



Reference: AF28914507

FOI 276/16/17 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:

“On 09 May 2016, the First Assistant Secretary Infrastructure (FASI), Mr Chris Birrer received an allegation stating that, in all probability, through action taken to purchase the software tool AWARD by Limited Tender, divisional staff were acting in breach of a mandatory provision of the Commonwealth Procurement Rules (CPRs); a law of the Commonwealth. This allegation was provided to FASI by email containing a document entitled, ‘Notice of Dispute – Request for Senior Officer Negotiation.’

On 25 November 2016, in document reference FAS-ID/OUT/2016/AF27413284, on page 2 paragraph 5, FASI stated:

I have sought the advice of various internal stakeholders and experts. Having done so, I am unable to reach the same conclusions as you in this matter. I respectfully disagree with your interpretation of the Defence documents provided to you through the FOI process; and I am unable to agree with your interpretation of the CPRs.

Documents Requested

From the period 09 May 2016 to 25 November 2016, I seek:

1. Copies of all documents which sought to investigate the claims contained in the document ‘Notice of Dispute – Request for Senior Officer Negotiation’ regarding the potential breach of the CPRs by conducting a Limited Tender for a procurement above the procurement threshold, that were generated by:

*FASI, or
others, at FASI’s request*

2. Copies of any documents produced to FASI in response to any requests covered by Item 1) above.

3. Copies of documents containing the advice FASI received demonstrating evidence that:

a) the facts supported compliance by Departmental officials with paragraph 10.3(b) of the CPRs, including a description of the events that were unforeseen by the relevant entity, as required to activate use 10.3(b) of the CPRs,

or in the alternative,

b) paragraph 10.3(d)(iii) of the CPRs was complied with by Departmental officials, including the evidence relied on by FASI to be satisfied that [(d)] the goods and

services could only be supplied by a particular business and there was no reasonable alternative or substitute because of [(iii)]an absence of competition for technical reasons.

4. Documents providing probity advice from the engaged Probity Advisor to the project that were received by the Department about FASI's enquiries, to the extent this is not business information.

5. Documentary evidence of meetings/briefings by any relevant official that took place relating to the investigation of the alleged breach of the CPRs raised in the document entitled, 'Notice of Dispute – Request for Senior Officer Negotiation.'

In relation to FASI statement on page 2, paragraph 6, of document reference FAS-ID/OUT/2016/AF27413284 that:

I am also satisfied that no Commonwealth or Departmental law or policy was contravened during the procurement of services from CD,

6. Any document produced or evidence of advice, given by internal stakeholders and experts, which was relied on by FASI to satisfy compliance as stated in paragraph 6 of page 2 of document reference FAS-ID/OUT/2016/AF27413284.

7. Any document where internal stakeholders and experts identified to FASI that the relevant ETP and section 23 PGPA Act signatory (nor FASI himself) does not hold the delegation for the commitment of relevant money under FINMAN 2, Part 3: Software Purchases (Proposals for Commitment of Relevant money of Software Procurement), extant at the time of conduct

8. If there are no documents in relation to item 7), any documents that evidence FASI had a reasonable basis for relying on the expertise of the advisors chosen to provide him advice in relation to the matter.

9. A copy of the Objective configuration record(s) for each document.

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 duplicates of documents."

FOI decision maker

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

Documents identified

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

Decision

4. I have decided to:
- a. release three documents in full;
 - b. refuse access to documents 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
 - c. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:
- a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. relevant provisions in the FOI Act;
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
 - e. consultation with officers within the Directorate of Program Assurance, Estate and Infrastructure Group.

Reasons for decision

Section 24A – documents cannot be found, do not exist or have not been received

6. Section 24A(1) of the FOI Act states:

(1) An agency or Minister may refuse a request for access to a document if:

- (a) all reasonable steps have been taken to find the document; and*
- (b) the agency or Minister is satisfied that the document:*
 - (i) is in the agency's or Minister's possession but cannot be found;*
or
 - (ii) does not exist.*

Further information

7. In response to Items 1, 2, 3, and 6, no documents matching the scope of the request were produced. Two teleconference meetings and one in-person meeting with FASI occurred. All claims were discussed in their entirety during these meetings. No records of conversation were produced from these meetings. Consequently, there are no documents that match the scope of the request.

8. In response to Item 4, no probity advice was sought. There are no documents that match the scope of this Item of the request.

9. For Item 5, regarding documentary evidence of meetings / briefings that took place in relation to the investigation of the alleged breach of the Commonwealth Procurement Rules, I identified three documents that match the scope of the request.

10. In response to Items 7 and 8, this delegation was not required. Licenses to an off-system software tool, accessible via Defence Restricted Network terminals, were procured as part of the contract with the service provider. As no software was purchased, the delegation

identified in your request was not required. Therefore, there are no documents that match the scope of the request.

10. In response to Item 9, other than three Microsoft Outlook meeting invitations, there are no documents that match the scope of the request. The Microsoft Outlook meeting invitations were not stored on objective. Therefore, no Objective configuration records are available for the three documents identified for Item 5. I decided to release the three Microsoft Outlook meeting invitations intact.

11. Based on the above, I am satisfied that no documents could be found matching Items 1, 2, 3, 4, 6, 7, 8 and 9 for the scope of this request. Accordingly, I have decided to refuse access to those items under section 24A of the FOI Act.

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Craig Patterson
Accredited Decision Maker
Estate and Infrastructure Group

13 April 2017