



R34297764

FOI 333/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act), for access to:

“Contract CN3427279, with description Lease for premises at 6 John Street McMahons Point NSW:

- 1. A copy of the contract CN3427279.*
- 2. A copy of the Request for Tender documents that lead to contract CN3427279 being issued;*
- 3. A copy of the tender responses that were declined in favour of Noakes Group Pty Ltd; and,*
- 4. A copy of the internal approval document showing the name of the individual who approved the award of the Noakes Group Pty Ltd tender, excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding drafts and duplicates of documents.”*

FOI Decision Maker

2. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

3. I identified four documents as matching the description of the request.

Decision

4. I have decided to:
- a. release one document in full;
 - b. partially release three documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 47G [Public interest conditional exemptions-business], or section 47C [Public interest conditional exemptions-deliberative processes];
 - c. refuse access to one document of the request under subparagraph 24A(1)(b)(ii) [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and

- d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

5. It should be noted that as there was no ‘contract’ *per se* for CN3427279 (as the Approach to Market was for a building lease), the provisions of subparagraph 24A(1)(b)(ii) apply (that is, documents do not exist). A copy of the Lease has therefore been included in lieu of a contract.

Material taken into account

6. In making my decision, I had regard to:
 - a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. advice received from third parties;
 - d. relevant provisions in the FOI Act; and
 - e. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Reasons for Decision

Section 47C – Deliberative Process

7. Subsection 47C(1) of the FOI Act states ‘*a document is conditionally exempt if its disclosure under the Act 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 process involved in the functions of ... an agency ...*’. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

8. Upon examination of the documents, I identified information that was deliberative in nature and related to work conducted on behalf of Defence by Cushman and Wakefield. While I considered disclosing the information, I was mindful that it was in the nature of a recommendation to the Commonwealth, and disclosure would have added little value.

9. Accordingly, I have decided the information conditionally exempt under section 47C of the FOI Act.

Section 47G – Business

10. A document is conditionally exempt under section 47G if ‘*disclosure would, or could reasonably be expected to, unreasonably affect that ... organisation or undertaking in respect of its lawful business, commercial or financial affairs.*’

11. Upon examination of the documents, I identified information that has a commercial value that would reasonably be expected to be diminished if disclosed, namely the costing information provided in the tender documentation provided by both tenderers. This information covers more than the information that has been made public via the normal tendering processes and would disclose material deemed commercially sensitive by its owners.

12. Accordingly, I have decided the information is conditionally exempt under section 47G of the FOI Act.

Public Interest Considerations

In assessing whether disclosure of the conditionally exempt material is, on balance contrary to the public interest, I considered the guidelines together with a range of factors that favour access to the material, as set out in section 11B(3) of the FOI Act.

Factors in favour of disclosure

13. There are a number of factors that favour disclosure, including greater transparency for the expenditure of Commonwealth funds. In support of that, I note that the outcome of the deliberations of this process have been made public, including through the publication on AusTender of the successful tenderer.

Factors acting against disclosure

14. In considering the nature of this information, and its commercial sensitivity, I was mindful of the request by the third parties that were consulted. Third parties have agreed to the release some of their business information, but not all. They were implicit they wanted to protect their commercial information. They also explained that there are very limited providers of this type of service in our region so if their pricing became known to their competitors it would affect their competitive edge.

15. While I considered disclosing the information, I was mindful that the final documents would be made public via the departmental website, which would also expose commercial business information to others beyond the applicant. The pricing schedules are provided to Defence under the assumption that it would be kept as Commercial-in-Confidence. A factor against disclosure is the impact to Defence's relationships with business and future commercial dealings if they thought their pricing submission was disclosed.

Decision

16. Upon balancing all of these factors, I have decided not to disclose the information in order to protect the commercial data of the third party companies, and limit the likelihood of the withholding of information by future tenderers on the grounds that it may be subsequently made public. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making this decision.

Third party consultation

17. I decided to consult with third parties regarding their information which was contained in the documents. In response to this consultation, the third parties have agreed to the release of some of their business information, but not all. In making my decision I am mindful of the need expressed by third parties to protect their commercially sensitive data and the risk that the Commonwealth may be exposed to adverse comment if this information is made available.

18. It is for the reasons above that I find the documents exempt in part under section 47C and 47G of the FOI Act.

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Marcus Smith
Accredited Decision Maker
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