



Australian Government
Department of Defence

Reference: Objective ID: R26095745

FOI 294/15/16 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: MOTS Combat System RFI Evaluation Methodology (final version only)
Item 2: MOTS Combat System RFI Comparison Report (final version only)”*

excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, exclude duplicates of documents

FOI decision maker

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

Documents identified

3. I identified two documents as matching the description of the request. I note that the scope of the request asks for the ‘final version’ of each document. I have been advised that Item 1 did not progress to signature as some of the information from Item 1 was incorporated into a new report. I have been advised that this is the latest version of the document held by the Department. As such, I have considered this the final version of the document.

4. I have added an FOI reference number and Item number to each of the documents.

Decision

5. I have decided to:

- a. release Item 1 in full; and
- b. partially release Item 2, on the grounds that the deleted material is considered exempt under section 47G [public interest conditional exemptions-business] and/or section 33(a)(ii) [Documents affecting defence of the Commonwealth] and/or 33(a)(iii) [Documents affecting the international relations of the Commonwealth] of the FOI Act.

Material taken into account

6. 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 Future Submarine Program Office.

Reasons for decision

Section 22 – Edited copies with exempt or irrelevant matter deleted

7. Section 22 of the FOI Act provides that if an agency or Minister decides to:

(i) refuse access to an exempt document; or

(ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access;

and it is reasonably practicable to prepare a copy of the document modified by deletions, the agency or Minister must give the applicant access to the edited copy.

8. Considering all of the above, I decided that it was reasonably practicable to remove the irrelevant material, as stated in the scope of the request and release the document in that form.

Exemptions under FOI Act

Section 47G - Business

9. Upon examination of the documents, I found Item 2 contained Defence's assessment of each of the responses to the SEA1000 Combat System Request for Information (RFI). The document assesses the capabilities offered by each of the respondents in direct comparison against the capabilities offered by the Collins Reference Model.

10. Section 47G of the FOI Act states:

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...

11. 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.

12. I am satisfied that the expected effect of disclosing material identified as exempt under section 47G could have an adverse effect on each of the respondents as disclosure of their capabilities and how Defence assessed their submission could diminish their competitive nature and could affect the profitability of their business operations.

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

Sections 47G - Public interest considerations

14. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource and release of this information may increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act). It would also promote effective oversight of public expenditure.

15. Paragraph 6.29 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I found particularly relevant to this request are that release of this information could reasonably be expected to prejudice the agency's ability to obtain similar information in the future and harm the interests of a group of individuals, in this case the respondents.

16. As outlined above, releasing commercial-in-confidence information of the respondents is likely to harm their commercial interests, which in turn is likely to make future respondents more reluctant to provide the necessary information to Defence. This would mean that Defence would have less detail on procurement options. It will therefore be more difficult for Defence to evaluate the market to achieve the best value for money for the Commonwealth.

17. 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 section 47G of the FOI Act.

18. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

Sections 33(a)(ii) and 33(a)(iii)

19. Section 33 [Documents affecting national security, defence or international relations] of the FOI Act states:

33 Documents affecting national security, defence or international relations
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:
(i) the security of the Commonwealth;
(ii) the defence of the Commonwealth; or
(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 organization 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.

20. Section 33 of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to cause damage to the security or defence of the Commonwealth. In regards to the terms, 'could reasonably be expected to' and 'damage', the Guidelines specify:

5.13 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.

5.14 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.

5.25 '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. In determining whether damage was 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.

21. The Guidelines provides that *"The Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term includes:*

- *Meeting Australia's international obligations*
- *Ensuring proper conduct of international defence relations*
- *Deterring and preventing foreign incursions into Australian territory*
- *Protecting the Defence Force from hindrance or activities which would prejudice its effectiveness."*

22. I found that Item 2 contained information detailing Defence's submarine capabilities that, if released, could allow those hostile to the Commonwealth's interests to take appropriate counter measures and hinder Defence operations. Hindrance of these activities would prejudice Defence in its effectiveness to undertake military operations required by the Government and to be ready for future tasks as part of the Government's overall national security strategy. An understanding of Defence's submarine capabilities would allow adversaries to target any weaknesses and adversely affect Defence's ability to defend the Commonwealth. For this reason, I have removed material under subsection 33(a)(ii) of the FOI Act.

23. With regards to international relations, the Guidelines provides:

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. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between government agencies...

5.32 For example, 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 future. On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.

24. In considering the above, I found the document contained information regarding the capability of foreign commercial entities and details of our allied activities with foreign defence forces. The release of such information could reasonably be expected to cause damage to Australia's international relations.

25. 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.

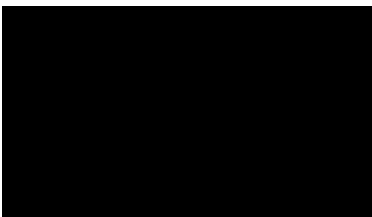
26. Taking the above into account, I found material in Item 2 to be exempt under section 33(a)(ii) and 33(a)(iii) of the FOI Act.

Further Information

27. The document identified as matching Item 1 is the final version of that particular document held by the Department. The document did not progress to signing, as evident on page 2 and remains incomplete, as evident in paragraph 3.2.3. I have been advised that a new document was created that captured some of the material detailed in Item 1. I am confident that these documents are two individual documents rather than different versions of the same document. The Comparison Report (Item 2) details both documents separately in the list of references. I have also been advised that some of the methodologies suggested in Item 1 – Evaluation Methodology Report – were not used during the RFI process.

28. 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.

Yours sincerely



Melissa Davidson
Accredited Decision Maker
Associate Secretary Group

8 June 2016