



DEFENCE FOI 361/22/23 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:

“1) The documents which would have been supplied to the public at the time of the RFT referred to as the “ATM document set”. Most importantly this should include a Statement of Work, and a Conditions document where the following are defined:

Clause 1.9 Statement of Tax Record;

Clause 2.4 Preparation and Transmission of Classified Tenders; and

Clause 2.5 Defence Security Requirements

2) The Tender Evaluation Board’s report(s) – by my understanding there should be one (or perhaps there are several) documents outlining why some roles were filled and others were not, at the conclusion of the RFT process.

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 six 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 number and item/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 two documents in full;
 - b. 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 47E(d) [public interest conditional exemptions-certain operations of agencies] of the FOI Act; and
 - c. refuse access to two documents on the grounds that the documents are considered exempt under sections 45 [documents containing material obtained

in confidence], 47C [public interest conditional exemptions - deliberative processes] and 47E(d) [public interest conditional exemptions - certain operations of agencies] of the FOI Act.

Material taken into account

8. 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; and
- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

REASONS FOR DECISION

Section 22 - Documents denied in full

9. Section 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 45 – Documents containing material obtained in confidence

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

11. Section 45(1) of the FOI Act states “A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.” In relation to a breach of confidence, the guidelines at paragraphs 5.158 and 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 the 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.*

12. Through examining the material 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 information supplied is confidential business information that has been provided to Defence in confidence.

13. 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.

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

Section 47C – Public interest conditional exemptions - Deliberative processes

15. Section 47C of the FOI Act conditionally exempts from disclosure documents that 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.

16. I found that the identified documents contain material in respect of which a claim for exemption under section 47C of the FOI Act is warranted.

17. I considered the question of whether the information is purely factual. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines which clarifies ‘purely factual material’ that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive;
- b. incidental administrative content;
- c. procedural or day to day content;
- d. the decision of conclusion reached at the end of the deliberative process; and
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposed of, a deliberative process.

18. I have also taken into account further detail in the Guidelines (6.73) that advise *“‘Purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.”*

19. The document contains material communicating opinion, advice and recommendations for a request for tender process. This material contains the processes of dealing with particular issues, and proposing options for consideration closely intertwined with factual information.

20. There is a risk that release of the deliberative matter contained in the document would harm the smooth operation of Defence business including the ability for Defence to present and communicate frank preliminary advice at the highest levels to the Government.

21. Taking the above into consideration, I am satisfied that this information contained in the documents is conditionally exempt under section 47C of the FOI Act.

22. 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.

23. My public interest considerations are set out below.

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

24. Subsection 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 an agency.

25. In relation to section 47E(d), the FOI Guidelines explain that for this exemption to apply, the predicted effect must bear on the agency’s ‘proper and efficient’ operations, that is, the agency is undertaking its expected activities in an expected manner.

26. Names, positions and contact details of employees of the Commonwealth, including Defence, are exempt under section 47E(d) of the FOI Act on the basis that the relevant departments and agencies all have procedures in place to manage contact with members of the public and answer queries, and that disclosure of direct contact details would have a substantial adverse effect on the proper and efficient conduct of their operations.

27. As release of these direct contact details would undermine the purpose of public facing inquiries teams to receive and manage enquiries from the public and would result in a diversion of resources away from the performance of normal duties, I consider disclosure of the material at issue would have an adverse effect on the proper and efficient conduct of these operations.

28. Noting the above I am satisfied that this information contained in these documents is conditionally exempt under section 47E(d).

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 that time would, on balance, be contrary to the public interest.

30. My public interest considerations are set out below.

Public interest considerations – sections 47C & 47E(d)

31. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

32. In determining whether to release the document, I considered the Guidelines, together with a range of factors that favour access to a document set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to the public interest. Specifically, I considered if disclosure of the document would:

- a. promote the objects of the FOI Act;
- b. inform debate on a matter of public importance;

- c. promote effective oversight of public expenditure; or
- d. allow a person to access her or his personal information.

33. I found that disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act) with the view to promote better decision-making, nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

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

- a. the protection of an individual's right to privacy;
- b. an agency's ability to obtain confidential information;
- c. an agency's ability to obtain similar information in the future;
- d. the competitive commercial activities of an agency; and
- e. harm the interests of an individual or group of individuals.

35. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47C and 47E(d) of the FOI Act.

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

FURTHER INFORMATION

37. One of the documents released as part of this request contain a dissemination-limiting marker (DLM), as the documents are approved for public release the DLM has been struck through.



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