



Reference: AF33466408

FOI 373/17/18 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:

“In 2017 former Senator Nick Xenophon placed a Question on Notice in the Senate (number 531) relating to the basing of future submarines on the East Coast of Australia that stated inter alia: in relation to the SEA 1000 project:

- 1. Noting that the project involves the construction of 12 submarines, is the Royal Australian Navy considering basing some of the submarines on the East Coast; if so, in which East Coast city or cities.*
- 2. What work (including contracted work or studies) has been carried out in respect of future submarine basing, and can the nature, extent and scope of the work be provided.”*

Defence stated that:

- “1. Defence is considering the operational, workforce, training and industry implications and requirements of an increased submarine force structure.*
- 2. Defence previously conducted a basing study in 2011 that considered the viability of a range of ports around Australia for submarine basing.*

This request seeks access to the following:

Item 1: The study referred to in Defence’s answer to question 2, insofar as it goes to base locations, workforce, industry and training.

Item 2: The primary documents since the commencement of the Future Submarine Competitive Evaluation Process that relates to the basing of the submarines on the East Coast and workforce, industry and training issues associated with that.

Excluding emails and other communications leading to the creation of key documents from the request so that only the primary documents are covered.”

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 four 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 three documents of the request in accordance with section 22 [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], 47C [public interest conditional exemptions-deliberative processes], 47F [public interest conditional exemptions-personal privacy] and 47G [public interest conditional exemptions-business] of the FOI Act; and
 - b. deny access to one document in accordance with section 22 [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 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; and
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines);
 - e. advice received from the Submarines Branch, Capability Acquisition and Sustainment Group; and
 - f. advice received from third parties.

Reasons for decision

Section 33 Documents affecting national security, defence or international relations

8. I considered the documents contained material that is exempt under Section 33(a)(i) of the FOI Act, as it could reasonably be expected to cause damage to the security of the Commonwealth.

9. In order for the exemption to apply, it must be shown that disclosure 'would, or could reasonably be expected to' cause damage.

10. The Guidelines provide that the term 'reasonably expected' in the context of section 33(a)(i) requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27 the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning. A mere allegation or mere possibility of damage will be insufficient for the purposes of the exemption. 'Damage' is not confined to loss or damage in monetary terms and the relevant damage may be of an intangible nature.

11. The material that I have decided to exempt relates to submarine scheduling over a specified period, submarine capability limitations and information relating to tactics and procedures by the Royal Australian Navy in the operation of submarines. I have formed the view that release of this material would pose security implications as it would provide non-allied nations with an insight into Defence's capability.

12. In evaluating potential harmful effects of disclosing information in the document that would affect Australia's security, I have also taken into account the intelligence technique known as the 'mosaic theory'. This theory holds that individual pieces of information, when combined with information already in the public domain, can generate a composite 'a mosaic', which could lead to an adversary applying this information and therefore undermining Defence's capability and effectiveness.

13. Taking into account the above reasons, I have decided the release of this material could reasonably be expected to cause damage to the security of the Commonwealth. Accordingly, I have decided to exempt the material under section 33(a)(i) of the FOI Act.

Section 47C – Deliberative processes

14. Section 47C(1)(a) of the FOI Act states:

“a document is conditionally exempt if 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...”

15. I have also taken into account the Guidelines, noting that one consideration in the exemption under section 47C is whether the document includes content of a deliberative matter. I found that the identified documents contain material in respect of which a claim for exemption under section 47C of the FOI Act is warranted. Upon examination of the documents, I identified material prepared for deliberation by Defence that will also inform future Cabinet considerations. This includes advice and recommendations that have been obtained, prepared and recorded relating to the ongoing work with dispositioning and basing of the future submarine force. No decisions have yet been made in relation to the advice and proposals made through these documents.

16. I then considered the question of whether the information is purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines, that 'purely factual material' would be regarded as deliberative matter and 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 strategic considerations and the proposal options that are closely intertwined with factual information.

19. If the documents were released, Defence could have options compromised 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 operation of Defence business, including the ability for Defence to present and communicate frank preliminary advice to the Government.

21. Taking the above into consideration, I have decided that the documents are conditionally exempt under section 47C of the FOI Act.

22. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

23. My public interest considerations are detailed in paragraph 34.

Section 47F - Personal privacy

24. Upon examination of the documents, I identified information, specifically the name of an individual other than the applicant.

25. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors:

- 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 document;
- c. the availability of the information from publicly accessible sources; and
- d. the effect the release of the personal information could reasonably have on the individual.

26. Against the criteria, I found:

- a. the specific personal information listed is not well known;
- b. the individuals whose personal information is contained in the document are not widely known to be associated with the matters dealt in the document; and
- c. the information is not readily available from publicly accessible sources.

27. Taking into account the above factors, I consider that the release of information of the individual would be an unreasonable disclosure of personal information and is conditionally exempt under section 47F of the FOI Act.

28. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

29. My public interest considerations are detailed in paragraph 34.

Section 47G - Business

30. Upon examination of the documents, I identified information of a third party. Under section 47G of the FOI Act, a document is conditionally exempt if it discloses 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.’*

31. I note that the use of the word ‘could’ in this provision requires no more than a degree of reasonableness to be applied in deciding whether disclosure would cause the consequences

specified. The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself.

32. Upon examination of the document, I identified information relating to Power Initiatives processes and methodologies, which are of sensitive nature. Disclosure of the identified material could diminish the competitive nature and affect the profitability of its business. In addition, it would show potential competitors its processes, allowing other businesses to potentially use this information in their own negotiations in the future.

33. In light of the above, I have decided that the specified material identified is conditionally exempt under section 47G of the FOI Act.

Sections 47C, 47F and 47G - Public interest considerations

34. I have found that the identified documents contain material that is conditionally exempt under sections 47C, 47F and 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'.

35. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines, together with a range of factors that favour access to a document set out in section 11B(3) 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.

36. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request are that release of this information could reasonably be expected to prejudice:

- a. security, law enforcement, public health or public safety;
- b. the protection of an individual's right to privacy;
- c. an agency's ability to obtain similar information in the future; and
- d. the competitive commercial activities of an agency.

37. I considered that all four factors weighed heavily against disclosure at this time. 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.

38. I consider the release of personal information could reasonably be expected to result in the decline in confidence in Defence's ability to maintain the privacy of third parties. I consider that the public interest is better served in this case by maintaining the personal privacy of the individual named.

39. There is also a public interest in not releasing information that would unreasonably affect a business. Defence maintains strong links with industry and it is imperative that Defence is able to collect and retain commercially sensitive information. Release of this information would lessen confidence in Defence's ability to protect information and restrict the future flow of such information. If the information was made public it could reasonably cause an adverse effect on Defence's ability to conduct and manage working relationships with its contractors in the future.

40. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47C, 47F and 47G of the FOI Act.

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


Section 22 (where documents are being denied in full)

1. 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 document to the applicant with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

Further Information

42. 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.

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CRL Stephenson

Captain, Royal Australian Navy
Accredited Decision Maker
Navy Group