



Australian Government
Department of Defence

Reference: R28085770

FOI 104/16/17 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the revised application by [REDACTED], under the *Freedom of Information Act 1982* (FOI Act), for access to the uncrossed sections of the future submarine 'Design and Mobilisation Contract' (DMC) with DCNS as follows:

2. *Conditions of Contract*

- ~~i. Options for Further Quantities and Optional Extras~~
- b. *Australian Industry Capability (If strategic template is used)*
- c. *Intellectual Property*
- ~~d. Price and Payment~~
- ~~e. Contract management~~
 - i. *Confidential information*
 - ~~ii. Commonwealth Access~~
 - ~~iii. Defence Security~~
- ~~f. Policy and Law~~
 - i. *Governing law*
 - ii. *Australian Industry Capability (If strategic template is not used)*
- ~~g. Dispute and Termination~~

3. *Annex to Contract*

- a. *Statement of Work*
 - i. *Scope*
 - ~~ii. General requirements~~
 - ~~iii. Specification (Annex A to Statement of Work)~~
- ~~b. Price and Delivery Schedule~~
 - ~~i. Price~~
 - ~~ii. Schedule of milestones~~
- ~~e. Liquidated Damages~~
- ~~d. Government Furnished Equipment~~
- ~~e. Schedule of Prices for further Quantities and optional Extras~~
- f. *Intellectual Property Schedule*
- ~~g. Security Classification and Categorisation Guide~~
- h. *Confidential Information*
- i. *Australian Industry Capability*
 - i. *Industry Requirements*
 - ii. *Australian Industry Capability Plan*

FOI decision maker

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

Documents identified

5. I identified four documents containing information matching the description of the request. Specifically:

Serial 1 – Conditions of Contract

Serial 2 – Conditions of Contract – Attachment A – Statement of Work

Serial 3 – Conditions of Contract - Attachment D – Technical and Data Software Rights

Serial 4 – Conditions of Contract – Attachment H – Confidential Information and Reporting

6. An FOI reference number has been added to the documents in the form for release, along with serial numbers as outlined above.

Decision

7. I have decided to:

- a. partially release two documents in accordance with section 22(1)(a)(ii) [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 [Documents affecting national security, defence or international relations] and/or section 47G [Public interest conditional exemptions – business] of the FOI Act;
- b. deny access to two documents on the grounds that they are exempt under section 33 and/or section 47G of the FOI Act;
- c. refuse access to three listed items under section 24A(b)(ii) [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and
- d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(a)(ii) of the FOI Act.

Material taken into account

8. 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 Future Submarine Program Office.

Reasons for decision

Section 24A of the FOI Act

9. Section 24A(1) of the FOI Act states:

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

- (1) *An agency or Minister may refuse a request for access to a document if:*
- (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found;*
or
 - (ii) ***does not exist.***

10. The Future Submarine Program (FSP) Office undertook searches on my behalf to locate documents relevant to this request. The office advised that the following documents were not yet in existence:

- 3. Annex to Contract
 - i. Australian Industry Capability
 - i. Industry Requirements; and
 - ii. Australian Industry Capability Plan.

11. However, the office advised that the Contractor will be required to develop an Australian Industry Capability Plan in future steps of the DMC.

12. The guidelines state that an agency *may refuse a request if it has taken 'all reasonable steps' to find the document requested and is satisfied that the document... does not exist.* I am satisfied that the advice provided by the FSP Office is sufficient evidence that those parts of the request do not exist. No further searches, outside of the FSP Office, were undertaken as that office has the sole responsibility for the management of the DMC.

13. Accordingly, I have decided to refuse access to those parts of the request listed above under section 24A of the FOI Act.

Section 33 of the FOI Act

14. In reviewing the identified documents, I found that serials 1 and 4 contained information that is bespoke to the Future Submarine Program, and which may not be offered to any other sovereign nation. Release of this material would, or could reasonably be expected to, cause damage the Commonwealth's international relations. Release of the identified information would affect the ability of the Australian Government to maintain a good working relationship with both the Republic of France and DCNS, and to protect the flow of confidential information between them and Australia, especially given the long-term strategic nature of the FSP (noting that the Republic of France is a majority shareholder of DCNS).

