



DEFENCE FOI 165/24/25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 27 August 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

I seek access to:

1. 2024 Ministerial submissions/briefings provided to either the Minister for Defence or Minister for Defence Industry relating to the termination of procurement process for the ADF Family of Sea Boats (SHIP/RFT/18421/1).

2. 2024 Ministerial submission/briefings provided to either the Minister for Defence or Minister for Defence Industry relating to options being considered to acquire a similar/alternate capability via Foreign Military Sales.

Should no documents be found that meet the terms of the request, then I seek access to briefs on the same topics provided by the Department to the Secretary of Defence.

I do not seek access to duplicates of any document captured within the scope of the request.

I do NOT seek access the mobile numbers or full email addresses of government officials, nor the names and contact details of government officials not in the Senior Executive Service or equivalent.

I do ask that junior official's position or titles be left unredacted, along with email domains that provide useful information as to the origin and destination of communication e.g. '[redacted]@defence.gov.au'.

Background



FOI decision maker

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

Documents identified

5. I have identified three documents as falling within the scope of the request.

Exclusions

6. Duplicates of documents are excluded from this request. Defence has only considered final versions of documents.

Decision

7. I have decided to:
- a. partially release three 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 33 [Documents affecting national security, defence or international relations], 47D [Public interest conditional exemptions – financial or property interests of the Commonwealth], 47E [Public interest conditional exemptions – certain operations of agencies] and 47F [Public interest conditional exemptions – personal privacy] of the FOI Act; and
 - b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

8. 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; 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 – Access to edited copies with exempt or irrelevant matter deleted**

9. 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.
10. The documents identified as being released in part contain exempt and irrelevant material such as mobile telephone numbers that do not relate to the request.
11. 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.

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

12. Section 33(a)(ii) 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

13. In regard to the terms ‘would, or 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.

...

5.32 The meaning of ‘damage’ has 3 aspects:

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

14. In regard to ‘defence of the Commonwealth’, the Guidelines, at paragraph 5.36, refer to previous Administrative Appeals Tribunal (AAT) decisions which provide that the term includes:

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

15. I have identified material in the documents which, upon release, could prejudice the effectiveness of the Australian Defence Force (ADF). This is because the information relates to specific military capabilities that is not in the public domain. The release of this material could be used by external entities to hinder capability. Such action could result in damage to the defence of the Commonwealth.

16. Accordingly, I find that this material would, or could reasonably be expected to, cause damage to the defence of the Commonwealth and is exempt under section 33(a)(ii) of the FOI Act.

Section 47D – Public interest conditional exemptions – financial or property interests of the Commonwealth

17. Section 47D of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

18. Paragraph 6.90 of the Guidelines state:

Financial or property interests
 6.80 *The financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities. An agency's property interests may be broader than merely buildings and land, and include intellectual property or the Crown's interest in natural resources.*

19. In regards to the term 'substantial adverse effect', of the Guidelines provide:

6.18 The term 'substantial adverse effect' broadly means '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 including 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

20. Upon examination of the documents, I identified information relating to the assessment of tender submissions and extracts of those submissions. This information is not in the public domain. Disclosure of the identified material would have a substantial adverse effect on future tender processes as tenderers may cease to engage with Defence on the basis that Defence may publicly disclose their confidential business information even though that information was provided on the understanding that it would be kept confidential. This would severely restrict Defence's ability to procure equipment in an environment that encourages competition and innovation. Competitive tendering is an important strategy for Defence to achieve value for money in accordance with legislative requirements, and to achieve this it is important that Industry is able to rely on Defence to respect the sensitive nature of the confidential business information being shared.
21. Further, Defence is required to comply with the Commonwealth Procurement Rules (CPRs) for which achieving value for money is a core rule. More specifically, rule 7.23 provides that "submissions must be treated as confidential before and after the award of a contract". Defence's compliance with the CPRs enable third parties to engage in tender processes without the risk of their commercial in confidence information being released. I consider that disclosure of this information would undermine the CPRs purpose of achieving value for money and tenderers may be less likely to engage in tender processes if their information were routinely disclosed.

