



Australian Government
Department of Defence

Reference: R32886405

FOI 222/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Senator Rex Patrick under the *Freedom of Information Act 1982* (FOI Act), for access to:

'PLANS TO MOVE COLLINS SUBMARINE DOCKINGS

Description:

1. I seek access to all documents, emails, records of conversation etc. that discuss shifting full-cycle dockings from Adelaide to another location, including any correspondence with ASC.

2. I seek access to any document communicated to ASC or the Government that there is no plan to move Collins full-cycle dockings.

Excluding cabinet documents.'

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 16 documents as matching the description of the request.

4. The decision in relation to each document is detailed in a schedule of documents.

5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:

- a. partially release 9 documents in accordance with section 22 of the FOI Act, on the grounds that the deleted material is considered exempt under sections 33(a)(ii) [documents affecting defence of the Commonwealth], 47C [public interest conditional exemptions-deliberative processes] and 47G [public interest conditional exemptions-business] of the FOI Act; and
- b. refuse access to 7 documents of the request under 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 or on the grounds that the deleted material would reasonably be regarded as irrelevant to the request for access and under section 47C [public interest conditional exemptions-deliberative processes] of the FOI Act.

Material taken into account

7. 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 received from ASC.

Reasons for decision

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

8. 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.

9. 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.

10. Upon examination of the documents, I identified material contained within serials four and six which upon release ‘could reasonably be expected to’ expose the Australian Defence Force to hindrance or activities which would prejudice its effectiveness.

11. 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 – deliberative processes

12. I found that the identified documents contain material in respect of which a claim for exemption under subsection 47C(1) of the FOI Act is warranted.

13. Upon examination of the documents, I identified draft content of responses to media enquiries, material prepared for Cabinet consideration and discussions of the pricing basis of the scoping study.

14. 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....’. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

15. I have taken into account the Guidelines, noting that one consideration under section 47C is whether a document includes content of a specific type, namely deliberative matter (see paragraph 6.55) regardless of any harm that may result from disclosure. I have determined that all of the material contained in the documents is exempt under section 47C as it is deliberative.

16. I also considered the question of purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines issued by the Australian Information Commissioner that 'purely factual material' that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive;
- b. incidental administrative content;
- c. procedural or day-to-day content;
- d. the decision or conclusion reached at the end of the deliberative process; and
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

17. I have also taken into account that while purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to the provision of policy advice and elaborates its context or likely impact, it may potentially come within the deliberative document exemption.

18. In my view, the documents contain material about Defence's policy-forming processes, dealing with the merit of particular issues, and proposing options for consideration closely intertwined with factual information.

19. There is a risk, if the documents were released intact, that Defence would have options curtailed by the premature release of sensitive considerations, with a resultant detrimental impact on planning and implementation of future Defence capabilities.

20. Release of the deliberative matter contained in the documents would harm the smooth operation of Defence business including the ability for Defence to present and communicate frank preliminary advice at the highest levels to the Government. Taking the above into consideration, I have decided that documents are conditionally exempt under subsection 47C(1) of the FOI Act.

Sections 47G – Business affairs

21. Upon examination of the documents, I identified conditionally exempt commercially sensitive information the disclosure of which would place ASC at a commercial disadvantage through disclosure of its level of resources and risk mitigation strategies.

22. Section 47G of the FOI Act states:

A document is conditionally exempt if it discloses under this Act 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.*

23. 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.

24. The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. I am satisfied that the effect of disclosing the identified material could have an adverse effect on a company as disclosure of their capabilities and the way in which Defence assessed their submission could diminish the competitive nature of the business and could affect the profitability of their business operations.

25. 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 22 (where documents are being denied in full)

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.

Public interest considerations – sections 47C and 47G

27. 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”.

28. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines provided by the Australian Information Commissioner, 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. 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 advice, opinions, recommendations and matters currently being considered by the Department prior to a final decision being made, would not increase public participation in Government processes nor would it, in my view, increase scrutiny or discussion of Government activities.

29. There is also a strong public interest in not releasing information that would unreasonably affect a business. Given Defence’s strong links with industry, it is imperative that Defence be able collect and retain sensitive commercial information without fear that the material would be released without authorisation.

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 sections 47C and 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.

Third party consultation

32. I decided to consult with ASC regarding their information which was contained in the documents. In response to this consultation, ASC has objected to the release of their business. I agree with all of the objections.

Further Information

33. 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.

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group

16 March 2018