI Act).

I apologise for the delay in providing this decision notice.

#### **Decision and reasons**

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests on behalf of the Office.

I have decided to:

- refuse access to parts of documents 1, 2, 3, 4, 22 and 23 and to refuse access in full to documents 6-21 under s 47 of the FOI Act; and in the alternative refuse access under s 47G(1)(a) of the FOI Act;
- refuse access to parts of documents 1, 2, 3, 4, 22 and 23 which contain the personal information of Adaptbl legal staff and staff of this Office under s 47F of the FOI Act

In making my decision I had regard to the terms of your request, the contents of the requested documents, submissions from a third party, relevant provisions of the FOI Act, and Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act<sup>1</sup> (the FOI Guidelines).

A schedule of documents is available below at **Attachment A**.

Information about your complaint and review rights is at **Attachment B**.

#### **FOI request**

In your request dated 16 January 2022 you requested access to the following:

- “...a) the written document (or documents) setting out the contract associated with CN3722705-A1 (and CN3722705), so that I can determine what services were provided by adaptbl legal, and what was requested by the OCO;*
- b) any purchase orders associated with CN3722705-A1 (and CN3722705);*
- c) any invoices issued by the supplier with respect to CN37122705-A1 (and CN3722705);*
- d) any and all documents setting out the scope of the role of this contractor (including what duties they had to perform, performance indicators etc.);*
- e) any and all documents setting out the ‘research’ (e.g. interviews with other staff, analysis of similar roles in other agencies, analysis of going market rates in relation to the*

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<sup>1</sup> <https://www.oaic.gov.au/freedom-of-information/foi-guidelines>.

*work to be performed by the contractor etc.) undertaken by OCO staff to determine the proper scope of the role of the contractor...”*

In your email of 1 February 2022, you confirmed that you do not request access to the direct email addresses, phone numbers or last names of third parties. I have treated these things as irrelevant to your request, under s 22 of the FOI Act.

### **Third party consultation**

During the processing of your request, we consulted a third party that would potentially be affected by the release of the documents falling within the scope of your request and that third party has made a submission in support of an exemption contention.

As I have decided to grant access to parts of the documents, I cannot provide the released documents until after all the opportunities of the supplier concerned for review or appeal in relation to my decision have run out.

### **Steps taken to locate documents**

To locate the requested documents, I have searched our electronic file management system using the information provided in your request (contract notice reference numbers) and consulted with relevant internal staff to retrieve records. I am satisfied that this search was appropriate and all documents relevant to your request have been identified where possible.

I identified 23 documents within the scope of your request.

### **Exemption - Documents disclosing trade secrets or commercially valuable information – Section 47**

I have decided to exempt from release the pricing information and the relevant APS classification for contractor staff (breakdown of rates, fees etc.) in respect of a contract for services between the Office and Adaptbl Legal (the supplier) (‘the commercial information’) under s 47 of the FOI Act.

Under s 47(1)(b) of the FOI Act, a document must satisfy two criteria to be exempt from disclosure:

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

I will deal with each of these criteria in turn.

#### ***Commercial value***

In order to determine whether the requested material contains information that has a commercial value, I have considered the following factors outlined in the FOI Guidelines:

- 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
- whether a genuine ‘arm’s-length’ buyer would be prepared to pay to obtain that information
- whether the information is still current or out of date (out of date information may no longer have any value)
- whether disclosing the information would reduce the value of a business operation or commercial activity

Having regard to the submissions of the supplier and the terms of the relevant work order in respect of confidentiality I am satisfied that the commercial information is known only to the Office and the

supplier, and this limited disclosure does not detract from its intrinsic commercial value.

Information may confer a competitive advantage where it provides a benefit to an organisations' commercial operations over a competitor. In my view the commercial information would confer some competitive advantage over a competitor, as it would detail the pricing structure relating to a successful commercial transaction.

However, I am not satisfied that a genuine arm's length buyer would be prepared to pay to obtain that information as it relates to a single commercial arrangement and is not highly technical in nature or requires significant research and development to produce.

I consider that as the relevant work order has not concluded the information is still current and relevant to the ongoing services of the supplier. In my view, the commercial information does have an intrinsic commercial value, particularly as it reveals information about the pricing structure for services provided by the supplier.

***Disclosure would, or could reasonably, destroy or diminish commercial value***

Based on my examination of the requested commercial information, I consider that disclosure would reveal confidential pricing information about the services provided by the supplier. In my view, maintaining confidentiality in respect of the pricing information of a supplier of labour hire services is critical to the commercial viability of that business.

