



BN9269791

FOI 060/19/20 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 access to:
 - “a) *A letter written by Rear Admiral Sammut to Naval Group dated 29 September 2017 relating to Future Submarine construction yard assumptions.*
 - b) *Top level layout diagrams as to the Future Submarine construction yard at Osborne (only a final, or most recent draft is required)”*

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 two documents as matching the description of the request.
4. I have added an FOI reference number and Item number to each of the documents.

Decision

5. I have decided to partially release two 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 33(a)(ii) [Documents affecting national defence] and 47 [documents disclosing trade secrets or commercially valuable information] 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);
 - e. advice received from officers within the department from the Future Submarine Program Office [FSPO] and Governance and Reform Division; and
 - f. feedback received following consultation with Naval Group.

Reasons for decision

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

7. Subsection 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

8. 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.

9. In determining the extent to which the subsection 33(a)(ii) exemption should be applied, the FOI Guidelines at paragraph 5.39 stipulate:

“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 the ‘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”.

10. The mosaic technique enables analysts using diverse sources of data to piece together the potential strengths and weaknesses of different militaries. This data may be sourced from apparently innocuous information. As stipulated by the Administrative Appeals Tribunal in *Re Millisse and National Archives of Australia* [2000] (“the Millisse case”) at paragraphs [21] and [22]:

“[I]n seeking to obtain access to material, a searcher may seek or be enabled to — with the smallest particle of intelligence, even though such particle may be innocuous standing alone, when used in conjunction with other pieces of intelligence — build up a picture, the like of which the searcher was seeking to construct.

Thus information on its face or in conjunction with other material might, depending on the evidence, enable a person to ascertain by process of inference, induction or deduction, the identity of a source in question.”

11. In considering the reasoning in the Millisse case it is important to take into account that the release of information under the FOI Act cannot be limited, so it must instead be considered a release to the world at large. Given that the information contained in the redacted part of the document contains technical information of a sensitive nature, I consider the information could or would damage the defence of the Commonwealth if released.

12. In light of the above, I have decided that the specified material identified is exempt pursuant to section 33 of the FOI Act.

Section 47 – documents disclosing trade secrets or commercially valuable information

13. Where access has been denied to information under section 47 of the FOI Act, I considered that the commercial value of the material could reasonably be expected to be destroyed or diminished if the information were disclosed.

14. 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.

15. Upon examination of the documents I identified exempt commercially valuable information about submarine construction processes and workflows specific to Naval Group the value of which could reasonably be expected to be diminished by its disclosure.

16. The Guidelines at paragraph 5.205 lists factors that may assist in deciding whether information has commercial value:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors*
- *whether a genuine ‘arm’s-length’ buyer would be prepared to pay to obtain that information*
- *whether the information is still current or out of date (out of date information may no longer have any value)*
- *whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price*

17. As noted above at paragraph 15, commercially valuable information is contained in the documents. The redacted information provides the ability, through a process of either deduction or inference, to obtain commercially valuable trade secrets about the specialised trade of submarine construction. This information has been developed via investment into research and workforce experience, and is not otherwise publically available to any except a limited ground of individuals within Naval Group and the submarine project. In forming this view I note the statement on the document that the material contained is foreground information from the contract. Given the specific and technical nature and layout of the foreground information in this document I consider that release of this specific foreground information would or could allow sensitive background information about the construction of the submarines to be inferred and/or deduced. I consider that the release of this information would adversely impact on Naval Group's commercial advantage.

18. I consider that even if the redacted information was deemed not to fall into the category of trade secrets, the information would be classified as "other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed, thus the information would be captured by the operation of the section 47(1)(b) exemption, and therefore would still be exempt from release.

19. In the context of the documents identified, release of the information identified would be unreasonable due to its currency and the insight it provides into the details of the method of construction employed by Naval Group. I am satisfied that disclosure of the identified material could reasonably be expected to destroy or diminish its commercial value.

20. In light of the above, I have decided that the specified material identified is exempt pursuant to section 47 of the FOI Act.

Third party consultation

21. I decided to consult with Naval Group regarding their information which was contained in the documents. In response to this consultation, Naval Group has objected to the release of their business information. I do not agree with all of the objections.

9. The department is required to advise Naval Group of my decision. Documents will be provided when all review rights have been exercised.

Further Information

10. The documents matching the scope of this request contained classification or dissemination limiting markers. I have declassified the versions of the documents that are approved for release, and have struck through the dissemination limiting markers.

Digitally signed by
ChrisHorscroft
ChrisHorscroft
Date: 2019.09.26 13:18:48
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Accredited Decision Maker
Capability Acquisition and Sustainment Group