



Australian Government
Department of Defence

[OBJ REF]

FOI 083/18/19 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:

“Correspondence dated 9 September 2016 from Mr Stephen E. Johnson to Mr Herve Guillou (reference GMSUB/OUT/2016/061). I request access to the complete letter.”

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 one document as matching the description of the request.

Decision

4. I have decided to partially release the document 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 sections 47G [public interest conditional exemptions-business affairs] and section 33(a)(i) [Documents affecting national security] 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);
 - e. the Commonwealth Procurement Rules (CPRs); and
 - f. advice received from officers within the department from the Future Submarine Program Office [FSPO].

Reasons for decision

Section 33 – Documents affecting national security, defence or international relations

6. Subparagraph 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

7. In regards to the terms ‘could reasonably be expected to’ and ‘damage’, the Guidelines provide:

5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

5.28 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

8. Upon examination of the documents, I identified material which upon release 'could reasonably be expected to, cause damage to the defence of the Commonwealth' by making public certain considerations in designing the Future Submarine Program.

9. In light of the above, I have decided that the specified material identified is exempt pursuant to section 33 of the FOI Act.

Section 47G – Business affairs

10. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

11. Section 47G of the FOI Act states:

(1) A document is conditionally exempt 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; or

(b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

12. Upon examination of the documents I identified conditionally exempt commercially sensitive information the disclosure of which would place DCNS at a commercial disadvantage through disclosure of proposed contracting and resourcing strategies. Specifically, I identified comments that may have been used to determine a commercial position in relation to live and ongoing contractual negotiations. I consider that disclosure of this information could reasonably be expected to adversely affect such negotiations and prejudice frank and open future supply of information to the Commonwealth.

13. I note that the use of the word ‘could’ in this provision requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause the consequences specified.

14. The Guidelines at paragraph 6.184 state that “*The operation of the business exemption depends on the effect of disclosure rather than the precise nature of the information itself.*” In the context of the documents identified, release of the information identified would be unreasonable due to the live nature of the contractual negotiations. I am satisfied that the effect of disclosing the identified material would have an adverse effect on a company as disclosure of a proposed contracting and resourcing strategy could diminish the competitive nature of the business and could affect the profitability of business operations.

15. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.

Section 47G - Public interest considerations

16. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

17. In determining whether to release the document, I considered the Guidelines, together with a range of factors that favour access to a document set out in section 11B(3) [public interest exemptions-factors favouring access] of the FOI Act. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to public interest. Specifically I considered if disclosure of the documents would:

- a) promote the objects of the FOI Act;
- b) inform debate on a matter of public importance; or
- c) promote effective oversight of public expenditure.

18. Disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, there is a strong public interest in not releasing information that could unreasonably affect a business. Given Defence’s strong links with industry, it is imperative that Defence be able to discuss proposed contracting and resourcing strategies with industry partners without fear that the material would be released without authorisation.

19. I found that disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

20. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request is that the release of this information could reasonably be expected to prejudice:

- a) the competitive commercial activities of an agency;
- b) an agency’s ability to obtain similar information in the future; and
- c) an agency’s ability to obtain confidential information.

21. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In paragraph 6.189 the Guidelines state that “*The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required; and in ensuring that public programmes are properly administered.*” I have found that at this

time, release of the information identified would inhibit the proper administration of public monies by impeding the proper completion of ongoing contractual negotiations.

22. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47G of the FOI Act.

23. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making my decision.

Third party consultation

24. I decided to consult with DCNS regarding their information which was contained in the document. In response to this consultation, DCNS has objected to the release of their business information. I do not agree with all of DCNS's objections.

Further Information

25. The document matching the scope of this request contained a dissemination limiting marker, as the documents are approved for public release the marker has been struck through.

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Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group