

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/80009
Applicant:	
Respondent:	Infrastructure Canberra
Respondent reference:	MPCFOI2024/19
Date:	1 April 2025
Decision reference:	[2025] ACTOFOI 3
Catchwords:	Freedom of Information Act 2016 – identifying information within scope of application – deciding access – whether information is contrary to the public interest information – promote open discussion of public affairs and enhance the government’s accountability – ensure effective oversight of expenditure of public funds – advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government – prejudice the economy of the Territory – prejudice the competitive commercial activities of an agency.

Decision

1. For the purpose of s 82 of the Freedom of Information Act 2016 (FOI Act), I am a delegate of the ACT Ombudsman.

2. The applicant requested Ombudsman review of a primary decision made by Major Projects Canberra (subsequently known as Infrastructure Canberra)¹ (iCBR) refusing access to the median and average tender submission prices for 16 different tenders ('tender pricing information').
3. For the reasons set out below, I have decided to **vary** the decision made by iCBR under s 82(2)(b) of the FOI Act to grant partial access to the requested information because I consider this information is not contrary to the public interest information.

Background to Ombudsman review

4. On 2 August 2024, the applicant applied to the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) for:

Provide data on

- a) the number of conforming tender submissions
- b) the average tender submission price (GST inclusive), and
- c) the median tender submission price (GST Inclusive) for the following tenders:

Garden City Stage 1B & 1C Superintendency (30992-RFT-003)

Emu Bank Design & Superintendency (30993-RFT-003)

Active Schools Construction Phase Services (39004-RFT-002)

Shea Street Construction Services (39058-RFT-001)

Footpath Maintenance & Civic Pavers Construction Phase Services (30991-RFT-001)

Active Travel Missing Link Design & Superintendency (30998-RFT-001)

Gungahlin Active Travel Design upgrades (30996-RFT-150.01)

BIF Active Travel Maintenance Superintendence (30865-RFT-301)

Yerrabi District Park Upgrade PAP Services (39007-RFT-001)

Garden City Cycle Route Stage 1A Superintendent (Torrens St) (30992-RFT-002)

¹ [Administrative Arrangements 2024 \(No 1\)](#) Sch 1.

Inner North Play Destination PAP Services (30942-RFT-002)

Acton Waterfront PAP Services (57809-RFT-003)

Goliath Court Stormwater Superintendence (30793-RFT-300)

Superintendent Services Mt Taylor Carpark, Sulwood Drive and Mannheim St Intersection (30864-RFT-310)

Stromlo Playing Fields Detailed Design (57161-RFT-001)

Old Well Station Drive Design & Superintend (52318-NCT-001).

5. On 13 August 2024, iCBR accepted transfer of the application from CMTEDD under s 57 of the FOI Act.
6. On 4 September 2024, iCBR decided to grant access to the number of conforming tender submissions and refused access to the average and median tender price for each tender listed above as they decided this information, on balance, was contrary to the public interest to disclose.
7. On 24 September 2024, the applicant applied for Ombudsman review of the decision refusing access to the average and median tender submission prices.
8. On 25 September 2024, the Office of the ACT Ombudsman (the Office) wrote to iCBR to give notice of the application for review and request access to:
 - the original access application and any correspondence clarifying or modifying the scope of the application, and
 - an unredacted copy of any correspondence requested in the original access application.
9. On 27 September 2024, iCBR wrote to the Office requesting a meeting to discuss the request for information.

10. On 4 October 2024, iCBR provided correspondence between CMTEDD, iCBR and Transport Canberra and City Services about iCBR accepting the transfer of the application. iCBR stated as the original application involved a request for data, no correspondence was held within the scope of the application.
11. On 16 October 2024, the Office wrote to iCBR to request access to a copy of the tender pricing information by 23 October 2024.
12. On 21 October 2024, iCBR wrote to the Office to request a meeting to discuss our request for a copy of the tender pricing information. On the same day, officers from the Office met with iCBR. In this meeting, iCBR stated the tender pricing information was not readily available as it was not collated in processing the application but could be provided.
13. On 24 October 2024, the Office advised iCBR to disregard the previous 23 October 2024 deadline, as the Office was preparing a notice for iCBR to conduct further searches.
14. On 8 November 2024, the Office issued a notice to iCBR directing iCBR to conduct a further search for the tender pricing information and to provide this information to the Office for the purpose of the review.²
15. On 12 November 2024, iCBR requested an extension of time to provide the tender pricing information until close of business on 25 November 2024. On the same day the Office agreed to the extension.
16. On 25 November 2024, iCBR provided a copy of the tender pricing information to the Office and noted:

