



Defence FOI Reference: FOI 274/18/19

**FOI 274/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF  
INFORMATION ACT – THIRD PARTY CONSULTATION**

1. I thank you for your letter of 7 June 2019 informing the Department of Defence (“Defence”) that you are acting on behalf of [REDACTED] (“the Third Party”). In your letter you sought an internal review under section 54A of the *Freedom of Information Act 1982* (FOI Act) of the Accredited Decision Maker’s decision dated 1 May 2019.

**Background**

2. On 27 March 2019, Defence advised the Third Party that Defence had received a request for access to documents under the FOI Act and that one of the documents falling within the scope of the request contained the business information of the Third Party. Defence consulted the Third Party over that document, under section 27 of the FOI Act, and invited the Third Party to comment on the release of their business information contained in the document. On 9 April 2019, the Third Party objected to the disclosure of the whole document.

3. On 9 May 2019, Defence advised the Third Party that the Accredited Decision Maker had considered their objections to the disclosure of the document. However, the Accredited Decision Maker decided to partially release the document in accordance within section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the material is exempt under sections 33 [Documents affecting national security, defence or international relations] and 47G [public interest conditional exemptions– business] of the FOI Act.

**Contentions**

4. The Third Party in this case has set out contentions predominately based on prejudice to business affairs stating:

*“[T]hat notwithstanding the subject documents have been edited in accordance with section 22 of the Act, the unredacted portions when read together are grounds for exemption under section 47G of the Act. Section 47G(1)(a) of the Act provides that a document is conditionally exempt if its disclosure would disclose information concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information would, or could reasonably be expected to, unreasonably affect that organisation or undertaking in respect of its lawful business, commercial or financial affairs.*

*The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself, therefore [REDACTED] submits that the disclosure of the unredacted portions of the subject documents and therefore the documents would reasonably be expected to have an unreasonable adverse effect on [REDACTED] business interest for the following reasons:*

- (a) it relates to information about aspects of [REDACTED] business affairs;*
- (b) the information is not currently available from public resources;*
- (c) disclosure of the business information would be a disclosure of [REDACTED] capabilities and methods and could diminish the competitive nature of the business and affect the profitability of their business operations;*
- (d) it could reasonably be expected to expose [REDACTED] name and reputation to potential damage given what may be considered as the sensitive nature of [REDACTED] and [REDACTED];*
- (e) it could reasonably be expected to adversely affect the reputation of [REDACTED] and expose it to misleading publicity, thereby prejudicing its commercial affairs.*

*Release of the documents does not and would not inform debate on a matter of public importance, increase public participation in Government processes, promote effective oversight of public expenditure or allow a person to access his or her own personal information. The matter is of a private business nature that does not involve the use or expenditure of Australian State or Commonwealth funds."*

5. The purpose of this statement of reasons is to provide the Third Party with a fresh decision relating to the Third Party's document to which the Third Party raised contentions regarding its release.

#### **Reviewing officer**

6. 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**

7. Taking into account the Third Party's contentions, a single document is the subject of this internal review.

#### **Internal review decision**

8. I have decided to vary the original decision, by applying a section 47G exemption across the whole of the document.



9. I do agree with the original Accredited Decision Maker, in that the section 33 exemption also applies to parts of the document. Therefore, I uphold that component of the original decision.

10. I have considered the Third Party's contentions at point (c) of their letter, which states:

*"disclosure of the business information would be a disclosure of [REDACTED] capabilities and methods and could diminish the competitive nature of the business and affect the profitability of their business operations".*

11. In regards to this point, the contention lies more with the application of section 47 [documents disclosing trade secrets or commercially valuable information] of the FOI Act. However, I am prevented from including a section 47 exemption due to subsection 47G(2), which provides that section 47 cannot be claimed in conjunction with section 47G of the FOI Act. Further, I believe that the section 47G exemption is the appropriate section of the FOI Act to be applied in this circumstance.

12. Additionally, the contention that the document holds information of a trade secret nature is a point that I consider goes to public interest considerations as part of the public interest test set out in section 47G, as opposed to an exemption in and of itself in this case.

13. The reasons for my decision in relation to the changed decision is set out below.

#### **Material taken into account**

14. 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. the contentions and information supplied by the Third Party.

#### **Section 47G**

15. Section 47G Public interest conditional exemptions [business] 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.*
- (2) *Subsection (1) does not apply to trade secrets or other information to which section 47 applies.*
- (3) *Subsection (1) does not have effect in relation to a request by a person for access to a document:*
  - (a) *by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or*
  - (b) *by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or*
  - (c) *by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.*
- (4) *A reference in this section to an undertaking includes a reference to an undertaking that is carried on by:*
  - (a) *the Commonwealth or a State; or*
  - (b) *an authority of the Commonwealth or of a State; or*
  - (c) *a Norfolk Island authority; or*
  - (d) *a local government authority.*
- (5) *For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.*

16. It is noted that the requirement in section 47G is that the release –

*“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”.* [Emphasis added].

