



Australian Government
Department of Defence

Reference: Objective ID:

FOI 321/16/17 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. On 30 May 2017, the Department of Defence (Defence) made a decision on the request by [REDACTED] for access to the following under the *Freedom of Information Act 1982* (FOI Act):

"...It is noted that on 31 March 2017 the Minister for Defence Industry announced the release of a Request for Tender to BAE, Fincantieri and Navantia for the Future Frigate Program.

This letter serves as a request for the purposes of the Freedom of Information Act 1982 for the following:

- 1. The sections of the tender that deal with Australian Industry Capability.*
- 2. Any information in the tender documentation or covering letters that deals with the partnering of Australian shipyards by the tender recipients.*
- 3. Any information in the tender or covering letters that relates to how Techport and other Australian facilities might be used by the tender recipients..."*

2. The original decision provided to the applicant denied access to the documents under sections 33(a)(i) & 33(a)(ii) [Documents affecting national security], 47C [public interest conditional exemptions – deliberative process], 47D [public interest conditional exemptions – financial or property interests of the Commonwealth or Norfolk Island] and 47E [public interest conditional exemptions – certain operations of agencies] of the FOI Act.

3. On 8 June 2017, [REDACTED] applied for an internal review of the original decision. On 10 July 2017, Defence upheld the decision to refuse access to extracts of the documents under sections 47C, 47D and 47E(d) of the FOI Act.

4. On 11 August 2017, the Office of the Australian Information Commissioner (OAIC) advised Defence that the applicant had requested the Information Commissioner (IC) to review the internal review decision.

5. The purpose of this statement of reasons is to provide the applicant with a revised decision in relation to the request under paragraph 55G(1)(a) [Procedure in IC review – revocation or variation of access refusal decision] of the FOI Act. This revised decision is a fresh decision on the request for access to documents.

Description of the documents

6. Upon review, I identified 18 Serials as matching the scope of the request which are listed in the Schedule of Documents at Attachment 1. I note that the previous decisions mentioned above identified four documents. However, for ease of reference I have separated the four documents into 18 serials as the documents cover Items 1, 2 and 3 of the request.

Revised decision

7. I have decided to vary the decision by:

- a. releasing Serials 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17 and 18 intact;
- b. partially releasing Serial 15 with the material considered exempt removed under sections 33(a)(i) and 47E(d) of the FOI Act; and
- c. denying access to Serial 10 under sections 33(a)(i) and 47E(d) of the FOI Act.

8. A copy of the documents in the form approved for release are at Attachment 2.

Findings and reasons

Section 33(a)(i) – damage to the security of the Commonwealth

9. The release of Serial 10 and some material in Serial 15 is considered exempt under section 33(a)(i) of the FOI Act, as it could reasonably be expected to cause damage to the security of the Commonwealth.

10. In order for the exemption to apply, it must be shown that disclosure ‘would, or could reasonably be expected to’ cause damage.

11. The Guidelines provide that the term ‘reasonably expected’ in the context of section 33(a)(i) requires consideration of the likelihood of the predicted or forecast damage. In particular, at 5.27 the Guidelines indicate that there must be ‘real’ and ‘substantial’ grounds for expecting the damage to occur which can be supported by evidence or reasoning. A mere allegation or a mere possibility of damage will be insufficient for the purposes of the exemption. ‘Damage’ is not confined to loss or damage in monetary terms and the relevant damage may be of an intangible nature.

12. The material that I have decided to exempt relates to the Mission System, the requirements of the Future Frigate capability and capability changes that Defence has requested to the existing ship designs. Further, this information relates to the specifications for military capability.

13. I have formed the view that release of this material would pose security implications for Defence capability as it would provide non-allied nations with an insight into the intended capability and role of the Future Frigate. Additionally, release of this information would prevent Defence from having an advantage of a discrete capability when undertaking missions. Furthermore, release of this information would lead to Australia’s national security interests being compromised.

14. In evaluating potential harmful effects of disclosing information in the documents that would affect Australia’s security, I have also taken into account the intelligence technique known as the ‘mosaic theory’. This theory holds that individual pieces of information, when combined with other pieces already in the public domain, can generate a composite ‘a mosaic’, which could lead to an adversary applying this information and therefore undermining Defence’s capability and effectiveness.

15. Taking into account the above reasons, I have decided that release of this material could reasonably be expected to cause damage to the security of the Commonwealth. Accordingly, I have decided to exempt the material under section 33(a)(i) of the FOI Act.

Section 47E(d) – certain operations of an agency

16. I identified information which was created for the purpose of the Future Frigate Program such as critical military capability and capability changes that Defence has requested to the existing ship designs.

17. I note that paragraph 6.123 of the Guidelines state that any predicted substantial adverse effect must “*bear on the agency’s ‘proper and efficient’ operations, that is, the agency is undertaking its expected activities in an expected manner*”.

18. In summary, I found that Defence’s operations would be substantially adversely affected if this information was disclosed, as it would undermine the whole process of the Future Frigate Program and weaken Defence’s critical military capability. For this reason, this material is conditionally exempt under section 47E(d) of the FOI Act.

19. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

Public interest considerations – section 47E(d)

20. I have considered section 11B of the FOI Act, which sets out factors favouring access and irrelevant factors when considering the public interest test.

21. Subsection 11B(3) of the FOI Act sets out factors favouring access to the document in the public interest which include whether access to the document would do any of the following:

- a. promote the objects of the FOI Act;
- b. inform debate on a matter of public importance;
- c. promote the effective oversight of public expenditure; and
- d. allow a person to access his or her own personal information.

22. I consider that the public interest in promoting the objects of the FOI Act has been satisfied with the material I have decided to release. I acknowledge that there is a public interest in the Future Frigates Program in general. I also accept that there is a public interest in ensuring that Defence undertakes its business in a proper and transparent matter. However, it would, on balance, be contrary to the public interest to release material that would undermine the Future Frigate Program and inhibit Defence’s ability to conduct its core business of capability development. I also consider that there is a stronger public interest in protecting the security of Australia and withholding information about military capability.

23. While the material may be of some interest to the applicant I do not consider it will promote effective oversight of public expenditure nor will it allow the applicant further access to personal information.

24. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

25. After taking all of the above into consideration, I am satisfied that the public interest factors against disclosure outweigh the factors for disclosure in this instance.

Section 22

26. Section 22 of the FOI Act requires a decision maker to give an applicant access to an edited copy of a document with the exempt material deleted, if it is reasonably practicable to do so and retain a copy of a meaningful non-exempt edited copy of the document.

27. Based on my findings and reasons set out above, I found that it is not practicable to make an edited copy of Serial 10 without it becoming meaningless.

Further information

28. I note that the previous decisions denied access to the documents. I had regard to the fact that the tender process for the Future Frigate Program has been finalised and the passage of time. Taking this into account, I was able to make a fresh decision to release information where possible.



Mr Jarrod Howard
Decision Maker

25 January 2018