Infrastructure Canberra would like to advise that under Section 2.2(a)(xi), we believe that this information is commercially sensitive and not for release to the broader public.

² [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) s 80.

17. On 3 December 2024, the Office wrote to iCBR to ask if iCBR would be willing to participate in informal resolution of this review matter by providing access to the tender pricing information.
18. On 9 December 2024, iCBR advised it was not agreeable to the informal resolution proposal because it maintained the tender pricing information is contrary to the public interest information. At that time, the Office ceased informal resolution activities.
19. On 9 January 2025, the Office requested information about the procurement process including a copy of procurement guidelines.
20. On 17 January 2025, iCBR provided the Office with references to information available online about government procurement.³
21. On 27 February 2025, the Office sent a draft consideration to the parties and invited them to provide any final submissions by 7 March 2025.
22. The applicant responded on the same date accepting the preliminary decision and did not provide any additional submissions.
23. iCBR requested an extension of time until 21 March 2025. On 20 March 2025, iCBR advised it would not provide any further submissions.

Key issue - identifying information within scope of application and forms of access

24. In deciding the original access application, iCBR advised it did not collate the tender pricing information as this information was not contained in a written record held by iCBR.

³ [Procurement ACT, Supplying to ACT Government; Infrastructure Canberra, Supply to government.](#)

25. Each tender submission score was recorded separately, and to produce the average and median tender submission prices, iCBR needed to extract this information, calculate those figures, and present the information in a table.
26. Consequently, the Office issued a direction under s 80 of the FOI Act to conduct further searches and produce the tender pricing information to the Office for the purpose of this Ombudsman review.
27. If an access application relates to information that is not contained in a written record held by an agency or Minister, access may be given by providing a written document using equipment usually available to the agency or Minister for retrieving or collating stored information.⁴
28. I note iCBR decided to give access to a table containing the number of conforming tender submissions for each tender, and this was provided to the applicant when the decision was made.
29. While iCBR ultimately decided not to give access to the tender pricing information, I consider iCBR was obliged to take reasonable steps to identify all government information within the scope of the application.⁵
30. In my view, this involves more than identifying that data is held and includes taking reasonable steps to search for and, if necessary, prepare that information to enable the information officer to consider the information within scope and decide the application.
31. If a decision is made to refuse to give access to information because it is contrary to the public interest under the public interest test in the FOI Act, the decision notice must include a description of the information and a statement of reasons setting out:⁶

⁴ FOI Act s 47(1)(d).

⁵ FOI Act s 34(1).

⁶ FOI Act s 54(2).

- the findings on any material questions of fact referring to the evidence or other material on which the findings were based
- the relevant factors favouring disclosure and nondisclosure
- how the factors were balanced; and
- the harm to the public interest that can reasonably be expected to occur from disclosure.

32. I consider information officers are required to examine the information in scope to ensure all relevant factors favouring disclosure and favouring nondisclosure are identified and assessed; and to support the decision-makers findings on whether the information is contrary to the public interest information.

33. While it may be apparent from the nature of the information sought whether certain sensitivities arise, agencies should identify and collate information as part of the search and decision-making process.

Information at issue

34. The information at issue in this Ombudsman review is a table of figures listing the number of conforming tenders, average and median tender submission price for each tender.