15. Paragraph 5.30 of the guidelines states, *the phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between government agencies.*

16. Paragraph 5.31 also states *the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government or one of its agencies.* At 5.32 the guidelines provide the following example: *the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.*

17. Taking the above into account, I consider that the material in question is exempt under section 33(a)(iii) of the FOI Act.

18. I am also mindful that disclosure of the identified information in serials 1 and 4 would divulge information that was communicated in confidence by DCNS and agreed between parties to be treated and held as confidential information under the DMC.

19. Paragraphs 5.36 – 5.39 discuss ‘information communicated in confidence’. Of particular relevance to this request is paragraph 5.36 which states *the test is whether information is communicated in confidence between the communicator and the agency to which the communication is made — it is not a matter of determining whether the information is of itself confidential in nature.*

20. I am satisfied that the information was received and communicated with an express understanding that the communication would be kept confidential and I therefore consider the material to be exempt under section 33(b) of the FOI Act.

Section 47G of the FOI Act

21. Upon examination of the four identified serials, I found that they all contained material that is highly commercially sensitive relating to the ownership, licensing and transfer of intellectual property rights and associated data, software and materials. Further they contain information relating to the sensitive commercial framework that has been agreed between Defence and DCNS which is specific to the requirements of the DMC and contain certain information relating to the information exchange arrangement to be followed between parties under the DMC which has been established for the specific requirements of the design arrangements/processes of the DMC.

22. Section 47G allows conditional exemption of a document if disclosure of the information “would, or could reasonably be expected to, unreasonably affect” the business concerned. I note that the use of the word ‘could’ in this provision requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause the consequences specified.

23. Paragraph 6.163 of the guidelines states *to be conditionally exempt, the disclosure of business information in a document must reasonably be expected to have either of the following outcomes:*

- *an unreasonable and adverse effect on the business or professional affairs of a person or on the business, commercial or financial affairs or an organisation or undertaking, or*
- *prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

24. I am satisfied that the expected effect of disclosing the identified material could have an adverse effect on the business of DCNS by disadvantaging their competitive edge over their competitors and disclose material that may advantage those competitors in future tender processes or in negotiating contracts with other customers. Furthermore, disclosure is highly likely to affect the future supply of information or services to the Commonwealth – under the current DMC and potentially any future FSP contracts.

25. For the above reasons, I have decided that the material is conditionally exempt under section 47G of the FOI Act.

Section 47G of the FOI Act – Public interest considerations

26. Section 11A(5) of the FOI Act 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’.

27. I considered the factors favouring disclosure as set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource and release of the material may increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act). It would also promote effective oversight of public expenditure.

28. Paragraph 6.29 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I found particularly relevant to this request are:

- *could reasonably be expected to prejudice an agency’s ability to obtain confidential information*
- *could reasonably be expected to prejudice an agency’s ability to obtain similar information in the future*
- *could reasonably be expected to prejudice the competitive commercial activities of an agency*

29. As outlined above, releasing commercial-in-confidence information of the respondent is likely to harm its commercial interests which, in turn, is likely to make future respondents more reluctant to provide necessary information to Defence.

30. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Therefore, I have decided that it would be contrary to the public interest to release the information considered exempt under section 47G of the FOI Act.

31. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

FURTHER INFORMATION

32. Some of the documents matching the scope of this request contained a dissemination limiting marker. As the documents are approved for public release the marker has been struck through.

Tony.Brown2

Digitally signed by Tony.Brown2

DN: c=AU, o=GOV, ou=DoD,

ou=PKI, ou=Personnel,

cn=Tony.Brown2

Date: 2016.12.09 11:15:21 +11'00'

Dr Tony Brown
Accredited Decision Maker
Associate Secretary Group

9 December 2016