



FOI 361/15/16 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 briefings and talking points prepared, respectfully, for the Minister of Defence, Secretary of the Department of Defence and Chief of the Defence Force in relation to the lease of Darwin port, since 2013.

Item 2 Correspondence between any Defence DEPSEC/Military Equivalent and above and the Northern Territory government in relation to the lease of Darwin port, since 2013.

Item 3 Formal correspondence with and briefings prepared for other agencies in relation to the lease of Darwin port since 2013.

Item 4 briefing material developed for Australian representatives attending foreign meetings or meetings with foreign officials in relation to the Darwin port lease, since 2013.

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

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 26 documents as matching the description of the request.

Decision

4. I have decided to:

- a. release four documents in full;
- b. deny access to one document under section 34 of the FOI Act;
- c. partially release the 21 remaining documents in accordance with section 22(1)(a)(i) [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], 34 [cabinet documents], 47 [documents disclosing trade secrets or commercially valuable information], 47B [public interest conditional exemptions - Commonwealth-State relations etc.] and/or 47G [public interest conditional exemptions – business] of the FOI Act;

- d. irrelevant material as referred to in the scope of the request has been removed in accordance with section 22(1)(a)(ii) 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 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. response to Commonwealth-State consultation; and
 - f. advice from the Department of Prime Minister and Cabinet.

Reasons for decision

Exemptions

Section 33 of the FOI Act

6. Upon examination of the documents I identified sensitive information relating to Commonwealth's security, in particular security assessments. The guidelines state, at 5.26 (a) that the term 'security of the Commonwealth' broadly refers to the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests.

7. I consider the disclosure of this material would, or could reasonably be expected to, cause damage to the security of the Commonwealth and is therefore considered exempt under section 33(a)(i) of the FOI Act.

8. I found that some of the documents contained information relating to Defence capability and I consider that disclosure of this material would, or could reasonably be expected to, cause damage to the defence of the Commonwealth and is therefore considered exempt under section 33(a)(ii) of the FOI Act.

9. I have also found that the some of the identified documents contain information, which, if released, could reasonably be expected to damage the international relations of the Commonwealth. If the material was to be released without authority it could diminish the confidence that country has in Australia as the recipient of confidential information and therefore limit the Commonwealth's ability to receive information from this country in the future. Accordingly, the material is exempt under section 33(a)(iii) of the FOI Act.

10. Finally, I also found that the documents contained information communicated in confidence to Defence by or on behalf of an authority of a foreign government. If the material was released without the express agreement of the foreign government it could harm the positive working relationship that Australia has with them. I am satisfied that the material is exempt under section 33(b) of the FOI Act.

11. When considering the material I considered to be exempt under the various subsections of section 33, I took into account the guidelines, specifically paragraphs 5.25 and 5.25 which consider the terms 'reasonably expected' and 'damage'.

Section 34 of the FOI Act

12. The guidelines relating to section 34 of the FOI Act state that *Agencies should refer to the Cabinet Handbook issued by Department of Prime Minister and Cabinet (PM&C) for guidance about Cabinet processes and the underlying principles of the Cabinet system. The Handbook states that agencies must consult the PM&C on any Cabinet-related material identified as being within the scope of an FOI request.*

13. One of the identified documents contains material that would likely be considered exempt under section 34 of the FOI Act. The FOI Directorate undertook the required consultation with PM&C and this decision is based on the response received from PM&C.

Section 47 – Documents disclosing trade secrets or commercially valuable information

14. I found that some of the identified documents contained information of commercial value that may be considered exempt under section 47 of the FOI Act. The guidelines provide that the information must satisfy two criteria:

- *The document must contain information that has a commercial value 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.*

15. I also had regard to paragraph 5.189 of the guidelines, which outlines factors which may assist in deciding whether information has commercial value:

- *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).*

16. The identified information relates to a lease, and the subject of that lease; being the Port of Darwin, is uncommon and its value is intrinsically related to negotiated terms. I am satisfied that the information has commercial value consistent with the guidelines. I consider that if this material was released it would, or could reasonably be expected to, destroy or diminish the commercial value.

Public interest conditional exemptions

Section 47B – Commonwealth- State relations

17. I found that a number of documents contained information that was communication, in confidence, between Defence and the Northern Territory Government (NTG).

18. In deciding whether section 47B(a) applied, I considered whether Defence has, and could be expected to maintain, a working relationship with the NTG. I am satisfied that there is a Commonwealth-State relationship that could be in jeopardy if material were to be released without the explicit agreement of the State. Accordingly, I considered it necessary to consult with the NTG on the documents in the form I proposed to release them.

19. Taking into account, that the relationship at hand may be considered to be continuing I considered that disclosure of some of the material contained in the documents would cause damage to the Commonwealth-State relations if it were released and the material is therefore conditionally exempt under section 47B of the FOI Act.

Section 47G - Public interest considerations

20. In reviewing the documents I found that some of the documents contained information relating to a proposal for consideration by the Foreign Investment Review Board.

21. 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.

22. I am satisfied that the expected effect of disclosing material identified as exempt under section 47G would have an adverse effect on the respondent as disclosure of their business information could diminish their competitiveness and could affect their business operations.

23. I have decided that the specific information is conditionally exempt under section 47G of the FOI Act.

Public interest considerations – Sections 47B and 47G of the FOI Act

24. Section 11A(5) of the FOI Act provides that, if a documents 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’.

25. In assessing whether disclosure is on balance, contrary to the public interest, I considered the range of factors set out in section 11B(3) of the FOI Act, which favours access to a document. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, as information held by the government is a national resource. However, the disclosure of the specific conditionally exempt material would not increase public participation in the Defence process, now would it increase scrutiny or discussion of Defence activities.

26. While I consider that release of the material may be of some interest to the applicant, disclosure of the specific conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way. Additionally, I do not consider that disclosure of the material would promote oversight of public expenditure.

27. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making this decision.

28. In finalising this decision, I took into account the response to formal consultation from the Northern Territory Government and consider that maintaining the integrity of the processes in place between Defence and a State authority far outweighs any interest that may be served from the disclosure of the conditionally exempt material. I further note that the guidelines, at paragraph 6.39, set out examples of the damage the disclosure of the document may cause. Of significance to this matter I found the following factors:

- *adversely affecting the administration of a continuing Commonwealth-State project*
- *adversely affecting the continued level of trust or co-operation in existing inter-office relationships*
- *impairing or prejudicing the flow of information to and from the Commonwealth*

29. In regards to the business information contained in the documents that I have deemed conditionally exempt, I found it of particular relevance that if this material was to be released, it may prejudice the agency's ability to obtain similar information in the future.

30. After weighing up all of the above, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the conditionally exempt material in the documents. Accordingly, I have decided that the specific material is exempt under sections 47B and/or section 47G of the FOI Act.

Further Information

31. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.



Glenna Parker
Accredited Decision Maker
Strategic Policy & Intelligence Group

29 August 2016