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Australian Government
Department of Finance

Reference: FOI 23-24/187
Contact: FOI Team
E-mail: foi@finance.gov.au

Interested Australian Citizen

By email only: request-11582-1a1cda05@righttoknow.org.au

Dear Interested Australian Citizen,

Freedom of Information Request – FOI 23-24/187

On 29 June 2024, the Department of Finance (Finance) received your email, in which you sought access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to the following:

“full copies of the following Approaches to Market (ATM) documents which the AusTender website references for the contracts awarded to Gruden Pty Ltd by Department of Finance.

Specifically, documentation provided by the Department of Finance for these Approaches to Market, including the requirements, and anything else provided to the prospective suppliers. I am not interested in any responses from any supplier back to the Department, only the Department's documents that were produced approaching the market related to these ATMs.

ATM References
FIN15BPAM3248
FIN16GC22APR
FINAT2016/05
FIN16GCSW1204
FIN15BPAM3255
FIN15BPAM3109
FINBPAM2661
FIN14BPAM2271
FIN14BPAM2270”

On 24 July 2024, Finance advised you that FIN15BPAM3248 was the original approach to market of this series of ATM references. The other AusTender references in your request were references to variations to the original contractual arrangement, not separate approaches approaches to market.

On 24 July 2024, you agreed to amend the scope of your request by the following:

“I agree to exclude third party information from the document.”

The purpose of this letter is to provide you with notice of my decision under the FOI Act.

Authorised decision-maker

I am authorised by the Secretary of Finance to grant or refuse access to documents.

Decision

I have identified one document falling within the scope of your request.

I have decided to release this document with some information redacted as the document contains irrelevant information, and information related to deliberative processes and certain operations of agencies.

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

- the terms of your FOI request;
- the content of the document that falls 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).

Locating and identifying documents

The documents were identified by conducting searches of Finance's internal share drives using all reasonable search terms that could return documents relevant to your request.

Relevant Finance staff able to identify documents within the scope of the request were also consulted.

Irrelevant information removed from the documents

Section 22 of the FOI Act allows for copies of a document to be modified for deletion of exempt and irrelevant information where access to the document is required. You have agreed for third party information to be excluded from the document and so this information is therefore irrelevant to your request.

Additionally, in our acknowledgement email, Finance advised that subject to any objections raised by you, the names and contact details of junior staff (non-SES officers) and staff employed under the *Members of Parliament (Staff) Act 1984* (adviser level and below) would be redacted under subparagraph 22(a)(ii) of the FOI Act on the basis that these details are irrelevant to the request. Finance did not receive any such objections. As such, I consider Finance staff information contained in this document is irrelevant to your request.

Therefore, I have redacted irrelevant information from the document under section 22 of the FOI Act and released the edited form of the document to you.

Information removed as it relates to deliberative processes

Section 47C of the FOI Act sets out the following:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, a advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth.

Exceptions

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

The FOI Guidelines provide:

[6.55] The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

[6.56] While identifiable harm resulting from disclosure is not a specific factor in determining whether a document may be categorised as ‘deliberative’, it may be relevant subsequently when deciding where the balance of the public interest lies. If, in a particular case, a deliberative document may be released without appreciable harm resulting, this would tend to indicate that it would not be contrary to the public interest to disclose the document and therefore it must be released to the applicant.

[6.59] ‘Deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

The document includes opinions and deliberations of Finance on the risks associated with transitioning to new cloud technologies for AusTender. Analysis of these risks provides technical insights into potential vulnerabilities in the AusTender online platform. Further, these considerations provide insight into how technical upgrades may affect system performance or pose weaknesses within the system. It is important that Finance can deliberate such technical information without exposing the system to the added risk of malicious actors that may use the information to breach the security of or compromise AusTender.

As a result, I have determined that the information on pages 40 and 41 of the document is conditionally exempt under section 47C of the FOI Act.

In making this decision, I have considered the exceptions identified in subsections 47C(2) and (3) of the FOI Act and found that they do not apply to the document.

Information removed as it relates to operations of agencies

Section 47E 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.

