



DEFENCE FOI 586/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 3 January 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

For the period from October 1st, 2022 to September 30, 2023 I am seeking correspondence between the Department of Defence, Avalon Airport Australia Pty Ltd, and Airservices Australia - specifically in relation to PFAS contamination in drinking water at the airport's fire station, and air traffic control tower.

I am particularly interested in information about how that contamination may have come about, including any mention of water pipes/pipelines, including fibre cement pipes, or fibrous cement pipes, and whether PFAS may have migrated through those pipes into the drinking water.



FOI decision maker

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

Documents identified

6. I have identified 14 documents as falling within the scope of the request.
7. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

8. Personal email addresses, signatures, 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

9. I have decided to:
 - a. partially release 11 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 47 [Documents disclosing trade secrets or commercially valuable information], 47C [public interest conditional exemptions - deliberative process], 47E [public interest conditional exemptions - certain operations of agencies], and; 47F [public interest conditional exemptions – personal privacy] and 47G [public interest conditional exemptions – business] of the FOI Act;
 - b. refuse access to three (3) documents on the grounds that the documents are considered exempt under sections 47 [Documents disclosing trade secrets or commercially valuable information] and 47G [public interest conditional exemptions – business] of the FOI Act; and
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

10. 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. responses received from third party consultations.

REASONS FOR DECISION

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

11. 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.
12. The documents contain exempt material and information that does not relate to the request. 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.

13. Further, 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.
14. 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.*
15. In view of the above, I have considered disclosing the documents to you with deletions, but have decided to refuse access as the remaining material would be meaningless and of little or no value once the exempt information is removed.

Section 47 – Documents disclosing trade secrets or commercially valuable information

16. Section 47 of the FOI Act states:

(1) *A document is an exempt document if its disclosure under this Act would disclose:*

...

(b) *any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

17. The Guidelines state that:

Information having a commercial value

5.204 To be exempt under s47(1)(b) a document must satisfy two criteria:

- *the document must contain information that has a commercial value either to an agency or to another person or body, and*
- *the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

5.205 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. ... The following factors may assist in deciding in a particular case whether information has commercial value:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates ...*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether the information is still current ...*
- *whether disclosing the information would reduce the value of a business operation or commercial activity ...*

...

5.207 The second requirement of s47(1)(b) ... must be established separately by satisfactory evidence. ... It must be established that the disclosure would destroy or diminish the commercial value of the information.

18. Upon examination of the documents, I identified information that has a commercial value which would be, or could reasonably be expected to be, diminished if it were

disclosed. I identified a report and presentation to contain valuable commercial information of third parties and the Commonwealth. The material in question details next steps, including further works methodology, and strategies for PFAS investigations which are based on and informed by third party intellectual property. This information is not in the public domain and could impact the Commonwealth's ability to effectively manage existing contracts and engage in future contract negotiations. Disclosure of this information could also reasonably be expected to provide competitors of third parties with sensitive information that would otherwise only be known to limited parties, thus conferring an unfair competitive advantage.

19. Accordingly, I consider that the release of the information would, or could reasonably be expected to, diminish commercial value, and is exempt under section 47(1)(b) of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

20. Section 47C(1) of the FOI Act 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.*

21. Upon examination of the documents, I found that they contained information relating to deliberative matters, the disclosure of which would reveal sensitive information prior to addressing outstanding issues. In this manner, the integrity of the decision-making process is maintained.
22. I have considered whether the information was purely factual. I have taken into account the Guidelines, at paragraph 6.66, which clarify 'purely factual material' that would not be regarded as deliberative matter as:
- 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 was not obtained, prepared or recorded in the course of, or for the purpose of a deliberative process.

23. Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material. The Guidelines, at paragraph 6.73, further state that:

[p]urely 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.

24. Accordingly, I am satisfied that the documents contain information that meets the definition of deliberative material, and that where the content is purely factual, it is embedded in, or intertwined with the deliberative content and cannot be excised.

Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

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

25. 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 the agency.

26. 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.

27. 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 under section 47E(d). 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.

28. 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 direct contact details could, therefore, reasonably be expected to prejudice the operations of Defence.

29. 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 that the direct contact details within the documents are not publicly available and that more appropriate communication channels are already available, I am satisfied that release of the information could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.

30. Additionally, I have found that the documents contain information relating to the operational processes of Defence, particularly the internal practices undertaken by Defence to respond to Media enquiries and external crises. In order to determine if the disclosure would, or could reasonably be expected to have a substantial, adverse effect on the proper and efficient conduct of the operations of Defence, I have considered the functions of the relevant area within Governance Group.

31. I consider that the relevant information would, or could reasonably be expected to release information about the internal workings and processes of these areas, which would impact the ability of these areas to undertake their usual functions, including the ability to have frank discussions about relevant processes. This could reasonably be

expected to prejudice the effectiveness of each area's current operations in relation to undertaking their usual functions.

32. Accordingly, I am satisfied that all staff information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

33. 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).

34. 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.*

35. I found that the documents contain personal information of other persons. This includes their names, email addresses and telephone numbers which would reasonably identify third parties.
36. 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; and
 - d. the effect the release of the personal information could reasonably have on the third party.
37. I found that the specific personal information listed is not well known, 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.
38. Accordingly, I am satisfied that the personal information is conditionally exempt under section 47F of the FOI Act.

Section 47G – Public interest conditional exemptions – business

39. 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:

(d) *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.*

40. 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.

41. 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.

42. 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)).

43. 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’.

44. 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 document would have an unreasonable adverse effect on the lawful business affairs of a third party organisation. I identified that the documents contained commercially sensitive information of third parties. I am confident that the release of this information would unreasonably affect the organisations’ business affairs in an adverse way, by providing a competitive advantage to competitors, which would impact the commercial projects and financial endeavours of third parties. These observations were upheld during third party consultations, which reconfirmed that the business affairs of third parties would be adversely impacted should the information in question be released.

45. 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.*

46. 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. Third parties 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 current and future commercial commitments.

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

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

48. 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.

49. 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.

50. 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).

51. 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 competitive commercial activities of an agency;
- harm the interests of an individual or group of individuals;
- prejudice the protection of an individual's right to privacy;
- harm the business, commercial or financial affairs interests of an organisation;
- prejudice the management function of an agency; and
- prejudice the effectiveness of testing or auditing procedures.

52. 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 direct contact details 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.



53. Additionally, 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 the material contained within the documents, particularly those that disclose elements of a decision-making process.

54. While I consider that the release of information removed under section 47F of the FOI Act may be of some interest to the applicant, its disclosure would not inform public debate on any matter of public importance in a meaningful way, nor would it promote effective oversight of public expenditure. In my view, it would be contrary to the public interest to disclose personal information of third parties. The public interest is better served in protecting the privacy of individuals' personal details contained within the documents from release to the public.
55. While I also consider that the release of information removed under section 47G of the FOI Act may be of interest to the applicant, the disclosure of such material could provide competitors with insights into commercially sensitive business operations of a third party. The release would not additionally inform public debate on any matter of public importance in a meaningful way, nor would it promote effective oversight of public expenditure. Given Defence's requirement to maintain strong links with industry, it is imperative that Defence be able collect and retain sensitive commercial information without Defence's commercial partners fearing the unauthorised publication of such material in breach of commercial-in-confidence.
56. 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.
57. 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 47C, 47E(d), 47F and 47G of the FOI Act.

FURTHER INFORMATION

58. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

 Digitally signed

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Accredited Decision Maker
Security and Estate Group
Department of Defence