



Reference: Objective ID: BN12952723

FOI 181/19/20 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the email of 2 January 2020, in which sought an internal review under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the Accredited Decision Maker's decision dated 25 November 2019.

2. The applicant's request was for access to the following documents under the FOI Act:

"... all permits granted for the export of military and dual – use equipment from Australia to the below countries from 1 July 2018 to 30 June 2019:

- 1. United Arab Emirates*
- 2. Saudi Arabia*
- 3. Myanmar*
- 4. Sri Lanka*
- 5. Democratic Republic of the Congo*

Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request and duplicates of documents are excluded from this request."

Contentions

3. In his application, the applicant specifically requested an internal review of the original decision to partially release documents on the grounds that material was exempt under section 47G [public interest conditional exemptions – business] of the FOI Act.

4. The applicant contended "*section 47G has been applied too broadly, and without consideration of information that could be released without prejudicing commercial sensitivities of the future supply of information to the Commonwealth or its agencies.*"

5. The applicant is of the view that details of the types of equipment and materiel approved for export are not of such commercial sensitivity that they would prejudice those sensitivities. The applicant contended that the fundamental details about the basic type and purpose of equipment should be disclosed in the public interest.

6. The applicant contended the original decision failed to give proper consideration to the individual elements of information contained within each permit. He believes that the details of the type and function of the materiel approved for export could be disclosed. Additionally, the applicant stated information that is unquestionably commercially sensitive could remain undisclosed, preserving the force and function of the section 47G considerations. The

applicant further contended that the sale and export of Defence materiel is of significant and profound public interest.

7. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents.

Reviewing officer

8. I am authorised to make this internal review decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

Scope of internal review

9. Taking into account the applicant's contentions the scope of this review is over the information that was originally considered exempt under section 47G of the FOI Act. As such, 86 documents (the permits), comprising 1208 pages, are the subject of this internal review.

Internal review decision

10. I have decided to vary the original decision by releasing further information and applying further exemptions to the redacted material.

11. Essentially, I have decided to partially release the documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the redacted material is considered exempt under section 33(a)(iii) [documents affecting national security, defence or international relations] and/or section 45 [material obtained in confidence] and/or 47E(d)[public interest conditional exemptions-certain operations of agencies] and/or section 47G[public interest conditional exemptions – business] of the FOI Act.

Material taken into account

12. In arriving at my decision, I had regard to:
- a. the scope of the applicant's request and subsequent internal review application;
 - b. the original decision;
 - c. the content of the documents subject to the internal review;
 - d. relevant provisions in the FOI Act;
 - e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines);
 - f. the outcome of fresh searches;
 - g. advice provided by Defence Export Controls;
 - h. consultation with the Australian Border Force; and
 - i. consultation with third parties.

Section 33(a)(iii)

13. Section 33(a)(iii) of the FOI Act provides that a document is exempt from disclosure if its disclosure under the FOI Act:

*‘(a) would, or could reasonably be expected to, cause damage to:
(iii) the international relations of the Commonwealth.’*

14. The phrase ‘*international relations*’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations.

15. In evaluating potential harmful effects of disclosing information in the documents that would affect Australia’s security and international relations, 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 other pieces, can generate a composite – a mosaic – that can damage Australia’s national security and/or international relations.

16. The information in the export permits, specifically where a foreign government is identified as the specified end user, essentially reveals that certain foreign governments have purchased or obtained military items. Taking into account the mosaic theory, a person may be able to combine this knowledge with other information to identify what item has been exported to the foreign government.

17. The foreign government’s ownership of, or access to, that capability may not be publicly known. The release of this information would cause a loss of trust and confidence such that foreign officials would likely be less willing to engage with the Australian government. This would cause damage to an important relationship of the Australian government.

18. Accordingly, noting my findings, I have decided to exempt some of the material in the documents under section 33(a)(iii) of the FOI Act.

Section 45

19. Where access has been denied under section 45 of the FOI Act, I considered that the material was communicated in confidence and its disclosure would allow the source of the information to bring an action for breach of confidence.

20. Section 45(1) of the FOI Act states “*A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.*”

21. In relation to a breach of confidence, the Guidelines, paragraphs 5.158 & 5.159, provide that

5.158 A breach of confidence is the failure of a recipient to keep information, which has been communicated in circumstances giving rise to the obligation of confidence, confidential. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

5.159 To found an action for breach of confidence (which means that s45 would apply), the following five criteria must be satisfied in relation to the information:

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual understanding of confidence*
- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

22. Upon examination of the documents matching the request I formed the view that disclosure of the information relating to individuals and companies listed as end-users (i.e customers) in the export permits would be a basis for an action to be brought forward against the Commonwealth for breach of confidence, and for compensation to be sought for loss or damage arising from the disclosure.

23. The courts in Australia have generally accepted that business information which an entity generates about its activities as being inherently confidential. This can include pricing data, sales statistics, customer and supplier lists, negotiation information and customer requirements.

