



DEFENCE FOI 374/22/23 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:

1. The scope of work in the contract between the Department of Defence and the Rand Corporation (Australia) Pty Ltd relating to a Strategic Shipbuilding Review (see AusTender Contract Notice CN3922294:

<https://www.tenders.gov.au/Cn/Show/b86ddf0b-6bdb-40e5-b05e-de3022aa21e6>);

2. Any submission, advice or correspondence provided by the Department of Defence to the Minister for Defence and/or the Minister for Defence Industry that relates to the above contract.

3. Any report, review, advice or assessment provided to the Department of Defence by Rand Corporation (Australia) Pty Ltd in fulfilment of the above contract.

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 three (3) documents as matching the description of items 1 and 3 of the request.

4. I did not identify any documents as matching the description of item 2 of the request.

Exclusions

5. 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 considered final versions of documents.

Decision

6. I have decided to:

- a. refuse item 2 of the request under section 24A of the FOI Act;
- b. partially release the three (3) 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 33 [documents affecting national security, defence or international relations], section 47F [public interest conditional exemptions – personal privacy], and section 47G [public interest conditional exemptions – business] of the FOI Act; and
- c. remove irrelevant material under section 22 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); and
- e. advice received from personnel within the Naval Shipbuilding and Sustainment Group (NSSG) on the scope of the contract; and
- f. advice received as part of a third party consultation process under section 27 of the FOI Act.

Reasons for decision

Section 24A – Requests may be refused if documents cannot be found, do not exist or have not been received

8. Section 24A of the FOI Act states:

- (1) An agency or Minister may refuse a request for access to a document if:*
- (a) all reasonable steps have been taken to find the document; and*
 - (b) the agency or Minister is satisfied that the document:*
 - (i) is in the agency's or Minister's possession but cannot be found; or*
 - (ii) does not exist.*

9. Paragraph 3.94 of the Guidelines advises the detail this statement of reasons should include to refuse a request under section 24A(1):

...the statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search...

10. To ensure that 'all reasonable steps' have been taken in relation to this request, every reasonable avenue of identifying documents relating to the scope have been exhausted.

11. In relation to item 2, NSSG conducted searches through their information holdings including the Defence Record Management System, 'Objective', personal and group email accounts, and hard copy repositories for documents matching the scope of item 2 of the request. No documents within the scope of item 2 were identified.

12. I am satisfied that all reasonable steps have been taken to locate the documents sought by the applicant. I am therefore satisfied that the documents cannot be found or do not exist, and refuse item 2 of the request under section 24A(1) of the FOI Act.

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

13. Section 33 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:*

...

- (iii) the international relations of the Commonwealth.*

14. 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.

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.

International Relations: [Damages]

5.37...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.

15. Additionally, 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. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.

16. Having considered the Guidelines in relation to the request, I identified material that contains information relating to Australia’s relationships 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. Based on my consideration of the above, I am satisfied that release of the material could reasonably be expected to cause damage to the international relations of the Commonwealth.

18. I have, therefore, determined that the specified material is exempt pursuant to section 33(a)(iii) of the FOI Act.

Section 47F - Public interest conditional exemptions - Personal privacy

19. Section 47F of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

20. The FOI Act shares the same definition of ‘personal information’ as the *Privacy Act 1988* (Cth). The Guidelines provide that:

6.128 Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- a. whether the information or opinion is true or not; and*
- b. whether the information or opinion is recorded in a material form or not.*

21. Upon examination of the documents, I identified information, specifically names, education and qualifications of individuals other than the applicant, that meets the definition of ‘personal information’.

22. In accordance with section 47F(2), when assessing whether the disclosure of this personal information is unreasonable, I considered the following factors:

- 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 document;
- c. the availability of the information from publicly available sources; and
- d. the effect of the release of the personal information could reasonably have on the third party.

23. I found that for some of the personal information, the specific personal information is readily available from publicly accessible sources (i.e. the supplier’s website). Accordingly, that information has been released.

24. I found that for some of the personal information, the:

- a. specific personal information listed is not well known;
- b. individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents; and
- c. the information is not readily available from publicly accessible sources.

25. The release of the personal information identified in the documents could reasonably be expected to cause harm to third parties. The persons to whom this information relates are likely to have had no expectation that this personal information would be disclosed in connection with their association with the subject matter of the documents.

26. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable disclosure of personal information and it is, therefore, conditionally exempt under section 47F(1) of the FOI Act.

27. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless (in the circumstances) access to the documents at this time would, on balance, be contrary to the public interest. My public interest considerations are set out below.

Section 47G - Public interest conditional exemptions - business

28. Upon examination of the document, I identified business information belonging to a supplier to Defence.

29. Section 47G of the FOI Act 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.*

30. Where access has been denied under section 47G(1)(a) of the FOI Act, I consider that the disclosure of the specified material contained in the documents would have an unreasonable adverse effect on the lawful business affairs of a third party organisation. The disclosure of this material would result in the release of information that is not in the public domain and have the effect of exposing the commercial sensitivities of a third party organisation to competing interests.

31. Where access has been denied under section 47G(1)(b) of the FOI Act, the Guidelines further explain that:

5.18 The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

...

6.198 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 the agency.*

32. Upon examination of the documents, I identified information relating to the commercial arrangements between the supplier and Defence. Disclosure of this information could reasonably be expected to benefit competitors of the industry participants by revealing commercial arrangements that the industry participant is willing to accept. Consequently, disclosure of this information could reasonably be expected to adversely affect the supplier in respect of their business or professional affairs.

33. Accordingly, I am satisfied that the specified information contained in the documents is conditionally exempt under section 47G of the FOI Act. My public interest considerations are detailed below.

Public interest considerations – Sections 47F and 47G

34. I find the identified material conditionally exempt under sections 47F and 47G of the FOI Act.

35. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, 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] of the FOI Act.

36. In coming to my decision, I had regards to the Guidelines, specifically paragraph 6.22, in relation to public interest factors against disclosure and found that the identified material, if released:

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

While I consider that release of the material removed under sections 47F and 47G of the FOI Act may be of some interest to the applicant, I do not consider this information, if released, would inform debate on matters related to Defence or Government administration, enhance scrutiny of government decision making or promote the objects of the FOI Act more broadly.

37. Noting the above, I have decided that the disclosure of the specified information would be an unreasonable disclosure of personal information and/or business information belonging to others. Accordingly, I consider the material to be exempt under sections 47F and 47G of the FOI Act.

Third party consultation

38. I have consulted with third parties regarding their information which is contained within the documents.

Further Information

39. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

erin. [REDACTED] Digitally signed by erin [REDACTED]
Date: 2023.02.23 14:31:42
+11'00'

Erin [REDACTED]
Accredited Decision Maker
Naval Shipbuilding and Sustainment Group