



Reference: FOI 098/20/21  
Objective ID: BN 26731995

## **FOI 098/20/21 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the email of 12 December 2020, in which [REDACTED] sought an internal review under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the Accredited Decision Maker's (ADM) decision dated 5 November 2020.

2. The applicant's request was for access to the following documents under the FOI Act:

*"1. The contract dated on or about 22 February 2011, including its associated Schedules, entered into by the Defence Department with Air Company Vertical-T LLC, possibly just Vertical-T LLC, for the supply of one or more rotary wing aircraft for Operation Slipper in Afghanistan.*

*2. The contact amendment (dated on or about 1 August 2011 which extended the period of the above contract from 31 August 2011 to an amended end date of 30 June 2012.*

*3. The tender documentation submitted to Defence by Mr Yuri Tchernobryvko on behalf of Vertical-T in response to Defence's ATM ID AO/004/10-11 (Published 25.10.10), which was successful in winning the above contract.*

*4. A list of names of other companies that submitted tenders for the above contract. If such a list is too large, it can be limited to 5-10 of the most substantial companies that tendered.*

*5. The main few documents produced by and/or relied on by Defence during its due diligence process prior to selecting Vertical-T as the successful tenderer.*

*6. Significant items of correspondence between Defence and Vertical-T, and/or Defence and Vertical-T's Australian agent Vertical Australia Pty Ltd, from the ATM date (25.10.10) to 31 August 2011.*

*The following information may be excluded, if contained in documents falling within the scope of this request: personal email addresses, signatures, PMKeys numbers, and mobile telephone numbers."*

*Duplicates of documents, and documents sent to and from the applicant are excluded from this request. Defence has only considered final versions of documents.*

### **Background**

3. On 3 September 2020 the applicant submitted a request for documents under the FOI Act.

### **Original Decision**

4. The original decision identified 68 documents. The ADM decided to:

- a. release 49 documents in full;
- b. partially release 10 documents with exemption applied under section 33 [documents affecting national security, defence and international relations], section 47F [public interest conditional exemptions-personal privacy] and section 47G [public interest conditional exemptions - business] of the FOI Act;
- c. deny access to nine documents on the grounds that they are exempt under section 47G of the FOI Act; and
- d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(b)(ii) of the FOI Act.

## Contentions

5. In her email of 12 December 2020, the applicant made the following contentions:

*1. **The denial of access to nine documents** with no identifying factors provided about them. Given the time that has elapsed since this procurement, the parties involved, and the available evidence, this is an unjustifiably stringent decision. Thus, in relation to documents 2, 17, 18, and 21–26, I seek a review of the decisions to deny access and to provide no identifying details. To support this request I make two further points.*

*a) I note access was denied under s47G to protect the business interests of the unnamed parties. It should be noted that unlawful activity may have occurred in relation to this procurement (see article [here](#)), which may have involved parties mentioned in these documents. Section 47G, paragraph 1(a), says that disclosure may be exempt if a party was going about its **lawful** business and may be adversely affected. However, it is possible one or more persons or companies were not acting lawfully and/or may have contravened Defence requirements during this procurement, in which case the exemption ought not apply. I request the denial of access to these documents be reconsidered.*

*b) Following a review, if the documents are still regarded as being unsuitable to release in full – or part – then, at a minimum, I request the following details be supplied: each document’s date; the name of the person(s)/company(ies) involved; a description of the document which makes clear the nature of its content.*

*2. **Vertical T Tender documentation is missing.** I requested the release of Vertical T’s tender documentation. As far as I can see, this has not been released. Would you confirm whether this has been withheld and let me know why? I assume that document 8, even though it is labelled as “Email – Tender Response of Vertical T” is not the actual tender documentation but an email that refers to it. If I am incorrect in that assumption, please advise.*

*If the Vertical T tender document is one of the nine documents being denied then I assert (on the basis of the article linked above, along with additional information we have) that it is possible this company has been involved in unlawful activity and that*

