



BN1556605

FOI 155/18/19 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:

*“[Item] 1. The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period; and
[Item] 2. The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract”*

FOI decision maker

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

Documents identified

3. I identified 13 documents as matching the description of the request.

Decision

4. I have decided to:

- deny access to 11 documents on the grounds that the deleted material is considered exempt under section 47(1)(b) [Documents disclosing trade secrets or commercially valuable information] and 47G [Public interest conditional exemptions-business affairs] of the FOI Act; and
- deny access to two documents on the grounds that the deleted material is considered exempt under section 33(a)(ii) [Documents affecting national defence], section 47(1)(b) [Documents disclosing trade secrets or commercially valuable information] and 47G [Public interest conditional exemptions-business affairs] 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);
- e. the Commonwealth Procurement Rules; and
- f. advice received from officers within the department from the Future Submarine Program Office [FSPO].

Reasons for decision

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

6. Subparagraph 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

7. In regards to the terms ‘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.

5.28 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

8. Upon examination of the documents, I identified material which upon release ‘could reasonably be expected to, cause damage to the defence of the Commonwealth’ by making public certain considerations in the project management plan for the Future Submarine Program.

9. In light of the above, I have decided that the specified material identified is exempt pursuant to section 33 of the FOI Act.

Section 47 – Documents disclosing trade secrets or commercially valuable information

10. Section 47 of the FOI Act provides that a document is exempt from disclosure requirements ‘if its disclosure under the Act would disclose (a) trade secrets; or (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed’.

11. In regards to the terms ‘commercial value’ and ‘destroyed or diminished’, the Guidelines provide:

5.203 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have ‘exchange value’, in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case whether information 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 ‘arm’s-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 a business operation or commercial activity — reflected, perhaps, in a lower share price.*

5.204 The time and money invested in generating information will not necessarily mean that it has commercial value. Information that is costly to produce will not necessarily have intrinsic commercial value.

5.205 The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — must be established separately by satisfactory evidence. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known. Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.

12. Upon examination of the documents, I identified material the development of which depended on the developer’s experience in designing and constructing submarines, including scheduling and cost attribution information. This information is considered valuable intellectual property by the developer, and is not generally known information. Release of this information could reasonably be expected to provide Naval Group SA’s competitors with critical and sensitive information, including scheduling structures and detailed cost breakdowns, that would otherwise only be known to limited individuals within the Commonwealth, Lockheed Martin, and Naval Group.

13. In light of the above, I have decided that the specified material identified is exempt pursuant to section 47(1) of the FOI Act.

Section 47G – Business affairs

14. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

15. Section 47G 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; or

(b) could reasonably be expected to 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.

16. Upon examination of the documents I identified information that has been provided in confidence and in the expectation that it would not be made publically available. This information is the subject of live and ongoing contractual negotiations. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the administration of procurement processes.

17. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.

Section 47G - Public interest considerations

18. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

19. In determining whether to release the conditionally exempt material, I considered the Guidelines, together with a range of factors that favour access to a document set out in section 11B(3) [public interest exemptions-factors favouring access] of the FOI Act. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to public interest. Specifically I considered if disclosure of the documents would:

- a) promote the objects of the FOI Act;
- b) inform debate on a matter of public importance; or
- c) promote effective oversight of public expenditure.

20. I found that 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).

21. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request is that the 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 similar information in the future; and
- c) an agency's ability to obtain confidential information.

22. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In particular, I consider the release of the business information of third parties could reasonably be expected to prejudice the operations of an agency. I also consider that release of material which contributes to a live process could reasonably be expected to prejudice the outcome of that process. I consider that the public interest is better served in this case by maintaining the confidentiality of the business information provided to the Commonwealth.

23. 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 47G of the FOI Act.

24. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making my decision.

Third party consultation

25. I decided to consult with Naval Group S.A. regarding their information which was contained in the document. In response to this consultation, Naval Group S.A. has objected to the release of their business information. I agree with Naval Group S.A.'s objections.

Section 22

26. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the documents would be meaningless and of little or no value once the exempt material is removed.

ChrisHorscroft Digitally signed by ChrisHorscroft
Date: 2018.12.06 10:21:45 +11'00'

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group