



DEFENCE FOI 063/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

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

“Communications (including minutes and briefings) to/from DEPSEC SP&I in relation to the decision of Defence to acquire nuclear power submarines as part of the AUKUS agreement.”

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 15 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 and document 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 1 document in full;
 - b. partially release 4 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:
 - i. section 33 [documents affecting national security, defence or international relations] of the FOI Act; and/or
 - ii. section 47C [public interest conditional exemptions – deliberative process] of the FOI Act ; and/or
 - iii. section 47E [public interest conditional exemptions – certain operations of agency] of the FOI Act.

- c. deny access to 10 documents, on the grounds that they are exempt in full under:
 - i. section 33 [documents affecting national security, defence or international relations] of the FOI Act; and/or
 - ii. section 47C [public interest conditional exemptions – deliberative process] of the FOI Act.
- d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1) of the FOI Act.

Material taken into account

8. 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. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
 - e. advice from relevant Defence subject matter experts from the Nuclear Powered Submarine Taskforce.

Reasons for decision

Section 22 - Access to edited copies with exempt or irrelevant matter deleted

9. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

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

10. 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*

11. Upon examination of the documents, have formed the view that disclosure of the material would or could reasonably be expected to cause damage to the security and international relations of the Commonwealth.

12. In relation to subsection 33(a)(i) of the Guidelines state:

5.29 The term 'security of the Commonwealth' broadly refers to:

- (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests*

5.30 A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

13. In relation to subsection 33(a)(iii) of 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.

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 relation 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.

14. 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 possibility of damage will be insufficient for the purposes of the exemption.

15. Further the terms 'would or could reasonably be expected to' and 'damage', the Guidelines state:

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, is presently occurring, or could occur in the future.

16. Having considered the Guidelines in relation to the request, I have identified material that contains information relating to Australia's relationship with foreign governments. Release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interest. Further this information is not readily available to the public. As such, any release of the information would cause loss of trust and confidence in the Australian government and foreign officials may be less willing to engage with Australian government officials in the future.

17. In addition to the above, the identified material could reasonably be expected to affect participating nation's expectations. This is particularly the case concerning the subject of defence related inquiries, where the public release of such documents may impact upon, and potentially undermine, the trusted relationship between the nations and/or wider international relations with other nations if they become, or are made, aware of those confidential arrangements between nations.

18. Based on my consideration of the above, I am satisfied that release of the material could reasonably be expected to cause damage to national security and international relations of the Commonwealth.

19. I have therefore determined that this material is exempt under section 33(a)(i) and 33(a)(iii) of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

20. Section 47C of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

(a) an agency; or

(b) a Minister; or

(c) the Government of the Commonwealth.

21. Upon the examination of the documentation, I have identified deliberative matter – that is, content that is in the nature of, or relating to either opinion, advice or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the purpose of, a deliberative process of Defence.

22. Information for which access has been redacted contain opinions, advice, recommendations and supporting material that was gathered through consultation. Consequently, I find the documents contain deliberative matters and are conditionally exempt under section 47C of the FOI Act.

23. Section 11A(5) of the FOI Act 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. My public interest considerations are detailed further below.

Section 47E(d) – Public interest conditional exemptions – certain operations of agencies

24. Section 47E(d) of the FOI Act states:

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 the agency.

25. The Guidelines, at paragraph 6.123, state that:

The predicted effect must bear on the agencies 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner.

26. The material I have exempted from disclosure are departmental staff names, their email addresses and titles.

27. In assessing whether disclosure could be expected to adversely affect the operations of Defence, I consider that the publication of Departmental staff's names, direct email address and titles would raise risk to the harm of the individual's privacy by allowing members of the public to contact staff directly. This access could create opportunity to undermine the Department's control of public inquiries and encourage incorrect communication channels. This would impede the management of public contact and would be reasonably expected to cause substantial and adverse effect to the operations of the Department.

28. Accordingly, I am satisfied that the documents are exempt under section 47C of the FOI Act.

Sections 47C and 47E - Public interest considerations

29. Section 11A(5) of the FOI Act provides that if a document is conditionally exempt it must be disclosed '*unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest*'.

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

- (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) promote effective oversight of public expenditure; and*
- (d) allow a person to access his or her own personal information.*

31. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the specific conditionally exempt material would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

32. While I consider that release of the material removed under sections 47C and 47E of the FOI Act may be of some interest to the applicant, I consider this to be distinct from this being of interest to the public. Disclosure of the conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way. Furthermore, the public interest is better served in protecting the oversight of public inquiries to the Department and maintaining the individual's privacy whose personal details are contained within these documents from release to the public at large.




33. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors that I find particularly relevant to this request are that the release of this information could reasonably be expected to prejudice or harm:

- a. the protection of an individual's right to privacy;*
- b. the interests of an individual or group of individuals; and*
- c. the management function of an agency.*

34. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and deem the information exempt under sections 47C and 47E of the FOI Act.

Further Information

35. 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.

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Bronwyn 
Accredited Decision Maker
Nuclear Powered Submarine Taskforce