



Australian Government
Department of Defence
Defence Support and Reform Group

Freedom of Information and
Information Management Branch
Department of Defence

CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610
Tel: 02 626 62200
Fax: 02 626 62112
FOI@defence.gov.au

Our reference: FOI 337/12/13



By email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your request, dated 27 March 2013, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

[ITEM 1] - Copies of Ministerial Submissions between 15 January 2013 and 27 March 2013 provided to Defence Minister Stephen Smith and/or Parliamentary Secretary Senator David Feeney addressing the Defence Logistics Transformation Program (DLTP) and the status of employee entitlements if there is a change of service provider for warehousing and distribution services to the ADF.

I would expect the correspondence to have been raised by either Rear Admiral Clint Thomas - Commander Joint Logistic Command (CJLOG) or his predecessor, Air Vice Marshall Margaret Staib; and/or Mr David McGahey - Project Director, Defence Logistics Transformation Program."

2. 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 makers

3. Mrs Patricia Clifford, Director, Coordination, Communication and Security, and Mr Rod Dudfield, Director Freedom of Information, are the accredited decision makers, under the FOI Act, in relation to your request.

Documents identified

4. Mrs Clifford identified three documents as matching the description of your request. A schedule of documents is at Enclosure 1.

Decision

5. Mrs Clifford and Mr Dudfield have decided to:

- a) Partially release 18 Serials with deletions made 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 47F [Public interest conditional exemptions—personal privacy] and or 47D [Public interest conditional exemptions – financial or property interests of the Commonwealth] and or 47G [Public interest conditional exemptions – business] and or 47C [Public interest conditional exemptions – deliberative process] of the FOI Act.
- b) Release in full 7 Serials as detailed in the schedule of documents at Enclosure 1.

Material taken into account

6. In making their decision Mrs Clifford and Mr Dudfield had regard to:

- c) the terms of your request;
- d) the content of the documents in issue;
- e) advice from Defence officers with responsibility for matters relating to the documents to which you sought access;
- f) advice from the Department of the Prime Minister & Cabinet (PM&C);
- g) the relevant provisions of the FOI Act; and
- h) the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines).

Reasons for decision

Section 47D – documents affecting the financial or property interests of the Commonwealth

7. Section 47D provides that a document is conditionally exempt if its disclosure under the FOI Act would have a substantial adverse effect on the financial interests of the Commonwealth. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

8. Mrs Clifford found that some documents contained information and opinions about the ongoing supply of contracted services to Defence. The information reflects the deliberations of, and considerations taken into account by, Joint Logistics Command in coming to a decision as to the successful bidder for a Defence contract. Further, under the terms and conditions of the requests for tender for the Land Materiel Maintenance and Warehousing and Distribution contracts, the Commonwealth is obliged not to release commercial information relating to the tender process and the proposed contracts until after successful contract negotiations have occurred and both contracts have been signed.

9. Mrs Clifford took into account the guidelines issued by the Australian Information Commissioner noting that the financial interests of the Commonwealth may encompass an indirect effect. In relation to the material identified as exempt under section 47D, Mrs Clifford noted that, if

this information was released, contracted services to the Commonwealth may be jeopardised, which, accordingly, would not serve the financial interests of the Commonwealth. In addition, under the terms and conditions of the requests for tender for the Land Materiel Maintenance and Warehousing and Distribution contracts, the Commonwealth is obliged not to release commercial information relating to the tender process and the proposed contracts until after successful contract negotiations have occurred and both contracts have been signed, and that doing so would jeopardise the financial interests of the Commonwealth.

10. Mrs Clifford 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, Mrs Clifford was satisfied that the information was exempt under section 47D.

Section 47F - documents affecting personal privacy

11. Paragraph 47F(1) conditionally exempts a document if its disclosure would involve the unreasonable disclosure of personal information about any person.

Personal information

12. Personal information is defined in section 4 of the FOI Act as:

Information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

13. The elements of 'personal information' are:

- a) identifies, or could identify, a person;
- b) it says something about the person;
- c) may form part of a database;
- d) may be in the form of an opinion
- e) may be true or untrue, and;
- f) relates to a natural person.

14. Mrs Clifford found that many of the documents contained personal information such as names, mobile phone numbers and other private information about a person.

Disclosure unreasonable

15. If information is personal information, it will be exempt if disclosure would be 'unreasonable'. There are a range of factors in deciding whether or not disclosure would be unreasonable, including:

- a) the extent to which the information is already a matter of public knowledge;
- b) whether the person to whom the information relates is known to be (or to have been) associates with the matters dealt with;
- c) the availability of the information from publicly accessible sources; and
- d) no public purpose would be achieved through release.

16. Mrs Clifford found that disclosure of the documents exempted under section 47F would involve unreasonable disclosure of personal information. Release of the personal information would be unreasonable because:

- a) the information is not a matter of public interest;
- b) it identifies individuals not known to be associated with the matter;
- c) the information is not available from publically accessible sources; and
- d) the release of this personal information would achieve no public purpose.

