



GPO Box 4889, Sydney NSW 2001

Mr Ted Pretty

Via [www.righttoknow.org.au](http://www.righttoknow.org.au)

Our reference: 1-KOQ7EDT  
Contact officer: J Fabbro

16 March 2020

Dear Mr Pretty

**Decision regarding your Freedom of Information (FOI) request 1-KOQ7EDT**

I refer to your request for documents under the *Freedom of Information Act 1982 (FOI Act)*, received by our office on 13 February 2020.

I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

**Your request**

Your request sought the following documents:

*Please provide all documents relating to the Open Tender of and contract for Computer Services by the ATO awarded to Macquarie Telecom Pty Limited ("Macquarie") including documents relating to the :*

- 1. calling of the tender*
- 2. the contract awarded to Macquarie (please provide a copy)*
- 3. any technical specifications or requirements issued by the ATO in relation to the tender or contract*

*The following references on AusTender may be helpful:*

*CN ID: CN3629254  
ATM ID: FIN14BPAM2098  
SON ID: SON2914302*

*Agency Reference ID: 5600000858*

*AusTender also notes there is no confidentiality on the Contract or outputs.*

**My decision in relation to your FOI application**

I have identified 14 documents within the scope of your request.

Of these, I have decided to release to you 1 document in full, release 5 documents in part and exempt 8 documents in full.

The reasons for my decision are set out in the attached Statement of Reasons.

### **Overview of Cloud Services Panel**

Given the wording of your request above, I thought it prudent to give a brief overview of the process concerning the contract notice you have quoted above, in order to aid in your understanding of this specific procurement.

The Department of Finance established the Commonwealth Whole of Government Cloud Services Panel (ATM ID: FIN14BPAM2098), which is now managed by the Digital Transformation Agency ('DTA').

The procurement of SIGBOX by the ATO in September 2019 (CN ID: CN3629254) was made directly with via the established Cloud Services Panel (SON2914302). Macquarie Telecom Pty Ltd can be found listed as a supplier on AusTender under Standing Offer Notice 2914302, which is open for the period 30/01/2015 to 31/03/2021.

As such, there was no '*calling of the tender*', as you have requested above. The 'open tender' mentioned in the AusTender Contract Notice CN3629254 refers to the process under which the Cloud Services Panel itself was set up, not the process conducted by the ATO specifically to acquire SIGBOX for the 2019-2020 period.

### **Documentary Evidence Considered**

I have taken the following material into account in making my decision:

- Scope of your request
- Content of the documents
- FOI Act
- Guidelines issued by the OAIC under section 93A of the FOI Act
- Consultation with internal IT Commercial Services business area of the ATO

### **Access to documents**

The documents being released pursuant to your request are being provided on the ATO FOI Disclosure log, under the reference number above.

### **Your rights of review**

If you are unhappy with the decision, you can either request an internal review or request an independent review by the Australian Information Commissioner. You can also apply to the Australian Information Commissioner after an internal review has been conducted.

A request for an internal review needs to:

- be in writing
- be sent to us within 30 days of being notified of my decision, and
- be sent, quoting the reference number above via:

Email at [foi@ato.gov.au](mailto:foi@ato.gov.au) or

Mail to: Australian Taxation Office  
GPO Box 4889  
Sydney NSW 2001

The internal review will be done by an officer who did not make the initial decision.

A request for an independent review by the Australian Information Commissioner needs to:

- be sent within 60 days of being notified of my decision
- include a copy of this notice
- include an address where notices can be sent (e.g. your email address), and
- be sent to:

Email at [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au) or

Mail to: OAIC  
GPO Box 5218  
Sydney NSW 2001

For further details regarding the Information Commissioner visit [www.oaic.gov.au](http://www.oaic.gov.au)

You may also apply to the Information Commissioner if you have not been informed of the outcome of an internal review within 30 days.

### **Complaints**

Any complaint about the processing of your FOI request can be forwarded to the Information Commissioner. The complaint needs to be in writing and identify the agency against which the complaint is made. There is no particular form required to make a complaint, however using the online form is preferable.

- Online: [https://forms.business.gov.au/aba/landing.htm?formCode=ICCA\\_1](https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1)
- Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
- Mail to: GPO Box 5218, Sydney NSW 2001
- In person: Level 3, 175 Pitt Street, Sydney NSW

The Information Commissioner can be contacted on 1300 363 992 for the cost of a local call.

### **For more information**

If you have any questions, please telephone me on 02 9374 2836. In the event that I am unavailable, please contact Melissa Tonglee on 08 8208 1955.

Yours sincerely



### **J Fabbro**

Senior Lawyer  
General Counsel  
Australian Taxation Office

# Statement of Reasons

## Applicant details and ATO reference number

Mr Ted Pretty

## Reasons for decision

The reasons for my decision and provisions of the FOI Act relied upon are set out below.

