



Reference: BM4624792

## FOI 355/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act), for access to:

*“1. Defence's work order to ASC for the 'interim report' on Collin class submarine full cycle dockings future referred to by the CEO of ASC (Submarines) in Finance and Public Administration Senate Estimates on 04 April 2019.*

*2. The 'interim report' referred to by the CEO of ASC.*

*3. Any document, note, diary entry or record in the possession of ASC that shows the 'interim report' is proposed for submission to Cabinet (s34(1)(a)) or is to be prepared for the dominant purpose of briefing a minister on a Cabinet submission (s34(1)(b)).*

*In relation to item 2, and in respect of claims made at hearing that the documents might "inform the cabinet", it is noted that this does not meet the threshold requirement for the any s34 claim.”*

### FOI decision maker

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

### Documents identified

3. I identified five documents as matching the description of the request.

### Decision

4. I have decided to release one document in full and partially release four documents in accordance with section 22 [access to edited copies with exempt or irrelevant material deleted] on the grounds that the deleted material is exempt under section 33(a)(ii) [defence of the Commonwealth], conditionally exempt under section 47C [deliberative processes], conditionally exempt under section 47E(d) [certain operations of agencies], conditionally exempt under section 47F [personal privacy] and/or conditionally exempt under section 47G(1) [business].

### Material taken into account

5. In making my decision, I had regard to:
- the terms of the request;
  - the content of the identified documents in issue;
  - relevant provisions in the FOI Act;

- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines);
- e. consultation with the affected third party; and
- f. advice received from departmental officers.

### **Third party consultation**

6. I decided to consult with ASC as the other party to the *Collins class full cycle docking location study*. In response to this consultation, ASC objected to the release of the document in part with respect to business information that would disclose sensitive commercial and financial information and may lead to opportunity loss for ASC resulting in commercial and competitive detriment or disadvantage. While I generally agree with the objection, as the decision maker, I believe there is some information that is in the public interest to disclose, including information that is publicly available, and information that has been previously disclosed.

7. The department is required to advise the third party of my decision. Documents will be provided when all review rights have been exercised.

### **Reasons for decision**

#### **Section 33(a)(ii) – defence of the Commonwealth**

8. Section 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

9. While the FOI Act does not define ‘defence of the Commonwealth’, previous Administrative Appeals Tribunal decisions indicate the term includes protecting the Defence Force from hindrance or activities which could prejudice its effectiveness.

10. The document contains specific information on the planning and management of a significant Defence capability. Disclosure of this information would make public the capabilities of Defence assets and workforce, and such disclosure could be reasonably be expected to cause damage to the defence of the Commonwealth by providing adversaries with a military advantage.

11. In evaluating the potential harmful effects of disclosing information in the documents I have also taken into account ‘mosaic theory’, which refers to individual pieces of information which may not be harmful in isolation, but which may cause damage to the defence of the Commonwealth when combined with other publicly available information and material in the document that is being released.

12. I have therefore determined that the material is exempt under section 33(a)(ii) of the FOI Act.

#### **Section 47C – deliberative processes**

13. In assessing the document I have identified deliberative matters – that is, content that is in the nature of, or relating to either opinion, advice or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the purpose of, a deliberative process of the department. Paragraphs 6.58-6.62 of the Guidelines describe what constitutes a deliberative process.

14. The document is an interim report that contains opinions, analysis, advice, recommendations and supporting material. Defence has not yet fully considered the report,

and made no decisions on its recommendations. Consequently, I find the document contains deliberative matters that are conditionally exempt under section 47C(1) of the FOI Act.

#### **Section 47E(d) – certain operations of agencies**

15. Section 47E(d) of the FOI Act provides that a document is conditionally exempt from disclosure if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

16. The documents contain information that was provided to Defence for the purpose of developing options for Government consideration and decision. The information includes planning assumptions and constraints that are relevant to the continuing examination of options under development. Defence is reliant upon information received from a variety of sources information to ensure advice to Government is comprehensive and robust, and to ensure Defence conducts its business efficiently and effectively.

17. Disclosure of this information would not only damage Defence's ability to obtain honest and candid information in future studies to support Government decisions, there would also be a risk that future studies would be prepared with a public audience in mind. This would impede Defence's ability to conduct proper and thorough studies in the future.

18. As such, I consider that release of the material could reasonably be expected to prejudice the effectiveness of any future studies or tasks conducted by Defence and for this reason, is conditionally exempt under section 47E(d) of the FOI Act.

#### **Section 47F – personal privacy**

19. Section 47F of the FOI Act provides that a document is conditionally exempt from disclosure if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person.

20. Upon examination of the documents, I identified personal information, such as signatures, belonging to individuals other than the applicant.

21. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors:

- 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.

22. I found that the:

- a. specific personal information listed is not well known;
- b. individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents; and
- c. information is not readily available from publicly accessible sources.

23. The release of the signatures of individuals identified in the document could reasonably be expected to cause harm to their privacy. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an

unreasonable disclosure of personal information and is therefore conditionally exempt under section 47F(1) of the FOI Act.

### **Section 47G(1) – business**

24. Section 47G 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.*

25. The documents contain information on aspects of ASC's operating assumptions and constraints provided by ASC as part of the development and analysis of options. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for conducting studies to inform advice to Government.

26. Businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate information on its operating constraints for future studies could reasonably be expected to be reduced. Consequently, I find this information conditionally exempt under section 47G(1)

### **Sections 47C, 47E(d), 47F and 47G(1) – public interest considerations**

27. Section 11A(5) of the FOI Act provides that if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

28. In determining whether to release the documents, I considered the Guidelines, together with a range of factors that favour access to the documents set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to the public interest. Specifically, I considered if disclosure of the documents would:

- a. promote the objects of the FOI Act;
- b. inform public debate on a matter of public importance; or
- c. promote effective oversight of public expenditure.

29. I found that 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).

30. Paragraph 6.22 of the Guidelines provides 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 or harm:

- a. the management function of an agency (Defence);

- b. the competitive commercial activities of an agency;
- c. an agency's ability to obtain similar information in the future;
- d. an agency's ability to obtain confidential information;
- e. the protection of an individual's right to privacy; and
- f. the interests of an individual or group of individuals.

31. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information.

32. In particular, I find that release of this information could reasonably be expected to prejudice a Defence management function, specifically its ability to elicit candid and honest information to support the development of advice for Government.

33. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of the material contained in the documentation. In my view, disclosure would cause a detriment to future requests for information, as parties engaged to conduct studies or provide analysis, information and advice may not provide candid information if they were aware that it could subsequently be released under FOI. Further, there is an expectation that Defence manages its information in a sensitive way and only grants access to such information on a need-to-know basis.

34. There is also a strong public interest in Defence maintaining the Commonwealth's good working relationships with its stakeholders, and not releasing information that would harm the effectiveness in obtaining information in future. Disclosure of this information would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence and development of its advice to Government and would not, in my view, be in the public interest.

35. Where I considered there was a genuine risk to the ability and effectiveness to conduct future studies and directed tasks, I have placed significant weight on this factor.

36. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and that the information is therefore exempt under sections 47C, 47E(d), 47F and/or 47G(1) of the FOI Act.

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

### **Further Information**

38. Some of the documents matching the scope of this request contained a dissemination limiting marker. As the documents are approved for public release the marker has been struck through.

**Tony.Brown2** Digitally signed by Tony.Brown2  
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