



Defence Reference: FOI 130/20/21

FOI 130/20/21 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:

“Relevant documents from 1 July 2019 concerning:

- *views, advice or opinions of the Naval Shipbuilding Advisory Board (NSAB) and/or NSAB members with respect to possible or actual delays to the schedule for the Future Frigate Program;*
- *advice and/or the preparation of advice to Government by Defence regarding possible or actual delays to the schedule for the Future Frigate Program;*
- *advice and/or the preparation of advice for the Minister for Defence (or their office) pertaining to a report in the Australian Financial Review on 16 September 2020 that the Future Frigate Program could be delayed by up to two years; and*
- *correspondence regarding the possible or actual delays to the schedule for the Future Frigate Program between Defence and/or the Minister for Defence (or their office) and/or the NSAB (or NSAB members) and/or third parties under contract for the Future Frigate Program.”*

Personal email addresses, signatures and mobile telephone numbers contained in documents that fall within the scope of the FOI request and duplicates of documents are excluded from this request. Defence has only considered final versions of documents.

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 11 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/Document number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. release one document in full;
 - b. partially release five documents on the grounds that the deleted material is considered exempt under section 33(a)(i) [Documents affecting the security of the Commonwealth], section 33(a)(iii) [Documents affecting the international relations of the Commonwealth], Section 47F [Public interest conditional

exemption – personal privacy] of the FOI Act, and or Section 47 [Documents disclosing trade secrets or commercially valuable information] of the FOI Act;

- c. deny access to five documents under section 34 [Cabinet documents] of the FOI Act; and
- d. 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 ASC Shipbuilding; and
 - f. advice received from the Department of Prime Minister & Cabinet.

Reasons for decision

Section 22 – Access to edited copies with exempt or irrelevant matter deleted

8. Upon examination of the documents, I found the documents contained material not relating to the scope of the request and considered 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)(b)(ii) of the FOI Act, I removed this material.

Section 33 – Documents affecting national security

9. 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.

10. 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.

11. Subparagraph 33(a)(iii) 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.

12. 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.

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

Section 34 – Cabinet documents

14. Section 34(3) of the FOI Act exempts documents to the extent that their disclosure would reveal any deliberation or decision of the Cabinet unless the existence of the deliberation or decision has been officially disclosed.

15. The Guidelines state that:

'Deliberation' in this context has been interpreted as active debate in Cabinet, or its weighing up of alternatives, with a view to reaching a decision on a matter (but not necessarily arriving at one).

16. Following review of five documents within the scope of this request, as outlined in the schedule, and having consulted with the Department of the Prime Minister and Cabinet, I am satisfied the five documents are exempt as they contain information, disclosure of which will reveal a deliberation or decision of the Cabinet which has not been officially disclosed. Accordingly, I have refused full access to these five documents on the basis they are exempt under section 34(3) of the FOI Act.

Section 47 - Documents disclosing trade secrets or commercially valuable information

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

18. 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'.

19. In regards to the terms 'commercial value' and 'destroyed or diminished', the Guidelines provide:

5.205 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case 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.*

5.206 The time and money invested in generating information will not necessarily mean that it has commercial value. Information that is costly to produce will not necessarily have intrinsic commercial value.

5.207 The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — must be established separately by satisfactory evidence. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known.[167] Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.

20. Upon examination of the documents, I identified material of a commercial value that is not generally known information. Release of this information could reasonably be expected to undermine ASC Shipbuilding’s ability to effectively manage critical and sensitive information with the Commonwealth and its commercial partners.

Section 47F - Public interest conditional exemption – personal privacy

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

22. 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.

23. 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.

24. 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 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.

Public interest considerations – section 47F

25. In assessing whether disclosure is on balance, contrary to the public interest, I considered the Guidelines together with a range of factors set out in section 11B(3) of the FOI Act, which favours access to a document:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) inform debate on a matter of public importance;*
- (c) promote effective oversight of public expenditure;*
- (d) allow a person to access his or her own personal information*

26. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the specific conditionally exempt material would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

27. While I consider that release of the material removed under sections 47F may be of some interest to the applicant, disclosure of the conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way. Additionally, I do not consider that disclosure of the material would promote oversight of public expenditure. Furthermore, the public interest is better served in protecting the privacy of individuals whose personal details are contained within these documents from release to the public at large.

28. 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 or harm:

- a. the protection of an individual's right to privacy;
- b. the interests of an individual or group of individuals;
- c. an agency's ability to obtain confidential information; and
- d. an agency's ability to obtain similar information in the future.

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

30. After weighing all of the above, I consider that, on balance the public interest factors against disclosure outweigh the factors for disclosure. I have therefore decided that it would be contrary to the public interest to release the information considered exempt under subsections 47F of the FOI Act.

Digitally signed by
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Mr Paul D'Orival
Accredited Decision Maker
Capability Acquisition and Sustainment Group