



**DEFENCE FOI 677/23/24**

**STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982**

1. I refer to the request by [REDACTED] (the applicant), dated and received on 12 February 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

*Any documentation, including communications, memos, or meeting minutes, that provide details or insights into the decision to cancel the original procurement "EST05911 Woomera Electrical Works". The official reasons for the reissuance of the procurement as "EST05911-1".*

**FOI decision maker**

7. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

**Documents identified**

8. I have identified 5 documents as falling within the scope of the request.
9. The decision in relation to each document is detailed in the schedule of documents.

## **Exclusions**

10. Personal 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**

11. I have decided to:
  - a. partially release 5 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 sections 42 [documents subject to legal professional privilege], 47E [public interest conditional exemptions – certain operations of agencies], 47F [public interest conditional exemptions – personal privacy] and 47G [public interest conditional exemptions – business] of the FOI Act; and
  - b. remove irrelevant material in accordance with section 22 of the FOI Act.

## **Material taken into account**

12. In making my decision, I have had regard to:
  - a. the terms of the request;
  - b. the content of the identified documents in issue;
  - c. relevant provisions of 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. consultation with a third party.

## **REASONS FOR DECISION**

### **Section 22 – Access to edited copies with exempt or irrelevant matter deleted**

13. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.
14. Some of the documents contain irrelevant material and information such as mobile telephone numbers and information that is outside of the scope of the request.
15. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.
16. Where a decision maker denies access to a document, section 22(1) of the FOI Act requires that they consider releasing the document with exempt matter deleted, if possible.

17. Paragraph 3.98 of the Guidelines provides that:

*...an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant.*

18. I have considered disclosing the documents to you with deletions, but have decided to refuse access to the documents as they would be meaningless and of little or no value once the exempt material is removed.

#### **Section 42 – Documents subject to legal professional privilege**

19. Section 42(1) of the FOI Act states:

*A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

20. I find that some of the documents contain legal advice which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

21. The Guidelines provide, at paragraph 5.129, that in considering whether LPP exists, the following factors should be considered:

- *whether there is a legal adviser-client relationship*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential*

22. I am satisfied that the legal adviser-client relationship had been established, as the advice was provided by lawyers, who were acting in their capacity as independent professional advisers.

23. I am satisfied that the specific material contained in the documents was created for the dominant purpose of giving or receiving legal advice, and that advice was provided independently. I also note there is no evidence to suggest that privilege has been waived by the client or the legal adviser.

24. I note that while the material in question is contained in documents being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed at paragraph 5.148 of the Guidelines, which provides that ‘[m]odern organisations often work in teams and several people may need to know about privileged communications...’.

25. Accordingly, I am satisfied that the information is exempt under section 42 of the FOI Act.

#### **Sections 47E(c) and (d) – Public interest conditional exemptions – certain operations of agencies**

26. Section 47E(c) 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:*

*(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency*

27. The Guidelines provide, at paragraph 6.113, that:

*Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:*

- an effect would reasonably be expected following disclosure*
- the expected effect would be both substantial and adverse.*

28. I find that the material contained within the documents relates to the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety.

29. In the case of 'ABK' and *Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner (IC) found that where the direct email addresses and phone numbers of agency staff are not publicly known, they should be conditionally exempt. The IC made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

30. I am satisfied that were the contact details of Defence personnel made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels. Further, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of names, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of Defence.

31. Section 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, do any of the following:*

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

32. The Guidelines, at paragraph 6.123, provide that:

*The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner.*

33. A further examination of the documents identified contract and tender information that if released could impact the probity of Defence's tender evaluation processes in the future by disclosing its considerations and approach to such matters.

34. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.' Given the

nature of the request seeks to understand the reasons why Defence cancelled and re-issued this tender, and is not for the considerations or assessments of the received tenders, I am satisfied that release of this information would not reasonably be expected to lead to a change in Defence's processes that would lead to any efficiencies.

35. Accordingly, I am satisfied that the information is conditionally exempt under sections 47E(c) and 47E(d) of the FOI Act.

### **Section 47F – Public interest conditional exemptions - personal privacy**

36. Section 47F(1) of the FOI Act states:

*A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

37. The FOI Act shares the same definition of 'personal information' as the *Privacy Act 1988* (Cth). The Guidelines provide that:

*6.128 Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in a material form or not.*

38. I found that the documents contain personal information of other persons. This includes their names, email addresses and contact details which would reasonably identify third parties.

39. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors in accordance with section 47F(2):

- a. the extent to which the information is well known;
- b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- c. the availability of the information from publicly accessible sources;
- d. the effect the release of the personal information could reasonably have on the third party; and
- e. [add any other evidence you relied on in making the decision to apply this exemption].

40. I found that the specific personal information listed is associated with individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the document and the information is not readily available from publicly accessible sources.

41. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

### **Section 47G – Public interest conditional exemptions – business**

42. Section 47G(1)(a) 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.*

43. I note that the use of the word ‘could’ in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.

44. The Guidelines explain, at paragraph 6.188:

*The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.*

45. The Guidelines also state, at paragraph 6.184:

*The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).*

46. The Guidelines go on to provide, at paragraph 6.192, ‘[t]he term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.

47. 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.

48. I consulted with a third party in relation to their business information contained within the documents. I considered their advice and agree with their contentions on the release of their business information contained within the documents.

49. The application of this exemption depends on the effect of disclosure rather than the precise nature of the information itself. I am satisfied that disclosure of the information relating to the business and commercial affairs of those identified organisations could reasonably be expected to affect the efficient conduct of Defence business and working relationships with external providers in the future.

50. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

**Public interest considerations - sections 47E(c), 47E(d), 47F and 47G**

51. Section 11A(5) of the FOI Act states:

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

52. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

*(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*

*(b) inform debate on a matter of public importance;*

*(c) promote effective oversight of public expenditure;*

*(d) allow a person to access his or her own personal information.*

53. In my view, 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).

54. 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 release of this information could reasonably be expected to prejudice:

- the protection of an individual's right to privacy;
- the interests of an individual or a group of individuals;
- an agency's ability to obtain confidential information;
- an agency's ability to obtain similar information in the future; and
- the management function of an agency.

55. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the names, email addresses and phone numbers of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.

56. While I consider that release of the exempted material may be of some interest to the applicant, disclosure of the conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way at this time.

Additionally, I do not consider that disclosure of the material would promote oversight of public expenditure.

57. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of material contained in the documents. In my view, it would be contrary to the public interest to disclose personal or commercial information of third parties and cause unnecessary distress to them.
58. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.
59. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to you. Accordingly, I find that the information is exempt under sections 47E(c), 47E(d), 47F and 47G of the FOI Act.

**Amanda** Digitally signed by  
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[redacted] Date: 2024.05.14  
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**Amanda** [redacted]  
Accredited Decision Maker  
Security and Estate Group  
Department of Defence