



Australian Government
Department of Defence

Freedom of Information
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CANBERRA BC ACT 2610
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FOI@defence.gov.au

Our reference: FOI 399/14/15



By email: [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

I refer to your email, dated 10 June 2015, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

"Specifically I am seeking:

- 1. The itinerary, and all briefing notes relevant to the itinerary, relating to Mr King's November/December 2014 trip to Europe.*
- 2. All documents, including emails, and/or memos and/or briefing notes and/or evaluations and/or communications provided to former DMO CEO Warren King relating to the exclusion and/or potential exclusion of Sweden as a participant and/or potential participant in any "competitive evaluation" or tender process.*
- 3. All documents, including emails, and/or memos and/or briefing notes and/or evaluations and/or communications, relating to issues or potential issues, and/or concerns about Swedish intellectual property contained within Japanese submarines and its perceived or actual impact on any tender and/or competitive evaluation process."*

Background

On 17 July 2015 I wrote to you to advise you of the revised preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. You provided the receipt for your payment of the required deposit on 28 July 2015. As such, the statutory deadline for processing your request is 27 August 2015.

On 26 August 2015 you agreed to revise the scope of your request to remove the biographies of foreign officials from the documents.

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

Ms Linda McCann, Director, Freedom of Information, Estate and Infrastructure Group, is the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

Ms McCann has identified eight documents as matching the description of items 1 and 2 of your request. No documents relating to item 3 of your request were found.

The decision in relation to each document is detailed in a schedule of documents, which will be provided when the documents are released (refer to below for further information).

When documents are released, you will note that for ease of reference and for the purpose of processing this request, the decision maker has added FOI item and serial numbers to each of the documents, which corresponds with the schedule.

The term "overseas shipbuilder" for the Future Submarine (mentioned on pages 61 and 64 of these documents) refers to an "experienced overseas submarine designer" as stated in earlier text on the same pages. It is not intended to mean or imply that construction of the Future Submarine will necessarily take place overseas. Rather it recognises that Australia will need to work with an international partner with current and operating submarine design and build experience to develop and deliver the Future Submarine.

Decision

Ms McCann has decided to:

- a. release in full item 1, serials 1 and 2
- b. partially release item 1, serials 3-6 with deletions made in accordance with subsection 22(1) [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 47F [public interest conditional exemptions-personal privacy], and/or section 47C [public interest conditional exemptions – deliberative processes] and/or section 47D [public interest conditional exemptions – financial or property interests of the Commonwealth or Norfolk Island];
- c. partially release item 1, serial 7 with deletions made in accordance with subsection 22(1) [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 47F [public interest conditional exemptions-personal privacy] and section 34 [Cabinet document]; and
- d. refuse access to item 2, serial 1 of the request under section 34 [Cabinet decisions] of the FOI Act.

Material taken into account

In making her decision, Ms McCann 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. the Principles on open public sector information issued by the Information Commissioner;
- f. advice received from the Department of Prime Minister and Cabinet and the Department of Foreign Affairs and Trade; and
- g. advice received from officers within the department.

Reasons for decision

Section 34 – Cabinet documents

Ms McCann was advised by the author of item 2 that the document was prepared for the dominant purpose of briefing the Minister for Defence on a Cabinet submission. The release of this document would make public much of the Cabinet's continuing deliberations in relation to the government consideration of its options to acquire new submarines. Item 1, serial 7 contains information that would reveal a Cabinet decision that has not been officially disclosed.

A strong Cabinet system is fundamental to well informed decision making and policy development by the Government. The convention of the collective responsibility of Ministers for government decisions is central to the Cabinet system of government. Cabinet is a forum in which Ministers are able to discuss proposals, options and views with complete freedom while working towards a collective position. This requires that Cabinet deliberations and decisions are treated confidentially.

Based on the above, Ms McCann was satisfied that the requirements of section 34 had been met.

Subsection 47C – deliberative processes

Under section 47C of the FOI Act, a document is conditionally exempt if its disclosure would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberations that have taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

Item 1, serial 5 contains factors being weighed by the Government in evaluating its various submarine acquisition options. Item 1, serial 6 contains unsolicited proposals from companies that are seeking to be involved in the Government's submarine acquisition process. These documents contain advice from Defence subject matter experts on what factors the Government may wish to consider in evaluating its submarine acquisition options, as well as the advice and opinion of the companies on what options they can provide. The information is not operational or purely factual; instead it includes opinion, judgements and recommendations of a nature beyond mere administrative or procedural content. As such, Ms McCann found that the information contained in item 1, serial 5 and 6 is deliberative material.