17. Noting the findings against the above criteria, Mrs Clifford decided that the disclosure of this information would constitute an unreasonable disclosure of personal information belonging to a person other than you. Accordingly, Mrs Clifford considered this material to be conditionally exempt under section 47F of the FOI Act.

18. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

Section 47G – business

19. Mrs Clifford found that some Serial 3 documents contained information concerning the business affairs of a number of third parties. The information Mrs Clifford identified revealed that these third parties provided commercial-in-confidence bids for tender, and that these parties were unsuccessful in their bids.

20. Mrs Clifford considered that it is in the public interest that Defence does not disclose sensitive proprietary information of other companies or organisations, as this may not only adversely affect their lawful business and commercial affairs, but also affect their further dealings and prejudice supply to the department.

21. Mrs Clifford considered that the disclosure of this information could allow a competitor or another person to use this information to gain advantage when competing for contracts or in other commercial ventures.

22. Having considered the above, Mrs Clifford considered that the information, if released, would adversely affect the businesses in respect of their lawful business and commercial affairs and is therefore considered conditionally exempt under section 47G of the For Act.

Section 47C – deliberative process

23. Mr Rod Dudfield, on advice from PM&C found that the FOI Act includes provisions under section 47C to protect documents that are involved in the government's broader decision-making and deliberative processes. Some of the documents, in Mr Dudfield's view, contain deliberative information, which if disclosed at this point in time would release matter relating to opinion, advice and recommendations for the purposes of the deliberative processes involving functions of Defence.

24. Under section 47C(1) 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.

25. Mr Dudfield considered that the information was conditionally exempt at this time, under subsection 47C(1) of the FOI Act, as it is currently being considered by Defence. Further, as the information is still under consideration, it does not represent the Department's, Minister's or Government's final view on either its content or possible actions on recommendations arising from it.

26. Mr Dudfield believes that the premature release of this information prior to its full consideration has the potential to impact on Defence.

27. Taking into account the guidelines issued by the Australian Information Commissioner, it is noted that one consideration in the exemption under section 47C is whether the document includes content of a specific type, namely deliberative matter. It is his view the information contains material which can be protected under subsection 47C(1) of the FOI Act, due to its deliberative nature.

Public interest test – Section 47D, 47F, 47C and 47G

28. As sections 47D, 47F, 47C and 47G are conditional exemptions, Mrs Clifford applied the public interest test in order to determine whether disclosure of the documents would be contrary to the public interest. Mrs Clifford took into account the following public interest factors in favour of and against disclosure:

Factors in favour of disclosure

- a) promoting the objects of the Act (refer sections 3 and 3A);
- b) informing debate on a matter of public importance; and
- c) promoting effective oversight of public expenditure.

Factors against disclosure

- a) interest in preserving the efficient and proper functioning of government;
- b) interest in protecting the integrity of the decision making process by separating the final decision making policy from the opinions and advice of the officials who contributed to the consideration.

29. In Mrs Clifford's view, in relation to these sections of the documents, the factors against disclosure outweigh the factors in favour of disclosure as this information will make only a minimal contribution to governmental accountability.

30. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Mrs Clifford considered the range of relevant factors that favour access to a document set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. Mrs Clifford noted that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of this information would not increase public participation in Government processes, nor would it increase scrutiny or discussion of Government activities.

31. While Mrs Clifford noted that the release of this information may be of some interest to you, it would not inform public debate on any matter of public importance in any meaningful way. Additionally, disclosure of the information would not promote oversight of public expenditure, nor would it allow you further access to their personal information. Furthermore, Mrs Clifford

considered that the protection of an individual's right to privacy far outweighs any public interest there may be in the release of this material.

32. In coming to the above decision, Mrs Clifford considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. Accordingly, Mrs Clifford considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the document. Therefore, Mrs Clifford decided on balance that it would be contrary to the public interest to release the information considered exempt under subsection 47D [documents affecting the financial or property interests of the Commonwealth], 47F(1) [public interest conditional exemptions – personal privacy], 47C [deliberative process] and 47G [business] of the FOI Act.

Payment of Charges

33. In our letter, dated 28 March 2013, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request.

34. Accordingly you are now required to pay the charge of [REDACTED] in order to finalise your request. Please complete and return the form at Enclosure 2 to the FOI Directorate, this form is an agreement to pay charges and enables the FOI Directorate to continue processing your request without delay. Upon receipt of the form an invoice will be generated, noting this can take up to three business days. Details about payment of the invoice are on the form.

Rights of review

35. The FOI Act provides for rights of review of decisions. A copy of the fact sheet, "Freedom of Information – Your Review Rights", setting out your rights of review is at Enclosure 3.

FOI Disclosure Log

36. 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 two working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions. I will advise you of the publication date when the documents are dispatched to you.

Further advice

37. Should you have any questions, please contact this office.

38. The FOI Act may be accessed online at: <http://www.comlaw.gov.au/Details/C2011C00803>.

Yours sincerely

[REDACTED]
Matthew Kshauer
Case Manager
Freedom of Information

26 April 2013

Enclosures:

1. Schedule of documents
2. Freedom of Information Payment Authorisation Form
3. Fact Sheet: Freedom of Information – Your Review Rights