



FOI 417/17/18 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:

“Any briefing notes, deliberative or similar documents, internal and external correspondence, held by the Department of Defence relevant to human rights and international law considerations relating to the approval of military exports to Saudi Arabia and the United Arab Emirates. The date range for the request is from 1 January 2016 till present.”

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 117 documents as matching the description of the request, from 1 January 2016 to 5 July 2018.

4. The decision in relation to each document is detailed in a schedule of documents.

5. I have added an FOI reference number and Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:

- a. Release one document in full;
- b. partially release 110 documents 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 section 47E(d) [public interest conditional exemptions-certain operations of agencies], section 47C [public interest conditional exemption - deliberative material], section 47G [public interest conditional exemption – business information] and section 33(a)(iii) [Documents affecting international relations of the Commonwealth] of the FOI Act;
- c. refuse access to 6 documents of the request in accordance with section 7(2A) of the FOI Act on the grounds that the documents originate from agencies listed in section 7(2)(a); and
- d. 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

7. 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; and
- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Reasons for decision

Section 22

8. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the documents would be meaningless and of little or no value once the exempt material is removed.

Section 47C – Deliberative Processes

9. I found that the documents contain opinions, advice and recommendations regarding the assessment of export permit applications. I considered whether this information may be exempt under subsection 47C(1) of the FOI Act.

10. Subsection 47C(1) of the FOI Act states ‘*A document is conditionally exempt if its disclosure under the Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative process involved in the functions of...an agency...or a Minister.*’

11. I have taken into account the Guidelines noting that one consideration under section 47C is whether the document includes deliberative matter. Upon examination of the documents I identified information which, if released, would disclose opinions and advice that have been prepared or obtained for the purposes of the deliberative process involved in the functions of an agency and a Minister.

12. I then considered the question of whether the information is purely factual. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines that ‘purely factual material’ that would not be regarded as deliberative matter would include:

- a. Content that is merely descriptive
- b. Incidental administrative content
- c. Procedural or day to day content
- d. The decision of conclusion reached at the end of the deliberative process
- e. Matter that was not obtained, prepared or recorded in the course of, or for the purpose of, a deliberative process.

13. I have also taken into account the Guidelines that “*‘purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.*”

14. Taking the above into consideration, I am satisfied that this information contained in these documents is conditionally exempt under section 47C of the FOI Act

Section 47E - Certain operations of agencies

15. Upon examination of the documents, I identified information related to the administration of Defence's statutory authority to assess and issue exports permits. More specifically the information contained in these documents includes details relating to the analytic process, criteria, data and data sources used to make recommendations to approve or deny export permit applications. I considered whether this information may be exempt under subsection 47E (d).

16. Subsection 47E(d) of the FOI Act states '*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to...have a substantial adverse effect on the proper and efficient conduct of an agency.*' Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

17. 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. The reasonable expectation refers to information on how Defence assesses export permit applications, including the assessment of risk that a proposed export may be diverted to end users whose policies and activities are in opposition to the security, defence or international relations of Australia.

18. I am satisfied that disclosing detailed information on the export permit risk assessment process could reasonably be expected to have a substantial adverse effect on the proper and efficient operations of Defence as an export control authority. The release of this information would divulge the analytic process, criteria, data and sources that Defence uses to determine whether a proposed export is consistent with Australia's security, defence or international relations. In releasing this information, entities that deliberately seek to mislead export control authorities will be better equipped to do so.

19. Taking the above into consideration I am satisfied that the material is conditionally exempt under subsection 47E(d) of the FOI Act.

Section 33(a)(iii) – Documents affecting international relations

20. Upon examination of the documents, I identified information that, if released would or could reasonably be expected to cause damage to the international relations of the Commonwealth. Paragraph 5.36 of the Guidelines describes international relations as the ability of the Australian Government to maintain good working relations with other governments and international organisations.

21. Paragraph 5.37 of the Guidelines says that "the expectation of damage to international relations must be reasonable in all circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship"

22. The documents contain information relating to Australia's relationship with foreign governments. Release of this information could reasonably be expected to cause damage to this relationship as it relates to the policies and activities of this government that are either not readily available to the public or acknowledged by that foreign government. The release of this information would cause a loss of trust and confidence such that foreign officials would likely be less willing to engage with the Australian Government. This would cause damage to important relationships of the Australian Government.

23. Accordingly, I consider the release of the information so marked would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth and exempt from release under section 33(a) (iii) of the FOI Act.

Section 47G – Business information

24. In examining the documents I identified business information of a number of third parties.

25. Under section 47G of the FOI Act, information is conditionally exempt if it discloses 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 the 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...’*

26. I note that this provision requires consideration of the reasonable expectation, rather than certainty, to be applied in deciding whether disclosure would cause the consequences specified.

27. This application of this exemption depends on the effect of disclosure rather than the precise nature of the information itself. I am satisfied that disclosing information related to the export activities of third parties could adversely affect the business affairs and profitability of those third parties.

28. As such, I am satisfied that this information contained in these documents is conditionally exempt under section 47G of the FOI Act.

Public interest considerations – sections 47C, 47E and 47G.

9. Section 11A (5) of the FOI Act provides that if a document is conditionally exempt, it must be disclosed *‘unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest.’*

10. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines, together with a range of factors that favour access to a document as set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

11. Although I consider there is a clear public interest in the appropriate execution of Defence’s export control activities I also consider that disclosing detailed information on Defence processes and information sources used for assessing export applications will assist those who would seek to evade proper and complete scrutiny of their proposed export activities. In my view, there is also a strong public interest in maintaining Defence’s capability to effectively determine whether proposed exports are consistent with Australia’s security, defence or international relations. The release of this information will undermine this capability.

12. On balance, I have found that it would be contrary to the public interest to release the information considered conditionally exempt under section 47E of the FOI Act.

13. There is also a clear public interest in the appropriate and thorough assessment export permit applications received by Defence and consulted with other agencies. However, by their nature, such thorough assessments must include deliberations on very sensitive issues and permit approval thresholds. I believe that there is a strong public interest in the Australian

Government's capacity to deliberate on sensitive questions regarding technologies, export end users and foreign government policies without either jeopardising the Australian Government's foreign relations or revealing information to those who would seek to exploit that information to provide false or misleading information to the Australian Government.

14. I therefore find that it would be contrary to the public interest to release information considered conditionally exempt under section 47C of the FOI Act.

15. I also consider that disclosure of the information conditionally exempt under section 47G of the FOI Act may increase scrutiny of Defence's administration of export control regulations. However, I consider that the release of commercial information that has been provided in confidence to the Commonwealth for the purposes of assessing export permit applications could reasonably be expected to prejudice the Commonwealth's ability to obtain similar information from applicants in the future. This would prejudice Defence's capability to determine whether proposed exports are consistent with Australia's security, defence or international relations.

16. As such, I have found that it would be contrary to the public interest to release the information considered conditionally exempt under section 47G of the FOI Act.

Further Information

9. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release. Some of the documents 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.

10. The risk assessment documents consolidate all of the risk assessment deliberations held in Defence's export permit case management system for those export permit applications within the scope of this request.

Context Statement

11. All applications to export controlled military and dual use technologies are subject to risk assessment. The risk assessment process is used to determine whether a proposed export is prejudicial to the security, defence or international relations of Australia. This process necessarily includes very sensitive deliberations regarding applicants, consignees and end-users.

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