

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Information Sheet - Tenders

The Information Commissioner deals with many disputes over access to documents generated in the course of public sector tender processes, e.g., tender submissions and material generated by government agencies in evaluating the relative merits of each tender. Typically, the access applicant is an unsuccessful tenderer. Often such cases involve the successful tenderer(s), and other unsuccessful tenderers, as third parties, each objecting to disclosure of information they provided in the course of the tender process. More complex disputes may also involve other parties, such as corporate information providers, and individuals/organisations who have provided references for a tenderer.

The FOI Act exemption provisions usually relied on by agencies to refuse access to documents in these cases are s.45(1)(b) (diminution of the commercial value of information), s.45(1)(c) (adverse effect on business affairs), and s.46(1)(a) and (b) (matter communicated in confidence). The Office of the Information Commissioner has published Information Sheets relating to each of these exemption provisions. This Information Sheet should be read in conjunction with those Information Sheets (available on the Office's website, or on request by telephoning 07-3005 7100).

This Information Sheet can only give guidance as to the general principles that may require evaluation in particular cases. Each case has to be carefully evaluated according to its particular facts and circumstances.

Conditions of Tender

Tender processes conducted by government agencies are usually governed by specific conditions of tender which set out the criteria that tendering businesses need to address and the types of information they are expected to provide, and which specify what information will be made public during, or at the conclusion of, the tender process (for example, the gross prices for goods or services to be supplied, as submitted by the successful tenderer).

The conditions of tender usually also contain clauses addressing the possibility of disclosure under the FOI Act, and requiring that tenderers specifically identify any information for which they seek confidential treatment. Those clauses do not promise that the government agency will treat in confidence any such information identified by the tenderer; however, they indicate that such information will be given special attention by the agency as to whether or not confidential treatment is required. In practical terms, this means that the range of information to be assessed as to whether or not it warrants confidential treatment by the agency will be limited to any information identified by the tenderer in accordance with the relevant clause in the conditions of tender.

The Deputy Information Commissioner has indicated in recent cases (see "Further Reading" below) that failure by a tenderer to follow explicit directions for identifying any information for which confidential treatment is sought, makes it difficult to find that an agency became subject to a contractual or equitable obligation of confidence in respect of information in that tender submission.

Kinds of information from tender documents that will not usually qualify for exemption

Matter that is frequently included in tender submissions that usually would not attract exemption includes the total cost/gross prices for goods or services to be supplied (as opposed to detailed breakdowns of costing, which may be commercially sensitive), promotional material or literature, matter which simply discloses a standard response to a legislative obligation (for example, a Workplace Health and Safety Plan), information that is

common knowledge within a particular industry, and other information that is available from sources in the public domain (e.g., audited financial statements which public companies, and large private companies, are obliged to lodge with the Australian Securities and Investment Commission, and which are open to public access on payment of a fee).

Other specific examples appear in the cases listed under "Further Reading" below.

Considerations relevant to the application of the exemption provisions likely to arise in the context of an application for access to tender documents are discussed below.

Section 45(1)(b) – commercially valuable information

Information such as:

- a method or procedure developed and employed in a business that enables it to provide a service more quickly, more cheaply, or to higher quality standards than its competitors; or
- a list of customers indicating special requirements of individual customers;

is the kind of commercially sensitive information that may possess a commercial value to the particular tenderer that could reasonably be expected to be diminished by its disclosure under the FOI Act (and hence may qualify for exemption under s.45(1)(b).

Quite frequently, however, much information contained in tender documents is of a kind that is common knowledge within a particular industry, or is aged or out of date at the time the question of FOI access falls to be decided, or has lost any value it may once have had by virtue of the conclusion of the tender process. In these circumstances, it is less likely to qualify for exemption under this section.

Section 45(1)(c) – business affairs

Information submitted by a tenderer will usually be information concerning the business, professional, commercial or financial affairs of the tenderer, and hence will usually satisfy the requirement for exemption imposed by s.45(1)(c)(i).