If competitors or potential customers became aware of the pricing information of the supplier, it could reasonably be expected to affect the ability of the supplier to competitively enter into future commercial arrangements or negotiations.

I am satisfied that the commercial value of this information could reasonably be diminished if the information was disclosed.

**Public Interest Conditional Exemption – business – Section 47G of the FOI Act**

In the alternative, I have decided to refuse access to the commercial information under s 47G(1)(a) of the FOI Act.

Section 47G conditionally exempts documents where disclosure 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 (business information), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the 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 (s 47G(1)(a)).

The FOI Guidelines explain that the business information exemption is intended to protect the interests of third parties dealing with the Government. The operation of s 47G depends on the effect of disclosure rather than the precise nature of the information itself<sup>2</sup>.

***Business information***

I am satisfied that the commercial information in the documents relates to the money-making affairs of the supplier as opposed to its private or internal affairs. As the material directly relates to the services provided as part of a commercial transaction I consider the information is business information for the purpose of s 47G of the FOI Act.

***Disclosure would unreasonably affect business, commercial or financial affairs***

In deciding whether disclosure of a document containing business information would be unreasonable for the purpose of s 47G(1)(a), a decision maker must balance the public interest and

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<sup>2</sup> FOI Guidelines, [6.184] – [6.185].

the private interests of the business.

I consider that as the commercial information relates to the expenditure of public funds by this Office there is a moderate public interest in ensuring service providers are properly performing contractual obligations and the Office is appropriately procuring services. However, I note that information about the contract is already publicly available on the Austender website<sup>3</sup>.

I have considered that the commercial information was obtained from the supplier for the purpose of giving effect to the contractual arrangement for services and this information has been expressly protected by confidentiality in the relevant work order. There is a strong private interest in the business being able to preserve the confidentiality of their commercial information to enable the supplier to maintain and carry on a profitable business.

I have considered the market in which the supplier operates, and I am satisfied that disclosure of information that could be used to calculate or determine the pricing structure of the suppliers services would give competitors an advantage in a competitive operating environment.

In my view, as the commercial information is not otherwise publicly available and considering the detrimental effect disclosure would have on the supplier, disclosure would be unreasonable in these circumstances.

#### **Public Interest Conditional Exemption – Personal privacy – Section 47F of the FOI Act**

I have decided to refuse access to the full names and signatures of adaptbl legal staff and the signatures of staff in this Office under s 47F of the FOI Act.

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about a person.

#### ***Personal information***

Section 4(1) of the FOI Act provides that ‘personal information’ has the same meaning as in the *Privacy Act 1988* (the Privacy Act). Section 6(1) of the Privacy Act provides:

*‘personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in a material form or not’*

The identity of the relevant staff is reasonably ascertainable from the inclusion of their full names and their signatures. I am therefore satisfied that the relevant information constitutes personal information under the definition set out in section 4 of the FOI Act.

#### ***Disclosure unreasonable***

If information is personal information, it will be conditionally exempt if its disclosure would be ‘unreasonable’. In considering whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known
- 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
- the availability of the information from publicly accessible sources,
- any other matters that I consider relevant.

The FOI Guidelines set out further information to which decision makers must have regard to when

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<sup>3</sup> [AusTender Homepage: AusTender \(tenders.gov.au\)](https://www.tenders.gov.au).

determining whether disclosure would be unreasonable, including<sup>4</sup>:

- 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.

As per the factors set out in the Guidelines, and s 47F of the FOI Act, I have turned my mind to whether disclosure would be unreasonable in this particular case. In respect of the personal information of adaptbl legal staff I have considered the following factors:

- the personal information is included in a work order which has not concluded and for this reason the information is current and accurate
- the personal information was provided on the understanding that it would be kept confidential
- release of the document to the FOI applicant, especially noting that release is via the Right to Know website (which automatically publishes information publicly), could reasonably be expected to cause the employees stress
- disclosure is not likely to advance the public interest in government and transparency, particularly noting relevant details about the contract are publicly available on Austender.

In respect of the personal information of staff in this Office:

- the information is included on documentation for the purpose of a commercial arrangement and for this reason the information is not well known or otherwise publicly available
- the information remains current and accurate

For these reasons, I consider that release of the personal information of the relevant staff would be unreasonable in the circumstances.

***Disclosure not in the public interest***

Pursuant to subsection 11A(5) of the FOI Act, I have concluded that the relevant material is not required to be disclosed because disclosure at this time would be, on balance, contrary to the public interest.

