



DEFENCE FOI 867/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to a revised request by [REDACTED] (the applicant), received by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (FOI Act):

Briefing and any other documents provided to the Minister for Defence relating to the firm Elbit Systems

Records of requests from the office of the Minister for Defence relating to Elbit Systems

Departmental responses to any such requests

Timeframe: from 04/03/2024 to 02/05/2024.

Background



FOI decision maker

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

Documents identified

7. I have identified five (5) documents falling within the scope of the request.

Exclusions

8. 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 the 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], 47E [public interest conditional exemption - certain operations of agencies], 47F [personal privacy] and 47G [public interest conditional exemption – business affairs] of the FOI Act; and
 - b. 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);
 - e. advice received from relevant officers within Navy and the Capability Acquisition and Sustainment Group (CASG); and
 - f. advice received from a third party.

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.

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

13. 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

14. 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 three 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.

15. In regard to ‘defence of the Commonwealth’, the Guidelines, at paragraph 5.34, 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.
16. I have identified material in the document, which, upon release, would cause, or could reasonably be expected to cause, damage to the defence of the Commonwealth by making public details of a Defence capability that is highly classified. The exempt material contains sensitive information about a capability that could potentially allow those with hostile intentions to identify and exploit the Australian Defence Force, and which would prejudice, or hinder its effectiveness.
17. Accordingly, I find that this material is exempt under section 33(a)(ii) of the FOI Act.

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

18. 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:

...

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

19. The Guidelines provide, at paragraph 6.102, that:

Where the document relates to the agency's policies and practices in relation 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.*

20. 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.
21. Releasing information potentially identifying individuals involved in Defence business processes could reasonably be expected to have a substantial adverse effect on Defence's management of day-to-day business. Releasing details about this process could adversely affect Defence's ability to conduct future business if employees felt Defence lacked integrity with respect to protecting the confidentiality of records; thus affecting the proper and efficient conduct of the operations of Defence.
22. 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.

23. I am satisfied that were the names and 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.
24. 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 the nature of the information contained within the documents, I am satisfied that release of this information could not reasonably be expected to lead to a change in Defence’s processes that would lead to any efficiencies.
25. Accordingly, I am satisfied that the information is conditionally exempt under section 47E of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

26. 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).

27. 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.*

28. 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.
29. 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.

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

Section 47G – Public interest conditional exemptions - business

31. 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.

32. 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.

33. The Guidelines explain, at paragraph 6.185:

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

34. The Guidelines also state, at paragraph 6.181:

The operation of the business information conditional 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)).

35. The Guidelines go on to provide, at paragraph 6.191, ‘[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’.

36. The documents contain sensitive information about the business affairs of third parties. Disclosure of this information would, or could reasonably be expected to, unreasonably affect the third party’s business affairs by providing a competitive advantage to competitors. The information could be used by competitors to assess the third parties’ services and commercial arrangements, which would, in turn, undermine the third parties’ future ability to secure contracts. Furthermore, disclosure of this

information could have a substantial adverse effect on the trust between these parties and Defence. This could potentially compromise the future supply of third party business information to Defence related to contracts and capability delivery, or its regulatory functions including defence export controls.

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

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

38. 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.

39. 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.

40. 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).

41. Paragraph 6.233 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 and personnel function of an agency.

42. 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 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.

43. 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 materiel contained in the documents, particularly those that refer to Defence's internal processes, which allow Defence to undertake its operational activities in an expected and lawful manner.
44. In my view, it would be contrary to the public interest to disclose personal information of third parties, causing unnecessary distress. Furthermore, the public interest is better serviced in protecting the privacy of individual's personal details from release to the public at large.
45. I consider that releasing third party business information would reduce confidence in Defence's ability to protect their information, which could then have an adverse effect on Defence's ability to conduct and manage working relationships with its suppliers in the future.
46. 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.
47. 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, 47F and 47G of the FOI Act.

