

FOI-2022-10020

7 April 2022

By email: [foi+request-8372-899be3a4@righttoknow.org.au](mailto:foi+request-8372-899be3a4@righttoknow.org.au)

Dear D

### Freedom of Information request – access decision

I refer to your request received on 5 February 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).

#### 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 grant access in part to 5 documents; and refuse access to parts of the documents which constitute:

- the full names, position titles and signatures of third parties under s 47F of the FOI Act;
- the surnames and signatures of staff within this Office under s 47F of the FOI Act;
- an internal email address of this Office under s 47E(d) of the FOI Act;
- commercially valuable information of a supplier under s 47 of the FOI Act, and in the alternative under s 47G(1)(a) 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 Office of 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 7 February 2022 you requested access to the following:

“...A

*I refer to Contract Notice CN3831540 on the AusTender website. The supplier is Technology One Limited (ABN: 84 010 487 180). The procurement was the subject of an open tender process. A level of documentation commensurate with the scale, scope and risk of the procurement must be maintained. I request access to the following documents:*

- a) the written document (or documents) setting out the contract associated with CN3831540; and*
- b) any purchase orders associated with CN3831540; and*

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

c) any "request documentation", as that term is defined in the Commonwealth Procurement Rules, associated with CN3831540.

B

I refer to Contract Notice CN3761420 on the AusTender website. The supplier is Technology One Limited (ABN: 84 010 487 180). The procurement was the subject of an limited tender process. A level of documentation commensurate with the scale, scope and risk of the procurement must be maintained. I request access to the following documents:

a) the written document (or documents) setting out the contract associated with CN3761420; and

b) any purchase orders associated with CN3761420; and

c) any "request documentation", as that term is defined in the Commonwealth Procurement Rules, associated with CN3761420; and

d) a rule 10.5 report setting out i) the value and type of goods and services procured, and ii) a statement indicating the circumstances and conditions that justified the use of limited tender, and iii) a record demonstrating how the procurement represented value for money in the circumstances.

### **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 for review or appeal by the supplier in relation to my decision have run out<sup>2</sup>.

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

To locate the requested documents, we 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.

Our searches identified 5 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 information concerning the pricing, fees, services, technical specifications, and products ('commercial information') of a supplier 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.

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<sup>2</sup> FOI Guidelines, [3.202] available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-3-processing-and-deciding-on-requests-for-access>.

### ***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 Head Agreement to which the commercial information relates; I am satisfied that the commercial information is known only to a limited number of Government entities and the supplier, and this limited disclosure does not detract from its intrinsic commercial value.

Based on my examination of the commercial information I am satisfied that the supplier has expended significant resources and carried out substantial research and development to provide the services to which the commercial information relates. For this reason, I consider that the information confers a competitive advantage on the supplier and a genuine arm's length buyer would be prepared to pay to obtain that information.

The commercial information is still current as it relates to an ongoing contract for service which has not expired or been terminated.

In my view, release of the information would reveal how such products are developed and therefore would reduce the value of the commercial activity of the supplier.

For these reasons, I am satisfied that the commercial information has commercial value.

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

I have had regard to the market in which the supplier operates being the supply of enterprise solutions (integrated information sharing systems) and the highly technical nature of the commercial information.

Based on my examination of the commercial information, I consider that disclosure would reveal:

- confidential pricing information about the services provided by the supplier
- detail about the products and service offerings of the supplier, including information about how those products are implemented and ongoing support services

In my view, maintaining confidentiality in respect of the pricing information of a supplier 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 have considered that the commercial information is highly technical in nature, as the information describes in detail the functionality of the relevant products. Release of this information would diminish its commercial value by making this information available to competitors without significant investment.

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 of 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>3</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 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>4</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 head agreement. There is a strong private interest in the supplier being able to preserve the confidentiality of their commercial information to enable the supplier to maintain and carry on a profitable business.

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.

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

Subsection 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

I consider that disclosure would promote the objects of the FOI Act, including to inform the community of the operations of this Office, in particular the expenditure of public monies. I have afforded minor weight to this factor as the total value of the contracts are publicly available.

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<sup>3</sup> FOI Guidelines, [6.184] – [6.185].

<sup>4</sup> [AusTender Homepage: AusTender \(tenders.gov.au\)](https://www.tenders.gov.au).

I consider that disclosure would prejudice the commercial operations of a private business and could reasonably be expected to prejudice the ability of this Office to obtain confidential information in the future. I have given significant weight to these factors as I believe there is a strong public interest in ensuring government agencies are able to enter into commercial arrangements to deliver services and carry out legislative functions.

On balance, I am satisfied that the commercial information is contrary to the public interest to disclose at this time.

