



Australian Government
Department of Defence

R35081110

FOI 478/17/18 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:

“Item 1: Any decision record to not use ASC as the build partner of DCNS or Naval Group for the future submarine fleet.

Item 2: Any letters written by any of the following Ministers/Officials in 2016 through 2018 to DCNS or Naval Group that makes reference to, notifies an intention to, or makes a commitment to DCNS or Naval Group that they will be the builder of the future submarine fleet (in part or in full).

- o Minister Pyne*
- o Minister Payne*
- o Mr Stephen Johnson*
- o Rear Admiral Greg Sammut*

Item 3: Any sections of the latest draft version of the Strategic Partnering Agreement between the Commonwealth and Naval Group (either the French public law company or its Australian daughter entity) that details responsibilities in relation to the build or details any commitment for the Naval Group to build the future submarine fleet (in part or in full).”

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.

Decision

4. I have decided to:
- a. deny access to one document from Item 1 of the request as it is considered exempt under section 34 [Cabinet documents] of the FOI Act;
 - b. partially release one document from Item 2 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 section 47G [public interest conditional exemptions-business] of the FOI Act;
 - c. release one document from Item 2 of the request intact;

- d. deny access to one document from Item 3 of the request as it is considered exempt under section 47G [public interest conditional exemptions-business] of the FOI Act; and
- e. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(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. the Principles on open public sector information issued by the Information Commissioner;
 - f. the Cabinet Handbook issued by the Department of Prime Minister and Cabinet (PM&C);
 - g. advice received from PM&C;
 - h. advice received from officers from the Future Submarine Program Office (FSPO); and
 - i. feedback received following consultation with DCNS.

Reasons for Decision

Section 34 – Cabinet documents

6. Section 34 of the FOI Act states:

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet;....

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

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

8. In relation to Item 1 of the request, had a decision been made of this nature, it would have been both *submitted to Cabinet for its consideration* and *brought into existence for the dominant purpose of submission for consideration by the Cabinet*.

9. Therefore, a document of the nature described in Item 1 of the request, satisfies the requirements of subsection 34(1)(b) of the FOI Act. As such PM&C were consulted on any such document and subsequently recommended exemption in full under section 34(3) of the FOI Act.

10. Based on the above, I am satisfied that the requirements of section 34 have been met.

Section 47G – Business affairs

11. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

12. Section 47G of the FOI Act states:

(1) 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; or

(b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

13. Upon examination of the documents I identified conditionally exempt commercially sensitive information the disclosure of which would place DCNS at a commercial disadvantage through disclosure of proposed contracting and resourcing strategies. Specifically, I identified comments that may have been used to determine a commercial position in relation to live and ongoing contractual negotiations. I consider that disclosure of this information could reasonably be expected to adversely affect such negotiations and prejudice frank and open future supply of information to the Commonwealth.

14. 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.

15. The Guidelines at paragraph 6.184 state that “*The operation of the business exemption depends on the effect of disclosure rather than the precise nature of the information itself.*” In the context of the documents identified, release of the information identified would be unreasonable due to the live nature of the contractual negotiations. I am satisfied that the effect of disclosing the identified material would have an adverse effect on a company as disclosure of a proposed contracting and resourcing strategy could diminish the competitive nature of the business and could affect the profitability of business operations.

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

Sections 47G - Public interest considerations

17. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

18. In determining whether to release the document, I 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. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to public interest. Specifically I considered if disclosure of the documents would:

- a) promote the objects of the FOI Act;
- b) inform debate on a matter of public importance; or
- c) promote effective oversight of public expenditure.

19. Disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, there is a strong public interest in not releasing information that could unreasonably affect a business. Given Defence's strong links with industry, it is imperative that Defence be able to discuss proposed contracting and resourcing strategies with industry partners without fear that the material would be released without authorisation.

20. I found that 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).

21. 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 is that the 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 similar information in the future; and
- c) an agency's ability to obtain confidential information.

22. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In paragraph 6.189 the Guidelines state that "*The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required; and in ensuring that public programmes are properly administered.*" I have found that at this time, release of the information identified would inhibit the proper administration of public monies by impeding the proper completion of ongoing contractual negotiations.

23. 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 section 47G of the FOI Act.

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

Section 22 (where documents are being denied in full)

25. 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 documents 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.

Third party consultation

26. I decided to consult with DCNS regarding their information which was contained in the documents. Following consultation, DCNS accepted the form the documents were proposed for release.

Further Information

27. 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.

ChrisHorscroft Digitally signed by ChrisHorscroft
Date: 2018.07.26 14:25:59 +10'00'

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group