17. Importantly, the operative term in this section is “unreasonably affect that person adversely” as opposed to the higher standard of “substantially damage” used in other sections of the FOI Act.

18. The Guidelines state at paragraph 6.184 that:

*“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))”.*

19. The Guidelines continue at paragraphs 6.187-188 stipulating:

*“The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. A **decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a)...** The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect”.* [Emphasis added].

20. The document in question is a document that I consider has some considerable degree of sensitivities for the Third Party and these sensitivities have been set out in the Third Party’s contentions provided to Defence. They include:

- a. The sensitive nature of the lawful business operation of the Third Party, and the unfortunate propensity of the Third Party’s business model to be potentially drawn into unreasonable external political debate best addressed by the parliament;
- b. The inclusion in the document of business material that would likely be considered trade secrets (such as funding models and training arrangements provided by the Third Party);
- c. The potential for interruption of the Third Party’s funding model if undue publicity was to arise out of the politicisation of the Third Party’s business affairs.

21. The document in question is addressed to the “Hon Marise Payne Minister of Defence” and is couched in terms and in a manner that conveys that the document was sent with an expectation of official confidence. The document contains material that could adversely impact on the Third Party and, for the most part, is not information that is well known, with some of the information being information that could potentially be classed as trade secrets. Given these considerations, I have determined that it is unreasonable to release the document and as such is conditionally exempt from the operation of the FOI Act pursuant to section 47G of the FOI Act.

22. 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 would, on balance, be contrary to the public interest. Defence’s public interest considerations in relation to section 47G is set out below.

### **Public interest considerations**

23. As part of my considerations on the relevant factors effecting the balance of public interest, consideration was given to the objectives of the FOI Act, the Guidelines and the

factors favouring access to documents set out at subsection 11B of the FOI Act, including that the provision of government information:

- a. increases scrutiny, discussion, comment and review of government activities;
- b. increases public participation in government processes, which helps to promote better informed decision making;
- c. should take place where possible to allow government held information to be used as a national resource;
- d. may inform debate on a matter of public importance;
- e. may promote effective oversight of public expenditure; and
- f. may allow a person to access their own personal information.

24. In this case, I accept that the document is likely to garner some degree of interest and the release of the document would likely increase public discussion in regards to the material contained in the documents, however the document is not a Defence document, so the discussion would not be about government activities, nor allow any scrutiny of government activities or government expenditure. For this reason, in my view, there is no public interest in the release of the document. Given the nature of the scope of the FOI request, it can be seen that the topic of the request has public interest, but that public interest is not served in directing enquiries to private businesses undertaking lawful business activities, rather it is best served by the direction of enquiries to the Parliament who have, as the case may be, either legislated for, or failed to prohibit, the undertaking of lawful business activities in this business area.

25. The Guidelines at paragraph 6.190 give guidance on determining the reasonableness of releasing business documents, stating:

*“The AAT has distinguished between ‘truly government documents’ and other business information collected under statutory authority. The first category includes documents that have been created by government or that form part of a flow of correspondence and other documents between the government and business. The AAT concluded that such documents inclined more to arguments favouring scrutiny of government activities when considering whether disclosure would be unreasonable. **By implication, the exemption is more likely to protect documents obtained from third party businesses.**” [Emphasis added].*

26. The information supplied in the Third Party’s submissions to Defence, that the Third Party does not receive any Australian government funding, lead me to conclude that the release of the document does not have any public interest in allowing scrutiny of government expenditure, as there is no government expenditure to be scrutinized in this case. Which means, in this case, that there really are little or no public interest considerations in favouring release of the documents.

27. Whilst there is little or no public interest in releasing this document, I consider that there is substantial public interest favouring not releasing the document, including unreasonably impacting on the business activities of the Third Party, potentially releasing sensitive operating and trading information of the Third Party and limiting the Third Party’s ability to undertake its law business activities into the future.

28. In balancing the public interest factors, I consider that those factors favouring release are out-weighed by those factors favouring denying access to the document. Accordingly, I consider the document is exempt in its entirety under section 47G of the FOI Act and in parts under section 33(a) of the FOI Act as per the original decision.

29. In coming to the above decision I ensured that all irrelevant considerations, including those factors outlined in section 11B(4) [irrelevant factors] of the FOI Act, were not taken into account in making my decision.

### **Further Information**

30. In regards to the Third Party's contentions, I did not give any weight to the contention that the release of the document would impact on the provision of information to the Commonwealth. Although, I am not in doubt that the release of the document would likely inhibit any future supply of information to Defence, the Third Party has not supplied any evidence as to how this refusal to supply information would impact adversely on Defence.

31. Section 47G(1)(b) [prejudicing of the supply of information to the Commonwealth] only applies so far as it impacts on "the administration of matters administered by an agency". If the Third Party wishes to rely on such an argument in any potential future Information Commissioner's review of this decision, then further submissions in relation to those impacts would have to be supplied to Defence in order for Defence to put forward that argument in any such Information Commissioner review.

Yours sincerely,

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by  
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Mrs Justine Nordin  
Director FOI  
Accredited Decision Maker – Internal Review