35. I note the tender listings are publicly available on the Tenders ACT website and all relevant tender processes have concluded and contracts awarded to the successful suppliers.⁷

⁷ Tenders ACT, [30992-RFT-003](#); [30993-RFT-003](#); [39004-RFT-002](#); [39058-RFT-001](#); [30991-RFT-001](#); [30998-RFT-001](#); [30996.RFT.150.01](#); [30865-RFT-301](#); [39007-RFT-001](#); [30992-RFT-002](#); [30942-RFT-002](#); [57809-RFT-003](#); [30793-RFT-300](#); [30864-RFT-310](#); [57161-RFT-001](#); [52318-NCT-001](#).

36. Of the 16 tenders listed above, 14 were open tender procurements, and 2 tenders used quotation limited tender procurement method.⁸

37. In preparing this decision, I considered:

- the applicant's review application dated 24 September 2024
- the respondent's decision of 4 September 2024 and additional submissions received on 9 December 2024
- an unredacted copy of the tender pricing information
- the FOI Act, particularly ss 7, 16, 17, 34, 35, 72 and Schedule 2
- the Freedom of Information Guidelines made under s 66 of the FOI Act
- relevant legislative instruments including:
 - the [Government Procurement Act 2001 \(ACT\)](#)
 - [Government Procurement Rules 2024 \(ACT\)](#)
- ACT government procurement guidance materials including:
 - Procurement ACT, [Supplier Debriefing \(Procurement Factsheet: SCE-04\) July 2024](#)
 - Procurement ACT, [Supplier Complaints Management Procedure, December 2018](#)
- relevant case law including:
 - *CH32GI and Department of Justice and Attorney-General; Third Parties* [\[2012\] QICmr 60](#) (22 November 2012) ('CH32GI')
 - *Gapsa and Department of Transport and Main Roads* [\[2013\] QICmr 25](#) (6 September 2013) ('Gapsa')
 - *Reform BCC and Transport Canberra and City Services* [\[2025\] ACTOFOI 2](#) (12 February 2025)

⁸ Tenders ACT, [Contract 52318-NCT-100 Design and Superintendency - Rural Roads Upgrades \(Old Well Station Road\)](#); [Contract - 30739-NCT-300 Goliath Court Stormwater Improvements 2021-22 Superintendence](#).

- *Wanless Wastecorp Pty Ltd and Caboolture Shire Council* [[2003](#)]
[QICmr 3](#) (30 June 2003).

Relevant law

38. Section 7 of the FOI Act gives every person an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.⁹
39. Furthermore, s 9 of the FOI Act expressly provides it is the intention of the Legislative Assembly that the FOI Act be administered with a pro-disclosure bias.
40. Section 34 of the FOI Act requires an agency or Minister to take reasonable steps to identify all government information within the scope of the application.
41. Section 35(1)(c) of the FOI Act provides an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
42. Contrary to the public interest information is defined in s 16 of the FOI Act as:
information—
- (a) that is taken to be contrary to the public interest to disclose under schedule 1;
 - or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.

⁹ FOI Act s 35(1)(c).

43. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
44. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.
45. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

46. In the decision notice, iCBR said:

The release of this information will inform the public of the number of applicants during the request for tender process who could satisfactorily meet the tender requirements for each of the aforementioned tenders. I am satisfied that these are relevant considerations favouring disclosure in this case, and in the spirit of enhancing open discussion, I afford them significant weight...

I place significant weight on the agencies right to withhold specificity surrounding tender submission price (average and median) as the release of this information could reasonably be expected to negatively impact the Territories economy in terms reduced competition. Additionally, the release of this information would place Territory entities at a disadvantage in negotiating with private sector entities on a commercial basis...

Further to the above, I have considered the competitive commercial activities of MPC. MPC as the ACT Government's infrastructure delivery agency engages with commercial service providers to deliver vital infrastructure high value projects. Revealing the average and median tender submission prices you have requested would reasonably be considered to prejudice MPC's ability to engage in competitive commercial activities.

Given the necessity for MPC to engage in these competitive commercial activities and engage with commercial third parties to negotiate best value for money infrastructure on MPC's projects I give these factors significant weight. As the release of this information could reasonably be expected to diminish the MPC's bargaining power and ability to negotiate competitive commercial terms it is contrary to the public interest to release this information.

