



DEFENCE FOI 140/21/22 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:

- Any documents held by CASG or the Future Submarine Project, dated between 2009 and 2016, that go to the consideration (for or against) of a nuclear powered submarine as a solution for Australia's future submarine project.
- Any documents held by the Office of the Chief of Navy and the Chief of Navy, dated 2021, that discuss a nuclear power submarine for the Royal Australian Navy.

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

Exclusions

6. Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

Decision

7. I have decided to:
 - a. release 26 documents in full;
 - b. partially release three (3) 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 deleted material is exempt under section 33(a)(ii) [documents affecting defence of the Commonwealth] and section 33(a)(iii) [documents affecting international relations of the Commonwealth] of the FOI Act.

Material taken into account

8. 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); and
- e. advice from the Office of the Chief of Navy.

Reasons for decision

Section 33 – Documents affecting national security, defence or international relations

9. Subparagraphs 33(a)(ii) and 33(a)(iii) of the FOI Act state:

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:*
- (ii) the defence of the Commonwealth; or*
- (iii) the international relations of the Commonwealth;*

10. In regards to the terms ‘could reasonably be expect to’ and ‘damage’, the Guidelines state:

5.16 The test requires the decision maker to assess the likelihood of the predicated or forecast event, effect or damage occurring after disclosure of a document.

5.17 The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

5.28 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

11. While the FOI Act does not define ‘defence of the Commonwealth’. Previous Administrative Appeals Tribunal decisions indicate the term includes protecting the Defence Force from hindrance or activities that could prejudice its effectiveness.

12. The document at Item 1 (serial 15) of the request contains information on operational concepts and mission tasks for deploying and operating the submarine capability. Disclosure of this information could reasonably be expected to cause damage to the defence of the Commonwealth by providing adversaries with a military advantage.

13. The documents at Item 1 (serials 21 and 22) of the request contain information on the planning and management of the naval workforce – a fundamental input for a sensitive Defence capability. Disclosure of this information could give insight into the Commonwealth’s ability to manage and apply that capability and such disclosure could be reasonably be expected to cause damage to the defence of the Commonwealth by providing adversaries with a military advantage.

14. With regard to the term ‘international relations’ the Guidelines state:

5.36 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 and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.

5.37 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

5.38 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.

15. The documents at Item 1 (serials 21 and 22) of the request contain information on different international approaches to the planning and management of a submarine workforce. The information was provided by experienced submarine specialists from nations with which Australia has continuing close and important defence and strategic interests. Disclosure of the information could cause those countries to lose trust and confidence in Australia as a reliable recipient of sensitive information, making those countries less willing to cooperate in future, with attendant adverse impacts on defence and diplomatic initiatives.

16. In evaluating the potential harmful effects of disclosing the information, I have taken into account the 'mosaic theory', which refers to individual pieces of information that may not be harmful in isolation, but may cause damage to the defence and international relations of the Commonwealth when combined with other publicly available information and material released in the document.

17. Based on my consideration of the above, I am of the view that release of the documents could reasonably be expected to cause damage to the defence and international relations of the Commonwealth by making public information about Australian and international approaches to the planning and management of submarine capability and submarine workforce.

18. Noting all of the above, I have decided that the documents are exempt under sections 33(a)(ii) and 33(a)(iii) of the FOI Act.

Further Information

19. The document at Item 1 (serial 15) contains a reference to 'strategic strike'. In the context of this document, strategic strike refers to the use of conventional weapons. Australia will not seek to develop or acquire nuclear weapons and will comply with the obligations under the Non-Proliferation Treaty not to acquire nuclear weapons.

20. It is worth noting that the documents at Item 1 (serials 21 and 22) contains numerous errors of fact and consequently the resulting conclusions should be viewed with caution.

21. Some of the documents matching the scope of this request contained a dissemination limiting marker. Where documents have been approved for public release, the dissemination limiting marker has been struck through.

Tony.Brown2 Digitally signed by Tony.Brown2
Date: 2021.11.08 15:32:42 +11'00'

Tony Brown
Accredited Decision Maker
Capability Acquisition and Sustainment Group