



Australian Government

Department of Health and Aged Care

FOI reference: 25-0019 LD IR

Health Anon

Email: foi+request-12050-63c3d94c@righttoknow.org.au

Dear Health Anon

Decision on your Freedom of Information Request for Internal Review

I refer to your request of 12 November 2024, to the Department of Health and Aged Care (the department), requesting an internal review of the department's decision on access dated 11 November 2024 (the original decision) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

Original FOI request

On 12 September 2024, you requested access to:

All approach to market documents and the department's procurement evaluation and value for money assessment relating to CN4085822

<https://www.tenders.gov.au/Cn/Show/af64de87-4fd4-4b89-825c-2cc0f2978db3> which shows a contract awarded to Accenture for \$289,360,500.00

CN ID: CN4085822

Agency: Department of Health and Aged Care Publish

Date: 5-Aug-2024

Category: Computer services

Contract Period: 2-Jul-2024 to 30-Jun-2026

Contract Value (AUD): \$289,360,500.00

Description: ICT Transformation Delivery

Procurement Method: Open tender

Original FOI decision

On 8 November 2024 Da decision was made to:

- grant access to one document in full

- grant access to one document in part, subject to the deletion of exempt and irrelevant material.

Your submissions

In making your request for the department to review its original decision on access, you stated:

Can you confirm that the Department has indeed included the full value for money assessment as within scope of my request, and if not, why not?

In relation to section 22 of the FOI Act, in your request for a review, you submitted:

Section 22, part 3(b) requires that the grounds for the deletions be provided.

The decision maker has not provided details as to the criteria used to determine the remaining 236 pages of the committee approval minute are irrelevant to my request.

I also find it difficult to believe there are no other documents that relate to this procurement evaluation held by your department. Would you please confirm why that is the case.

In your request for an internal review, you have also provided submissions in relation to the application of the exemptions in sections 47D, 47E and 47G and asked the use of the conditional exemptions be reconsidered. As conditional exemptions were applied in making the original decision, you have made submissions regarding the public interest test and asked that this is re-evaluated for the reasons listed in your review application.

Internal Review Decision

In making a fresh decision as part of this internal review, I have identified three documents that are relevant to your request. These documents were in the possession of the department when your request was received.

Under section 54C of the FOI Act, I have decided to grant greater access without providing full access. My decision is to:

- give access to one document in full
- give access to two documents in part, subject to the deletion of exempt material.

A schedule setting out the documents relevant to your request, with my decision in relation to each document, is at **ATTACHMENT A**.

My reasons for not providing access to material that has been deleted from the documents are set out in **ATTACHMENT B**.

Legislative provisions

The FOI Act, including the provisions referred to in my decision, are available on the Federal Register of Legislation website: www.legislation.gov.au/Series/C2004A02562

The *Privacy Act 1988*, can also be accessed from the Federal Register of Legislation website here: www.legislation.gov.au/Series/C2004A03712

Your review rights

I have set out your further review rights at **ATTACHMENT C**.

Publication

You should be aware that where I have decided to release documents to you, the department may also publish the released material on its Disclosure Log. The department will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference the department's Disclosure Log can be found at:
www.health.gov.au/resources/foi-disclosure-log

Contacts

If you require clarification of any matters discussed in this letter you can contact the FOI Unit on (02) 6289 1666 or at FOI@health.gov.au

Yours sincerely

A handwritten signature in black ink, appearing to read 'B. Schumacher', followed by a period.

Brian Schumacher
First Assistant Secretary
Digital Transformations & Delivery Division

09 January 2025

ATTACHMENT A.

SCHEDULE OF DOCUMENTS
FOI 25-0019 LD IR

Doc.	Date	No. of pages	Description	Decision on access	Relevant provision of FOI Act
1.	26 June 2024	5	Signed Commitment Approval Minute	Released in part	s 42 s 47D s 47E(C) s 47E(d) s 47F s 47G
2.	26 June 2024	260	Commitment Approval Minute	Released in part	s 22 s 42 s 47 s 47C s 47D s 47E(c) s 47E(d) s 47F s 47G
3.	January 2024	6	Request For Quote Document	Released in full	N/A

ATTACHMENT B.