24. The Defence Export Control (DEC) permit application form states:

“the business and financial information you provide in your application will be treated as confidential... We will not disclose this information to third parties for any purpose, unless you have provided your consent or we are otherwise authorised to do so by law”

25. This statement gives rise to a mutual understanding that the Department has undertaken to handle the applicant’s business and financial information, including information about its customers, confidentially.

26. I have established that the companies to which the customer information relates have not given the Department authority to disclose it to either the applicant or the world at large. Such disclosure would potentially allow competitors to poach current and future sales from the companies, reducing the profits of the company. Further, the companies’ customers may also take their future business elsewhere if such information is disclosed due to the breach of confidentiality.

27. In light of the above, I have decided that the specified material identified is exempt pursuant to section 45 of the FOI Act.

Section 47E(d)

28. Upon review, I found export permits within the documents that contain information considered exempt under subsection 47E(d) of the FOI Act, which state:

‘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.’

29. I found that the documents contain a number of export permits with a unique export number for each permit. Permit numbers are unique identifiers that exporters must provide to the Australian Border Force (ABF) prior to export. It is then used by the ABF to verify the validity of the export. The ABF and the Department also use the permit numbers to monitor compliance with export controls.

30. The public disclosure of the permit numbers increases the risk of export controls being circumvented. The permit number could be used to falsify export documentation and therefore increase the risk of items being illegally exported from Australia.

31. In conclusion, I have decided that the documents are conditionally exempt under sections 47E(d) of the FOI Act.

Section 47G

32. 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.

33. I note 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.

34. In accordance with section 27(3) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of business information, I had regard to:

- 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 information;
- c. the availability of the information from publicly available sources; and
- d. any other matters that the agency considers relevant.

35. Against those criteria, I found that:

- a. the information is not well known to the broader community;
- b. the information is not readily available from publicly accessible sources; and
- c. the third party has objected to the release.

36. In making my decision I had regard to the Guidelines, specifically 6.184 which notes, *‘The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself’*. It adds at 6.185, *‘it is intended to protect the interest of third parties dealing with the government.’*

37. I also considered paragraph 6.197 of Guidelines where it notes *‘A document that discloses the kind of information ... will be conditionally exempt if the disclosure could reasonably be expected to prejudice future supply of information to the Commonwealth...’*

38. Further, at 6.198 of the Guidelines it notes *‘This limb of the conditional exemption comprises two parts:*

- *a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government*
- *the reduction will prejudice the operations of an agency’*

39. The information in the permits relate to multiple companies business and commercial affairs. Specifically the information pertains to commercial transactions that the companies have entered into. Disclosure of this information could unreasonably affect the company in respect of their lawful commercial affairs.

40. The companies who hold the permits are engaged in competitive business activities. Release of the information in the permits could reveal otherwise unknown viable market opportunities to competitors, allowing them to approach those identified customers and undercut the companies. The loss of these sales, including potential future repeat purchases, could have significant financial impact on the companies.

41. Noting my findings, the information is exempt under section 47G of the FOI Act.

Public interest considerations under sections 47E(d) and 47G

42. 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.

43. While I consider release of this information may increase scrutiny or discussion of Defence activities, I found that disclosure would reveal sensitive approaches relating to Defence activities, in particular those related to relationships with foreign governments and businesses.

44. I also consider there is a strong public interest in preventing an adverse effect on the proper and efficient conduct of the operations of Defence.

45. I referred to the non-exhaustive list of factors against disclosure, as provided in the Guidelines. The factors that I found particularly relevant to this internal review were that release:

- could reasonably be expected to prejudice an agency’s ability to obtain similar information in the future;

- could reasonably be expected to prejudice the competitive commercial activities of an agency; and
- could reasonably be expected to harm the interest of an individual or group of individuals—in this instance the exporters.

46. While I accept that there is a public interest in ensuring that the Department undertakes its functions in a transparent and proper manner, I consider there is a public interest in protecting the confidentiality of the material. Release of the material could potentially harm Defence's ability to effectively manage government business and foreign relations.

47. In response to the applicant's contentions at paragraphs 4, 5 and 6, I have considered the passage of time since the documents were created and do not consider that the sensitivity of the information contained in the documents has diminished. Even where permits have expired, the transactions may still be ongoing. In some instances, a permit may only cover the export of a sample and the end user may still be deciding whether to purchase the goods. In other instances, the permit may only cover a portion of the ongoing transaction, therefore, there remains a reasonable risk that this information could still be used by competitors to poach future sales and impact the profitability of the companies.

48. I consider that it could reasonably be expected that the foreign governments and other companies will reduce their cooperation with Defence and the Australian Government if they believe that their permit details will be affected by the public release of documents.

49. In coming to the above decision, I also considered subsection 11B(4) of the FOI Act. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the document that matches the scope of the request. I therefore decided that it would be contrary to the public interest to release the information considered exempt, under subsections 47E(d) and 47G of the FOI Act.

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