The FOI Guidelines provide:

[6.99] Sections 47E(a) and (b) require a decision maker to assess whether the conduct or objects of tests, examinations or audits would be prejudiced in a particular instance. The term ‘prejudice’ is explained in Part 5.

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[6.100] In the context of this exemption, a prejudicial effect could be regarded as one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.

...

[6.120] An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.

Some of the information in the document outlines the technical capabilities of the AusTender platform and the impact that new cloud technologies will have on that capability. I am satisfied that this material relates to Finance's operations and functions as administrators of AusTender.

Paragraph 6.18 of the FOI Guidelines provide that 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'. The word 'substantial', in the context of substantial loss or damage, has been interpreted as including 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

I consider that if this document was released in full that it would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of Finance.

This is because the technical details within the document could reasonably be expected to be used by malicious actors to gain access to the system or learn how the platform operates with the intention of compromising it, or the procurement process itself. This poses a real risk to the security of the AusTender system. It is crucial that the AusTender platform is able to run fair and transparent procurement processes and protect large volumes of commercial information related to Government procurement processes.

As a result, I have determined that the release of this information on page 15 would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency and is conditionally exempt under section 47E of the FOI Act.

Public interest test

Section 11A of the FOI Act relevantly provides:

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

In finding that the document is conditionally exempt in part, I am required to consider whether it would be contrary to the public interest to give access to the information in the documents at this time.

Factors favouring disclosure

Section 11B of the FOI Act relevantly 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;

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- (c) promote effective oversight of public expenditure;
- (d) allow a person to access his or her own personal information.

In considering the scope of your request and the content of the documents, I have taken into account the intention of the FOI Act to provide for open Government and that the release of the documents would promote transparency of Government activities. I consider that the release of the documents would promote the objects of the FOI Act and promote effective oversight of public expenditure. Further, I have balanced this consideration against the factors against disclosure below.

Factors against disclosure

Paragraph 6.233 the FOI Guidelines provides a non-exhaustive list of factors against disclosure. I have considered these factors in making my decision and have also considered that other factors against disclosure include:

- protection of the AusTender platform against system compromise, and
- protection of the large volume of business and personal information on Government procurements contained on the platform.

The document contains technical information on the storage, maintenance and efficacy of AusTender systems and potential strengths and weaknesses therein. Information of this nature could be used by malicious actors to compromise the system or influence procurement processes. This would have substantial flow on effects for the protections and security of the information held on the AusTender system.

Releasing this information could also prejudice how the Department of Finance uses, upgrades or operates AusTender due to the heightened environmental risks for the potential breach of the system.

Therefore, for these reasons, I consider that the release of the redacted information in the document would not be in the public interest.

Irrelevant factors

Section 11B of the FOI Act relevantly provides:

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

I have not taken into account any of these irrelevant factors.

Balancing public interest factors

The FOI Guidelines relevantly provide:

[6.238] To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.

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I acknowledge that there is public interest in providing access to the specific information in the document. However, on balance, I consider that the factors against disclosure outweigh the factors favouring disclosure.

Disclosure of the information redacted from the document could significantly affect the activities of AusTender in ensuring transparency in public expenditure through procurement processes. There is a clear public interest in ensuring that Department of Finance can make impartial, reasoned decisions in upgrading or maintaining the AusTender system.

There is also a public interest in protecting the business and personal information held in the AusTender system. As such, I consider that there is a greater public benefit in refusing to release information that could compromise the AusTender system which would then compromise the security and privacy of the business and personal information held by Finance.

Charges

I have decided that a charge is not payable in this matter.

Review and appeal rights

You are entitled to request an internal review or an external 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 A**.

Publication

Finance will publish the document released to you on our [Disclosure Log](#). Finance's policy is to publish the document the working day after they are released to you.

If you have any questions about this request, please contact the FOI Team on the above contact details.

Yours sincerely,



Gareth Sebar
Assistant Secretary
Procurement Policy and Systems Branch
Department of Finance
29 July 2024



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision 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 the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 17 February 2023 it is \$1,011).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The 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 with the IC 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. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.