



Australian Government

Department of Defence

FOI 383/18/19 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 documents as outline in the request below:

“I seek access to documents held by the Department of Defence (“the Department”) relating to CU River Mining Pty Ltd and its operations in the Woomera Prohibited Area (“WPA”), and Jiujiang Mining Australia Pty Ltd and related companies with regard to their support of CU River Mining Pty Ltd in the WPA, in so far as those documents are:

- 1. Briefs to Ministers from the Department.*
- 2. Briefs to the Secretary of Defence from the Department.*
- 3. Any permissions granted by the Department to CU River Mining Pty Ltd relating to mining operations in the WPA.”*

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 have identified 24 documents that fall within the scope of the request.
4. The decision in relation to each document is detailed in the schedule of documents.
5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. partially release 14 documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 7(2A) of the FOI Act [Intelligence agency document], section 7(2C) [Defence intelligence document], section 33(a)(i) [Documents affecting the security of the Commonwealth], section 33(a)(ii) [Documents affecting the defence of the Commonwealth], section 33(a)(iii) [Documents affecting the international relations of the Commonwealth], section 34 [Cabinet documents], section 42 [Information subject to legal professional privilege], section 45 [Material obtained in confidence], section 47 [Commercially valuable information], section 47B [Commonwealth-State relations conditional exemption], section 47C [Deliberative process conditional exemption], section 47E [Certain operations of agencies conditional exemption], section 47F [Personal privacy conditional exemptions], and/or section 47G [Business affairs conditional exemption] of the FOI Act;
 - b. deny access to 10 documents of the request in accordance with section 34 of the FOI Act [Cabinet Document], section 42 [Information subject to legal

professional privilege] and section 47 [Commercially valuable information] of the FOI Act; and

- c. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

7. 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. Advice provided by the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, Department of the Treasury, Department of Industry, Innovation and Science, Cu-River Mining Australia Pty Ltd and their legal representative, and from Defence officials in Strategic Policy Division and Defence Legal.

Reasons for decision

Section 22 – Irrelevant material deleted

8. Upon examination of the documents, I found that they contained material that did not relate to the scope of the request. I considered that the material would disclose information that would reasonably be regarded as irrelevant to the scope of the request. As such, in accordance with section 22(1)(a)(ii) of the FOI Act, I decided to remove this material.

Section 22 – Documents being denied in full

9. Section 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with the exempt material deleted, where possible. I have considered disclosing the documents with deletions, but have decided against this course of action, as the relevant documents would be meaningless and of little or no value once the exempt material is removed.

Section 7 – Documents exempt from certain bodies

10. Under section 7(1), a number of bodies specified in Schedule 2, Part 1, Division 1 of the FOI Act are not agencies for the purposes of the FOI Act. All Australian Government agencies (including Defence) are exempt from the operation of the FOI Act in relation to 'intelligence agency documents' (section 7(2A)). A number of documents identified by Defence contain information that has been sourced from documents and material that have originated from an intelligence agency covered by this section. As the material would fall within the definition of 'intelligence agency documents', the section 7 exemption applies to the material.

11. On a similar basis, Australian Government agencies are also exempt from the operation of the Act in relation to 'defence intelligence documents' which include documents that originate with or were received from Defence and relate to the collection, reporting or analysis of operational intelligence. A number of documents identified by Defence contain material sourced from the Defence intelligence bodies relating to the collection, reporting and analysis of operational intelligence matters, and therefore fall

within the exemption under section 7 to the extent that the material is considered ‘defence intelligence documents’.

Section 33(a)(i) – Documents affecting national security

12. I have identified information that, if released, could reasonably be expected to cause damage to the security of the Commonwealth. Paragraph 5.29 of the Guidelines describes security of the Commonwealth as the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests. In determining ‘damage’, there are three aspects that need to be considered, namely; that of safety, protection or defence from something that is regarded as a danger, the means that may be employed either to bring about or to protect against danger of that sort (examples of these means include espionage, theft infiltration or sabotage), and the organisations or personnel providing safety or protection from the relevant danger are the focus of the threat.

13. The documents contain details on Defence’s processes in assessing domestic and international security threats, as well as information regarding the protection of national security capabilities, infrastructure and designated prohibited areas. Release of this information could reasonably be expected to cause damage to Defence and the wider national and international security communities’ ability to protect those interests and use those sites to conduct Defence activities, including the testing and evaluation of Defence capabilities.