The government has not made any decision on what submarine acquisition option it will pursue. The documents were created in order to assist the Minister for Defence and the Government evaluate what submarine acquisition options were available to them and what further information they may need to seek from interested companies in order to evaluate their options. Given this, Ms

McCann is satisfied that these documents contain deliberative material and have been produced in the course of a deliberative process that is continuing.

Section 47D – financial or property interests of the Commonwealth or Norfolk Island

Section 47D of the FOI Act provides that a document is conditionally exempt from disclosure requirements if disclosure 'would have a substantial adverse effect on the financial or property interests of the Commonwealth ... or of an agency'.

On examining item 1, serial 6, Ms McCann found that the document contained commercial-in-confidence material from companies seeking to be involved in Australia's acquisition of submarines. Release of this information may jeopardise Defence's long term relationship with these companies, which in turn could impact on future supply of contracted services to Defence and value of Commonwealth property.

Furthermore, the information also discloses the sorts of information/criteria that the companies believe would be relevant to Defence in assessing its submarine acquisition options. Given the long term relationship Defence has with many of these companies, it would not be unreasonable to assume that the companies drew on their knowledge and experience about what factors/criteria Defence used in assessing tenders to develop their unsolicited proposals. Releasing this information would likely provide information on some criteria Defence and Government would use in assessing their submarine acquisition options. This would not serve the financial interests of the Commonwealth as requests for tender and future contract negotiations could be unduly influenced. This in turn would not be in the public interest as there is an expectation that Commonwealth agencies will seek on behalf of the Australian people best value for money for contracts entered into.

Given that, Ms McCann found that the release of the information would have an adverse effect on the financial interests of the Commonwealth in that it may prejudice the ability of the Commonwealth to pursue its commercial objectives. Accordingly, Ms McCann was satisfied that the information was exempt under section 47D.

Section 47F – Personal privacy

Item 1, serials 1- 2 contain personal mobile numbers. Item 1, serial 3 contains personal passport numbers. Item 1, serial 4 contains personal signatures, employee identification numbers and personal information. Personal mobile numbers, passport numbers, signatures, employee identification and personal information could be used to reasonably ascertain the identity of an individual and therefore satisfies the definition of personal information in section 4 of the FOI Act.

To determine whether the disclosure of the identified personal information would be unreasonable, Ms McCann had regard to the criteria specified in section 47F(2) of the FOI Act:

- a. the extent to which the information is well known
- b. whether the persons to whom the information relates are 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.

Against these three criteria, she found the specific personal information listed is not well known and the information is not readily available from publicly accessible sources.

Ms McCann considered the release of these people's personal mobile numbers, passport numbers, signatures, employee identification and personal information to be an unreasonable disclosure of personal information and therefore conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations – for section 47C, 47D and 47F.

Subsection 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest. The Guidelines state (at 6.8-6.9):

... The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered ...

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies, based on the particular facts of the matter at the time the decision is made.

As sections 47C, 47D and 47F are conditional exemptions, in determining whether to release the documents, Ms McCann considered the Guidelines, together with a range of factors that favour access to a document set out in section 11B(3) [public interest exemptions - factors favouring access] of the FOI Act.

Ms McCann considered the following relevant factors favour access to the requested document. She noted that the disclosure may promote the objects of the FOI Act, as information held by the government is a national resource. She also acknowledged that while the acquisition of submarines is a matter of public importance, release of the information contain in item 1, serials 5 and 6 at this stage would not increase public participation in Government processes nor would it increase scrutiny or discussion of Government activities at this stage.

Instead, disclosure of the information in the documents would not only reveal sensitive information in relation to Defence's future direction, but also the factors and considerations being used to assess the Government's submarine options. As the acquisition of submarines is still a deliberative process, release of advice and opinion in relation to it would be releasing information that does not necessarily reflect the views of Defence or Government.