While it is in the public interest to promote effective oversight of public expenditure and inform the public on the operations of this Office I have afforded minor weight to these factors as the information about the contract is publicly available.

In my opinion, the public interest is best served by withholding this information on the ground that release of this information could reasonably be expected to prejudice the protection of a person's right to safety and privacy.

**Contact**

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<sup>4</sup> FOI Guidelines, [6.143].

You may contact me via email to [information.access@ombudsman.gov.au](mailto:information.access@ombudsman.gov.au), via telephone on 1300 362 072 or by post to Commonwealth Ombudsman GPO Box 442 Canberra ACT 2601.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Caitlin Christie', written in a cursive style.

Caitlin Christie  
Paralegal  
Legal Team

*Influencing systemic improvement in public administration*

**Attachment A – Schedule of documents**

**Freedom of Information Request FOI-2022-10012**

\*NOTE: where the schedule below refers to section 47 of the FOI Act as the relevant exemption – in accordance with the reasons above, in the alternative, the documents are exempt under s 47G(1)(a).

Doc No.	Date	Pages	Description of Document	Decision on access	Exemption
1.	14 August 2020	7	Draft work order	<i>Partial Access</i>	Section 47F – personal privacy (names of adaptbl staff) *Section 47 – commercially valuable information (pricing information)
2.	17 August 2020	7	Work order	<i>Partial Access</i>	Section 47F – personal privacy (names of adaptbl staff, signatures) *Section 47 – commercially valuable information (pricing information)
3.	18 August 2020	1	Contractor and Position Information form	<i>Partial Access</i>	Section 47F – personal privacy (names of adaptbl staff, signature of Ombudsman staff) *Section 47 – commercially valuable information (APS classification of contractor staff)
4.	28 July 2020	5	Request for approval to engage a contractor under a labour-hire arrangement form	<i>Partial Access</i>	Section 47F – personal privacy (signature of Ombudsman staff) *Section 47 – commercially valuable information (APS classification of contractor staff)
5.	18 August 2020	1	APS 5 FOI Team position description	<i>Release in full</i>	

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<b>Doc No.</b>	<b>Date</b>	<b>Pages</b>	<b>Description of Document</b>	<b>Decision on access</b>	<b>Exemption</b>
6.	30 September 2020	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
7.	30 October 2020	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
8.	30 November 2020	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
9.	31 December 2020	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
10.	31 January 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
11.	28 February 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
12.	31 March 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
13.	30 April 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)

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Doc No.	Date	Pages	Description of Document	Decision on access	Exemption
14.	01 June 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
15.	30 June 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
16.	31 July 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
17.	31 August 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
18.	30 September 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
19.	31 October 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
20.	30 November 2021	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)
21.	31 January 2022	4	Tax invoice	<i>Exempt in full</i>	*Section 47 – commercially valuable information (pricing information)

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Doc No.	Date	Pages	Description of Document	Decision on access	Exemption
22.	30 June 2021	7	Work order	<i>Partial Access</i>	Section 47F – personal privacy (names and signatures of adaptbl staff, signature of Ombudsman staff)  *Section 47 – commercially valuable information (pricing information)
23.	10 December 2020	7	Work order	<i>Partial Access</i>	Section 47F – personal privacy (names and signatures of adaptbl staff, signature of Ombudsman staff)  *Section 47 – commercially valuable information (pricing information)

## **Attachment B – FOI Review Rights**

### **Internal review**

You can request internal review within 30 days of you receiving this decision. An internal review will be conducted by a different officer from the original decision-maker.

No particular form is required to apply for review although it will assist your case to set out the grounds on which you believe that the original decision should be changed. Applications for internal review can be made:

- via email to [information.access@ombudsman.gov.au](mailto:information.access@ombudsman.gov.au)
- by mail to Commonwealth Ombudsman GPO Box 442 Canberra ACT 2601

If you choose to seek an internal review, you will afterward have a right to apply for Information Commissioner review (IC review) of the internal review decision.

### **Information Commissioner review or complaint**

You also have the right to seek IC review of this decision. For FOI applicants, an application for IC review must be made in writing within 60 days of the decision. For third parties who object to disclosure of their information, an application for IC review must be made in writing within 30 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

You can make an IC review application or make an FOI complaint in one of the following ways:

- online at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>
- via email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)
- by mail to GPO Box 5218 Sydney NSW 2001, or
- by fax to 02 9284 9666.

More information about the Information Commissioner reviews and complaints is available on its website: [www.oaic.gov.au/freedom-of-information/foi-review-process](http://www.oaic.gov.au/freedom-of-information/foi-review-process).