**REASONS FOR INTERNAL REVIEW DECISION
FOI 25-0019 LD IR**

1. Material taken into account

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

- the FOI Act
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act
- the terms of your FOI request as outlined above
- the content of the documents sought
- your request for internal review and submissions made to support that request
- advice from departmental officers with responsibility for matters relating to the documents sought
- submissions from third parties consulted about documents which contain information concerning them

2. Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemptions identified in the schedule of documents apply to parts of documents are set out below.

3. Section 22 – deletion of irrelevant material

Section 22 of the FOI Act applies to documents containing exempt material (subparagraph 22(1)(a)(i)) and irrelevant information (subparagraph 22(1)(a)(ii)) and allows an agency to delete such material from a document.

I have noted your contentions regarding the use of section 22 in the original decision.

I have deleted material in the documents which can reasonably be regarded as irrelevant to your request and prepared an edited copy for release. This information has been marked 's22' in the documents released to you.

As noted to you on 17 September 2024, the department will consider draft and duplicate information out of scope of your request unless advised otherwise. As no response was received, the department has considered duplicate information as out of scope of your request.

The information marked as 's22' in document two is a draft of the Commitment Approval Minute. A signed version, that is the final version, of this document has been provided at document one.

4. Section 42 - Documents subject to legal professional privilege

Section 42 of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The FOI Guidelines state:

5.145 To determine the application of this exemption, the decision maker needs to turn to common law concepts of privilege. The statutory test of client legal privilege under the *Evidence Act 1995* is not applicable and should not be taken into account.

5.148 The underlying policy basis for legal professional privilege is to promote full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. Legal professional privilege protects documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice. The information in a document is relevant and may assist determining the purpose of the communication, but the information itself is not determinative.

5.149 At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential

I am satisfied that the parts of the documents marked 's42' consists of information that is subject to legal professional privilege. I am satisfied that:

- the necessary legal adviser-client relationship exists; the legal adviser was acting in their capacity as a professional legal adviser and the giving of the advice was attended by the necessary degree of independence
- the communication was brought into existence for the dominant purpose of giving or receiving legal advice
- the advice was provided independently, and
- the advice provided was confidential.

The information marked 's42' relates to legal advice regarding the procurement of CN4085822. I am satisfied that this information meets the requirements of section 42 and considered to be subject to legal professional privilege. Should this information be disclosed, I am satisfied that it would be a breach of legal professional privilege between the department and the legal services provider.

For the reasons outlined above, I have decided that the parts of the document marked 's42' is exempt from disclosure under section 42 of the FOI Act.

5. Section 47 - Documents disclosing trade secrets or commercially valuable information

Subsection 47(1) of the FOI Act provides that a document is an exempt document if its disclosure 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.

Commercially valuable information

Paragraphs 5.234 and 5.235 of the FOI Guidelines state:

5.234 To be exempt under s 47(1)(b) a document must satisfy two criteria:

- 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

5.235 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. The following factors may assist in deciding in a particular case whether information has commercial value:

- 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 the information is still current or out of date (out of date information may no longer have any value), and
- whether disclosing the information would reduce the value of a business operation or commercial activity – reflected, perhaps, in a lower share price

I am satisfied that the relevant information contained in the documents:

- is only known to the department and the affected third party for whom it has value

- is not known to others, and disclosure of the information would detract from its intrinsic commercial value
- confers a competitive advantage on the affected third party, and provides the affected third party with access to markets not available to its competitors
- is something that a genuine “arm’s length’ buyer would be prepared to pay to obtain
- is still current, and retains its intrinsic value to the affected third party
- would reduce in value to the business operations or commercial activities of the affected third party if disclosed.

As notified to you on 5 December 2024, in accordance with the obligations under section 27 of the FOI Act, the department has consulted with an affected third party. In making my decision on access to the relevant documents, I have taken into consideration the exemption submissions made during that consultation process.

The information marked ‘s47’ has a commercial value relating to a third party. Should this information be disclosed, I am satisfied that its release would be, or could reasonably be expected to destroy or diminish the commercial activities of the third party.

For the reasons outlined above, I have decided that the parts of the document marked ‘s47’ is exempt from disclosure under section 47 of the FOI Act.

6. Section 47C – Deliberative processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, 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 an agency; or a Minister; or the Government of the Commonwealth.

