



Australian Government
Department of Defence

DEFENCE FOI 055/21/22 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:

**The number of permits approved by Defence Export Controls since 1 January 2015, for each of the following countries: Saudi Arabia, United Arab Emirates, Myanmar, Sudan, Sri Lanka, the Democratic Republic of Congo, Iran, Iraq, Mali, Somalia, Libya, Algeria, Central African Republic*

**The number of permits denied by Defence Export controls since 1 January 2015 for each of the following countries: Saudi Arabia, United Arab Emirates, Myanmar, Sudan, Sri Lanka, the Democratic Republic of Congo, Iran, Iraq, Mali, Somalia, Libya, Algeria, Central African Republic*

**For each country, please break down the permits (both approved and denied) according to their designation under the Defence Strategic Goods List. Specifically, Part 1 Permits (i.e. for military use) and Part 2 permits (i.e. for dual use)*

For each permit that has been denied, I also request a copy of the Defence Department's independent assessment report that outlines on what grounds the permit has been denied. Please note this may not be the specific name of the report - I am requesting any report, briefing, memo, file note or similar that describes why the permit has been denied. **For reference: Defence Export Controls says: "All applications are assessed on a case by case basis in accordance with our export control provisions. This includes consideration of human rights, national security, regional security, foreign policy, and international obligations." I am seeking a copy of these assessments.*

**Please exclude permits (either approved or denied) issued for temporary exports, as well as repair and return permits'*

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 nine documents as matching the description of the request.

4. One of the nine documents 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

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

6. I have decided to deny access in full to eight documents under section 7 [exemption of certain persons and bodies], section 33 [national security, defence or international relations], section 45 [material obtained in confidence], section 47 [commercially valuable information], section 47C [public interest conditional exemption - deliberative process], section 47E [public interest conditional exemption - certain operations of agencies], section 47F [public interest conditional exemption – personal privacy] and section 47G [public interest conditional exemption - business affairs] 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. information provided by subject matter experts within the Department of Defence (Defence).

Decision

Reasons for decision to release of identified documents

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

Reasons for decision to deny release of other identified documents

Section 7 [exemption of certain persons and bodies]

9. The Guidelines state:

Under s 7(1), the following bodies specified in Schedule 2, Part I, Division 1 are not agencies for the purposes of the FOI Act:

- (i) the Australian Secret Intelligence Service;
- (ii) the Australian Security Intelligence Organisation;
- (iii) the Inspector-General of Intelligence and Security;

- (iv) the Office of National Intelligence;
- (v) the Australian Geospatial-Intelligence Organisation;
- (vi) the Defence Intelligence Organisation;
- (vii) the Australian Signals Directorate

10. I have identified that information relating to the documents is derived from these agencies, agencies exempt from the FOI Act under section 7.

11. The Guidelines go on to state:

All Australian Government agencies are exempt from the operation of the Act in relation to 'intelligence agency documents' (for example, a document that originated with or was received from ASIO or ONA) (s 7(2A)) and 'defence intelligence documents' (for example, a document that originated with or was received from the Department of Defence and relates to the collection, reporting or analysis of operational intelligence (s 7(2C)). These exemptions also apply to documents in the possession of ministers (s 7(2B)). The exemption extends to a part of a document that contains an extract from or a summary of an intelligence agency document or a defence intelligence document.

12. Taking the above into account, I consider that information identified is exempt under section 7 of the FOI Act.

Section 22

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

Section 33 – Documents affecting national security, defence or international relations

14. Section 33 of the FOI Act exempts a document if its disclosure under the Act would, or could reasonably be expected to, cause damage to:

- i) the security of the Commonwealth;*
- ii) the defence of the Commonwealth; or*
- iii) the international relations of the Commonwealth.*

15. Upon examination of the export documentation matching the request, I formed the view that disclosure of the information could damage the security of the Commonwealth and international relations of the Commonwealth.

16. In relation to subsection 33(a)(i) the Guidelines state:

Security of the Commonwealth

5.29 The term 'security of the Commonwealth' broadly refers to:

- (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests ...*

5.30 A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

17. In relation to subsection 33(a)(iii) the Guidelines state:

International relations

5.36 The phrase 'international relations' has been interpreted 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...

5.37 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

18. The Guidelines provide that the term 'reasonably expected' requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 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 mere possibility of damage will be insufficient for the purposes of the exemption.

19. Having considered the Guidelines in relation to the identified information, I have formed the view that, if the material were released, would, or could reasonably be expected to, cause damage. The documents contain information relating to Australia's relationships with foreign governments. Release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interests. Further, this information is not readily available to the public. As such, any release of the information would cause a loss of trust and confidence in the Australian government and foreign officials may be less willing to engage with Australian Government officials and Australian businesses in the future.

20. Accordingly, I have decided that the material is exempt under section 33 of the FOI Act.

Section 45 – Documents containing material obtained in confidence

21. 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, or the Commonwealth), for breach of confidence.*”

22. 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 confidential, information which has been communicated in circumstances giving rise to the obligation of confidence. 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 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.

23. Upon examination of the export documentation matching the request, I formed the view that disclosure of the information relating to individuals and companies, consignees and end-users (i.e. customers) in the export permit documentation 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.