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

I have decided to refuse access to the full names, position titles and signatures of third parties and the surnames and 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 individuals 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 when determining whether disclosure would be unreasonable, including<sup>5</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

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<sup>5</sup> FOI Guidelines, [6.143].

- 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 FOI 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 third-party individuals I have considered the following factors:

- the personal information which appears in the documents relates to agreements which are current and therefore the information remains relevant
- the personal information is not otherwise publicly available or otherwise well known
- there is a limited number of people who are aware that the individuals are known to be associated with the matters dealt with in the documents
- disclosure is not likely to advance the public interest in government and transparency, particularly noting relevant details about the contracts 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
- As this FOI request has been made through the Right to Know website<sup>6</sup> I consider that release would result in immediate dissemination of the personal information into the public domain
- the information remains current and accurate
- the ordinary duties of the relevant staff do not involve public facing contact or complaint handling functions. For this reason, I do not believe that disclosure would advance the ability of the public to raise complaints with the Ombudsman about public administration.

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

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

Subsection 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be 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 relevant 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.

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.

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<sup>6</sup> [https://www.righttoknow.org.au/request/documents\\_pertaining\\_to\\_procurem#outgoing-17098](https://www.righttoknow.org.au/request/documents_pertaining_to_procurem#outgoing-17098).

**Public Interest Conditional Exemption – certain operations of agencies – section 47E of the FOI Act**

I have decided to refuse access to an internal operational email address of this Office under s 47E(d) of the FOI Act.

Section 47E(d) relevantly 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 the agency.*

For a document to be conditionally exempt under s 47E(d) of the FOI Act, it would need to be shown that disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The relevant email address is not publicly available, and it generally only used for internal correspondence between staff within this Office. As a result, there is a limited number of staff who are responsible for managing incoming correspondence to this email address.

The relevant email address is generally only used for matters which relate to the financial activities of the Ombudsman's Office. In my view, any increase in unrelated communications to this email address would amount to a substantial increase in workload on staff performing work concerning the financial activities of the Ombudsman, and would directly impact on their ability to carry on their expected duties.

For these reasons, I have concluded that release would have a direct and substantial adverse impact on the financial operations of the Ombudsman's Office and that the email address is conditionally exempt under s 47E(d) of the FOI Act.

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

Subsection 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

I consider that disclosure would promote the objects of the FOI Act, including to inform the community of a minor aspect of the operations of this Office. I have afforded minor weight to this factor as disclosure would reveal very limited information about the work of the Commonwealth Ombudsman.

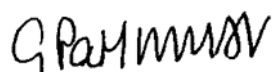
In my view, disclosure of the relevant email address could be reasonably expected to prejudice the operations of this Office. I find that moderate weight should be given to the reasonable expectation that disclosure would divert resources of the Ombudsman's Office from the performance of their usual duties. It is in the public interest that government agencies are able to effectively perform their activities, including compliance activities in accordance with Commonwealth procurement policies.

On balance, I am satisfied that disclosure of the relevant email address would be contrary to the public interest.

**Contact**

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 'G Parkhurst'.

Gregory Parkhurst  
Senior Legal Officer



**Attachment A – Schedule of documents**

**Freedom of Information Request FOI-2022-10020**

\*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.	19 March 2021	13	Schedule 4: Order and Contract details	Partial Access	Section 47(1)(b) - Documents disclosing commercially valuable information (commercial information) Section 47F – Personal Privacy (full names and position title of third party, Ombudsman staff surnames and signature) Section 47E(d) – Certain operations of agencies (internal email address)
2.	7 April 2021	1	Section 23 Approval Record	Partial Access	Section 47(1)(b) - Documents disclosing commercially valuable information (commercial information) Section 47F – Personal Privacy (Ombudsman staff surnames)
3.	11 November 2021	1	Section 23 Approval Record	Partial Access	Section 47(1)(b) - Documents disclosing commercially valuable information (commercial information) Section 47F – Personal Privacy (Ombudsman staff surnames)
4.	15 November 2021	107	Change Order	Partial Access	Section 47(1)(b) - Documents disclosing commercially valuable information (commercial information)

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\*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
					Section 47F – Personal Privacy (names and position title of third party, Ombudsman staff signature)
5.	31 August 2017	128**	Head Agreement for the provision of financial management information systems and services	Partial Access	Section 47(1)(b) - Documents disclosing commercially valuable information (commercial information) Section 47F – Personal Privacy (names and signatures of third parties) **33 pages exempt in full

## **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 at its website: [www.oaic.gov.au/freedom-of-information/foi-review-process](http://www.oaic.gov.au/freedom-of-information/foi-review-process).