



DEFENCE FOI 231/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] (the applicant) under the *Freedom of Information Act 1982* (FOI Act) for access to:

... *the final report of the Peever Review into Defence Innovation.*

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.

4. The attached Schedule of Documents specifies the pages with corresponding exemptions that have been removed from the document as they have been redacted in full.

Exclusions

5. Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

Decision

6. I have decided to partially release this 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 33 [documents affecting national security, defence or international relations], 47C [public interest conditional exemptions-deliberative processes], 47E [public interest conditional exemptions-certain operations of agencies] and 47G [public interest conditional exemptions-business] 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 document 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. advice from the departmental officers with responsibility for the matters relating to the document to which you sought access; and
- f. third-party consultation responses.

Reasons for decision

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

8. Section 33(a) of the FOI Act states:

A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

...

(ii) the defence of the Commonwealth; or

(iii) the international relations of the Commonwealth;

9. In regards to the terms 'would or could reasonably be expected to' and 'damage', the Guidelines provide:

Would or could reasonably be expected to:

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.

Defence of the Commonwealth: [Damages]

5.35 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage ... However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

International Relations: [Damages]

5.37 ... The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

10. Additionally, the Guidelines state:

Defence of the Commonwealth

5.34 The FOI Act does not define 'defence of the Commonwealth'. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the terms includes:

- meeting Australia's international obligations*
- ensuring the proper conduct of international defence relations*
- deterring and preventing foreign incursions into Australian territory*
- protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

International relations

5.36 *The phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

11. Upon examination of the document, I have identified material which, if released, would or could reasonably be expected to cause damage to the defence of the Commonwealth. The detail in the document would provide hostile actors with an approximate understanding of the size and scale of a Defence capability as well as its state of readiness and ability to respond to, or support ADF operational requirements.

12. Further, the document also contains information, which if released, could reasonably be expected to damage the international relations of the Commonwealth. If this information were to be publicly released by Defence, it would likely cause damage to the international relations of the Commonwealth insofar as it could limit the Commonwealth’s ability to deal with that country in relation to similar matters in the future. The disclosure of such information could diminish the confidence which another country has in Australia as a reliable recipient of its confidence, making that country less willing to cooperate with the Australian Government and its agencies in the future. Furthermore, the document contains information about foreign governments and international organisations that has not been independently verified and, for which no representations are given with respect to, the accuracy or completeness of any such information.

13. In view of the above, I consider the specified material to be exempt from release under section 33 of the FOI Act.

Section 47C – Public interest conditional exemptions – deliberative processes

14. Section 47C of the FOI Act conditionally exempts from disclosure, documents that would disclose deliberative matter.

15. Section 47C of the FOI Act specifically states:

(1) A document is conditionally exempt if its disclosure under this 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 processes involved in the functions of:

(a) an agency; or

(b) a Minister; or

(c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

(a) operational information ...;

(b) purely factual material.

16. Relevantly, the Guidelines, at paragraph 6.52, state:

... Deliberative matter is content that is in the nature of, or relating to either:

- *an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- *a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister.*

17. Upon examination of the document, I have identified deliberative matter – that is, information in the nature of, or relating to, either opinion, advice or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the purpose of a deliberative process of Defence.

18. The redacted information contains opinions, advice, recommendations and supporting material that was gathered through consultations. Consequently, I find that the document contains deliberative matters and are conditionally exempt under section 47C(1) of the FOI Act.

Section 47E - Public interest conditional exemptions – certain operations of agencies

19. Section 47E of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

20. The Guidelines explain the term ‘substantial adverse effect’ to broadly mean:

5.20 ... an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person. The word ‘substantial’, taken in the context of substantial loss or damage, has been interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal.’

21. The Guidelines further explain:

6.101 For the grounds in [section 47E(d)] to apply, the predicted effect needs to be reasonably expected to occur. ... There must be more than merely an assumption or allegation that damage may occur if the document were to be released.

6.103 An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect should be identified during the decision making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker’s statement of reasons, if they can be included without disclosing exempt material.

22. The document details assessments and benchmarking methodologies, surveys, etc. and then ranks the performance of the system against our allies and external entities. The review analyses the Innovation system including internal defence processes and the investment processes and procedures of Defence Science and Technology Group. Disclosing material about such methodologies and internal processes could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Defence.

23. For this reason, I consider that the release of this information would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence and is, therefore, exempt under section 47E(d) of the FOI Act.

Sections 47G - Public interest conditional exemptions - business

24. 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.*

25. Upon examination of the document, I have identified business information belonging to a service provider to Defence.

26. Where access has been denied under section 47G(1)(a) of the FOI Act, I consider that the disclosure of the specified material contained in the documents would have an unreasonable adverse effect on the lawful business affairs of a third party organisation. The disclosure of this material would result in the release of information that is not in the public domain and have the effect of exposing the commercial sensitivities of a third party organisation to competing interests.

27. Where access has been denied under section 47G(1)(b) of the FOI Act, the Guidelines further explain that:

Would or could reasonably be expected to

5.18 The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

Prejudice future supply of information

6.198 This limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government*
- the reduction will prejudice the operations of the agency.*

28. Outside formal reporting obligations, I believe that disclosure of the relevant information may inhibit the free expression of opinions as well as deter the provision of complete and frank information. The third party could be more circumspect in their findings and records of deliberations for fear of damage to their reputation. Disclosure of this information could have a substantial adverse effect on the future supply of information to Defence and unreasonably affect Defence's significant commercial commitments.

29. Accordingly, I am satisfied that the specified information contained in the document is conditionally exempt under section 47G of the FOI Act.

Public interest considerations – Sections 47C, 47E and 47G

30. 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.

31. I have found that some of the material in the document is conditionally exempt under sections 47C, 47E and 47G of the FOI Act.

32. 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 set out in section 11B(3) [Public interest exemptions – factors] of the FOI Act. I am of the view that the release of the material would promote the objects of the FOI Act by providing access to government-held information.

33. However, 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).

34. 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 are that this information could reasonably be expected to prejudice:

- (a) an agency's ability to obtain confidential information;*
- (b) an agency's ability to obtain similar information in the future; and*
- (c) the management function of an agency.*

35. While I note that the release of this material would be of some interest to the applicant, I do not consider that this information, if released, would inform debate on matters related to Defence or Government administration, enhance scrutiny of government decision making or promote the objects of the FOI Act more broadly.

36. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and that, on balance, it is against the public interest to disclose the redacted information to you. Accordingly, I deem the relevant information exempt under sections 47C, 47E and 47G of the FOI Act.

carolyn [redacted]

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Date: 2023.02.24

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Carolyn [redacted]
Assistant Director FOI
Associate Secretary Group