



DEFENCE FOI 973/23/24

55G STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 10 June 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

1. The final version of Senate estimates briefs relating to (i) defence export permits to Israel and (ii) the F-35 supply chain, as prepared for the purposes of Defence's appearance at the 5-6 June 2024 Senate estimates hearing.

2. A breakdown by number / type of item / description / date of the approximate 66 defence export permits to Israel that were issued since 2019 and that remained active, as of the time of the above estimates hearing.

3. Any instructions or requests received by Defence from Defence portfolio ministers in relation to how Israel-bound defence export permits should be assessed and handled, including any instructions or requests underpinning Senator McAllister's comments to estimates that the government is calibrating its approach to export to Israel and is "scrutinising pre-existing export permits to Israel to ensure that they align with this calibrated approach". Part 3 of this application is limited to documents generated between 1 January 2024 and 9 June 2024 inclusive.

Background

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FOI decision maker

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

Documents identified

7. I identified four documents as falling within the scope of the request.

Exclusions

8. Mobile telephone numbers contained in documents that fall within the scope of the FOI request are excluded from this request. Defence has only considered final versions of documents.

Revised Decision

9. I have decided to:
- a. partially release three documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted on the grounds that the deleted material is considered exempt under sections 47E [public interest conditional exemption – certain operations of agencies] and 47F [public interest conditional exemption – personal privacy];
 - b. refuse access to one document on the grounds that it is considered exempt under sections 33 [national security, defence or international relations], section 45 [material obtained in confidence], 47E [public interest conditional exemption – certain operations of agencies] and 47G [public interest conditional exemptions – business] of the FOI Act; and
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

10. 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. responses received following consultation with an external party.

REASONS FOR DECISION

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

11. 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.
12. The documents to be released in part contain exempt and irrelevant material such as mobile telephone numbers that do not relate to the scope of the request.

13. Where whole pages are considered to be exempt in full or irrelevant to the scope of the request, these pages have been removed from the released document pack.
14. 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.
15. Where a decision maker denies access to a document, section 22(1) of the FOI Act requires that they consider releasing the document with exempt matter deleted, if possible.
16. Paragraph 3.98 of the Guidelines provides that:

...an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant.
17. In the case of one document identified as being refused in full, I have decided to refuse access to this document as it would be meaningless and of little or no value once the exempt material is removed.

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

18. Section 33(a)(ii) 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:*
 - (ii) the defence of the Commonwealth.*
19. In regard 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.

...

5.32 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.*

20. In regard to 'defence of the Commonwealth', the Guidelines, at paragraph 5.36, note that the FOI does not define the term, and refers to previous Administrative Appeals Tribunal (AAT) decisions which indicate that the term includes:

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

21. I have determined that the document contains information that if disclosed would, or could reasonably be expected to, cause damage to the defence of the Commonwealth by making public information which would, or could reasonably interfere with Defence capabilities. The exempt material contains sensitive information about the supply chains for Defence capabilities. I am of the view that disclosure could expose information that external entities with hostile intentions could use to exploit or complicate these supply chains, which would prejudice, or hinder the effectiveness of the Australian Defence Force.

22. I consider that in making supply chains supporting Defence capabilities publically known, those not allied with Australia, or its interests, could take steps or devote resources to disrupt the Defence capability supply chains, or seek to exploit weaknesses, which would, or could reasonably be expected to cause damage to the defence of the Commonwealth.

23. Accordingly, I am satisfied that the material is exempt under section 33(a)(ii) of the FOI Act.

Section 45 – Documents containing material obtained in confidence

24. 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.

25. The Guidelines, at paragraph 5.186, provide that:

A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

26. In regards to finding an action for breach of confidence where Section 45 may be applied, the Guidelines at paragraph 5.189, provide that the following 5 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.
27. I have determined that the document contains information that satisfies all five criteria that would result in Defence breaching confidence if such information was released.
28. The document comprises business information supplied to Defence by regulated entities, to support applications for export permits issued by Defence. As part of the export permit application process, Defence provides an undertaking to applicants that the business information they provide will be treated confidentially and only released in certain circumstances without their consent. Defence does not have authority to disclose such information without the authority of these entities. I have also considered internal advice that this undertaking meets the threshold of confidentiality.
29. I am satisfied that the resulting action from a breach of confidence would cause detriment. Regulated entities could commence legal proceedings against Defence or otherwise seek compensation from the Department for breach of confidence.
30. Further, I have considered that releasing the information could also harm the trust necessary between current, and future regulated entities and Defence. I consider that disclosure could hamper Defence's administration of Australia's export controls, as regulated entities may reduce the fulsomeness of information ordinarily supplied to Defence, to protect their business information from unauthorised disclosure.
31. I have additionally considered that releasing this information could cause further detriment to regulated entities, as disclosure could increase risk of harm to these entities or their staff, noting media reports of protest activity that have disrupted and caused physical damage at businesses that are perceived to have a relationship with Israel.
32. Accordingly, I am satisfied that the material is exempt under Section 45 of the FOI Act.

