



DEFENCE FOI 166/21/22 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] the *Freedom of Information Act 1982* (FOI Act) for access to:

“I would like to request, based on information held by Defence Exports Control (DEC) and the Department of Defence, a table detailing the voluntary disclosures made during the 2020/21 financial year under DEC's Voluntary Disclosure protocol.

I would request that the table include:

The number of voluntary disclosures made to DEC in the 2020/21 financial year

The names of the organisations/companies which made those disclosures

The country/organisation to which the exports were made

The nature of materiel exported

The amount of materiel exported

If a disclosure resulted in a referral

What other remedial actions was ordered/undertaken

If any of the exports had been made by companies/organisations that had previously made a voluntary disclosure or had previously been found to be in breach of export regulations.

I would request that the table list the disclosures data separately, that is, the data NOT be collated so as to make the number/type/destination of the exports indistinguishable.”

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. A document was generated under section 17 of the FOI Act matching the description of the request:

- A document was produced containing the information by using a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information s17(1)(i), and
- Producing the document did not substantially and unreasonably divert resources of the agency from its other operations s17(2).

Decision

4. I have decided to release the document created under section 17 of the FOI Act. In accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] under section 45 [material obtained in confidence], section 47 [commercially valuable information] section 47G [business affairs], section 33 [documents affecting national security, defence or international relations] and section 42 [documents subject to legal professional privilege] 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); and
 - e. information provided by DEC Branch within the Department of Defence.

Reasons for decision

Section 45 - material obtained in confidence

6. Where access has been denied under section 45 of the FOI Act, I consider that the material contained in the documents provided to DEC was communicated in confidence and its disclosure of source information would bring action for the breach of confidence.

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

8. 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.*

9. Through examining the documents matching the request, I have formed the view that disclosure of the information would be a basis for an action to be brought against the Commonwealth for breaches of confidence, and for compensation to be sought for loss or damages arising from the disclosure. The information relating to organisations/companies in the documents and the nature of the goods exported / information supplied and the country that received the goods/information is confidential business information that has been provided to DEC in confidence as part of making a voluntary disclosure.

10. 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, sales statistics, order details, customer and supplier lists, negotiation information and customer requirements.

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

Sections 47 – commercially valuable information

12. The information is of commercial value to the organisations/companies involved. Paragraph 5.204 of the Guidelines states that to be exempt under section 47(1)(b) a document must satisfy two criteria – it must contain information that has commercial value either to the agency or to another person or body; and the commercial value of the information would be, or could be reasonably expected to be, destroyed or diminished if it were disclosed.

13. The requested table of voluntary disclosures contains commercial information relating to specific goods or information exported or supplied and to the countries/organisation where exports were made. Additionally the nature or description of the goods exported / information supplied could uniquely identify the exporter as only a small number of Australian organisations/companies manufacture export or supply these items.

14. The nature or description of the goods/information exported or the name of the company, when combined with the information about the country or organisation to which the goods / information was provided, could uniquely identify the customer and diminish the commercial advantage of the exporter.

15. The release of such information could reasonably be expected to diminish the commercial advantage of those companies and could reveal potential market opportunities for competitors.

16. Therefore, I consider the release of such information would, or could reasonably be expected to, diminish commercial value and reveal trade secrets, and be exempt from release under section 47(1) of the FOI Act.

Section 47G – Public interest conditional exemptions - Business affairs

17. Where access has been denied under section 47G of the FOI Act relevantly 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.*

18. 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.

19. In accordance with the 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.

20. 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 would likely object to the release.

21. 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.’*

22. 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...’*

23. 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’*

24. The information in the voluntary disclosures 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.

25. Release of the information provided in a voluntary disclosure could reveal otherwise unknown viable market opportunities to a competitor. The loss of sales, including potential future repeat purchases, could have significant financial impact on the companies. This would prejudice the future supply of information to the Commonwealth for the purpose of the administration of Australian export controls laws.

26. Furthermore, it should be noted that should information contained in a voluntary disclosure be released organisations or companies may be more discerning about making voluntary disclosures and the information they disclose in voluntary disclosures due to concern about subsequent public release. This would prejudice the future supply of information to the Commonwealth for the purpose of the administration of Australian export controls laws.

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

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

28. Section 33 of the FOI Act exempts a document if its disclosure under the Act would, or could reasonably be expected to, cause damage to:

- i) *the security of the Commonwealth;*
- ii) *the defence of the Commonwealth; or*
- iii) *the international relations of the Commonwealth.*

29. In relation to subsection 33(a)(iii) the Guidelines state:

International relations

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...

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. On the other hand disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.

30. The Guidelines provide that the term 'reasonably expected' requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27 the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning. A mere allegation or mere possibility of damage will be insufficient for the purposes of the exemption.

31. Having considered the Guidelines in relation to the identified information, I have formed the view that, if the material were released, it would, or could reasonably be expected to, cause damage. The documents contain information relating to goods exported or information supplied out of Australia potentially in breach of Australia's export controls regulations. Release of this information could reasonably be expected to damage international confidence in Australia's export controls and subsequently international partner's willingness to share sensitive technology. As such, any release of the information could result in reduced confidence by international agencies which may hamper co-operation and the international exchanges of controlled goods and technology with Australia. Further, this information is not readily available to the public. Upon examination of the information contained in the voluntary disclosures matching the request, I formed the view that disclosure of the information could damage the international relations of the Commonwealth.

32. Accordingly, I have decided that the material is exempt under section 33 of the FOI Act.

Section 42 – Documents subject to legal professional privilege

33. Section 42 of the FOI Act exempts a document if it is of such a nature that it would be privileged from the production in legal proceedings on the ground of legal professional privilege.

34. Further Guideline 5.129 states “ *At common law, determining whether a communication is privileged requires a consideration of:*

- *whether there is a legal advisor-client relationship*
- *whether the communication was for the purposes of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential.*

35. I have identified information in the document that could reasonably be considered as being of legal professional privilege.

36. Accordingly, I have decided that the material is exempt under section 42 of the FOI Act.

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