47. In their further submissions of 9 December 2024, iCBR said:

The release of the average and median tender submission prices for each tender in a small infrastructure market such as the ACT can reasonably be expected to influence potential contractors' future tender submissions.

While you note the tenders in question are now closed, the infrastructure projects that iCBR manage are essentially similar in nature. Our concern is that the release of the median and mean tender price submissions to the public at large will provide a starting point for future infrastructure tender pricing and will reduce the competitiveness of tender pricing. Even if this effect is considered minor, the cumulative outcome over our many projects would result in much larger ACT Government expenditure than if this information is not released.

We are also concerned that setting a precedent that this type of information is in the public interest to release will afford the opportunity for tenderers to manipulate future tender processes. As noted above, many of our projects are essentially similar. In a situation where (noting the small ACT market) there are only 3 tenderers equipped to deliver a project, tenderer "A" could provide a lowball tender price and tenderer's "B" and "C" would tender in good faith. As you note the successful tender price would be published on our Contracts Register, and FOI request would be lodged by tenderer "A" or its agent and the tender price of the other unsuccessful tenderer would be calculated. Again, even if this effect is minor the cumulative outcome would be considerable.

48. In their Ombudsman review application, the applicant said:

1. Winning tender prices are made known publicly through Tenders ACT.
2. ACT Government Guidelines for 'Value for Money Considerations' (Procurement Practice guide SCE-01) direct that 'A Territory entity must achieve value for money when undertaking procurement'.
3. Tenderers are always offered a debrief as per 'Supplier Debriefing' (Procurement factsheet SCE-04) which is given in order to
 - (i) improve the quality of offers and
 - (ii) increase the potential for improved value for money in future procurements.

Given the above, BMCA do not see how the publishing of average and median tender submission prices for the same tender will negatively reduce competition because:

4. If the winning price is higher than the median or average, then unsuccessful tenderers will know that the winning tender must have been strong on quality, and the unsuccessful tenderer will therefore focus on their own quality improvements in future offers (this being an objective as stated in Procurement factsheet SCE-04) which will facilitate future benefit to Territory through greater likelihood of better-quality tenders.
5. If the winning price is lower than the median or average, then unsuccessful tenderers will know that the winning tender's price will have played a substantial part of the decision, and unsuccessful tenderers will therefore reevaluate their pricing of future offers (this being an objective as stated in Procurement factsheet SCE-04), which will facilitate future benefit to Territory through greater likelihood of lower priced tenders.
6. Where the winning tender price is greater than the median/average tender price, the publishing of median and average prices in conjunction with the winning price will demonstrate that evaluators are transparent and have the confidence in their decisions in order to withstand public scrutiny.

7. In all cases the competitive tender environment is maintained because each tender is subject to tenderers submitting an Ethical Suppliers Declaration, and all tenders are subject to the Standard Conditions of Tender of which section 15.1.3 requires:

'In submitting a Tender, the Tenderer warrants that:

- a) the Tenderer has no knowledge of the tender price, including rates, of any other tenderer for the Works/Services;*
 - b) except as disclosed in its Tender, the Tender has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor; and*
 - c) the Tenderer has not otherwise engaged in any collusion, anti-competitive conduct or any other similar conduct in relation to the preparation of their Tender'...*
8. MPC have not stated how revealing the average and median prices for the projects requested might prejudice their ability to engage in competitive commercial practices.

49. These submissions are discussed in more detail below.

Consideration

50. The key issue to be decided in this Ombudsman review is whether the tender pricing information—specifically the average price of the tender and the median tender submission price for the tender—is, on balance, contrary to the public interest information.

Public interest test

51. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:

- identify any factor favouring disclosure that applies in relation to the information (*a relevant factor favouring disclosure*), including any factor mentioned in schedule 2, section 2.1

- identify any factor favouring nondisclosure that applies in relation to the information (*a relevant factor favouring nondisclosure*), including any factor mentioned in schedule 2, section 2.2
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

52. iCBR identified 3 factors favouring disclosure of the tender pricing information.

