



DEFENCE FOI 146/21/22 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:

“The initial tasking or the initial terms of reference for the work requested of Commodore Timothy Brown in the second half of 2020 examining “force structure requirements for undersea warfare” including submarines (this is the project that was confirmed in Defence Senate Estimates on 2 June 2021), including the date that tasking or request was made.

The initial tasking or the initial terms of reference for the Defence Capability Enhancement Review that began around February 2021 led by Vice-Admiral Jonathan Mead (this is the review that was confirmed in Defence Senate Estimates on 1 June 2021), including the date that tasking or request was made.

I ask you to take into account, in considering what is able to be released, the fact that the existence of these reviews has already been publicly confirmed and more recently the outcomes of these reviews have been publicly announced by Government.”

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 two documents as matching the description of the request.

Decision

4. I have decided to:

- a. partially release two 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 considered exempt under section 47F [public interest conditional exemptions-personal privacy], section 33(a)(i) [Documents affecting national security] of the FOI Act, section 47B [documents affecting Commonwealth-State relations] of the FOI Act, and section 47E(d) [public interest conditional exemptions-certain operations of agencies] of the FOI Act; and
- b. 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. terms of the request;
 - b. content of the identified documents in issue;
 - c. relevant provisions in the FOI Act;
 - d. guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
 - e. advice received from relevant Defence subject matter experts from Navy and the Nuclear-Powered Submarine Task Force.

Reasons for decision

Subsection 33(a)(i) – Documents affecting national security, defence or international relations

6. Section 33(a)(i) of the FOI Act provides that a document is exempt from release if its disclosure could reasonably be expected to cause damage to the security of the Commonwealth. For this exemption to be claimed I must be satisfied that there is a ‘real’ and ‘substantial’ risk of damage occurring. It is insufficient that there merely be a possibility of such damage.

7. In regards to the terms ‘could reasonably be expected to’ and ‘damage’ paragraphs 5.16, 5.17 and 5.28 of the Guidelines provide that:

5.16 The test requires the decision maker to assess the likelihood of the predicted 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, be 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... determined on the facts of each particular case.

8. Having reviewed the information in light of the Guidelines, I am satisfied of the real and substantial risk to the Nuclear-Powered Submarine Task Force that the release of the exempt information would pose.

9. Additionally, 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 of the Commonwealth when combined with other publicly available information and material released in the document.

10. Based on my consideration of the above, I am of the view that release of the document ‘could reasonably be expected to cause damage to the defence of the Commonwealth’ by making public information about current and anticipated military preparedness and readiness.

Section 47B - Public interest conditional exemption – Documents affecting Commonwealth-State relations

11. Section 47B of the FOI Act conditionally exempts a document where disclosure would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a state or territory government. In accordance with the Guidelines, I examined the content of each document that was relevant to the terms of the FOI request.

12. I have identified material in the documents that I consider, given the nature of the material, would damage Commonwealth-State relationships if disclosed as the material relates to commercial information not otherwise readily available. I have decided to exempt and redact this material from the documents released under this FOI request.

Section 47E(d) – Certain operations of agencies

13. Section 47E(d) conditionally exempts from disclosure documents that would, or could be reasonably expected “*to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency*”.

14. Upon examination of the documents I identified information for which a claim under section 47E(d) of the FOI Act is warranted. 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 Defence.

15. I note that use of the word ‘could’ in this provision also requires no more than a degree of reasonableness to be applied in deciding whether disclosure would cause the consequences specified.

16. Having reviewed the information, with respect to the Guidelines, I am satisfied that the release of the information could have an adverse effect on the Nuclear-Powered Submarine Task Force.

Section 47F - Personal privacy

17. Upon examination of the documents, I identified information, specifically personal information of third parties other than the applicant, such as names, personal opinions and sensitive material. I found the material to be conditionally exempt under section 47F of the FOI Act.

18. Section 47F of the FOI Act exempts documents if disclosure would involve the unreasonable disclosure of personal information. Section 47F(1) states:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

19. When assessing whether the disclosure of this personal information is unreasonable, I considered the following factors:

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

20. Against the above criteria I found:

- a. that the specific personal information is not well known;
- b. the individuals whose personal information is contained in the document is not known to be associated with the matters dealt with in the documents; and
- c. the information is not readily available from publicly accessible sources.

21. Taking into account the above factors, I consider that the release of the material would be an unreasonable disclosure of personal information of individuals other than the applicant and could reasonably be expected to cause harm to their privacy. I therefore have decided that this information is conditionally exempt under section 47F(1) of the FOI Act.

22. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest considerations are set out below.

Public interest consideration – Sections 47B, 47E(d) and 47F

23. I have found that some of the identified documents are conditionally exempt under sections 47B, 47E(d) and 47F 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’.

24. 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. 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) in a meaningful way.

25. 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:

(h) an agency’s ability to obtain confidential information; or

(i) an agency’s ability to obtain similar information in the future.

26. Information about certain operations of Defence, if released, could affect the integrity and efficacy of Defence’s internal processes and procedures regarding the Nuclear-Powered Submarine Task Force. Additionally, the public interest is better served in protecting the privacy of individuals whose personal details are contained within these documents from release to the public at large.

27. Accordingly, I considered that the public interest factors against disclosure outweigh the factors for disclosure of the identified material. Therefore I decided it would be contrary to the public interest to release the specific information and consider it exempt under sections 47B, 47E(d) and 47F of the FOI Act.

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

Exclusions

29. 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.

Further Information

30. Some of the documents matching the scope of this request were classified and/or contained a dissemination limiting marker (DLM). I have declassified the versions of the documents that are approved for public release and the DLM has been struck through.

 Digitally signed
by
bronwyn.madge
Date: 2021.11.18
10:52:10 +11'00'

Bronwyn Madge
Accredited Decision Maker
Nuclear-Powered Submarine Task Force