



Our reference: FOI 245/14/15



By email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 12 February 2015, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“...options papers created by the department in 2013-14 financial year regarding the proposed acquisition of a submarine fleet to replace the Collins class.”

Background

2. On 16 February 2015, I wrote to you to advise of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. On the same day, you agreed to proceed with your request, noting that a deposit was not required to be paid. I formally imposed the charges and referred your request for processing. Accordingly, the due date for a response to your request was calculated to be 17 March 2015.

3. On 10 March 2015, our office informed you that the decision maker had determined that there was a requirement to consult with a foreign government in accordance with section 15(7) [extension of processing period to consult foreign entity] of the FOI Act. As such, in accordance with section 15(8) of the FOI Act, the statutory timeframe was amended to 16 April 2015.

4. In the above mentioned email, I also sought your agreement to further extend the FOI deadline by 30 days, in accordance with section 15AA [extension of time with agreement] of the FOI Act. You kindly agreed to the requested extension, noting that the new due date was 16 May 2015.

5. On further review by the FOI decision maker, she found that consultation with a foreign government was not required. Taking this into account, I amended the deadline to remove the initial 30 day extension which reverted the due date to 16 April 2015.

6. 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

7. Ms Geraldine Gibson, Director, Europe, United Nations, Africa & Peacekeeping (EUNAP), International Policy Division was the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

8. Ms Gibson identified two documents as relevant to the scope of your request, being 'Ministerial Advice' (MA). Specifically, MA13-3365 (Document 1) and MA13-4168 (Document 2).

Decision

9. Ms Gibson decided to deny access to Document 1 on the grounds that it contains 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.

10. With regard to Document 2, Ms Gibson decided to release the identified document 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 material is exempt under sections 47 and 47F of the FOI Act.

Material taken into account

11. Ms Gibson 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 Defence officers with responsibility for matters relating to the documents which were sought.

Reasons for decision

Section 33 of the FOI Act

12. Where access has been denied under section 33 of the FOI Act, Ms Gibson considered the material would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth (section 33(a)(iii)) or would divulge information or matter communicated in confidence by or on behalf of a foreign government (section 33(b)).

13. The Guidelines provide that:

5.25 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...

5.30 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...

14. On examination of the documents Ms Gibson found that Document 1 contained information on negotiations of a sensitive nature between the Government of Australia, a foreign government and foreign commercial entities. The release of such information could reasonably be expected to cause damage to Australia's international relations.

15. Ms Gibson was also satisfied that Document 1 contains information officially communicated in confidence between a foreign government and the Defence Material Organisation (DMO). Information exchanged in confidence between the DMO and foreign governments is communicated and received under the implied understanding that the communication will be kept confidential. Ms Gibson was satisfied that if such information were released it would, or could reasonably be expected to, harm relations with the foreign government.

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

17. Taking the above into account, Ms Gibson found that Document 1 was exempt under section 33 of the FOI Act, specifically, subsections 33(a)(iii) and 33(b).

Section 47 of the FOI Act

18. On examination of the documents, Ms Gibson found that they both contained information of commercial value that may be considered exempt under section 47 of the FOI Act. The Guidelines provide that:

5.188 To be exempt under section 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 this information would, or could reasonably be expected to be, destroyed or diminished if it was disclosed.*

19. In assessing whether the information in Documents 1 and 2 had commercial value, Ms Gibson referred to the following factors on in Paragraph 5.189 of the Guidelines:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to other, to what extent that detracts from its intrinsic commercial value;*
- *whether the information confers a competitive advantage on the agency or the 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); and*
- *whether disclosing the information would reduce the value of this business operation or commercial activity (reflected perhaps in a lower share price).*

20. This request relates to the procurement of materiel in support of Australia’s Future Submarine Program and the documents identified include information on potential commercial partners for the Australian Government. Ms Gibson considered that certain information in Documents 1 and 2 has commercial value because it would reveal sensitive commercial information that could affect the value of a business operation. Disclosing such information could also allow another party to use the information in a way that could affect future negotiations with the Australian Government.

21. As such, Ms Gibson considered that some material in Documents 1 and 2 were exempt under section 47 of the FOI Act.

Section 47F of the FOI Act

22. 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.

23. Upon examination of the documents, Ms Gibson found that Documents 1 and 2 contained personal information, specifically, mobile telephone numbers and signatures of Department of Defence officials. In accordance with subsection 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, Ms Gibson 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 publicly available sources.

24. Taking into account those criteria, Ms Gibson decided that the disclosure of the identified personal information would constitute an unreasonable disclosure of personal information

belonging to persons other than you. Accordingly, Ms Gibson considered the material to be conditionally exempt under section 47F of the FOI Act.

25. Section 11A(5) of the FOI Act required 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.

Section 47F - public interest considerations

26. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Ms Gibson 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. While disclosure may promote some of the objects of the FOI Act, Ms Gibson did not consider it would increase public participation in government processes, nor would it increase scrutiny or discussion of government activities.

27. Ms Gibson noted that release of the information may be of some interest to you, it would 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 access to your own personal information. Further, she considered that the protection of an individual's right to privacy outweighs any public interest there may be in the release of this material.

28. Therefore, Ms Gibson decided that it would be contrary to the public interest to release the information considered exempt under section 47F(1) of the FOI Act.

Section 22 of the FOI Act

29. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document, consideration must be given to releasing the documents with the exempt material removed.

30. Ms Gibson considered the merits of releasing the document to which she had denied access, by removing the exempt material. Ms Gibson decided against this course of action in relation to Document 1 because deletion of the exempt material would necessarily render the document meaningless and of little or no value to the applicant.

Payment of Charges

31. Upon completion of your request, after deducting the free decision making time, the actual amount for processing matched the original assessment. Accordingly you are required to pay the [REDACTED] in order to finalise your request. Please find attached at Enclosure 1 a Payment Authorisation Form for the balance. Once you have completed the form please return it to foi@defence.gov.au.

Rights of review

32. 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 2.

FOI Disclosure Log

33. 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.

Further advice

34. The FOI Act may be accessed online at: <http://www.comlaw.gov.au/Details/C2015C00013>.

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

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

16 April 2015

Enclosures:

1. Freedom of Information Payment Authorisation Form
2. Fact Sheet: Freedom of Information – Your Review Rights