



**Australian Government**  
**Department of Defence**  
Defence Support and Reform Group

Ministerial and Information  
Management Branch  
Department of Defence

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Our reference: FOI 150/14/15



By email:



Dear Mr Hill



1. I refer to your revised request, dated 1 December 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

- *documentation, photographs or videos concerning the visits to Japan of Mr King, and any other members of the Future Submarine Project, in relation to the Soryu submarine*
- *meeting agendas which detail who Mr King, and members of his delegation, met (including where and when the meetings took place and what was discussed) for each of the three trips*
- *copies of notes relating to Soryu submarines taken by Mr King, or members of his delegation, during the above mentioned trips*
- *emails written or received by Mr King, and members of his delegation, during the trip or following the trip relating to the Soryu Submarines*
- *documents which outline the impact of building submarines overseas instead of Australia prepared by, or on behalf of, the Future Submarine Project for the past 12 months.*

*I do not require duplicate copies of documents.*

2. I note the due date for your request was amended to 20 February 2015, after you kindly agreed to an extension to the FOI processing timeframe in accordance with section 15AA of the FOI Act.

3. The purpose of this letter is to provide you with the decision relating to the documents that are the subject of your request.

#### **FOI decision maker**

4. Mr Mark Worrall, Director, Defence Materiel Organisation Ministerial Services and FOI was the accredited decision maker, under the FOI Act, in relation to your request.

#### **Documents identified**

5. Mr Worrall identified 11 documents as matching the scope of your request. A schedule of documents is at Enclosure 1. Please note that for ease of processing this request the FOI reference number and relevant Serial number was added to the top right hand corner of the documents approved for release.

#### **Decision**

6. Mr Worrall decided to deny access to nine of the identified documents on the grounds that they contained material that is considered exempt under sections 33 [documents affecting national security, defence or international relations], 47 [documents disclosing trade secrets or commercially valuable information] & 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

7. Mr Worrall decided to release the two remaining documents with material removed, 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 exempt under sections 33, 47F & 47G [public interest conditional exemptions – business] of the FOI Act.

8. Finally, Mr Worrall removed some material from the document identified as Serial 7 which is considered irrelevant to the scope as it relates to other matters. The material was removed in accordance with section 22 of the FOI Act.

#### **Material taken into account**

9. In making his decision Mr Worrall had regard to:
- a. the content of the identified documents in issue;
  - b. relevant provisions in the FOI Act;
  - c. advice from areas in Defence whose duties relate to the subject discussed in the documents; and
  - d. Defence guidance material on the FOI Act and the *guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the guidelines).

## Reasons for decision

### Section 33 of the FOI Act

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

11. On examination of the documents Mr Worrall found that they contained information that was communicated in confidence by or on behalf of a foreign government to an authority of the Commonwealth. The concept 'Information communicated in confidence' is an important consideration that underpins all of the identified documents. Section 33(b) exempts information communicated in confidence to an Australian Government agency by another government or one of its authorities. Information exchanged in confidence between DMO and foreign agencies and entities is communicated and received under the implied understanding that the communication is confidential.

12. Mr Worrall found that the documents contained material that was officially communicated in confidence to Australia by a foreign government. He was satisfied that if the material was released, it would, or could reasonably be expected to harm the positive working relationship that Australia has with the foreign government.

13. Further, Mr Worrall found that the documents contained information which reveals confidential and sensitive information relating to opinion and advice prepared for the purpose of the deliberative process involved in the functions of the Department and Government. If this material was to be released it could reasonably be expected to diminish the international relations between the parties.

14. The Guidelines state that *'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'*.

15. The Guidelines also state that *'the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government.'*

16. Release of material without the explicit agreement of the foreign government could diminish the relationship with Defence and impact on the ability of the Australian Government to maintain good working relationships. Release of the information could lessen the confidence in Australia's ability to protect information, and restrict the future flow of such information to the Commonwealth.

17. As such, Mr Worrall considered that some material in the documents identified as serials 2 – 6 & 8 - 11 is exempt under subsections 33(a)(iii) & 33(b) of the FOI Act.

### Section 47

18. Mr Worrall found that documents identified as Serials 3 - 6 & 10 contained material that has a commercial value in line with the provisions of section 47 of the FOI Act.

19. Mr Worrall noted that the subject of this request relates to consideration of procurement of materiel. Should this material be released it would, or could reasonably be expected to, destroy or diminish the commercial value and position of both the Australian and Japanese governments and its commercial partners.

20. Paragraph 5.188 of the Guidelines relevantly provides:

*To be exempt under s 47(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*
- *the commercial value of the information would, or could reasonably be expected to be, destroyed or diminished if it was disclosed.*

21. Mr Worrall considered the following factors as identified in Paragraph 5.189 of the Guidelines, to assist in deciding whether information contained in the requested documents 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 – for example, if it lowers the cost of production or allows access to markets not available to competitors;
- whether a genuine “arms length” buyer would be prepared to pay to obtain that information;
- whether the information is still current or out of date (out of date information may no longer have any value);
- whether disclosing the information would reduce the value of the business operation or commercial activity (reflected perhaps in a lower share price).

22. Mr Worrall considered that information contained in documents identified as Serials 3 - 6 & 10 has commercial value consistent with the Guidelines because it is current and because disclosure would reveal sensitive commercial information that could allow another party to use the information in such a way that could impact on future negotiations for the Commonwealth, as well as the future negotiations that the foreign government may intend to enter into.

### **Section 47C**

23. Mr Worrall found that documents identified as Serials 7 & 11 contained material for which a claim for exemption under section 47C(1) of the FOI Act is warranted.