Deliberative process

Paragraph 6.54 of the FOI Guidelines states that deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

Deliberative matter

Paragraph 6.59 of the FOI Guidelines states that ‘*deliberative matter*’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is

recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words 'opinion, advice or recommendation, consultation or deliberation'.

The information marked 's47C' relates to a draft contract of services with a third party, if this were disclosed it would reveal the department negotiating positions for commercial activities and value for money from a third party. I am satisfied that the parts of the documents marked 's47C' contains material that meets the criteria of deliberative matter, and that this material forms part of a deliberative process. The document can be characterised as the thinking process of the department.

For the reasons outlined above, I have decided that the parts of the document marked 's47C' is conditionally exempt from disclosure under section 47C of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

7. Section 47D - financial or property interests of the Commonwealth

Section 47D of the FOI Act provides that a document is conditionally exempt if its disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

Paragraph 6.80 of the FOI Guidelines provides that the 'financial or property interests of the Commonwealth or an agency' may relate to assets, expenditure or revenue-generating activities.

For section 47D of the FOI Act to apply, there is a requirement that there would be a 'substantial adverse effect' on the financial or property interests of the Commonwealth or an agency.

The FOI Guidelines provide [at 6.18 and 6.82]:

6.18 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 insubstantial or nominal'.

6.82 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 the best value for money through a competitive tendering process may be compromised.

You contended that the information you requested related to a past procurement process and would unlikely harm future tendering processes. You also contended that the department must provide evidence and demonstrate a tangible and significant financial detriment.

A substantial adverse effect on the financial or property interests to the Commonwealth or the department in releasing the documents regarding tendering process may be indirect. Per the FOI guidelines at paragraph 6.82 noted above, the disclosure of documents may have an indirect financial detriment by compromising the competitive tendering process.

I consider that if the information marked 's47D' is disclosed, it would compromise how the department assesses future tenders as this information provides the criteria by which the department assess tenders. Disclosure of this information would reduce the department's ability to create and nurture a competitive environment of various panel members to aid future negotiations. The reduction of panel members would in turn impact how the department engages in negotiations of savings within contracts, and would materially decrease the competitive environment. This would in turn materially decrease the department's ability to negotiate future savings within contracts.

For the reasons outlined above, I have decided that the parts of the document marked 's47D' is conditionally exempt from disclosure under section 47D of the FOI Act. Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

8. Section 47E - Documents affecting certain operations of agencies

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Paragraph 6.84 of the FOI Guidelines states that section 47E conditionally exempts a document where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain identified agency operations.

You have made contentions that:

information that is to be exempt under section 47E(b) does not explain how the release of information would prejudice the attainment of objectives of tests, examinations, or audits. It simply asserts that the information relates to operational activities being conducted lawfully and would not reveal inefficiencies.

Taking this into consideration, the department is no longer relying on section 47E(b).

Substantial adverse effect on management or assessment of personnel (section 47E(c))

Paragraph 6.103 of the FOI Guidelines states that for this conditional exemption to apply, the documents must relate to either:

the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety, or

the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.

The department has statutory obligations under the *Work Health and Safety Act 2011*, including a primary duty of care, so far as is reasonably practicable, to ensure that persons are not put at risk from work carried out as part of the conduct of the department. It is the aim of the department's Work Health and Safety framework to protect workers and other persons against harm to their health, safety and welfare through elimination or minimisation of risks arising from work, and release of such information could cause harm to their physical and mental wellbeing.

I am satisfied that disclosure of the personal information of public servants contained in the documents relevant to your request may be substantially and adversely affect the department's ability to meet its statutory obligations under the WHS Act. There is therefore a protective element to my decision to ensure that departmental staff are not subjected to inappropriate risks or harm.

I am satisfied that the parts of the documents marked 's47E(c)' relate to workplace health and safety functions.

I am satisfied that the parts of the documents marked 's47E(c)' would, or could reasonably be expected to have, a substantial adverse effect on the management or assessment of personnel by the department.

Substantial adverse effect on an agency's proper and efficient conduct of operations (Section 47E(d))

Paragraph 6.84 of the FOI Guidelines states that section 47E conditionally exempts a document where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain identified agency operations.