To satisfy s.45(1)(c)(ii), there must be a reasonable expectation (not mere speculation or conjecture) that disclosure of the information in issue could either:

- have an adverse effect on the business, commercial or financial affairs of the tenderer which the information concerns (e.g., by damaging commercial reputation, or unfairly advantaging a competitor); or
- prejudice the future supply of similar information to government.

As with s.45(1)(b), it is unlikely that disclosure of information that:

- is common knowledge within a particular industry; or
- has aged to an extent that any commercial sensitivity has dissipated; or
- is otherwise publicly available information;

could reasonably be expected to have an adverse effect upon a tendering business.

Examples of information found to satisfy the test that disclosure could reasonably be expected to have an adverse effect on business affairs *et cetera*, include:

- a successful tenderer's detailed breakdown of pricing information and costing methodology (as distinct from gross prices submitted): *Re Dalrymple Shire Council and Department of Main Roads* (1998) 4 QAR 474; *Re Macrossan & Amiet* (cited under "Further Reading" below);

- credit reference information: *Re Wanless Wastecorp Pty Ltd and Caboolture Shire Council* (2003) 6 QAR 242;
- detailed descriptions of business systems and service standards together with a detailed set of performance indicators and key service standards, offered by a tenderer for a local government waste disposal contract: *Re Wanless Wastecorp*.

Examples of information that did not satisfy the test for exemption under s.45(1)(c)(ii) include:

- gross prices quoted by a successful tenderer for the supply of a range of curtains, blinds *et cetera*: *Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority* (1995) 3 QAR 132 (95033);
- details of experience and expertise of staff members (including resumes) and details of Quality Assurance accreditation: *Re Macrossan & Amiet*;
- promotional CD-ROM multimedia package: *Re Wanless Wastecorp*.

The cases listed under "Further Reading" below contain other examples of information from tender documents that did, and did not, qualify for exemption under s.45(1)(c).

Sections 46(1)(a) and (b) – confidential information

It is an essential requirement of both these exemption provisions that the information claimed to be exempt is actually confidential in nature. Frequently, information contained in tender submissions will be generic in nature (such as broad statements of intent or "motherhood" statements), and contain little sensitive detail. Similarly, purportedly "confidential" information about a tendering business may often be common knowledge in the particular industry, or information already in the public domain, e.g. through a tenderer's own website, press releases, or its promotional activities and literature.

Where a tenderer has genuinely secret information about its business processes that it wishes to keep secret from competitors, it is advisable to seek an express agreement with the relevant government agency about treating that information in confidence. If a tenderer fails to obtain express assurances of confidential treatment, an agency may only be subject to an obligation of confidence if the information was clearly, on its face, of such commercial sensitivity that equity would hold that the agency ought to have known that confidential treatment was required. It is difficult to envisage any circumstances of that kind where the information would not qualify for exemption under s.45(1)(b) or s.45(1)(c): see *Re Wanless Wastecorp* at paragraph 170.

Even where a tenderer and a government agency have agreed to treat certain tender information in confidence, there may be public interest considerations warranting disclosure of some information. The s.46(1)(b) exemption is subject to an express public interest balancing test. Although s.46(1)(a) does not contain an express public interest balancing test, it operates by reference to the general law of breach of confidence. Under Australian law, an obligation of confidence (whether contractual or equitable) that is claimed to bind a government will be subject to a "public interest exception" in circumstances where the public's legitimate interest in obtaining information about the affairs of government is judged to outweigh the interest of the information-provider in maintaining secrecy for certain information. Accordingly, the issues discussed under "Public Interest" below are relevant to both the s.46(1)(a) and s.46(1)(b) exemptions.