Promote open discussion of public affairs and enhance the government's accountability – Schedule 2 s 2.1(a)(i); Ensure effective oversight of expenditure of public funds – Schedule 2 s 2.1(a)(iv)

53. Given the similarity of these factors in this case, I will consider these 2 factors favouring disclosure together.

54. In the decision notice, iCBR stated release of the number of conforming tender submissions would inform the public how many submissions satisfactorily met the tender requirements for each tender. iCBR did not explain how release of the tender pricing information would otherwise promote the public interest.

55. The procurement of services on behalf of government, and the method for selecting an appropriate supplier, are matters of public interest. The Territory must ensure the procurement is undertaken with probity (entity's behaviour is ethical and evidenced, and is done with integrity, uprightness and honestly) and must achieve value for money.¹⁰

¹⁰ [Government Procurement Act 2001 \(ACT\)](#) s 7 and 8.

56. The Government Procurement Rules relevantly provide:¹¹

The need to maintain the confidentiality of information should always be balanced against the public accountability and transparency requirements of the ACT Government. It is therefore important for Territory entities to plan for, and facilitate, appropriate disclosure of procurement information.

57. The tender pricing information is related to the procurement processes carried out by iCBR. Given the nature of the information, disclosure would allow the community to scrutinise the tendering process and enable greater accountability concerning iCBR's decision-making in selecting a successful tenderer.

58. While disclosure would not reveal the evaluation criteria for selecting a particular tenderer it could show some rationale for the decision to choose a particular tenderer to perform services under an infrastructure contract.

59. I agree it is reasonable to expect disclosure of the tender pricing information could promote the public's understanding of the tender process and allow for discussion of the procurement process, specifically the assessment of cost.

60. Further I note former Queensland Information Commissioner Smith stated in CH32GI¹²:

As the Information in issue relates to the payment of public funds to private sector organisations to perform government services prescribed by legislation, I consider that disclosure could reasonably be expected to promote open discussion of public affairs, enhance the Government's accountability and ensure effective oversight of expenditure of public funds. I am satisfied that these public interest factors carry significant weight in favour of disclosure.

¹¹ [Government Procurement Rules 2024 \(ACT\)](#), 8.1.

¹² [CH32GI and Department of Justice and Attorney-General; Third Parties \[2012\] QICmr 60](#) (22 November 2012) at [49].

61. I consider the abovementioned case is similar to this matter as the information at issue concerns the assessment of tender submissions by iCBR and the procurement of services concerning public infrastructure and the maintenance of public assets.
62. Release of the tender pricing information would allow for examination of the range of tender submission prices before the decision-maker and in combination with the published contract price, would provide transparency of the procurement process and oversight of expenditure.
63. I attribute significant weight to these factors.

Advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government – Schedule 2 s 2.1(a)(vii)

64. A factor favouring disclosure is where release could reasonably be expected to advance the fair treatment of individuals and other entities in their dealings with government. Agencies must treat the public in accordance with the law and act in a fair, reasonable manner without bias.
65. I consider this factor may be relevant in managing complaints made to the agency, investigations or regulatory actions, the administration of justice, or other processes where procedural fairness is expected to be afforded to relevant parties.
66. However, I agree with the observations made by the former Queensland Information Commissioner in *Gapsa* that this public interest factor does not involve the assessment of whether an applicant is provided with sufficient information to enable that applicant to be subjectively satisfied they have received fair treatment.¹³

¹³ [Gapsa and Department of Transport and Main Roads \[2013\] QICmr 25 \(6 September 2013\)](#) at [20].

67. Many of the tenders were conducted as an open tender process where the same information about the tender requirements and specifications is published and available for all prospective tenderers on the Tenders ACT website.¹⁴
68. I do not consider the tender pricing information is detail which is generally provided to unsuccessful tenderers as part of the de-briefing process, where feedback is provided against the evaluation criteria, and where Territory entities do not discuss the submission or evaluation or other responses or disclose other sensitive commercial information about another supplier.¹⁵
69. Further, suppliers have the option of lodging a complaint for assessment and investigation which assesses the outcomes sought by the supplier, public interest implications, impact on the supplier, public and the Territory, severity, complexity, the need and possibility of immediate action (e.g. in exceptional circumstances where the procurement process may need to be ceased or paused) and whether other stakeholders need to be involved.¹⁶
70. In this matter, I am satisfied that disclosure of the tender pricing information would not further advance the fair treatment of the applicant or other suppliers who all have the equal opportunity to receive a de-briefing to improve their likelihood of success in future procurement processes.
71. I have no evidence before me that any of the prospective tenderers will suffer adverse consequences because information about the average and median tender submission prices of previously conducted tenders is provided.
72. I do not consider this factor applied to the tender pricing information.