22. This outcome would have a significant impact on Defence's ability to negotiate with tenderers. As a result, Defence's financial interest in seeking to obtain value for money through a competitive tender process may be compromised, such that disclosure of the information would have a substantial adverse effect on the financial interests of the Commonwealth.
23. Upon examination of the documents, I identified information relating to Defence's budget allocations. This information is not in the public domain. Disclosure of this information would weaken Defence's commercial negotiating position in any future procurement activity associated with the ADF Seaboat capability because potential suppliers would have prior knowledge of the price Defence may be willing to accept. This would prejudice Defence's ability to negotiate the best price and to achieve a 'value for money' outcome for the taxpayer.
24. Taking the above into consideration, I am satisfied that the relevant information is conditionally exempt under section 47D of the FOI Act. My public interest considerations are detailed further below.

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

25. 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.

26. The Guidelines, at paragraph 6.115, provide that:

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

27. Upon examination of the documents, I identified material that relates to Defence's consideration of potential funding arrangements and potential acquisition strategies. This information is not in the public domain. It is important that Defence personnel are willing to engage in open and frank discussions about potential courses of action to ensure thorough consideration of the related benefits, risks and issues. If this information were released into the public domain, Defence personnel may be less willing to engage in such discussions. This would have a substantial adverse effect on the ability of Defence units to undertake their usual operations in a proper and efficient manner.
28. In addition, I have exempted from disclosure material within the scope of this request that would reveal Defence's evaluation of submissions under a 'Request for Tender' process. This information is not in the public domain. It is important that Defence personnel are willing to engage in open and frank discussions during the evaluation of tender submissions to ensure the evaluation is thorough, that all potential risks and issues are identified and to develop well-reasoned arguments to present to the decision-maker. If this information were released into the public domain, Defence personnel may be less willing to engage in such discussions. This would have a

substantial adverse effect on the ability of Defence units to undertake their usual operations in a proper and efficient manner.

29. The Guidelines provide, at paragraph 6.112, 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 information described above is not publicly 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. Accordingly, I am satisfied that the relevant information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

31. 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).

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

6.123 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.

33. I found that one of the documents contains personal information of another person. This includes their image, name and details of their professional experience that would reasonably identify a third party.
34. 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.
35. I found that:
 - a. the specific personal information listed is not well known;
 - b. the individual whose personal information is contained in the documents is not widely known to be associated with the matters dealt with in the document; and

c. the information is not readily available from publicly accessible sources.

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

Public interest considerations – sections 47D, 47E and 47F

37. 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.

38. 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.

39. In my view, disclosure of this information would promote the objects of the FOI Act by:

a. increasing public participation in Defence's processes, with a view to promoting better-informed decision-making (section 3(2)(a) of the FOI Act); and

b. increasing scrutiny, discussion, comment and review of Defence's activities (section 3(2)(b) of the FOI Act).

40. Paragraph 6.233 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factor I find particularly relevant to this request are that 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 confidential information;

c. an agency's ability to obtain similar information in the future;

d. the protection of an individual's right to privacy; and

e. the interests of an individual or a group of individuals.

41. I consider that the public release of the redacted information could reasonably be expected to harm Defence's competitive commercial activities by adversely affecting:
 - a. future Defence procurement activities;
 - b. Defence's ability to achieve "value for money" in accordance with the CPRs;
 - c. Defence's negotiating position with potential suppliers; and
 - d. the willingness of Defence personnel to freely engage in frank conversations about potential funding arrangements, potential acquisition strategies and assessments of tender submissions.
42. Further, I consider that the public release of the redacted information could reasonably be expected to harm Defence's ability to obtain confidential information now and in the future by adversely affecting the willingness of potential suppliers to release confidential business information to Defence.
43. I consider that this potential harm outweighs the potential benefits of increasing public participation in Defence's processes and increasing scrutiny, discussion, comment and review of Defence's activities. In my view, the public interest is better served by protecting Defence's competitive commercial activities and Defence's ability to obtain confidential information as this gives Defence the best prospect of being able to achieve "value for money" outcomes for the public.
44. I also consider that the public release of personal information could reasonably be expected to cause harm to individuals. Defence is committed to protecting an individual's right to privacy. Unauthorised access to personal information can lead to misuse as well as jeopardise an individuals' security and well-being. Respecting privacy safeguards allows an individual to control their information and promotes open communications with Defence.
45. In my view, the potential harm to individuals outweighs the potential benefits of increasing public participation in Defence's processes and increasing scrutiny, discussion, comment and review of Defence's activities. The public interest is better served by protecting the privacy of individual's personal details from release to the public at large.
46. On balance, I am of the view that the factors against disclosure outweigh the factors favouring disclosure.
47. 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.
48. 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 47D, 47E and 47F of the FOI Act.

FURTHER INFORMATION

49. 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.



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