14. Accordingly, I consider the release of the information so marked could reasonably be expected to cause damage to the security of the Commonwealth and exempt the release of this information under section 33(a)(i) of the FOI Act.

Section 33(a)(ii) – Documents affecting national defence

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

16. A number of documents identified contain information relating to Australia’s defence capabilities, key critical infrastructure assets and operational training matters. Upon examination of the documents, I am of the view that the material, once released, could reasonably be expected to cause damage to the defence of the Commonwealth by disclosing considerations used in the assessment of whether permissions should be granted to prospective users in the WPA. Further, I believe the release of the material could reasonably be expected to cause damage to the ability of the Defence Force to maintain its critical asset, as well as potentially providing an avenues through which foreign incursions could interfere with Australia’s defence assets.

17. I note that the WPA is a strategic Defence capability and testing and evaluation asset that plays a significant role in Australia’s national security. Releasing the material relating to Defence’s internal assessment of user access could result in hindrance or activities which would prejudice the effectiveness of the access arrangements in the WPA under the *Defence Act 1903*, the *Defence Force Regulations 1952* and the *Woomera Prohibited Area Rule 2014*.

18. Accordingly, I have assessed the release of the information as marked could reasonably be expected to cause damage to the defence of the Commonwealth and exempt the release of this information under section 33(a)(ii) of the FOI Act.

Section 33(a)(iii) – Documents affecting international relations of the Commonwealth

19. I have identified information that, if released, could reasonably be expected to cause damage to the international relations of the Commonwealth, specifically in relation to sensitive national security matters. Paragraph 5.36 of the Guidelines provides ‘international

relations' 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.

20. In assessing the potential to cause damage to Australia's international relations consideration was given to the information shared with our foreign partners, the relative importance to our joint national security needs and the need to maintain the trust and confidence of our security partners, especially as they relate to the WPA and the activities that are undertaken within. Following this assessment, I considered the release of the information as marked in the identified documents would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth and exempted the release of this information under section 33(a)(iii) of the FOI Act

Section 34 – Cabinet documents

21. I identified documents that are assessed as being Cabinet documents and are therefore exempt in total under section 34 of the FOI Act.

22. I also identified information in other documents relating to the Cabinet documents which was used to brief the Minister for Defence. These documents contain information and briefing material used to support Cabinet deliberations on activities in the WPA. I also consider these documents to be exempt under section 34(1)(c) and 34(3) of the FOI Act.

Section 42 – Documents subject to legal professional privilege

23. Upon examination, I found a number of the documents constituted legal advice and were determined to be documents subject to legal professional privilege under section 42 of the FOI Act. Paragraph 5.129 of the Guidelines outlines that determining whether a communication is privileged requires a consideration of:

- a. whether there is a legal adviser-client relationship;
- b. whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;
- c. whether the advice given is independent; and
- d. whether the advice given is confidential.

24. I am satisfied that the legal adviser-client relationship has been established, as the advice was provided by a qualified lawyer, who was acting in their capacity as a professional adviser.

25. Further, I am satisfied that the specific material contained in the documents relevant to this request were created for the dominant purpose of giving legal advice, and there is no reason to doubt the legal advisers' independence in providing such advice. I note that legal professional privilege is the client's privilege to waive and I am satisfied that the waiver has not occurred.

Section 45 – Documents containing material obtained in confidence

26. I have identified information that I consider to have been provided in confidence, specifically in relation to commercial-in-confidence material. To be deemed 'in confidence', the information must satisfy five criteria, namely; specifically identified, have the necessary quality of confidentiality, communicated and received on a basis of mutual understanding of confidence, could be disclosed or threatened to be disclosed without authority, and unauthorised disclosure will cause detriment. These criteria were applied to those areas where sections 47 (Commercially valuable information) and 47G (Business affairs) did not apply, yet still warranted consideration with respect to commercially sensitive information,

not publicly available, provided by Cu-River Mining Australia Pty Ltd to Defence on a confidential basis for the sole purpose of the WPA access application process and ongoing operations within the WPA.

27. Given the sensitive nature of the material and the purpose for which it was provided to Defence, I am of the view that its disclosure would found an action by a person for breach of confidence. In other words, Cu-River Mining Australia Pty Ltd, which provided the confidential information, would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.