24. 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.

25. The Defence Export Control (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”

26. This statement gives rise to a mutual understanding that Defence has undertaken to manage the applicant’s business and financial information, including information about its customers, products and pricing, confidentially.

27. The companies to which the customer and product information relates have not given Defence 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 any future business elsewhere if such information is disclosed due to the breach of confidentiality.

28. 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 – Documents disclosing commercially valuable information

29. Section 47 of the FOI Act states:

1) “A document is an exempt document if its disclosure under this 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, found an action, by a person (other than an agency, or the Commonwealth), for breach of confidence.”*

30. I identified information in the export documentation submitted to DEC of commercial value to the companies applying for permits. For this exemption to apply paragraph 5.204 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.

31. The export applications and export documentation 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.

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

Section 47C – Public interest conditional exemptions - Deliberative process

33. Subsection 47C(1) of the FOI Act states:

‘A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of...an agency.’

34. Upon examination of the documents, I found material that contains opinions, advice, recommendations, interim decisions and deliberations which were conducted by Defence when assessing the applications submitted to DEC.

35. I considered the question of whether the information was purely factual. In relation to section 47C ‘considerations’ under the FOI Act, I have taken into account the Guidelines which clarify that ‘purely factual material’ would not be regarded as deliberative matter, if it included:

- content that was merely descriptive,
- incidental administrative content,
- procedural or ‘day to day’ content,
- the decision, or conclusion reached at the end of the deliberative process,
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

36. I have also taken into account further detail in the Guidelines (6.73) that advise “‘purely factual material’” does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it’.

37. Taking the above into consideration, I am satisfied that the material contained in the documents is conditionally exempt under section 47C of the FOI Act.

38. 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. My public interest considerations are detailed below.

Section 47E - Public interest conditional exemptions - certain operations of agencies

39. Under section 47E of the FOI Act, a document is conditionally exempt if its disclosure would, or could reasonably be expected to:

a) *prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*

....

d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

40. In relation to section 47E(a) of the FOI Act, Defence has an established method to assess export applications. It is reasonable to expect the disclosure of the assessments would, or could prejudice the effectiveness of the procedure.

41. In relation to section 47E(d) of the FOI Act, paragraph 6.123 of the Guidelines advises that, where the document relates to certain operations of agencies, the decision maker must address whether *the predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner.*

42. Maintaining the integrity of the processes within Defence is paramount. Releasing information that has been provided 'in-confidence', could adversely affect Defence's ability to conduct future assessments; if third parties believe Defence lacked integrity in the management of, and protection of their confidential records. This, by effect, would impede the proper and efficient conduct of the operations of Defence.

43. Based on my consideration of the above, I am of the view that release of third parties' information and Defence's practices and procedures would have a substantial adverse effect and therefore prejudice the effectiveness of similar future assessments. This would directly affect the proper and efficient conduct of the operations of Defence.

44. Noting all of the above, I have decided that the material identified is therefore conditionally exempt under section 47E of the FOI Act.

45. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless (in the circumstances) access to the documents at this time would, on balance, be contrary to the public interest. My public interest considerations are set out below.

Section 47F - Public interest conditional exemptions – Personal privacy

46. Where access has been denied under section 47E of the FOI Act, I considered that the material contained in the export documentation would involve the unreasonable disclosure of personal information about any person (including a deceased person).

47. In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

i) *the extent to which the information is well known;*

ii) *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;*

iii) *the availability of the information from publicly accessible sources.*

48. On examination of the documents, I have found the documents contain personal information (names and position titles) of a number of individuals other than the applicant.

49. Taking into account the above factors, I consider that the release of the identified personal information to be an unreasonable disclosure and conditionally exempt under section 47F(1) of the FOI Act.

Section 47G – Public interest conditional exemptions - Business affairs

50. Where access has been denied under section 47G of the FOI Act relevantly 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.*

51. 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.

52. 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.

53. 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.

54. 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.*’

55. 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...*’

56. 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'*

57. 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.

58. 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.

59. Furthermore, it should be noted that the issuance of a permit does not mean the sale or export necessarily occurred.

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

Public interest considerations – section 47C, 47E, 47F and 47G

61. I have found that the identified documents are conditionally exempt under sections 47C, 47E, 47F and 47G 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'.

62. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objectives of the FOI Act, as information held by the government is a national resource.

63. Whilst I note that the release of the information being withheld may be of interest to the applicant, it would not inform public debate on any matter of public importance in any meaningful way.

64. Paragraph 6.22 of the Guidelines specifies 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:

- a. the protection of an individual's right to privacy,
- b. the interests of an individual or a group of individuals,
- c. an agency's ability to obtain confidential information,
- d. an agency's ability to obtain similar information in the future,
- e. the management function of an agency, and
- f. an agency's effectiveness of testing or auditing procedures.

65. Whilst 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 material obtained and for which was communicated to Defence in confidence.

66. Releasing the export application and assessments would, or could reasonably be expected to adversely impact on Defence's ability to gain the confidence of in submissions of this material and could significantly undermine any applications and assessments in the future.

67. 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, 47E, 47F and 47G of the FOI Act.

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

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Mr Paul Main
Accredited Decision Maker
Strategy, Policy, and Industry Group