



Reference: BN9126045

FOI 011/19/20 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:

“In ANAO’s Performance Audit Report - Auditor-General Report NO. 2 OF 2017–2018 - Defence’s Management of Materiel Sustainment, published Tuesday 11 July 2017, paragraphs 5.12 and 5.13 refer to two papers presented to Defence officials by Bechtel:

*Item 1 - “Australian Defence Organisation—DMO Transformation Opportunities” in 2013
Item 2 - Delivering CASG Transformation” in 2015.”*

FOI DECISION MAKER

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

Documents identified

2. I identified two (2) documents as matching the description of the request.

Decision

3. I have decided to partially release two (2) documents with deletions made in accordance with section 33 [documents affecting national security, defence or international relations], 47 [documents disclosing trade secrets or commercially valuable information] and 47G [public interest conditional exemptions – business] of the FOI Act.

Material taken into account

4. 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);
 - e. advice from the Defence Audit and Fraud Control Division; and
 - f. response from third party consultation.

Reasons for decision

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

5. 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 the security, defence or international relations of the Commonwealth, or information that would divulge information or matter communicated in confidence by or on behalf of a foreign government.

6. Upon examination of the documents, I found that both of them contained information that would divulge information or matter communicated in confidence on behalf of a foreign government. The matter is not security classified, but is information about the United States of America and the United Kingdom that is in confidence between Bechtel and the United States Government and between Bechtel and the United Kingdom, which is of relevance and was communicated to the Australian Department of Defence. If this material was to be released, it could compromise the relationship with the United States of America and United Kingdom and could increase the potential for harm of a close security partner/ally.

7. In deciding that material was exempt under section 33 of the FOI Act, I also considered the mosaic theory. The Guidelines state that:

5.39 When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite – a mosaic – that can damage Australia's national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.

5.40 The mosaic theory does not relieve decision makers from evaluating whether there are real and substantial grounds for the expectation that the claimed effects will result from disclosure.¹

8. I found that a portion of the documents contained information that, if disclosed, may add to what is already known, or already in the public domain. This could lead to an adversary applying the mosaic theory to information relating to the United States military capability and ultimately undermine its effectiveness.

9. Taking the above into account, I consider that disclosure of the material would divulge information or matter communicated in confidence by or on behalf of a foreign government. Accordingly, I consider the material to be exempt under section 33(a)(iii) of the FOI Act.

¹ It is a question of fact whether the disclosure of the information, alone or in conjunction with other material, could reasonably be expected to result in the claimed effect, *Re Nitas and Minister for Immigration and Multicultural Affairs* [2001] AATA 392

Section 47- trade secrets or commercially valuable information

10. Section 47 of the FOI Act exempts a document if its disclosure under the Act would disclose trade secrets or 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.

11. The Guidelines state:

Information having a commercial value

5.202 To be exempt under s 47(1)(b) a document must satisfy two criteria:

- a. the document must contain information that has a commercial value either to an agency or to another person or body, and*
- b. the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

12. Upon examination of the documents, I found that both of them contained commercial information, specifically pertaining to management and operations contractor arrangements. The information relates to Bechtel's commercial activities, such as contract and financial matters that confers a commercial advantage to Bechtel. Releasing the information could reasonably be expected to adversely affect be of value to Bechtel's competitive advantage in the market.

13. I have therefore determined that the information is exempt under section 47(1)(b) of the FOI Act.

Section 47G – Business affairs

14. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to unreasonably affect that organisation or undertaking in respect of its lawful business, commercial or financial affairs and prejudice the future supply of information to the Commonwealth.

15. Section 47G(1) 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.*

16. Upon examination of the documents I identified information which, when combined with publically available information, could provide commercially sensitive information about Bechtel, such as finance and contract arrangements, to the marketplace. I consider that disclosure of this information could reasonably be expected to adversely affect business

decisions and relations between Defence and Bechtel and could prejudice frank and open future supply of information to the Commonwealth.

17. The Guidelines at paragraph 6.184 state that *“The operation of the business exemption depends on the effect of disclosure rather than the precise nature of the information itself.”* In the context of the documents identified, release of the information identified would be unreasonable due to exposing the internal business operations of Bechtel and financial matters concerning Bechtel and making this commercially sensitive information available to the public and competitors, which would both unreasonably effect Bechtel in respect to its lawful business affairs, and would reasonably be expected to prejudice the future supply of information to the Department of Defence.

18. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G(1) of the FOI Act.

19. 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.

20. My public interest considerations are detailed below.

Sections 47G - Public interest considerations

21. I have found that the identified documents are conditionally exempt under section 47G(1) of the FOI Act.

22. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors are that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource and may inform debate on a matter of public importance, or promote effective oversight of public expenditure.

23. However disclosure 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).

24. 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 is that the release of this information could reasonably be expected to:

- a. prejudice the competitive commercial activities of a business;
- b. harm the interests of an individual or group of individuals;
- c. prejudice an agency’s ability to obtain confidential information; and
- d. prejudice an agency’s ability to obtain similar information in the future.

25. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In paragraph 6.189 the Guidelines state that *“The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required; and in ensuring that public programmes are properly administered.”* I have found that at this time, release of the information identified would not enhance the public information on proper administration of public monies.

26. 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 section 47G of the FOI Act.

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

glenva.parker
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glenva.parker
Date: 2019.09.09
10:24:55 +10'00'

Glenva Parker
Accredited Decision Maker
Capability Acquisition & Sustainment Group

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