*the company is not entitled to the protection of s47G. Further, it is a Russian company with no presence in Australia and (to the best of my knowledge on publicly available evidence) it is no longer contracted to the Commonwealth. Thus, there is no compelling reason for, and strong reasons against, the use of s47G to withhold this and any other documents referencing this company.*

*If, despite these reasons, the reviewer feels the Vertical T tender documentation cannot be released then, at a minimum, I request evidence of the exact date and time the Vertical T tender documentation was received by Defence, and the name of the person who received it. I also request a statement confirming the tender documentation met all Defence's tender requirements, and the name of the person who certified this.*

**3. DynCorp (Aust) Tender documentation is missing.** *There is no mention or inclusion of any documentation related to the second tender process (whether Open or Limited) in 2012 which appointed DynCorp (Aust) as the new prime contractor after the Vertical T contract expired. I request the release of documents held in relation to this tender and/or whatever appointment/due diligence process was undertaken prior to the signing of the contract. If these documents are amongst those to which access has been denied, then I request this denial be reconsidered in light of the points made previously as to possible unlawful activity. If the documents continue to be withheld, then I request a list of document dates along with descriptive statements of the nature of each document making plain what is being denied.*

#### **4. Inconsistent and unbalanced use of s47F to withhold names**

*Throughout the documents, s47F has been used with marked inconsistency. For example, details for the lead contact for Vertical T in Australia, prime contractor on the first contract, have been released throughout, along with those of its subcontractor PME on the first contract. In contrast, and uniquely, the name of the Managing Director of DynCorp Australia, prime contractor on the second contract, has been uniformly redacted from all documents.*

*These two former contact people have been treated unequally, yet both men continue to live and work in Australia. It seems possible this inconsistent treatment may be because the lead contact on the DynCorp contract is a former officer of the Australian army. I request that all relevant documents be re-released with the DynCorp lead contact's name released throughout wherever it appears, just as the Vertical T contact has been disclosed.*

#### **5. Document 6**

*It appears this document may be inaccurate, in either one way or another. It is my understanding that Vertical T was considered "the single tender received" because the tender submitted by Air Charter Solutions was received late and was returned unopened (ref. document 28). If a tender wasn't opened, and was returned, then perhaps it does not qualify for the list, although I accept the wording in my request*

*was not specific on this.*

*If Air Charter Solutions is to remain on the list, then shouldn't SkyLink Aviation also be included? According to document 33, SkyLink submitted a tender that was late also. Presumably SkyLink's tender was left unopened and returned, although I found no mention of this.*

*Would you advise how the SkyLink tender was dealt with? Is it then necessary to revise document 6 to either include SkyLink Aviation or otherwise remove Air Charter Solutions?*

#### **6. Document 28**

*In Item 5 of my FOI request I asked for the main due diligence documents relied on by Defence. Document 28 is obviously one of those. The assessment documents referred to in paragraphs 9 and 10 of document 28 are highly relevant to my request and ask that they be released as well.*

#### **7. Document 30**

*In paragraph 13 at the bottom of page 4 of this document there is a list of project deliverables. I have been unable to find in the documents released: b) the probity plan, or h) the Request for Tender documentation. I think these are pertinent to my request and would like to see both of these deliverables if possible please.*

6. On 12 January 2021 the applicant made the following additional contention:

*The item in my Review Request below that seems most likely to have triggered that thought for you (on the surface of it) is my third point: **DynCorp (Aust) Tender documentation is missing.***

*My response to this is to note that the second contract - the one with DynCorp - which followed straight on from the Vertical T contract - was included in the documents released to me in response to my original request. Thus, the original decision-maker considered that second contract relevant to include, despite the fact that I had not specifically requested it. Having read all the documents, I feel this was an appropriate decision to make as it was a straight swap-around of roles and so the two contracts are very closely linked and relate to exactly the same work in Afghanistan - which remained ongoing the whole time, managed by the same people on the ground (as far as I can tell). That is, in the first contract Vertical T was the prime contractor, and DynCorp was the subcontractor... and then in the second contract this swapped and DynCorp became the prime contractor and Vertical T became the subcontractor.*

*My contention therefore is this: given the original decision maker decided to include the DynCorp contract in the documents released to me, I believe it would be inconsistent to now say that access to the tender documents DynCorp must have supplied in order to secure that contract sit outside the scope... How could they, when the contract awarded on the basis of those tender docs was considered within the scope? So this is why I requested a copy of that (apparently) missing tender.*

7. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents.