Examples provided in paragraph 6.113 of the FOI Guidelines indicate that use of 47E(d) may be appropriate where disclosure of the information would:

- result in the need to make substantial changes to procedures to avoid jeopardising the effectiveness or methods and procedures used by the agency, and/or
- prejudice of the ability of an agency to perform its statutory, regulatory or public safety functions.

Paragraph 6.112 of the FOI Guidelines states that 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.

Paragraph 6.115 of the FOI Guidelines state that the predicted effect of disclosure must bear on the department's 'proper and efficient' operations, that is, the department is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

You have requested access to documents that contain information about how the department engages with panel members for its tendering process.

In addition, you have made contentions that the FOI guidelines state that revealing unlawful or inefficiencies do not justify the use of s47E(d), and that embarrassment and loss of confidence are irrelevant factors to decision making. You further contended that the department does not adequately explain how disclosure of costing information would impede future procurements or the department's ability to obtain value for money procurements, and you believe that public scrutiny is required to prompt positive change, encourage better practices and enhance efficiency.

The FOI guidelines at 6.15 state that:

[6.15] The use of the word 'could' is less stringent than 'would' and requires analysis of the reasonable expectation rather than the certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

Section 47E is not limited to the term 'would' but also inclusive of the term 'could'. Section 47E(d) may apply if the disclosure of information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Therefore, the conditional exemption may be applied where there could be a reasonable expectation that there is a substantial effect on the operations of an agency.

In addition, you have noted in your contentions that on disclosure would in fact potentially prompt positive change, encourage better practices and enhance efficiency. Noting paragraph 6.112 of the FOI guidelines which state:

[6.112] 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.

Noting the above procurement was undertaken in a lawful and expected manner, the disclosure of the information marked 's47E(d)' would not lead to a more efficient change in process and would not prompt positive change and encourage better practices. This is because the tender was undertaken in accordance with the Commonwealth Procurement Rules (CPR's) and is open to a pool of tender applicants who are then assessed for suitability. Disclosure of this information would impact how

the department approaches a tender process to this pool of tender applicants, where it would unreasonably disclose the steps taken to make it a more competitive process seeking value for money to the department. Therefore, I am satisfied that disclosure of the information marked 's47E(d)' contains information which, if disclosed, would or could reasonably be expected to, have a substantial adverse effect on the department's proper and efficient operations.

I am satisfied that if the information in the documents marked 's 47E(d)' were disclosed it would / could reasonably be expected to impact how the department assesses future tender applications, as well as sharing vendor information which may impact in how they respond. The effect if this were to occur, would or could reasonably be expected to impact any negotiation the department may undertake for value for money or savings within its contract negotiations.

In this situation, the department would need to create a new competitive environment of panel members to aid future negotiations, at significant financial and operational cost to the department. As such, I am satisfied that it would result in a substantial adverse effect on the proper and efficient operations of the department.

Additionally, the information marked 's47(d)' contains information regarding how the department evaluated the tender applications. If this information would be disclosed, it would provide the criteria by which the department assessment tenders and impact the department's ability to obtain the best value for money through a competitive tendering process

In forming this decision, I am satisfied the s47E(d) material contained in the documents relates to operational activities that are being undertaken in an expected and lawful manner, and that release of this information would not reveal inefficiencies in the way in which the department conducts those operational activities.

You have also requested access to documents that contain non-public facing email addresses used by the department.

I am satisfied that the parts of the documents marked 's47E(d)' contain information which, if disclosed, would or could reasonably be expected to, have a substantial and an unreasonable effect on the department's proper and efficient operations, namely, its management of its communications channels.

If the email addresses in question were to be released, it could reasonably be expected to result in an influx of unsolicited emails to mailboxes used for internal administrative processes. If this occurred, the department would need to change the addresses of or decommission those inboxes, at operational and financial loss to the department. I am therefore satisfied that any impediment to the efficient and effective administration of departmental emails and communication channels would have a substantial adverse effect on the proper and efficient conduct of the department.

In forming this decision, I note that the use of non-public facing operational email addresses to manage administrative functions are operational activities that are being undertaken in an expected and lawful manner. I am further satisfied that release of

these addresses would not reveal inefficiencies in the way in which the department conducts those operational activities.