¹⁴ [Tenders ACT](#).

¹⁵ Procurement ACT, [Supplier Debriefing \(Procurement Factsheet: SCE-04\) July 2024](#), page 2.

¹⁶ [Procurement ACT, Supplier Complaints Management Procedure, December 2018](#), page 3.

Factors favouring nondisclosure

Prejudice the economy of the Territory – Schedule 2 s 2.2(a)(viii)

73. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice the economy of the Territory.
74. The FOI Act does not define 'economy' however, I consider it clear that Schedule 2, s 2.2(a)(viii) was intended to recognise release of commercial information could be detrimental to the success of the Territory's economic policy.
75. In considering the Territory's economic policy, it is relevant to consider the guidance on economic indicators for the ACT, provided by ACT Treasury.¹⁷ These include economic growth, the labour market and the housing market.
76. For example, this factor may apply where disclosure could reasonably be expected to prejudice the ability of entities to obtain commercial and investment advice and reduce investment in joint venture projects with private industry. Prejudice may occur in monetary term as well as regarding the loss of the influence which may place the economy of the Territory at risk by deterring potential investors.
77. In the decision notice, iCBR stated disclosure of the tender pricing information could reasonably be expected to negatively impact the Territory's economy in terms of reduced competition and could place the Territory at a disadvantage in negotiating with private sector entities on a commercial basis.

¹⁷ [Economic Indicators for the ACT – Treasury.](#)

78. In submissions, iCBR expressed that while the tenders listed in the application were now concluded, release of the tender pricing information could give prospective tenderers a 'starting point' for pricing and thus reduce the competitiveness of tender pricing and increase government expenditure.
79. In their Ombudsman review application, the applicant explained that once the procurement process is concluded the contract price is published, and release of information as part of a de-briefing process is intended to improve the quality of officers and increase the potential for improved value for money in future procurements.
80. For example, the applicant explained comparing the tender pricing information against the successful tender bid price will give tenderer insight into their own tender submission price to evaluate and inform their future bids ultimately resulting in better-quality and lower priced tenders.
81. I accept the ACT is a relatively small infrastructure market and future procurements for similar services is highly likely, being maintenance and other similar construction works.
82. However, I am not satisfied iCBR has met the onus that disclosure of the tender pricing information for concluded tender processes could reasonably be expected to reduce competitiveness of tender price submissions in future procurements to the extent it would have a negative impact on the Territory's economy.
83. iCBR submitted 2 tenders involved only 3 conforming tenders, and in the event the applicant was also a tenderer, the applicant could use the contract price and their own tender price to estimate the value of the other unsuccessful tenderer if the average and median price was disclosed.

84. I accept that this is possible for procurements with 3 or fewer conforming tenders and I consider release of the tender pricing information in those circumstances could reasonably be likely to result in the identification of the prices submitted by individual tenders. However, I do not find this argument holds weight for procurements with 4 or more conforming tenders. For those, the average and median tender price may be skewed by one substantially higher or lower price.
85. While I accept future similar procurements are likely, the scope of works is unlikely to be replicated in the tender requirements where a tenderer could utilise the tender pricing information to establish a baseline or starting point in a future tender bid. Importantly, price is not the sole factor when assessing value for money.¹⁸
86. Further, I do not consider potential tenderers would be unwilling to participate in procurement if the tender pricing information was released, noting it is attractive to private entities to obtain contracts for government services (to improve their reputation, experience and competitive position in future procurements), and they are made aware government procurement involves transparency in the decision-making process.
87. I do not consider this factor is relevant to the tender pricing information where there are 4 or more conforming tenders.
88. However, I do consider this factor relevant to tender pricing information where there are 3 or less conforming tenders. In those instances, I afford the factor significant weight.

