



Australian Government
Department of Defence

R35187026

FOI 477/17/18 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:

“The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018.”

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 47E [public interest conditional exemptions-certain operations of agencies], 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); and
- e. advice received from departmental officers and consultation with affected third party.

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 the capabilities of Defence assets and workforce.

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 47E – Certain operations of agencies

10. Section 47E of the FOI Act provides that a document is conditionally exempt from disclosure requirements 'if its disclosure under the Act would, or could reasonably be expected to, do any of the following: prejudice the effectiveness of procedures or methods for the conduct of test, examinations or audits by an agency and, in particular have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.'

11. I found that the document identified contains statements of the planning assumptions and constraints made in the hypothesis analysis, and that these statements are relevant to ongoing examinations of basing options. The disclosure of these statements could reasonably be expected to prejudice the agency's ability to properly consider the options without adversely affecting current operations.

12. Taking the above into consideration, I have decided that the document is conditionally exempt under subsection 47E of the FOI Act.

Section 47G – Business affairs

13. 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.

14. 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.

15. Upon examination of the documents I identified information on operating assumptions and constraints provided by ASC as part of the hypothesis analysis. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the conduct of studies into basing options.

16. Businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate information on its operating constraints for future studies could reasonably be expected to be reduced.

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

Sections 47E and 47G - Public interest considerations

18. 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.

19. 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.

20. 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).

21. 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.

22. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In particular, I consider the release of the business information of third parties could reasonably be expected to prejudice the operations of an agency. I also consider that release of material which contributes to a study which was provided exclusively to test a hypothesis that may become the basis for a further study could reasonably be expected to prejudice the outcome of such processes. I consider

that the public interest is better served in this case by maintaining the confidentiality of the operational and business information provided.

23. 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 sections 47E and 47G of the FOI Act.

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

Third party consultation

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

ChrisHorscroft Digitally signed by ChrisHorscroft
Date: 2018.08.06 16:29:28 +10'00'

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group