For the reasons outlined above, I have decided that the parts of the documents marked 's47E(d)' are conditionally exempt from disclosure under section 47E of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

9. Section 47F - Documents affecting personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Personal Information

Personal information has the same meaning as in the Privacy Act. Specifically, section 6 of the Privacy Act provides that *personal information* means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

Paragraph 6.125 of the FOI Guidelines states that personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.

Paragraph 6.132 of the FOI Guidelines states that an individual is a natural person and does not include a corporation, trust, body politic or incorporated association. Section 47F specifically extends to the personal information of deceased persons.

I am satisfied that the information in the documents marked 's47F' includes personal information, such as names, email addresses and phone numbers of department and third party staff members.

Unreasonable Disclosure of Personal Information

Subsection 47F(2) of the FOI Act provides that in determining whether the disclosure would involve the unreasonable disclosure of personal information, I 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.

Paragraph 6.133 of the FOI Guidelines states that:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making 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 when assessing the public interest balance.

I note that the AAT, in *Re Chandra and Minister for Immigration and Ethnic Affairs [1984] AATA 437* at paragraph 51-52, stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...

Paragraphs 6.137 and 6.138 of the FOI Guidelines state:

6.137 Key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release

6.138 As discussed in the leading s 47F IC review decision of 'FG' and National Archives of Australia [2015] AICmr 26, other factors considered to be relevant include:

- 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

The documents contain the personal information of Australian Public Service (APS) staff who are not in the Senior Executive Service (SES).

Paragraph 6.152 of the FOI Guidelines states:

When considering whether it would be unreasonable to disclose the names of public servants, there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether their name would be unreasonable to disclose. In seeking to claim the exemption, an agency needs to consider the factors identified above at [6.135] – [6.138] in the context of the document, rather than start from the assumption that such information is exempt. However, I note that in *Chief Executive Officer, Services Australia and Justin Warren* [2020] AATA 4557 (*Warren*), at paragraph 83, Deputy President S A Forgie noted:

The whole of the FOI Act is a finely tuned balance between two interests. In one side of the balance is the facilitation and promotion of access to a national resource that is information held by Government, which enables increased public participation in Government processes and increased scrutiny, discussion, comment, and review of the Government's activities. In the other is the protection of the national interest, the essential operation of government and the privacy of those who deal with government. It is most important, therefore, that its provisions be read very carefully and that presumptions should not be introduced that are not expressed, or necessarily implicit, in the words Parliament has chosen to achieve the balance that it wants. Those words should be the starting point of any consideration rather than any presumption that agencies and ministers should start from the position that the inclusion of the full names of staff in documents increases transparency and increases the objects of the FOI Act.

I am satisfied that the disclosure of personal information contained within the documents would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the individuals whose personal information is contained in the documents are identifiable
- release of this information would cause anxiety to the individuals concerned
- no further public purpose would be achieved through the release of the personal information, noting that the personal information is included in the document as a result of their employment circumstance
- the information is current and has not lost its sensitivity through the passage of time
- the placing of the personal information of individuals who work for a government department into the public domain has the potential to place those individuals at risk of harassment, abuse, threats and intimidation. This would be detrimental to the individuals concerned, and potentially also their families. Mitigating this risk is even more important with the prevalence of social media and technology allowing individuals to be more easily identifiable and contactable in online environments
- the individuals would not expect the information to be placed in the public domain, and detriment may be caused to the individuals to whom the information relates, and

- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

For the reasons outlined above, I have decided that the parts of the documents marked 's47F' are conditionally exempt from disclosure under section 47F of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

10. Section 47G - Business information

Section 47G of the FOI Act provides that a document is conditionally exempt if its 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, 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; or
- (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Business information

Paragraph 6.177 of the FOI Guidelines states that the conditionally exempt information must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking.

Paragraph 6.191 of the FOI Guidelines states that the use of the term 'business or professional affairs' distinguishes an individual's personal or private 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'.

Paragraph 6.193 of the FOI Guidelines states that 'profession' is not static, and is clearly intended to cover the work activities of a person who is admitted to a recognised profession and who ordinarily offers professional services to the public for a fee.

Therefore, parts of the documents marked 's47G' contain business affairs information that is relevant to the business, commercial or financial affairs of an organisation or undertaking. This information is relevant to the profitability and financial viability of an organisation or undertaking, and does not relate to its private or internal affairs.

