



Reference: BN28630030

**DEFENCE FOI 377/20/21 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 a list that summarises:

*“...all applications for approval to export military/dual-use goods and technologies to Myanmar during the years 2016/2017, 2017/2018, 2018/2019/, 2019/2020, and 2020-present date, including descriptions of the goods in question and whether approval was granted or rejected in each case.”*

**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. A document was generated under section 17 of the FOI Act matching the description of the request:

- a. a document was produced containing the information by using ‘a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information’ s17(1)(c)(i), and
- b. producing the document did not substantially and unreasonably divert resources of the agency from its other operations s17(2).

**Decision**

4. I have decided to release the document created under section 17 of the FOI Act in full.

5. The request sought ‘descriptions of the goods in question’ for each application submitted. I have decided not to release this information on the grounds that this and related information enclosed in an export application submitted to Defence Export Controls (DEC) is considered exempt under section 45 [material obtained in confidence], section 47 [commercially valuable information] and section 47G [business affairs] of the FOI Act.

**Material taken into account**

6. In making my decision, I had regard to:
- a. the terms of the request;
  - b. the content of the identified documents in issue;
  - c. 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); and
- e. information provided by DEC Branch within the Department of Defence.

## Reasons for decision

### Section 45 – material obtained in confidence

7. Where access has been denied under section 45 of the FOI Act, I considered that the material contained in the export applications submitted to DEC was communicated in confidence and its disclosure would allow the source of the information to bring an action for breach of confidence.

8. 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, the Commonwealth or Norfolk Island), for breach of confidence.*”

9. In relation to a breach of confidence, the Guidelines, paragraphs 5.158 & 5.159, provide that

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

*5.159 To found an action for breach of confidence (which means that s45 would apply), the following five 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.*

10. Upon examination of the export applications matching the request, I formed the view that disclosure of the information relating to individuals and companies listed as exporters, consignees and end-users (i.e. customers) in the export permits and the descriptions of the goods proposed for export would be a basis for an action to be brought forward against the Commonwealth for breach of confidence, and for compensation to be sought for loss or damage arising from the disclosure.

11. The courts in Australia have generally accepted that business information which an entity generates about its activities as being inherently confidential. This can include pricing data, sales statistics, customer and supplier lists, negotiation information and customer requirements.

12. The DEC permit application form states:

*“the business and financial information you provide in your application will be treated as confidential... We will not disclose this information to third parties for any purpose, unless you have provided your consent or we are otherwise authorised to do so by law”*

13. This statement gives rise to a mutual understanding that the Department has undertaken to handle the applicant's business and financial information, including information about its customers, products and pricing, confidentially.

14. I have established that the companies to which the customer and product information relates have not given the Department authority to disclose it to either the applicant or the world at large. Such disclosure would potentially allow competitors to poach current and future sales from the companies, reducing the profits of the company. Further, the companies' customers may also take their future business elsewhere if such information is disclosed due to the breach of confidentiality.

15. In light of the above, I have decided that the specified material identified is exempt pursuant to section 45 of the FOI Act.

#### **Section 47 – commercially valuable information**

16. I also identified information in the export applications submitted to DEC of commercial value to the companies applying for permits. Paragraph 5.202 of the Guidelines states that to be exempt under section 47(1)(b) a document must satisfy two criteria – it must contain information that has commercial value either to the agency or to another person or body; and the commercial value of the information would be, or could be reasonably expected to be, destroyed or diminished if it were disclosed.

17. The export applications contain commercial information relating to specific items being sold to or marketed for sale to the destination country and specific end-users and the pricing of such items. Furthermore, the description of the goods proposed for export could uniquely identify the exporter and the intended end-user as only a small number of Australian companies manufacture the items. The release of such information could reasonably be expected to diminish the commercial advantage of those companies and could reveal potential market opportunities for competitors.

18. Accordingly, I consider the release of the information would, or could reasonably be expected to, diminish commercial value, and be exempt from release under section 47(1)(b) of the FOI Act.

#### **Section 47G – business affairs**

19. 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.*

20. I note 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.

21. In accordance with the section 27(3) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of business information, I had regard to:

- 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 information;
- c. the availability of the information from publicly available sources; and
- d. any other matters that the agency considers relevant.

22. Against those criteria, I found that:

- a. the information is not well known to the broader community;
- b. the information is not readily available from publicly accessible sources; and
- c. the third party would likely object to the release.

23. In making my decision I had regard to the Guidelines, specifically 6.184 which notes, *'The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself'*. It adds at 6.185, *'it is intended to protect the interest of third parties dealing with the government.'*

24. I also considered paragraph 6.197 of Guidelines where it notes *'A document that discloses the kind of information ... will be conditionally exempt if the disclosure could reasonably be expected to prejudice future supply of information to the Commonwealth...'*

25. Further, at 6.198 of the Guidelines it notes *'This limb of the conditional exemption comprises two parts:*

- *a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government*
- *the reduction will prejudice the operations of an agency'*

26. The information in the export applications relate to multiple companies business and commercial affairs. Specifically the information pertains to commercial transactions that the companies have entered into. Disclosure of this information could unreasonably affect the company in respect of their lawful commercial affairs.

27. The companies who hold the permits are engaged in competitive business activities. Release of the information in the permits could reveal otherwise unknown viable market opportunities to competitors, allowing them to approach those identified customers and undercut the companies. The loss of these sales, including potential future repeat purchases, could have significant financial impact on the companies.

28. Noting my findings, the information is exempt under section 47G of the FOI Act.

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