Section 47E – Public interest conditional exemptions – certain operations of agencies.

33. 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.*

34. The Guidelines, at paragraph 6.115, provide that:

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

35. Upon examination of the documents, I identified names and contact details of Defence personnel, as well as information that is associated with the business processes of Defence, which would not be widely known within the public domain. In order to determine if the disclosure would, or could reasonably be expected to have a substantial, adverse effect on the proper and efficient conduct of the operations of Defence, I have considered the functions of the relevant Groups and Services.
36. I consider that the relevant information would, or could reasonably be expected to release information about the internal workings and processes of these areas, which would, or could reasonably be expected to cause damage the operational efficiencies of Defence by negatively impacting the integrity of the system by which Defence undertakes its operations. As detailed above, I consider that disclosing details of supply chains for Defence capabilities could compromise national security, thereby aiding adversaries in countering or disrupting military operations.
37. Further, I consider that disclosing information used by Defence to perform its regulatory functions regarding the administration of Australia's defence export control laws, would, or could reasonably be expected to negatively impact such functions. I am satisfied of a reasonable expectation that disclosing such information would require the creation of additional or new processes and have the potential to create barriers between Defence and regulated entities, hindering Defence's ability to perform its regulatory responsibilities.
38. In addition, I am satisfied that were the names and contact details of Defence personnel made publicly available, it would, or could reasonably be expected to, have substantial adverse effects on the proper and efficient operation of existing public communication channels of Defence as I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of names, email addresses and phone numbers would, or could, therefore, reasonably be expected to prejudice the operations of Defence.
39. The Guidelines provide, at paragraph 6.112, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.' Given the nature of the information, I am satisfied that release of the information could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.
40. Accordingly, I am satisfied that the information is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

41. 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).

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

6.123 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.*

43. I found that the specified information contains personal information of a third party. This includes their name, email address and phone number, which would reasonably identify them.
44. 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.
45. I found that the specific personal information listed is not well known, the individual whose personal information is contained in the material is not widely known to be associated with the matters dealt with in the document and the information is not readily available from publicly accessible sources.
46. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

SECTION 47G – PUBLIC INTEREST CONDITIONAL EXEMPTIONS – BUSINESS

47. 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.

48. 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.

49. The Guidelines explain, at paragraph 6.185:

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. However, at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

50. The Guidelines also state, at paragraph 6.181:

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)).

51. The Guidelines go on to provide, at paragraph 6.191, ‘[t]he 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’.

52. The documents contain sensitive information about the business affairs of multiple third parties. Disclosure of this information would, or could reasonably be expected to, unreasonably affect the third party’s business affairs by providing a competitive advantage to competitors. The information could be used by competitors to assess the third parties’ services and commercial arrangements, which would, in turn, undermine the third parties’ future ability to secure contracts. Furthermore, disclosure of this information could have a substantial adverse effect on the future supply of information to Defence which would compromise its regulatory functions related to defence export controls.

53. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.


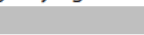
Public interest considerations - sections 47E 47F and 47G


54. 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.

55. 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.*
56. 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).
57. Paragraph 6.233 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:
- an agency's ability to obtain confidential information;
 - an agency's ability to obtain similar information in the future;
 - the protection of an individual's right to privacy;
 - the interests of an individual or a group of individuals;
 - the interests of businesses engaging with the Department in relation to its regulatory functions; and
 - the management and personnel management function of an agency.
58. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. The release of the names, email addresses and phone numbers of Defence personnel can reasonably be expected to prejudice the functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.
59. While I accept there is a public interest in ensuring that Defence undertakes its functions in transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of the materiel contained in the documents, particularly those that refer Defence's internal processes which allow Defence to undertake its operational activities in an expected and lawful manner.
60. Additionally, I am of the view that it would be contrary to the public interest to disclose the business information of regulated entities, where the information which has been communicated in circumstances that give rise to an obligation of confidence.

61. 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.
62. 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 47E, 47F and 47G of the FOI Act.

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Accredited Decision Maker
Strategy, Policy and Industry
Department of Defence