



DEFENCE FOI 105/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 2 August 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

“Pursuant to the FOI Act, we request:

- a. The decision record for each of the Permits including any relevant conditions applying to the Permit.*
- b. Any assessment reports that relevantly include consideration of human rights, regional security, foreign policy and international obligations prepared by DEC in relation to the Permits.*

For ease of reference, we will refer to the total permits granted (being 32) between 2018 and 2021 where the Final Importing State was Indonesia collectively as the Permits.”





FOI decision maker

7. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

8. I identified 27 documents as matching the description of Item 1 of the request.
9. I identified no documents as matching the description of Item 2 of the request.
10. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

11. 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

12. I have decided to:
 - a. partially release 27 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 sections 45 [documents containing material obtained in confidence], 47F [public interest conditional exemptions – personal privacy] and 47G [public interest conditional exemptions - business] of the FOI Act;
 - b. refuse Item 2 of the request under section 24A [requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

13. In making my decision, I have had regard to:
 - a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. relevant provisions of 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. consultation responses received from third parties.

REASONS FOR DECISION

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

- 14. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.
- 15. The documents contain exempt and irrelevant material and information (signatures) that do not relate to the request.
- 16. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

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

- 17. Section 24A(1) 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.*
- 18. 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 to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search...
- 19. To ensure that all reasonable steps have been taken in relation to this request, every reasonable avenue of locating potential documents matching Item 2 has been exhausted.
- 20. In relation to Item 2 of the request, Strategy, Policy and Industry's internal workflow system was searched for any assessment reports in relation to the permits. No records were found matching the applicant's scope.
- 21. I am satisfied that all reasonable steps have been taken to locate the documents sought by the applicant. I am satisfied that the documents cannot be found or do not exist, and refuse the request under section 24A(1) of the FOI Act.

Section 45 – Documents containing material obtained in confidence

22. 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.*”
23. In relation to a breach of confidence, the Guidelines, 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 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 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.*
24. 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 Defence Export Controls in confidence.
25. 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.
26. Accordingly, I am satisfied that the information is exempt under section 45 of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

27. Section 47F(1) of the FOI Act states:
- 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).*
28. 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.*

29. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors in accordance with section 47F(2):
- 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 accessible sources; and
 - d. the effect the release of the personal information could reasonably have on the third party.
30. On examination of the documents, I have found the documents contain personal information (names and locations) 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.
31. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Section 47G – Public interest conditional exemptions – business

32. Section 47G(1)(a) 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.

33. I note that the use of the word 'could' in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.
34. The Guidelines explain, at paragraph 6.188:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

35. The Guidelines also state, at paragraph 6.184:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or

professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

36. The Guidelines go on to provide, at paragraph 6.192, the term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.
37. The information provided to Defence is for the purpose of obtaining export permits from several companies’ business and commercial affairs. Specifically the information pertains to commercial value associated with their exports. Disclosure of this information could unreasonably affect the company in respect of their lawful commercial affairs.
38. Release of the information provided in the export permits 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.
39. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

Public interest considerations - sections 47F and 47G

40. Section 11A(5) of the FOI Act states:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

41. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

- (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;*
- (d) allow a person to access his or her own personal information.*

42. In my view, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).
43. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request are that release of this information could reasonably be expected to prejudice:
 - the protection of an individual’s right to privacy;
 - the interests of an individual or a group of individuals;

- an agency's ability to obtain confidential information; and
- an agency's ability to obtain similar information in the future.

44. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.
45. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to you. Accordingly, I find that the information is exempt under sections 47F and 47G of the FOI Act.

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by kerrie

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Kerrie

Accredited Decision Maker

Strategy, Policy and Industry Group

Department of Defence