Section 47 – Documents disclosing commercially valuable information

28. Section 47 of the FOI Act provides that a document is exempt from disclosure requirements ‘if its disclosure under the Act would disclose (a) trade secrets; or (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed’.

29. I have identified information that, if released, could reasonably be expected to cause commercial harm to Cu-River Mining Australia Pty Ltd and/or Jiujiang Mining Australia Pty Ltd. In applying the criteria set out in the Guidelines, I have considered whether the information was publicly available or strictly limited to the parties involved, the currency and commercial value of this information, and whether disclosure would impact the business affairs of the companies.

30. Upon examination of the documents, I identified material which relates to the internal business structure and operations of the companies. This information is likely to be considered valuable commercial property by the companies, and is not generally known information. Release of this information could reasonably be expected to provide the companies’ competitors with commercially valuable and sensitive information that would otherwise only be known to limited individuals within the companies, and Defence officials involved in the WPA access application process.

31. On this basis, I decided to exempt the release of this information under section 47(1)(b) of the FOI Act.

Section 47B – Documents relating to Commonwealth-State relations

32. I have identified information that, if released, could reasonably be expected to cause damage to the working relations between the Commonwealth and South Australia (SA). Paragraph 6.32 of the Guidelines describes ‘working relations’ as encompassing all interactions of the Commonwealth and the States, from formal Commonwealth-State consultation processes through to working arrangements between agencies undertaken as part of their day to day functions.

33. In assessing the damage of disclosure of information that applies under this section, consideration was given to the likely impact to the level of trust and/or co-operation that exists in the management framework of the WPA between Defence and the SA Government, hindrance or prejudice to the future free flow of information between Defence and SA Government as it relates to the WPA, and the potential adverse impact to the continued administration and use of the WPA in South Australia by Defence.

34. I have assessed the release of the information as marked would, or could reasonably be expected to, cause damage to the working relations between the Commonwealth and South Australia and exempt the release of this information under section 47B(a) of the FOI Act.

Public interest considerations – Section 47B

35. I have found that the identified documents are conditionally exempt under section 47B of the FOI Act. Section 11A(5) 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.

36. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors are that disclosure may promote the objects of the FOI Act, as information held by the Government is a national resource. However, having considered the sensitive nature of the documents, I do not believe it will inform public debate on a matter of public importance, promote effective oversight of public expenditure, or allow a person to access his or her own personal information.

37. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant and important to this request are that release of this information could reasonably be expected to prejudice:

- a. security,
- b. an agency's ability to obtain confidential information, and
- c. the management function of an agency.

38. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47B of the FOI Act. None of the factors listed in section 11B(4) [Irrelevant factors] were taken into account when making my decision.

Section 47C – Documents subject to deliberative process

39. In assessing the documents, I have identified deliberative matters, specifically, content that is in the nature of, or relating to; an opinion, advice or recommendation that has been obtained, prepared or recorded; or is a consultation or deliberation that has taken place as part of the deliberative process of the department. Paragraphs 6.58-6.62 of the Guidelines provides a framework for assessing what constitutes a deliberative processes and for this request deliberative matters were identified in the documents that related to assessing recommendations, exploring options and the provision of opinions.

Public interest considerations – Section 47C

40. I found that the identified documents are conditionally exempt under section 47C of the FOI Act. Sections 11A(5) and 11B(3) of the FOI Act were considered. On balance, I am of the view that the disclosure of this information would not increase or promote public participation in Defence processes, nor would it increase scrutiny or discussion of Defence activities.

41. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors that I have determined are relevant to this request are that release of this information could reasonably be expected to prejudice:

- d. an agency's ability to obtain confidential information, and
- e. the management function of an agency.

42. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47C of the FOI Act. None of the factors listed in section 11B(4) [Irrelevant factors] were taken into account when making my decision.

Section 47E – Documents dealing with certain operations of agencies

43. Section 47F conditionally exempts documents where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain listed agency operations. There are four separate grounds for this conditional exemption, one or more of which may be relevant in a particular case. With respect to this FOI request, section 47E(d) has particular relevance and is focused on whether disclosure has a substantial adverse effect on an agency's proper and efficient conduct of operations.

44. Upon examination of the documents, I found information that disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the management of the WPA access process undertaken by Defence. In assessing the information under this section, consideration was given to national security implications and revealing internal departmental assessment and deliberation processes.