As such, I am satisfied that this information is business information.

Unreasonable adverse effect of disclosure

Paragraph 6.184 of the FOI Guidelines states that the presence of 'unreasonably' in subsection 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. I must therefore balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of paragraph 47G(1)(a); but this does not amount to the public interest test of subsection 11A(5) which follows later in the decision process.

Paragraph 6.185 of the FOI Guidelines goes on to state that the test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. I must balance the public interest against a private interest of the affected third parties, preserving the profitability of a business.

In your submissions you contended that:

Your argument rests on the premise that disclosing information about unsuccessful submissions would damage the reputation of the organisations involved. However, the FOI Act emphasises transparency in government processes, including procurement.

Disclosing information about unsuccessful bids could actually enhance accountability and provide valuable insights into the evaluation process.

I note the CPR now requires written feedback to unsuccessful tenderers so that seems to suggest to me that the Commonwealth considers such information to be supportive of the overarching objectives of the CPR.

You claim that disclosure would be detrimental to the profitability of businesses. However, the letter does not offer concrete evidence or specific examples to support this claim.

For the conditional exemption in section 47G(1) to apply, the information would/or could have an unreasonable affect if disclosed. The conditional exemption in section 47G may apply where an unsuccessful tender applicant's business affairs be reasonably affected, should their information be disclosed. While successful applicants are published on the Austender website, unsuccessful applicants are not. Disclosure of information regarding unsuccessful applications could result in a risk to future tender applicants misrepresenting their capabilities or measures. In addition, by disclosing unsuccessful tender applicants' information, this may inadvertently limit their future business opportunities as a biased opinion could be formed to these applicants when seeking future tender opportunities.

The documents marked 's47G' contains information about pricing and costs of services to the department, as well as the overall business affairs of a third party. I am satisfied that the disclosure of the business affairs information would result in an adverse effect on the business, commercial or financial affairs of an organisation or undertaking. I have also had regard to the public and private interest factors, and I am satisfied that

the preservation of the profitability and ongoing viability of the affected third party business outweighs the public interest in the disclosure of this information.

Subsection 47G(2) of the FOI Act provides that subsection 47G(1) does not apply to trade secrets or other information to which section 47 applies. Section 47G has not been applied to any information which I have previously decided is exempt under section 47 of the FOI Act.

In making my decision, I have consulted with the affected third party regarding the relevant business affairs information, and I have considered any concerns.

For the reasons outlined above, I have decided that the parts of the documents marked 's47G' are conditionally exempt from disclosure under section 47G of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

11. Disclosure is not in the public interest

Pursuant to subsection 11A(5) of the FOI Act, the department must give access to conditionally exempt documents unless access to the documents at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the documents would be contrary to the public interest.

Paragraph 6.224 of the FOI Guidelines states:

The public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest
- not something of interest to the public, but in the interest of the public
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests
- necessarily broad and non-specific and
- relates to matters of common concern or relevance to all members of the public, or a substantial section of the public.

Factors favouring disclosure

Section 11B of the FOI Act provides that factors favouring access to documents in the public interest include whether access to the documents would do any of the following:

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure, or

- allow a person to access his or her own personal information.

Having regard to the above, I consider that disclosure of the conditionally exempt information at this time:

- would provide access to documents held by an agency of the Commonwealth which would promote the objects of the FOI Act by providing the Australian community with access to information held by the Australian Government.
- would not inform debate on a matter of public importance
- would promote effective oversight of public expenditure, and
- would not allow you access to your own personal information.

I note your contention on the public interest test, this being:

You state that the disclosure of conditionally exempt information would “would not inform debate on a matter of public importance “ but I disagree - I see the expenditure of 289 million dollars to be considered a matter of public importance, and more transparency around how the department came to award the contract would also inform the debate.

More specifically, the OAIC guidelines list “allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official” as one reason why disclosure may inform debate on a matter of public importance.