¹⁸ [Government Procurement Rules 2024 \(ACT\)](#), 4.4.

Prejudice the competitive commercial activities of an agency – Schedule 2 s 2.2(a)(xiii)

89. A factor favouring nondisclosure is where disclosure of information could reasonably be expected to prejudice the competitive commercial activities of an agency.
90. I accept iCBR is responsible for working with commercial service providers to deliver significant infrastructure projects. While these procurements might be necessary to perform government services, I do not consider iCBR's procurement of services is a competitive commercial activity of iCBR itself (i.e. where iCBR is competing for work or generating revenue from these services).¹⁹ I note the tenders listed above generally involve works to public assets and infrastructure owned by the ACT Government.
91. I acknowledge the importance for the ACT Government to protect commercial interests by ensuring they are on equal footing with other investors when considering projects and investments, however I am not satisfied that releasing this information would reasonably be expected to prejudice any competitive commercial activities of iCBR.
92. To justify the decision that release of the tender pricing information may prejudice the competitive position of iCBR in negotiations for services, iCBR had to demonstrate the tender pricing information contains commercial value however, they only asserted that upon release the information the potential tenderers would 'manipulate future tender processes'.

¹⁹ [Reform BCC and Transport Canberra and City Services \[2025\] ACTOFOI 2 \(12 February 2025\)](#) [73]-[75].

93. Information has a commercial value if:²⁰

...if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged.

The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending 'one-off' commercial transaction...

a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.

94. While the information in theory might be interesting for a potential tenderer, I do not consider it could be easily adopted by them because it simply would not be applicable to a competitor's operations or to a relevant tender process due to the different scope of the work on each tender.

95. The businesses who participated in the tender process operate in a highly competitive environment. I do not consider release of the tender pricing information would diminish competitiveness in that market in future tenders as this information being now out of date and has little if any commercial value, as the tenders have since been closed and contracts commenced.

96. There is no evidence before me to show the precise nature of the information or specific segments of it, or its commercial value. There is also no evidence to show or to explain how the value of the information would be diminished by its disclosure. iCBR's statement regarding the potential impact on their commercial activities is not enough to conclude release of the tender pricing information would have impact on their commercial activities.

²⁰ [Wanless Wastecorp Pty Ltd and Caboolture Shire Council \[2003\] QICmr 3 \(30 June 2003\)](#) at [45]- [46] citing *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [51]-[65].

97. I do not consider this factor applies to the tender pricing information.

Balancing the factors

98. Having identified public interest factors favouring disclosure and considered if any factors favouring non-disclosure applied, I now must consider the public interest balancing test set out in s 17 of the FOI Act.

99. In this matter, I considered 3 public interest factors favouring disclosure. I determined one factor is not relevant and give significant weight to 2 factors.

100. I considered 2 public interest factors favouring nondisclosure and I determined neither factor applied to the tender pricing information for 4 or more conforming tenders. However, one factor applies where there are 3 or less conforming tenders, and I give it significant weight.

101. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and non-disclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect disclosing the information has on the public interest.

102. The FOI Act has a pro-disclosure bias,²¹ and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.²²

²¹ [FOI Act s 17.](#)

²² [Explanatory Statement, Freedom of Information Bill 2016.](#)

103. For procurements with 4 or more conforming tenders, I am not satisfied any factors favouring nondisclosure of the information apply and give significant weight to 2 factors favouring disclosure. Disclosure of that information is in the public interest.

104. For procurements with 3 or fewer conforming tenders, I give significant weight to one factor favouring nondisclosure of the information and give significant weight to 2 factors favouring disclosure. Disclosure of that information is not in the public interest.

Conclusion

105. For the reasons set out above, I have decided to vary the decision made by iCBR under s 82(2)(b) that the tender pricing information is, on balance, contrary to the public interest information, with the result that access is given to the tender pricing information for any tenders with 4 or more confirming tenders.

David Fintan

Senior Assistant Ombudsman

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