



Reference: AB 32503882

FOI 089/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

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

“ Insofar as they mention Australian Industry Capability or the role of Australian shipyards or the use of Techport facilities/infrastructure, any files, brief or documents that we used as input to any SEA 5000 ‘gateway’ reviews.

Insofar as they are mention Australian Industry Capability or the role of Australian shipyards or the use of Techport facilities/infrastructure, any records of decisions made at SEA 5000 ‘gateway’ review”

Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request.

FOI DECISION MAKER

2. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request. In considering this request, I note that ‘gateway’ reviews is not a term used in the Defence Capability Acquisition and Sustainment Group, however I believe the FOI request relates to “Gate” reviews, thus I have substituted ‘gateway’ for “gate”.

Documents identified

3. I identified nineteen (19) documents as matching the description of the request.

Decision

4. I have decided to:
- a. fully release two documents;
 - b. partially release fifteen (15) documents with deletions made 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 section 33(a)(i) & 33(a)(ii) [Documents affecting national security], section 34 (i) (a) [Cabinet Documents], section 47C [public interest conditional exemptions – deliberative process], and section 47D [public interest conditional exemptions – financial or property interests of the Commonwealth or Norfolk Island] of the FOI Act.
 - c. Deny access to two documents
 - d. Irrelevant materiel as referred to within the scope of the request has been removed in accordance with section 22 (1)(a)(i) of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:
- a. the terms of the request;
 - b. the content of the identified documents 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); and
 - e. advice from the SEA5000 Phase 1 Future Frigates project office and advice from PM&C.

Reasons for decision

Section 33(a)(i) & 33(a)(ii) of the FOI Act

6. Section 33 of the FOI Act exempts a document if its disclosure under the Act would or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth, or information that would divulge information or matter communicated in confidence by or on behalf of a foreign government.

7. The Guidelines state:

Security of the Commonwealth

5.29 The term 'security of the Commonwealth' broadly refers to:

- (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests*
- (b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations (see definition in s 4(5)).*

8. In regard to the defence of the Commonwealth, the Guidelines state:

Defence of the Commonwealth

5.34 The Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term 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.*

9. Upon examination of the documents, I found that three of them contained sensitive information on the strategic operating environment and technical requirements, relative to SEA5000 Phase 1 Project. If this material was to be released, it could be used by an adversary to identify future capability and allow them to attempt to compromise that capability.

10. In deciding that material was exempt under section 33 of the FOI Act, I also considered the mosaic theory. The Guidelines state that:

- 5.39 *When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite – a mosaic – that can damage Australia's national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption¹.*
- 5.40 *The mosaic theory does not relieve decision makers from evaluating whether there are real and substantial grounds for the expectation that the claimed effects will result from disclosure.*

11. I found that a portion of the documents contained information that, if disclosed, may add to what is already known, or already in the public domain. This could lead to an adversary applying mosaic theory to information relating to this Defence capability and ultimately undermine its effectiveness.

12. Taking the above into account, I consider that disclosure of the material would, or could reasonably be expected to, cause damage to the security and/or defence of the Commonwealth. Accordingly, I consider the material to be exempt under sections 33(a)(i) and 33(a)(ii) of the FOI Act.

Section 34 of the FOI Act

13. Section 34 of the FOI Act exempts a document if the document has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be submitted and it was brought into existence for the dominant purpose of submission for consideration by the Cabinet, or a draft document to which the preceding requirements apply.

14. The Guidelines state that the Cabinet exemption applies to the following classes of documents:

Cabinet submissions that:

- a. have been submitted to Cabinet; or
- b. Are proposed for submission to Cabinet; or
- c. Were proposed to be submitted but were never in fact submitted, or
- d. And were brought into existence for the dominant purpose of submission for consideration by the Cabinet,
- e. Drafts of a Cabinet submission.

15. Documents in this class may be Cabinet submissions of attachments to Cabinet submissions.

16. One document is a partial copy of a draft attachment to a Cabinet Submission, which was brought into existence for the dominant purpose of submission for the consideration of

¹ It is a question of fact whether the disclosure of the information, alone or in conjunction with other material, could reasonably be expected to result in the claimed effect, *Re Nitas and Minister for Immigration and Multicultural Affairs* [2001] AATA 392

Cabinet. This document, if disclosed, would reveal Cabinet deliberations. On this basis, I consider that the document is exempt under section 34 of the FOI Act, and have denied access.

17. I have consulted with the Department of Prime Minister and Cabinet and the Department agrees with my decision to deny access under section 34(1) of the FOI Act.

Section 47C of the FOI Act

18. Upon examination of the documents, I found that the documents contained material that would be considered deliberative in nature. The documents set out the merits of acquisition strategy options and potential suppliers for the SEA5000 Future Frigate Program.

19. Release of this material could expose the deliberations that sit behind formulating proposals for Cabinet consideration and release would inhibit the full canvassing of issues in the development of Cabinet material.

20. Accordingly, I consider that the material is conditionally exempt under section 47C of the FOI Act.

Section 47D of the FOI Act

21. Upon examination, I found that a document contained information which relates to options associated with a government owned property. I consider the material to be commercially sensitive material and release of this information may expose negotiation strategies and government decisions which could impact the Government's property interests and contracts under SEA 5000 Phase 1.

22. In considering this exemption, I referred to the Guidelines which state that the potential effect that would be expected to occur following disclosure must be both substantial and adverse.

23. Taking the above into account, I consider the material to be conditionally exempt under section 47D of the FOI Act

Public interest considerations – Sections 47C and 47D.

24. I have found that the identified documents are conditionally exempt under sections 47C and 47D of the FOI Act. Section 11A (5) provides that if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

25. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors are that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource.

26. However, the 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).

27. Paragraph 6.29 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 or harm:

- a. Security, law enforcement, public health or public safety
- b. the competitive commercial activities of an agency

c. the management function of an agency.

28. Disclosure of some information in the document would reveal sensitive considerations associated with Defence activities under consideration in relation to Defence's capabilities and future direction. 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 public interest in maintaining the confidentiality of some material contained in the documents. Disclosure of some of the material contained in the documents would potentially have a significant impact on the Commonwealth's ability to effectively manage its commercial interests. While I considered that disclosure may increase scrutiny or discussion of Defence activities, I found that the public interest in protecting the commercial interest of the Commonwealth would far outweigh the public interest in premature release of the identified material.

29. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47C and 47D of the FOI Act.

Additional Information

30. A number of documents matching the scope of this request were classified. I have declassified the versions of the documents that have been approved for release.



Glenna Parker
Accredited Decision Maker
Capability Acquisition & Sustainment Group

5 October 2017