### ***Documents edited under section 22 of the FOI Act***

Section 22 of the FOI Act permits a decision-maker to edit a document by deleting irrelevant or exempt material so that the document may ultimately be made available to the applicant.

In line with subsection 22(1) of the FOI Act, where FOI provisions applied to exempt certain material I have granted you access, where possible, to edited copies of the documents with the exempt material removed.

The specific exemption provisions which apply to the 5 documents being released to you in part and 8 documents exempt in full are as follows.

### ***Section 45 of the FOI Act –***

Section 45(1) of the FOI Act provides that:

*[a] document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for a breach of confidence’.*

The FOI Guidelines explain that the exemption under s 45 of the FOI Act is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from the disclosure.

The Guidelines explain that, to found an action for breach of confidence and for s 45 to apply—the following five criteria must be satisfied:

- the information must be specifically identified
- it must have the necessary quality of confidentiality
- it must have been communicated and received on the basis of a mutual understanding of confidence
- it must have been disclosed or threatened to be disclosed, without authority, and
- unauthorised disclosure of the information has or will cause detriment

The material exempt under s45 comprise of the contract entered into between the ATO and Macquarie Telecom Pty Ltd, including the Cloud Services Head Agreement and documents negotiating the terms of the contract.

I confirm the contract, much like all contracts entered into for the supply of goods or services to the Commonwealth, contains a confidentiality clause. Access to the contract documents are limited to the parties subject to the contract (internally within the ATO, only that area responsible for IT procurement) and both parties have communicated and received the documents on the basis of a mutual understanding of confidence, as is normal practice for contractual negotiations.

Release of the information publicly, by either party amounts to a breach of that contractual agreement. The contract is current and its terms are not otherwise in the public domain.

As such, I find those documents fully exempt under s45.

### **Section 47 of the FOI Act – trade secrets or commercially valuable information**

Section 47 of the FOI Act permits a decision-maker to exempt a document (or parts of a document) where release of the information contained therein would disclose:

- (1) (a)...
- (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.*

The FOI guidelines issued by the Information Commissioner provide 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 FOI Guidelines provide a list of factors that may assist in deciding whether information has commercial value. These are:

- 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 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.

The information concerns the specific terms of the contractual arrangement, including detailed pricing arrangements for the provision of SIGBOX licenses. In respect of the above criteria, I am of the view that this information is only known to the agency and the supplier, and confers a competitive advantage on the body to which it relates.

The commercial value is considered in terms of achieving the present contractual position with the ATO, or the value of the same, to a competitor. The information is current - the contract for the provision of services by the supplier to the ATO is not due to expire until September 2020.

Publicly releasing the contractual negotiations and pricing structure of the arrangement between the supplier and the ATO diminishes the commercial value of the information of both the supplier and the ATO. The Cloud Services market is competitive and will become increasingly so in years to come. The supplier does not only provide services to the ATO, and the product and offered SIGBOX solution is not uniquely offered by the supplier alone – release of the detailed pricing made available to the ATO for the provision of licenses, and the supplementary information that comes with it, will severely impact the suppliers profitability and business.

The release would not only diminish the value of the information for the supplier, but would adversely affects the ATOs negotiating position in future commercial transactions, impede its ability to achieve best value for the ATO through legitimate procurement and would damage the relationship between the ATO and its current supplier.

### **Section 47G of the FOI Act - Public interest conditional exemptions—business**

The ATO submits that if the material concluded exempt under section 47 above was not exempt under that section, it would be exempt under section 47G.

Section 47G of the FOI Act permits a decision maker to conditionally exempt a document (or parts of a document) if:

*...its disclosure under this Act 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.*

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. Notwithstanding this, the information must have some relevance to a person in respect of their business or professional affairs or the business, commercial and financial affairs of the organisation.

I conclude that the material identified concerns the business and commercial affairs of Macquarie Telecom Pty Ltd.

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

Based on the same reasons given above at s47, I consider that disclosure would, or could reasonably be expected to, unreasonably adversely affect the lawful business, commercial or financial affairs of the supplier. The disclosure publicly of the suppliers pricing arrangement, either (expressly or impliedly through revealing the number of licenses purchased), the terms/conditions of the supply and the service levels offered would reveal those details to their competitors, damaging the future supply of those services to other 3<sup>rd</sup> parties, including government.

Disclosure of the relevant material would not inform debate on a matter of public importance, particularly as the documents do not reveal any of the kinds of dangers to government service provision identified at paragraph 6.188 of the FOI Guidelines.

Disclosure would not further promote effective oversight of public expenditure – the total value of the contract is publicly available and the procurement was openly conducted through the DTA Cloud Services Panel. An appropriate balance has already been struck between the accountability for the ATOs spending on IT services and maintaining the confidentiality of the supplier's business information through the publishing on AusTender.