Furthermore Ms McCann does not consider that it is in the public interest for Defence to disclose sensitive proprietary information of companies or organisations, as this may adversely affect their lawful business and commercial affairs and could reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

While Ms McCann accepts that there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner and allocates resources effectively, efficiently and with financial accountability, there is also a public interest in maintaining the confidentiality of

some material. Protecting the financial interests of the Commonwealth, at this stage of the process, outweighs any premature release.

The oversight of this public expenditure will be covered adequately in information provided to the Parliament and its subsequent scrutiny once an acquisition decision has been made.

With regards to the section 47F redactions, Ms McCann considered that the public interest in promoting the objects of the Act have been satisfied as, in her opinion, merely removing employee identifiers, mobile phone numbers, personal information of persons from the document does not detract from public disclosure of government-held information. Ms McCann noted that the release of this material may be of some interest to you; however, it would not inform public debate on this matter of public importance in any meaningful way. Furthermore, Ms McCann considered that the protection of an individual's right to privacy outweighs any public interest there may be in the release of this material.

Section 24A – [Documents cannot be found, do not exist or have not been received]

Section 24A states that:

- (1) An agency or Minister may refuse a request for access to a document if:*
- (a) all reasonable steps have been taken to find the document; and*
 - (b) the agency or Minister is satisfied that the document:*
 - (i) is in the agency's or Minister's possession but cannot be found; or*
 - (ii) does not exist*

Ms McCann was advised by the subject matter experts within Defence responsible for briefing senior Defence officials on submarine acquisition options that no documents matching the scope of item 3 of your request exist.

Notwithstanding this, this area also undertook comprehensive electronic searches of Objective (Defence's record management system) and advised that no documents matching the scope of item 3 of your request were found.

Accordingly, Ms McCann has decided to refuse access to the requested documents under s24A [Documents cannot be found, do not exist or have not been received] of the FOI Act.

Payment of Charges

In order to finalise your request, you are required to pay the remaining [REDACTED] Please find attached at Enclosure 2 a Payment Authorisation Form for the balance for you to complete and return.

Declassification of documents

A number of the documents matching the scope of this request were classified. The decision maker has declassified the versions of the documents that are approved for release.

FOI Disclosure Log

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 publishes identified

documents relating to requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Your Review Rights

Internal Review

Under the provisions of section 54 of the FOI Act, you are entitled to request a review of this decision. You must request a review, in writing, within 30 days of the date of this letter, or the date you receive the documents. Requests can be sent to:

Email: FOIReview@defence.gov.au
 Fax: 02 626 62112
 Post: Freedom of Information Directorate - Reviews
 Department of Defence
 CP1-6-029
 PO Box 7910
 CANBERRA BC ACT 2610

Australian Information Commissioner

Under the provisions of section 54 of the FOI Act, you are also entitled to request an external review of this decision by the Australian Information Commissioner. You have 60 days to lodge such a request, using one of the contact methods below:

Email: enquiries@oaic.gov.au
 Phone: 1300 363 992
 Fax: 02 9284 9666
 Post: GPO Box 2999
 Canberra ACT 2601

Complaints

You may complain to Defence, the Information Commissioner or the Commonwealth Ombudsman about an action taken by Defence in the exercise of its power or the performance of its functions under the FOI Act. There is no fee for making a complaint. Should you wish to complain to the Department of Defence, your complaint can be addressed to Mr Tony Corcoran using the contact details below:

Email: Tony.corcoran@defence.gov.au
 Post: Tony Corcoran
 Assistant Secretary Information Management and Access Branch
 CP1-6-14
 PO Box 7911
 CANBERRA BC ACT 2610

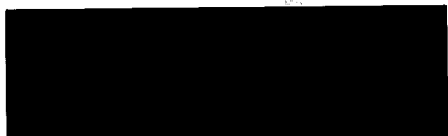
Contact details for the Commonwealth Ombudsman are below:

Phone: 1300 362 072)
 Fax: 02 6276 0123
 Post: Commonwealth Ombudsman
 GPO Box 442
 CANBERRA ACT 2601

Contact details for the Information Commissioner are above.

Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Michelle Rueckert
Assistant Director

27 August 2015

Enclosures:

1. Schedule of documents
2. Freedom of Information Payment Authorisation Form