



Reference: AF33867704

FOI 445/17/18 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:

“...2002 The Department of Defence entered I to an agreement with the Towofold Bay Native Tiltle Group. An ILUA Agreement was undertaken with the assistance of NSW Aboriginal Lands Council (NTRB) Native Title Representative Body) at the time. It is understood, and alledged that compensation may have also been involved. This FOI is requesting any documentation or payment records that could help clarify the compensation arrangement that may also alledgedly taken place.

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, excluding duplicates of documents, and documents sent to and from you. Furthermore, Defence only considers final versions of documents...”

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 Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to partially release four documents in accordance with section 22 of the FOI Act, on the grounds that the deleted material is considered exempt under sections 47E and/or 47G 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 document 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. Advice provided by the Director of Property Acquisition and Land Access, Property Management Branch, Infrastructure Division, Estate and Infrastructure Group; and
- f. Third party consultation.

Reasons for decision

Section 47E(d) – certain operations of agencies

8. I found that parts of the identified documents contain material in respect of which a claim for exemption under section 47E(d) of the FOI Act may be warranted. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

9. Section 47E(d) of the FOI Act states:

‘A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.’

10. Where access has been denied to information under section 47E(d) of the FOI Act, I considered that the material could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

11. Upon examination of the documents, I identified third party information relating to an external agency. The information, if released, could affect the integrity and efficacy of the agency’s internal processes and procedures. If the information was made publically available it could reasonably cause an adverse effect on the agency’s ability to conduct, manage and perform its functions and working relationships.

12. Taking the above into account, I consider that the identified documents contain information which is conditionally exempt under section 47E(d) of the FOI Act.

13. 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’.

Section 47G - Business

14. Where access has been denied under section 47G of the FOI Act, I considered that the material would, or could reasonably be expected to have an adverse effect on businesses involved in an agreement with the department.

15. 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*
- 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.”*

16. Upon examination of the documents I found that they contained information of a commercial value that may be considered exempt. The Guidelines, paragraph 5.202, provide that the information must satisfy two criteria:

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

17. I also had regard to the Guidelines, paragraph 5.203, which outlines factors which may assist in deciding in a particular case whether information has commercial value. Factors include:

- a. *whether the information is known only to the agency or person for whom it has value or, if known to others, to what extent that detracts from the intrinsic commercial value*
- b. *whether the information confers a competitive advantage on the agency or person to whom it relates – for example, if it lowers the cost of production or allows access to markets not available to competitors*
- c. *whether a genuine ‘arms-length’ buyer would be prepared to pay to obtain that information*
- d. *whether the information is still current or out of date (out of date information may no longer have any value)*
- e. *whether disclosing the information would reduce the value of a business operation or commercial activity – reflected, perhaps, in a lower share price.*

18. I found that the documents contained information relating to businesses involved in an agreement with the agency. Third party consultation was undertaken as a part of the decision making process. Where no advice was received back from the affected parties further redactions were applied.

19. I am satisfied that the expected effect of disclosing material identified as exempt under section 47G could have an adverse effect on these businesses as disclosure of their input into a signed agreement with the department could adversely affect the commercial activities of the businesses.

20. 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.

Sections 47E(d) and 47G - Public interest considerations

14. I have found that the identified documents are conditionally exempt under sections 47E(d) 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’.

15. 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.

16. However, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

17. 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. the competitive commercial activities of an agency;
- b. an agency's ability to obtain confidential information; and
- c. an agency's ability to obtain similar information in the future.

18. Releasing the pricing information of the business that provides legal advice to Defence would harm its future profitability and affect Defence's ability to obtain similar information in future. It would equally effect Defence's ability to operate if contracts were not managed with the appropriate care.

19. 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 47G and 47E(d) of the FOI Act.

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

BruceBennett2 Digitally signed by BruceBennett2
Date: 2018.07.30 17:24:15 +10'00'

Mr Bruce Bennett

Accredited Decision Maker
Estate and Infrastructure Group



FOI

FREEDOM OF INFORMATION REQUEST NO: 445/17/18
SCHEDULE OF DOCUMENTS

Serial	Date	Document title	Author	Addressee	Number of pages	Document description	Decision under the Act	Reason for decision	Subject to review
1	6/12/2001	Signed Twofold Bay ILUA	Defence		40	Agreement	Partial access	Deletions made in accordance with sections 11B and 22 of the FOI Act, on the grounds that the deleted material is exempt, under sections 47E(d) and 47G of the FOI Act	
2	2/5/2011	Executed Deed of Settlement	Defence		7	Agreement	Partial access	Deletions made in accordance with sections 11B and 22 of the FOI Act, on the grounds that the deleted material is exempt, under sections 47E(d) and 47G of the FOI Act	
3	10/7/2008	Payment Confirmation of Twofold Bay Legal Fees	Department of Finance & Administration	Lorraine Holcroft & Fiona Thomson	4	Internal emails and Letter	Partial access	Deletions made in accordance with sections 11B and 22 of the FOI Act, on the grounds that the deleted material is exempt, under sections 47E(d) and 47G of the FOI Act	
4	26/5/2011	Payment Confirmation for the Executed Deed of Settlement	Defence	Melissa Felton	3	Internal emails	Partial access	Deletions made in accordance with sections 11B and 22 of the FOI Act, on the grounds that the deleted material is exempt, under sections 47E(d) and 47G of the FOI Act	