



FOI 043/20/21 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:

- (1) *“Documents concerning the decision to list the Hunter Class Frigate capability acquisition project (SEA 5000 Phase 1) as a Project of Interest in Defence’s March 2020 Capability Acquisition and Sustainment Quarterly Performance Report including documents concerning the reasons for listing the project as a Project of Interest, briefs to the Minister or Ministers about the decision, and talking points or speaking notes about the decision.*
- (2) *Significant or substantive documents created since 1 April 2020 concerning the status of the Hunter Class Frigate capability acquisition project (SEA 5000 Phase 1), issues being managed by the project and remediation activities being planned or undertaken by the project (noting that this part of my request excludes routine or minor communications or emails mentioning the project).*

This request also excludes the names of any non-Senior Executive Service officers and duplicate documents. It also excludes private email addresses, signatures, personnel numbers and mobile telephone numbers contained in the document.”

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 eight documents as matching the description of the request.
4. The decision in relation to each document is detailed in a 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 where applicable.

Decision

6. I have decided to:
 - a. partially release seven 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 sections 33(a)(i) [Documents affecting national security], 47E(d) [public interest conditional exemptions-certain operations of agencies], 47F [public interest conditional

exemptions-personal privacy], and 47G [public interest conditional exemptions – business] of the FOI Act;

- b. refuse access to one document of the request under section 34 [Cabinet documents] 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);
 - e. advice from officers within the department from Capability Acquisition and Sustainment Group, and Navy; and
 - f. advice from the Department of the Prime Minister and Cabinet and consultation with a third party.

Reasons for decision

Section 33 – Documents affecting national security

8. 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.

9. Subparagraph 33(a)(i) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

10. In regards to the terms ‘could reasonably be expected to’ and ‘damage’, the Guidelines provide:

5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

5.17 The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

5.28 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

11. Upon examination of the documents, I identified material which upon release ‘could reasonably be expected to cause damage to the security of the Commonwealth’ by making public information about current and anticipated military capability levels, and their preparedness, arising from the performance of ongoing acquisition and sustainment activities.

Section 34 – Cabinet documents

12. Section 34 of the FOI Act exempts a document if the document has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be submitted and it was brought into existence for the dominant purpose of submission for consideration by the Cabinet, or a draft document to which the proceeding requirements apply.

13. The Guidelines state that the Cabinet exemption applies to the following classes of documents:

Cabinet submissions that:

- a. have been submitted to Cabinet; or
 - b. Are proposed for submission to Cabinet; or
 - c. Were proposed to be submitted but were never in fact submitted, or
 - d. And were brought into existence for the dominant purpose of submission for consideration by the Cabinet,
 - e. Drafts of a Cabinet submission.
14. One document in the scope of this request is exempt as it has been submitted to Cabinet, which was brought into existence for the dominant purpose of submission for the consideration of Cabinet. This document, if disclosed, would reveal Cabinet deliberations. On this basis, I consider that the document is exempt under section 34(1)(c) and 34(3) of the FOI Act, and have denied access.
15. I have consulted with the Department of the Prime Minister and Cabinet and the Department agrees with my decision to deny access under section 34 of the FOI Act.

Section 47E – Certain operations of agencies

16. Section 47E of the FOI Act provides that a document is conditionally exempt from disclosure requirements ‘if its disclosure under the Act would, or could reasonably be expected to, do any of the following: prejudice the effectiveness of procedures or methods for the conduct of test, examinations or audits by an agency and, in particular have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.’

17. I found that the documents identified contain statements of the intended course of action the Department of Defence (Defence) proposes to undertake, and that these statements are relevant to ongoing capability management activity, including commercial management. The disclosure of these statements could reasonably be expected to prejudice Defence’s ability to properly conduct its activities.

18. Taking the above into consideration, I have decided that the specified material identified is conditionally exempt under subsection 47E(d) of the FOI Act.

Section 47F – Personal privacy

19. Upon examination of the documents, I identified information, specifically names of individuals other than the applicant.

20. 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.

21. 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.

22. The release of the names of individuals identified in the documents 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 would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act.

Section 47G – Business affairs

23. 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.

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 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.*” Upon examination of the documents I identified information concerning the performance of companies contracting to Defence which is not publically available. This information is

pertinent to either live and ongoing tender or contract performance management activity. Disclosure of this information could reasonably be expected to provide competitors with information on Defence's assessment of company performance and capability which would unreasonably affect those suppliers in respect to their lawful business affairs, and would reasonably be expected to prejudice the future supply of information to the Department of Defence.

26. 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.

Section 47E, Section 47F and 47G - Public interest considerations

27. I have found that the identified documents are conditionally exempt under sections 47E(d), 47F(1) and 47G(1) of the FOI Act.

28. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

29. In determining whether to release the conditionally exempt material, I considered the Guidelines, together with a range of factors that favour access to a document 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 document would: a. promote the objects of the FOI Act including to enhance the scrutiny of government decision making; b. inform debate on a matter of public importance; or c. promote effective oversight of public expenditure.

30. 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: a. that the release of this information could reasonably be expected to prejudice security; b. that the release of this information could reasonably be expected to prejudice an agency's ability to obtain confidential information; c. that the release of this information could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and d. that the release of this information could reasonably be expected to prejudice the management function of an agency.

31. 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].

32. 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. In addition, I consider the release of company performance assessments, potential risk areas and remediation strategies for the specific activities could reasonably be expected to prejudice the ability of Defence and the companies to undertake their operations. I consider that the public interest is better served in this case by maintaining the confidentiality of this information.

33. 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, 47F and 47G of the FOI Act.

34. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making my decision.

Further Information

35. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

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Renee Butler
Accredited Decision Maker
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