24. Subsection 47C(1) of the FOI Act states ‘*A document is conditionally exempt if its disclosure under the 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 process involved in the functions of...an agency... or a Minister.*’ Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

25. Mr Worrall found that the identified material contained advice and recommendations for the purposes of the deliberative processes involving this issue at hand and for decision making by the government of the day.

26. Accordingly, Mr Worrall considered that the material is conditionally exempt under section 47C of the FOI Act.

**Public interest considerations – section 47C**

27. Section 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest.

28. In balancing the public interest in this instance Mr Worrall considered the following factors in favour in disclosure:

- a. promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Governments activities;
- b. informing debate on a matter of public importance; and
- c. promoting effective oversight of public expenditure.

29. However, Mr Worrall also considered that exempting the material at this stage would allow this issue to be given careful consideration, including further engagement by the Government.

**Section 47F**

30. Section 47F of the FOI Act conditionally exempts the disclosure of a document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person, including a deceased person.

31. Upon examination of the documents, Mr Worrall found that the documents identified as Serials 1, 2, 8 & 9 contained personal information, such as the names and mobile telephone numbers of drivers and designated points of contacts while in Japan, as well as the names and positions of Japanese nationals. In accordance with sub-section 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, he had regard to:

- 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 documents; and
- c. the availability of the information from publically accessible sources.

32. Against those criteria, Mr Worrall found that:

- a. the specific personal information is not well known to the general community;
- b. the persons to whom the information relates is not known by the general community to have been associated with the matters dealt with in the documents; and

- c. the personal information is not readily available from publically accessible sources.

33. Noting the findings against the above criteria Mr Worrall decided that the disclosure of this information would constitute an unreasonable disclosure of personal information belonging to persons other than you. Accordingly, he considered this material to be conditionally exempt under section 47F of the FOI Act.

34. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

#### **Public interest considerations – Section 47F**

35. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Mr Worrall considered the range of relevant factors that favour access to a document set out in Section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. He noted that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of this information would not increase public participation in government processes, nor would it increase scrutiny or discussion of government activities.

36. While Mr Worrall noted that the release of this information may be of some interest to the applicant, it would not inform public debate on any matter of public importance in any meaningful way. Additionally, disclosure of this specific information would not promote oversight of public expenditure, nor would it allow you further access to your own personal information. Furthermore, Mr Worrall considered that the protection of an individual's right to privacy far outweighs any public interest there may be in the release of this material.

37. In coming to the above decision, Mr Worrall considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. Accordingly, he considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the document. Therefore, Mr Worrall decided, on balance, that it would be contrary to the public interest to release the information considered exempt under subsection 47F(1) [public interest conditional exemptions – personal privacy] of the FOI Act.

#### **Section 47G**

38. Section 47G of the FOI Act states that a document is conditionally exempt if it discloses business 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 where its disclosure:

- a. would, or could reasonably be expected to , unreasonably affect the 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 (s47G(1)(a)); or
- b. could be reasonably expected to prejudice the future supply of information to the Commonwealth...for the purpose of the administration of a law of the Commonwealth or the administration of matters...by an agency (s47G(1)(b)).

39. Mr Worrall found that the document identified as Serial 9 in the schedule of documents contained pricing information from QANTAS. The information, if released, would adversely affect the company in respect of their lawful business and commercial affairs and is therefore considered conditionally exempt under section 47G of the FOI Act.

#### **Public interest considerations – Section 47G**

40. Subsection 11A (5) of the FOI Act provides that conditionally exempt matter must be released, unless, in the circumstances, access to that document would, on balance, be contrary to the public interest.

41. In considering subsection 11B(3) of the FOI Act, Mr Worrall noted that disclosure of the documents may promote the objects of the FOI Act, through access to government held information. He noted that the document, in general, may inform debate on a matter of public importance and promote effective oversight of public expenditure. However, he did not consider that release of the specific conditionally exempt material would inform debate on a matter of public importance, nor promote effective oversight of public expenditure.

42. In coming to his decision Mr Worrall took into account that the inappropriate release of the pricing information may have an adverse effect on the future negotiations between the organisation and the Commonwealth.

43. Mr Worrall considered that it is in the public interest that Defence does not disclose sensitive proprietary information of other companies or businesses. On balance, he considers that the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Accordingly, Mr Worrall decided that the specific information contained in the document identified as Serial 9 is exempt under section 47G of the FOI Act.

#### **Payment of Charges**

44. In our letter, dated 8 December 2014, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request and paid the amount in full on 8 December 2014.

45. Upon completion of your request, after deducting the free decision making time, the actual amount for processing exceeded the original estimate provided to you. However, as explained in the above mentioned letter the amount payable can only be more than the preliminary assessment if the decision is to release all of the documents requested in full. Accordingly, on this occasion you are not required to pay any further charges for the processing of your request.

46. Copies of the documents in the form approved for release are at Enclosure 2.

#### **Rights of review**

47. The FOI Act provides for rights of review of decisions. A copy of the fact sheet, “Freedom of Information – Your Review Rights” is at Enclosure 3.

## **FOI Disclosure Log**

48. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish details of information released under the FOI Act. Defence will publish the identified documents relating to this request within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions. This request will be published on 27 February 2015.

### **Further advice**

49. The FOI Act can be accessed online at: . <http://www.comlaw.gov.au/Details/C2014C00673>

50. Should you have any questions, please contact this office.

Yours sincerely



Theresa Stinson  
Assistant Director – Media Case Management  
Freedom of Information

20 February 2015

#### Enclosures:

1. Schedule of documents
2. Documents in the form approved for release
3. Fact Sheet: Freedom of Information – Your Review Rights