### **Reviewing officer**

8. I am authorised to make this internal review decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

### **Documents subject to internal review**

9. Taking into account the applicant's contentions, 68 documents are the subject of this internal review.

### **Internal review decision**

10. After careful consideration, I have decided to vary the original decision in relation to 17 documents by:

- a. providing access in part to four documents, previously denied [documents 2, 17, 18 and 21), with exempt material redacted under section 33(a)(ii) and (iii) [documents affecting defence and international relations] and section 47G [public interest conditional exemptions - business] of the FOI Act;
- b. refusing access to the remaining five previously denied documents with exempt material redacted under section 33 (a)(ii) and (iii) [documents affecting and international relations] and section 47G [public interest conditional exemptions - business] of the FOI Act; and
- c. providing access to additional material which was previously redacted under section 47F [public interest conditional exemptions – personal privacy] of the FOI Act (documents 38, 39, 42-44, 59, 64 and 68).

### **Material taken into account**

11. In arriving at my decision, I had regard to:

- a. the scope of the applicant's request and subsequent internal review application;
- b. the original decision;
- c. the content of the documents subject to the internal review;
- d. relevant provisions in the FOI Act;
- e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
- f. advice from the Office of the Defence General Counsel and Capability, Acquisition and Sustainment Group.

### **Findings and reasons**

#### *Section 33(a)(ii) – Documents affecting defence and international relation of the Commonwealth*

12. 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: ...*

*(ii) the defence of the Commonwealth; or*

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

13. In regards to the terms, 'could reasonably be expected to' and 'damage', the Guidelines specify:

*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.*

*5.28 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage was likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.*

14. Disclosure of some of the material contained in the tender documents would reasonably be expected to cause damage to the defence of the Commonwealth by revealing details of the logistical capabilities of the Australian Defence Force (ADF) in the context of overseas operations. Disclosure of this material would undermine the safety of ADF personnel and prejudice their effective operation in the future.

#### Mosaic Theory

15. In determining the extent to which the section 33(a)(ii) exemption applies, paragraph 5.39 of the FOI Guidelines stipulates:

*When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.*

16. In understanding the application of the mosaic theory it is fundamental to understand that it is not just strategic documents that are covered by the operation of section 33(a)(ii) of the FOI Act, but rather, key pieces of information that can be used in conjunction with the

already wide range of information available to build up a complete picture. As stated by the AAT in *Re Millisse and National Archives of Australia* [2000]<sup>1</sup> at paragraphs [21] and [22]:

*[I]n seeking to obtain access to material, a searcher may seek or be enabled to with the smallest particle of intelligence, even though such particle may be innocuous standing alone, when used in conjunction with other pieces of intelligence build up a picture, the likes of which the searcher was seeking to construct.*

*Thus information on its face or in conjunction with other material might, depending on the evidence, enable a person to ascertain by process of inference, induction or deduction, the identity of a source in question.*

17. Importantly when considering the release of sensitive information relating to Defence capabilities, it is essential to consider that documents released under a FOI request cannot be conditionally released, so must be considered as a release to the world at large. It is also essential to take into consideration both the environment in which the material will be released and the environment that Defence must undertake its essential functions.

18. Taking into account that the relevant material contains references to logistical capabilities of the ADF in relation to overseas operations, the material is likely to contain mosaic pieces of information for anyone looking to prejudice the defence of the Commonwealth. In these circumstances, it is the Department's position that if this material was released, it could or would be used in conjunction with information available from other sources in ways that could or would prejudice the effectiveness of the Department to undertake its core function of defending the Commonwealth and its interests.