Prejudice to future supply of like information

Both the s.46(1)(b) exemption, and the second limb of the test for exemption under s.45(1)(c)(ii), require consideration of whether disclosure of information claimed to be exempt could reasonably be expected to prejudice the future supply to government of information of that kind. That question is not to be assessed according to the reaction of the particular business operator whose information is in issue. The question is whether a substantial number of businesses could reasonably be expected to refuse to provide like information in the future, if the information in issue were disclosed under the FOI Act. Things that tell against the existence of such a reasonable expectation can include:

- the fact that an agency possesses legal power to require disclosure of information of the kind in issue;
- the fact that it is necessary, or there is a strong incentive, to supply the information in order to obtain some benefit, licence or approval from the government (the award of a government contract would be a relevant benefit);
- the fact that the supplier would be disadvantaged if it failed to supply the information.

In disputes about access to tender documents, the second and third factors listed above will usually be relevant. In many areas of industry today, government contracts provide a lucrative source of business. It will usually be difficult to argue that a substantial number of businesses would refrain from putting forward the best possible tender, simply because there is a possibility that information contained in a tender might be disclosed under the FOI Act.

Public interest

Both 45(1)(c) and 46(1)(b) are subject to a public interest balancing test. Also, as explained above, a "public interest exception" may affect a contractual or an equitable obligation of confidence relied upon for the purposes of s.46(1)(a) where information supplied to or by a government is concerned.

There will nearly always be public interest considerations favouring disclosure of information relating to tender processes. However, they may not be sufficiently strong to outweigh the legitimate commercial interests of a tenderer in preserving the secrecy of information that could unfairly advantage its competitors. Judgments must be made according to the particular circumstances of each case.

Government agencies are accountable to the public for decisions they make to award tenders for the performance of work that it is to be paid for from public funds. Agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful firms were the best candidates in terms of efficiency, effectiveness and economy in the delivery of services to be paid for from public funds. The public interest in accountability is even stronger when the tender is for the delivery of services to the public.

Such considerations have to be weighed against the adverse consequences for a tenderer of disclosure of commercially sensitive information, when deciding precisely what information should or should not be disclosed.

Generally, the public interest will favour disclosure of information about the type of services a government has decided should be delivered by a contracted service provider, the choice of service provider, the price payable by the public, details of significant guarantees and undertakings as to service quality, details of any transfer of assets between the government and the service provider, the results of any cost-benefit analyses, and any other information about how well the chosen service-provider has performed.

The public interest would not usually require disclosure of information about the service provider's internal cost structure or profit margins, innovative business processes that have previously been kept confidential, and like matters where disclosure would result in commercial disadvantage.

Private sector businesses who wish to contract with government to perform services for the public have to accept an appropriate level of scrutiny of their dealings with government, and of their performance in terms of service delivery to the public, as "part and parcel" of doing business with government.

Public interest considerations of the kind referred to above would not usually warrant disclosure of commercially sensitive information provided by unsuccessful tenderers.

Further Reading

Relevant decisions and Information Sheets of the Information Commissioner are available on the website (www.infocomm.qld.gov.au), or by calling the Office. The following Information Sheets may be helpful in assessing whether information from, or relating to, tender documents qualifies for exemption:

- Section 45(1)(b)
- Section 45(1)(c)
- Sections 46(1)(a) and (b)
- The Public Interest Balancing Test

If you want to read more about the application of these provisions and the public interest balancing test to tender documents, some cases you might like to look at are —

- *Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority* (1995) 3 QAR 132 (95033);
- *Re Dalrymple Shire Council and Department of Main Roads* (1998) 4 QAR 474 (98010);
- *Re Macrossan & Amiet and Queensland Health* (S 116/99, published on the Letter Decisions page of the website);
- *Re Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third Party)* (2003) 6 QAR 242 (03/2003).

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Information Sheets are introductory only. They deal with issues in a general way. Additional factors may be relevant in particular cases. Detailed consideration of the issues can be found in the cases referred to above. The Information Commissioner considers each case on its merits.