



Australian Government

Department of Defence

DEFENCE FOI 231/21/22 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:

“Defence Export Controls (DEC) is responsible to the Minister for Defence for regulating the export and supply of military and dual-use goods and technologies defined in the DSGL. DEC does this through the administration of Australia’s export control framework.

Australia is also a signatory of the Arms Trade Treaty (ATT). In accordance with the ATT, each year the Department of Foreign Affairs and Trade submits an Annual Report regarding exports and imports of conventional arms.

The information is based on the export approvals granted by Australian Department of Defence, Defence Export Controls Branch. The Annual Report disclosed in accordance with Article 13(3) – Export and Imports of Conventional Arms covered under Article 2(1) (Annual Report) indicate the following aggregate small arms and light weight exports:

- 1. In 2018, Australia authorised and granted 21 permits with a total number of items being 145 where the Final Importing State was Indonesia. The total value was not disclosed in the Annual Report.*
- 2. In 2019, Australia authorised and granted 1 permit with a total number of items being 4 where the Final Importing State was Indonesia. The total value was not disclosed in the Annual Report.*
- 3. In 2020, Australia authorised and granted 5 permits with a total number of items being 151 where the Final Importing State was Indonesia. The total value was not disclosed in the Annual Report.*

For ease of reference, we will refer to the total permits granted (being 27) between 2018 and 2020 where the Final Importing State was Indonesia collectively as the Permits. To avoid doubt, this application only refers to the Permits relating to aggregate small arms light weapons where the Final Importing State was Indonesia as reported in Australia’s Annual Report

Request for Information and Relevant Documents

Pursuant to the FOI Act, we request:

- (a) Details of the holders of Permits, including where relevant:*

- a. *Company Name, ABN and/or ACN.*
- b. *Business of trading names.*
- c. *Addresses of the registered office or principal place of business.*
- d. *Names of any company officers who hold any of the Permits.*
- e. *Names of any individuals or natural persons who hold any of the Permits.*

(b) The decision record for each of the Permits including any relevant conditions applying to the Permit

(c) Any assessment reports that relevantly include consideration of human rights, national security, regional security, foreign policy and international obligations prepared by DEC in relation to the permits.

(d) Documents or information relating to a description of the quantity or types of items, the designation of the items, as well as the value of those items (as stated by the applicant for the Permit) which pursuant to the Permits granted are authorised exports.

(e) All documents relating to the actual export associated with the Permits as distinct to the authorise exports.”

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 have identified 54 documents as matching the scope of the request; and
4. One 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 pursuant to s17(1)(i), and
 - Producing the document did not substantially and unreasonably divert resources of the agency from its other operations pursuant to s17(2).
5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to partially release 55 documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] under section 45 [material obtained in confidence], section 47E(a) [public interest conditional exemption - certain operations of agencies], section 47G [business affairs] and section 47F [public interest conditional exemption – personal privacy] of the FOI Act.

Material taken into account

7. 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);
- e. outcomes of third party consultation;
- f. all documents relating to the actual export associated with the Permits as distinct to the authorised exports are not held by the Department of Defence; and
- g. information provided by DEC Branch within the Department of Defence.

Reasons for decision

Section 45 - material obtained in confidence

8. 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.

9. 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.*”

10. In relation to a breach of confidence, the guideline’s paragraphs 5.158 & 5.159 provide that:

5.158 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. 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.*

11. 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 is confidential business information that has been provided to DEC in confidence.

12. 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.

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

Section 47G - Business affairs

14. 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, or*
 - b. *could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

15. 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.

16. 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.

17. 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 object to the release.

18. 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 interests of third parties dealing with the government.*’

19. 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...*’

20. 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*

21. The information provided to Defence for the purpose of obtaining export permits from several 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.

22. Release of the information provided in applications for export permits and subsequent correspondence to support these applications 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.

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

Section 47E(a) - Certain operations of agencies

24. Under section 47E of the FOI Act, a document is conditionally exempt if its disclosure would, or could reasonably be expected to:

- a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*

25. In relation to section 47E(a) of the FOI Act, Defence has an established method to assess export applications. It is reasonable to expect the disclosure of the assessments would, or could prejudice the effectiveness of the procedure.

26. Maintaining the integrity of the processes within Defence is paramount. Releasing information that has been provided 'in-confidence' could adversely affect Defence's ability to conduct future assessments; if third parties believe Defence lacked integrity in the management and protection of their confidential records. This, by effect, would impede the proper and efficient conduct of the operations of Defence.

27. Based on my consideration of the above, I am of the view that release of third parties' information and Defence's practices and procedures would have a substantial adverse effect and therefore prejudice the effectiveness of similar future assessments. This would directly affect the proper and efficient conduct of the operations of Defence.

28. Noting all of the above, I have decided that the material identified is therefore conditionally exempt under section 47E(a) of the FOI Act.

Section 47F - Personal privacy

29. Where access has been denied under section 47E of the FOI Act, I considered that the material contained in the export documentation would involve the unreasonable disclosure of personal information about any person (including a deceased person).

30. In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

- i) the extent to which the information is well known;*
- ii) 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;*
- iii) the availability of the information from publicly accessible sources.*

31. On examination of the documents, I have found the documents contain personal information (names and position titles) of a number of individuals other than the applicant. The release of personal details may lead to Defence's risk assessors receiving unsolicited contact from exporters seeking either updates on their export permit applications or details of the assessment process itself.

32. Taking into account the above factors, I consider that the release of the identified personal information to be an unreasonable disclosure and conditionally exempt under section 47F(1) of the FOI Act.

Sections 47E(a), 47F, and 47G - Public interest considerations

Factors in favour of disclosure

33. In assessing whether disclosure is, on balance, contrary to the public interest, I considered the a range of factors set out in section 11B(3) of the FOI Act and the FOI Guidelines which favours access to a document:

- a. promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- b. inform debate on a matter of public importance;*
- c. allow a person to access his or her own personal information.*

34. I considered that all of the above factors weighed heavily against disclosure at this time, particularly within the business space. Disclosure of this information would not increase public participation in government processes nor would it, in my view, increase scrutiny or discussion of government activities.

35. While I consider that release of the material removed under sections 47E(a), 47F, and 47G may be of some interest to the applicant, disclosure of the conditionally exempt and exempt material would not inform public debate. 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.

36. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure in many instance and I deem the information exempt under section 47E(a), 47F, and 47G of the FOI Act.

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

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