Public interest considerations – Section 47E

45. I have found that the identified documents are conditionally exempt under section 47E of the FOI Act. Sections 11A(5) and 11B(3) of the FOI Act were considered. On balance, I am of the view that the disclosure of this information would not increase public participation in Defence processes, nor would it increase scrutiny or discussion of Defence activities.

46. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors that I have determined are relevant to this request are that release of this information could reasonably be expected to prejudice:

- f. an agency's ability to obtain confidential information,
- g. an agency's ability to obtain similar information in the future, and
- h. the management function of an agency.

47. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47E of the FOI Act. None of the factors listed in section 11B(4) [Irrelevant factors] were taken into account when making my decision.

Section 47F – Personal privacy

48. Upon examination of the documents, I identified personal information, specifically names of individuals and their contact details. 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.

49. 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.

50. The release of the names of personnel 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 conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations – Section 47F

51. I have found that the identified documents are conditionally exempt under section 47F of the FOI Act. Sections 11A(5) and 11B(3) of the FOI Act were considered.

52. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors that I have determined are relevant to this request are that release of this information could reasonably be expected to prejudice or harm:

- i. the protection of an individual's right to privacy, and
- j. the interests of an individual or group of individuals.

53. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47F of the FOI Act. None of the factors listed in section 11B(4) [Irrelevant factors] were taken into account when making my decision.

Section 47G – Documents dealing with business affairs

54. Upon examination of the documents, I have found numerous references to the business affairs of Cu-River Mining Australia Pty Ltd that if disclosed, could reasonably be expected to unreasonably affect the business as it undertakes its lawful business activities in Australia. The Guidelines interprets 'business affairs' as meaning the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs (paragraph 6.192).

55. In assessing the documents, I drew upon previous Administrative Appeals Tribunal determinations as outlined by the Guidelines (paragraphs 6.189 and 6.190) that indicate greater weight should be given to not disclosing information provided by the commercial organisation to a Commonwealth body whilst the opposite is the preferred position in relation to FOI matters and as such favour disclosure (i.e. greater weight for disclosure of Commonwealth generated material).

56. In considering the application of this section to the documents, further weight was given to the second part of the section (section 47G(1)(b)), namely that disclosure of information could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of matters by an agency. This conditional exemption comes in two parts, firstly that there is a reasonable expectation of a reduction in the quantity and/or quality of business affairs to the government, and secondly the reduction of information will prejudice the operations of the agency. In making my decision, I considered the impact that disclosure would have for other commercial enterprises that operate in the WPA, as well as the future business ventures that may seek access to the WPA to undertake business activities. After careful consideration, I have determined that disclosure in this matter would adversely impact the relationships of trust between the Commonwealth and commercial businesses that have been established in the management of the WPA.

Public interest considerations – Section 47G

57. I have found that the identified documents are conditionally exempt under section 47G of the FOI Act. Sections 11A(5) and 11B(3) of the FOI Act were considered. On balance, I determined that having regard to the public and private interest factors in this matter, disclosure of Cu-River Mining Australia Pty Ltd's business affairs would adversely affect the company without a significant public interest gain.

58. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors that I have determined are relevant to this request are that release of this information could reasonably be expected to prejudice:

- a. an agency's ability to obtain confidential information,
- b. an agency's ability to obtain similar information in the future,
- c. the competitive commercial activities of Cu-River Mining Australia Pty Ltd, and
- d. the management function of an agency.

59. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47G of the FOI Act. None of the factors listed in section 11B(4) [Irrelevant factors] were taken into account when making my decision.

Third Party Consultation

60. I decided to consult with Cu-River Mining Australia Pty Ltd given the considerable amount of business/commercial material relating to the company. In response to this consultation, the company objected to the release of parts of the documents with respect to them adversely affecting their lawful business commercial and financial affairs. While I generally agree with the objections, as the decision maker, I believe there is some information that is in the public interest to disclose under the FOI Act.

61. Defence is required to advise the third party of this decision. Documents will be provided when all review rights of the third party have been exercised.

Further Information

62. Some of the documents falling within the scope of this request contained security classifications and caveats and dissemination limiting markers. As the documents are now approved for public release, the relevant documents have been declassified and the markings struck through.

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Date: 2019.08.14 11:28:01 +10'00'

Mrs Joanne Groves
Accredited Decision Maker
Associate Secretary Group