



## DEFENCE FOI 195/22/23 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:

“....the latest copies of the *Projects of Concern and Projects of Interest reports*”

### 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. Defence identified two documents that match the description of the request:
- a. the August 2022 Project and Product of Concern and Interest Dashboard Report; and
  - b. the August 2022 Project and Product of Concern and Interest Report.

### Decision

4. I have decided to:
- a. partially release one document 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 33 [Documents affecting national security, defence or international relations] of the FOI Act; and
  - b. deny access to one document under sections 33 [Documents affecting national security, defence or international relations] and 47 [Documents disclosing trade secrets or commercially valuable information] of the FOI Act.

### Material taken into account

5. In making my decision, I had regard to:
- a. the terms of the request;
  - a. the content of the identified documents in issue;
  - b. relevant provisions in the FOI Act;
  - c. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
  - d. advice received from subject matter experts within Capability Acquisition and Sustainment Group.

### Reasons for decision

#### Section 22

6. 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 document 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**

7. Section 33(a) of the FOI Act states:

*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:*

*(i) the security of the Commonwealth*

*(ii) the defence of the Commonwealth;*

8. In regards to the terms 'would or could reasonably be expected to' and 'damage', the Guidelines provide:

*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.*

*Security of the Commonwealth: [Damages]*

*5.31 The meaning of 'damage' has three aspects:*

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. The organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

*Defence of the Commonwealth: [Damages]*

*5.35 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage ...However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.*

9. Additionally, the Guidelines state:

*Security of the Commonwealth*

*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*
- (b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations.*

*Defence of the Commonwealth*

5.34 *The FOI Act does not define ‘defence of the Commonwealth’. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the terms includes:*

- *meeting Australia’s international obligations*
- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

10. I find that disclosure of the information exempt under section 33(a)(i) and 33(a)(ii) would cause, or could reasonably be expected to cause, damage to the “security of the Commonwealth” and potentially jeopardise the “defence of the commonwealth” as the exempt material contains sensitive information about capability that could potentially allow bad actors with hostile intentions to exploit the Australian Defence Force and other international forces that have also purchased these capability platforms.

11. In applying the exemption pursuant to section 33(a)(i) and 33(a)(ii) of the FOI Act, I have taken into account the intelligence technique known as the “mosaic theory”. This theory holds that the aggregation of individual pieces of information, when combined with information already in the public domain, can generate a composite “mosaic” which could lead to an adversary applying this information and therefore undermining Defence's capability and effectiveness.

12. Accordingly, I have decided that the material contained within the scope of the request is exempt pursuant to section 33(a)(i) and 33(a)(ii) of the FOI Act.

#### **Section 47 – Documents disclosing trade secrets or commercially valuable information**

13. Section 47 of the FOI Act provides:

*(1) A document is an exempt document if its disclosure under this Act would disclose:*

- (a) trade secrets; or*
- (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed*

14. For section 47(1)(b) to apply the Guidelines state at paragraph 5.204 a document must satisfy two criteria:

- *the document 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.*

15. On advice received from subject matter experts within Capability Acquisition and Sustainment Group, I identified the August 2022 Project and Product of Concern and Interest Report to contain valuable commercial information of the Commonwealth and a number of suppliers. This information could impact the Commonwealth’s ability to effectively manage existing contracts and engage in future contract negotiations, and is not in the public domain. Release of this information could also reasonably be expected to provide competitors of the

relevant suppliers and other customers with sensitive information that would otherwise only be known to limited parties.

16. Material within the August 2022 Project and Product of Concern and Interest Report was developed by the Commonwealth on the basis of a mutual understanding of contractual confidence. Release of such information without the explicit agreement of its owners could diminish their relationship with Defence and the Commonwealth and could breach that confidence and undermine any trust in Defence's ability to protect commercial information, and restrict the future flow of such information. If the information was made public it could reasonably cause an adverse effect on Defence's ability to conduct and manage working relationships with its contractors in the future.

17. Accordingly, I consider the release of the information would, or could reasonably be expected to, diminish commercial value, and is exempt under section 47(1)(b) of the FOI Act.

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Date: 2022.11.14 13:48:26 +11'00'

Melissa  
Accredited Decision Maker  
Capability Acquisition and Sustainment Group