As noted above, in your contention, the public expenditure of public money is its own consideration and extends to the consideration and deliberation of the administration of funding.¹ Your submissions currently do not suggest there is further interest to be able to consider it a matter of public importance, as noted above that the procurement was undertaken in a lawful and expected process.²

Factors weighing against disclosure

I consider that the following public interest factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

Section 47C – deliberative information

- could reasonably be expected to prejudice the deliberative processes of forming opinion, advice and/or recommendations by creating an environment in which there is a chilling effect on the open consideration of all options available to the department. Any impediment to the deliberative process could adversely impact the effectiveness of the department’s decision-making, which is against the public interest.

¹ *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41, 41.

² *Ibid.*

- could reasonably be expected to establish a precedent of release of deliberative material, which could hinder the flow of suggestions, preliminary opinions, device and/or recommendations within the department. Any impediment to the deliberative process could reasonably be expected to adversely impact the department's ability to innovate, iterate and improve its policy and procedures, which is against the public interest.

s47D – financial or property interests of the Commonwealth

- would compromise the department's future financial interest in seeking to obtain the best value for money through a competitive tendering process for contracts. Any impediment to the ability of the department to obtain best value for money is against the public interest.

s47E(c) – Certain operations of an agency

In considering the public interest in disclosing the names and contact details of the departmental officers to you, I have taken into consideration the following factors that weigh against disclosure of the conditionally exempt information at this time:

- the type of work undertaken by the relevant officers
- the fact that the relevant officers was not discharging powers or exercising functions that impact on the rights and entitlements of members of the community
- the fact that the relevant officer's details are not publicly available, including in the Government Online Directory

Having regard to these factors, I consider that release of the information to you:

- could reasonably be expected to prejudice the ability of the department to effectively manage its staff. Any impediment to the ability of the department to manage its staff to meet its operational requirements and statutory obligations is contrary to the public interest.

s47E(d) – Certain operations of an agency

- could reasonably be expected to prejudice the effectiveness of tender evaluation procedures. Any impediment to the ability of the department to conduct robust, accurate, fair and impartial evaluations is against the public interest.
- could reasonably be expected to prejudice the department's ability to obtain confidential information as part of a tender process. Any impediment to the ability of the department to obtain and consider relevant information as part of a tender process is against the public interest.
- could reasonably be expected to prejudice the competitive commercial activities of the department, including its ability to enter into contracts that provide best value for money. Any impediment to the ability of the department to achieve best value for money is against the public interest.

s47F – personal information

- could reasonably be expected to prejudice the protection of the relevant individuals' right to personal privacy, noting that the substance of the documents has been released to you and disclosure of the personal information would not provide you with any further insight into the workings of government.
- would not achieve any public purpose and, on balance, would harm the individuals' right to personal privacy.
- would prejudice the department's ability to meet its statutory obligations and responsibilities in relation to the work health and safety of its employees. Any impediment to the ability of the department to manage the health and safety of its staff would be contrary to the objects of the *Work Health and Safety Act 2011 (Cth)*, and therefore contrary to the public interest.
- could reasonably be expected to adversely impact the ability of the department to attract, recruit and retain staff. Any impediment to the ability of the department to meet its operational requirements and meet its statutory obligations is contrary to the public interest.

s47G – business information

- would have an unreasonable adverse effect on businesses that seek contracts with the department.
- could reasonably be expected to prejudice the department's ability to obtain confidential information from contractors and service providers. Any impediment to the ability of the department to obtain information to advance its programs would be contract to the public interest.
- could reasonably be expected to prejudice an agency's ability to obtain contracted services in the future. Any impediment to the ability of the agency to support its operational functions would be contrary to the public interest.

In forming my decision, I confirm that I have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act, which are:

- (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.

Conclusion

For the reasons set out above, after weighing all public interest factors for and against disclosure, I have decided that, on balance, disclosure of the conditionally exemption information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. I have therefore redacted the conditionally exempt information from the documents released to you.

ATTACHMENT C.

YOUR FURTHER REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for a review by the Information Commissioner.

Information Commissioner review or complaint

You also have the right to seek Information Commissioner (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 Department of Health and Aged Care 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 www.oaic.gov.au/freedom-of-information/reviews-and-complaints/
- via email to 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 the OAIC website here: www.oaic.gov.au/freedom-of-information/foi-review-process.

Complaint

If you are dissatisfied with action taken by the department, you may also make a complaint directly to the department.

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website here: www.health.gov.au/about-us/contact-us/complaints