#### *Documents affecting international relations of the Commonwealth*

19. 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 application of foreign relations, and the nature and context of "in confidence" communications does not deteriorate with time. Both issues require ongoing effort to maintain their effect.

20. Material within the scope of this request contain information, which if released, could reasonably be expected to damage the international relations of the Commonwealth. The material contain details of a foreign country's standard operating procedures. Disclosure of this information could limit the Commonwealth's ability to deal with this country in relation to similar matters in the future. The disclosure of such information may diminish the confidence which other countries have in Australia as a reliable recipient of information provided confidence, making that country less willing to cooperate with Australian agencies in the future.

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<sup>1</sup> AATA 565 at paragraphs 21 and 22.

21. Taking the above findings into account, I am satisfied that the information removed from the document is exempt under section 33(a)(ii) and (iii) of the FOI Act.

Section 47G – Public interest exemptions – business

22. The documents contain the contract tender details regarding third party businesses. They identify specific business capabilities, projected plans and proposed methods of delivering a service to the Commonwealth.

23. Section 47G of the FOI Act states:

*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....*

24. I note that the use of the word ‘could’ in this provision requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause the consequences specified.

25. The Guidelines explain:

*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.*

*...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.*

*...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.’*

26. These businesses have committed resources, such as time, manpower and finances, in developing their individual tender response. I consider this investment of resources would be devalued if the information the businesses provided as part of their tender response was released. The ongoing effect to the tenderer would be to harm any professional advantage gained by its effort to stand out against other companies in future tender processes.

27. Considering the factors above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.



*Public interest considerations – section 47G*

28. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines provided by the Australian Information Commissioner, 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.

29. The factors that I consider in favour of disclosing the information are:

- a. public awareness of public expenditure
- b. open tender processes to avoid inappropriate behaviour.

30. Notwithstanding the applicant's assertions of unlawful activity, no criminality or fraudulent behaviour was identified in relation to the tender. However, the harm caused to the third party if the material were to be disclosed would be the exposure and erosion of the third party company resources.

31. In my view, the release of some material provided in the tender documents could be expected to negatively influence future processes. I also consider the factors weighing against disclosing the information such as the information:

- a. could reasonably be expected to prejudice the agency's ability to obtain confidential information;
- b. could reasonably be expected to prejudice the agency's ability to obtain similar information in the future; and
- c. could reasonably be expected to prejudice the competitive commercial activities of an agency.

32. While I accept there is a public interest in ensuring that the Department undertakes its management of contracts, it would, on balance, be contrary to the public interest to breach the confidentiality of those participating in the tender process. Further, there is an expectation that the Department manages business information in a sensitive way.

33. Although the specific information is of interest to the applicant, it would not, in my view, inform public debate on any matter of public importance in any meaningful way.

34. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making my decision.

35. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the documents that match the scope of the request. I therefore decided that it would be contrary to the public interest to release the information considered exempt, under section 47G(1)(a) of the FOI Act.

Items outside of the scope of the FOI request

36. Items 3, 6 and 7 of the applicant's contentions made on 12 December 2020 refer to documents that the applicant believes should have been identified as falling within in the scope of her FOI request.

37. Item 3 refers to missing DynCorp (Aust) (DynCorp) Tender documentation. However, the applicant's FOI request refers to the contract between the Commonwealth and the third party which ended prior to the subsequent contract with DynCorp. As such, documents related to the subsequent contract are outside of the scope of the FOI request.

38. Items 6 and 7 refer to documents referenced in documents 28 and 30 provided in the original FOI decision. Documents 28 and 30 were provided in response to item 5 of the applicant's FOI request which seeks "the main few documents produced by Defence during its due diligence process." In my view the ADM has correctly interpreted the scope of the applicant's request and identified what they considered to be the main documents produced during the due diligence process.

39. The applicant is welcome to submit a fresh FOI request for these additional documents.

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