



Australian Government
Department of Defence

BJ1617259

FOI 182/18/19 STATEMENT OF REASONS UNDER THE *FREEDOM OF INFORMATION ACT 1982*

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

“...a copy of the *Future Submarine Project ‘Sovereign Sustainment Strategy for the FSM’*”

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 one document as matching the description of the request.

Decision

4. I have decided to partially release the document 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; 47C [public interest conditional exemptions – deliberative processes; and 47G [Public interest conditional exemptions – business] 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 document 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. consultation with the affected third party; and
 - f. advice received from departmental officers.

Reasons for decision

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

6. Subparagraphs 33(a)(i)(ii) and (iii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth; cause damage to the defence of the Commonwealth; or the international relations of the Commonwealth.

7. With regard 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 document, I identified material which upon release ‘could reasonably be expected to, cause damage to the security and defence of the Commonwealth’ by making public certain information regarding submarine capability and operational requirements.

9. I also identified material which upon release ‘could reasonably be expected to, cause damage to the international relations of the Commonwealth by making public information sensitive to Naval Group and its commercial and business affairs.

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

Section 47C – Public interest conditional exemptions – deliberative processes

11. Section 47C(1)(a) of the FOI Act states:

“A document is conditionally exempt if disclosure under this 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...”

12. With regard to assessing deliberative matter, the Guidelines state:

‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document. There is no reason generally to limit the ordinary meaning given to the words ‘opinion, advice or recommendation, consultation or deliberation’.

13. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

14. Upon examination of the document, I identified material that would be considered deliberative in nature concerning the sovereign sustainment requirements for the Future Submarine. Further information provided at paragraph 23 under public interest considerations.

Section 47G – Public interest conditional exemptions - business

15. Section 47G(1)(b) 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:

(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. The Guidelines state:

6.199 There must be a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government.

17. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

18. Upon examination of the document, I identified information that if released could reasonably be expected to prejudice the future supply of information to the Commonwealth concerning the design and future sovereign sustainment requirements for the Future Submarine. Further information provided at paragraph 23 under public interest considerations.

Section 11A – Public interest considerations

19. Section 11A 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.

20. In determining whether to release the document, 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 the public interest. Specifically I considered if disclosure of the document 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.

21. 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).

22. 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 the document could reasonably be expected to prejudice:

- a. an agency's ability to obtain similar information in the future.
- b. could reasonably be expected to prejudice the competitive commercial activities of an agency.

23. 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 note that the document in question is an initial draft and offers early ideas, opinions, advice and recommendations for

achieving sovereign sustainment and therefore deliberative in nature. The initial draft document is currently being updated and if released in its current form, could reasonably be expected to prejudice the future supply of equipment and information to the Commonwealth, as well as prejudice Defence's ability to obtain value-for-money outcomes while balancing capability and cost.

24. It is for this reason that I find the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47C and 47G(1)(b) of the FOI Act.

Third party consultation

25. Naval Group have been consulted as a third party to this FOI request. In response to this consultation, Naval Group objected to one paragraph of the document as it would disclose commercially sensitive information regarding Naval Group business to its competitors. I agree with this assessment.

Kira.Jorgensen Digitally signed by
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Kira Jorgensen
Accredited Decision Maker
Capability Acquisition and Sustainment Group

14 January 2019