



**Australian Government**  
**Department of Defence**

Reference: BM4624792

**FOI 291/18/19 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:

*“the Strategic Partnering Agreement (SPA) for the SEA 1000 Future Submarine Program”*

**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] on the grounds that the deleted material is considered exempt under section 33(a)(iii) and 33(b) [documents affecting international relations] and section 47(1)(b) [documents disclosing trade secrets or commercially valuable information].

**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. consultation with the affected third party; and
  - f. advice received from departmental officers.

**Third party consultation**

9. I decided to consult with Naval Group as the other party to the Strategic Partnering Agreement. In response to this consultation, Naval Group objected to the release of the document in full as it would disclose commercially sensitive information regarding Naval Groups commercial arrangements to its competitors and prejudice the competitive commercial activities of Naval Group. While I generally agree with the objection, as the

Decision Maker, I believe there is some information that is in the public interest to disclose, including information that has previously been disclosed.

10. The department is required to advise the third party of my decision. Documents will be provided when all review rights have been exercised.

### Reasons for decision

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

6. Subparagraph 33(a)(iii) and (b) states:

*A document is an exempt document if disclosure of the document under this Act:*

*(a) would, or could reasonably be expected to, cause damage to:*

*(iii) the international relations of the Commonwealth; or*

*(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth..*

7. With regard to the terms ‘could reasonably be expected to’ and ‘damage; the Guidelines state:

*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. With regard to the phrase ‘international relations’ the Guidelines state:

*5.38 The disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in the future.*

9. With regard to ‘information communicated in confidence’, the Guidelines state:

*5.44 An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the*

*circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated.*

10. Upon examination of the document, I identified material which upon release ‘could reasonably be expected to, cause damage to the international relations of the Commonwealth by making public information communicated in confidence and sensitive to Naval Group and its commercial and business affairs.

11. Naval Group is a strategic asset of the French Government, therefore any breach of commercial confidence would, or could reasonably be expected to result in broader flow on effect, and cause damage to the international relations of the Commonwealth at a Government to Government level.

#### **Section 47 – Documents disclosing trade secrets or commercially valuable information**

12. Subparagraph 47(1)(b) of the FOI Act states:

- (1) A document is an exempt document if its disclosure under this Act would disclose:*
- (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.*

13. The Guidelines state that to be exempt under s47(1)(b), a document must satisfy two criteria:

- (a) the document must contain information that has a commercial value either to an agency or to another person or body, and*
- (b) the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

14. Upon examination of the document, I identified material of commercial value to Naval Group that would be, or could reasonably be expected to be destroyed or diminished if it were disclosed.

15. The Strategic Partnering Agreement represents a unique commercial arrangement between Naval Group and the Commonwealth specific to the Future Submarine Program, therefore containing information that is of high commercial value to Naval Group.

16. Disclosure of this information may prejudice the competitiveness of Naval Group in future negotiations with potential customers resulting in the diminished or destroyed commercial value of Naval Group.

17. Furthermore, Defence is the largest procurement agency in the Commonwealth and is responsible for some of Australia’s most complex procurement activities. Defence engages with industry to deliver value for money procurement outcomes in order to support departmental and Australian Defence Force capability.

18. The Future Submarine Program is the largest Defence acquisition program in Australia’s history. It would be reasonable to expect that disclosure of information of a high commercial value within the Strategic Partnering Agreement, would prejudice the future supply of information to the Commonwealth diminishing the Commonwealth’s ability to ensure value-for-money procurement outcomes for Defence.

**Further Information**

19. The Strategic Partnering Agreement is a large document. Noting I have decided the majority of the document is exempt under the FOI Act, only those pages where material is considered suitable for disclosure will be provided.

**Kira.Jorgensen** Digitally signed by Kira.Jorgensen  
Date: 2019.04.05 13:41:13 +11'00'

Accredited Decision Maker  
Capability Acquisition and Sustainment Group

5 April 2019