



Reference: BN16088003

## **FOI 327/19/20 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the email dated 30 March 2020, in which a third party consulted under section 27 of the *Freedom of Information Act 1982* (FOI Act) sought an internal review under section 54A of the Accredited Decision Maker's decision dated 14 February 2020.

2. The applicant's request was for access to the following documents under the FOI Act:

*"...all correspondence, sent/received from July 2019 to the date of this FOI request, between the SEA 1000 Future Submarine Project and Naval Group relating to the transitioning of future submarine design activities from France to Australia"*

### **Background**

3. On 19 December 2019, the applicant submitted a request for documents under the FOI Act.

4. On 17 January 2020, the Accredited Decision Maker consulted the third party under section 27 of the FOI Act requesting their view on the release of information that could be considered to be their business information.

5. On 6 February 2020, the third party responded that they objected to the release of the information.

6. On 14 February 2020, the third party was advised that the decision maker did not agree with their contentions, and that the documents proposed for release would be partially redacted. The third party was advised of their right to seek a review of the decision.

7. On 30 March 2020, the third party requested an internal review of the access grant decision to partially release information.

### **Original Decision**

8. The original decision identified 39 documents. The decision maker decided to:

- a. partially release 29 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 47 [exemption-commercially valuable information]; section 47C(1) [conditional exemption-deliberative processes]; 47F [conditional exemption-personal privacy] and 47G [conditional exemption-business] of the FOI Act;
- b. deny access to 10 documents in accordance with section 47 [commercially valuable information]; section 47C [conditional exemption – deliberative process], section 47F [conditional exemption – personal privacy], and section 47G [conditional exemption – business affairs] 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.

### **Contentions**

- 9. In summary, the third party has requested an internal review of the exemptions and conditional exemptions that were applied to the documents in the original decision.
- 10. The purpose of this statement of reasons is to provide a fresh decision relating to the documents.

### **Reviewing officer**

- 11. I am authorised to make this internal review decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

### **Documents subject to internal review**

- 12. Taking into account the applicant's contentions, nine documents are the subject of this internal review.
- 13. The decision in relation to each document is detailed in a schedule of documents.

### **Internal review decision**

- 14. I have decided to vary the original decision by:
  - a. partially release 28 document 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 47 [exemption-commercially valuable information], section 47C(1) [conditional exemption-deliberative processes], section 47F [conditional exemption-personal privacy], and section 47G [conditional exemption-business] of the FOI Act;
  - b. deny access to 11 documents in accordance with section 33(a)(iii) [exemption-international relations], section 47 [exemption-commercially valuable information], section 47C [conditional exemption – deliberative process], section 47F [conditional exemption – personal privacy], and section 47G [conditional exemption – business affairs] 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**

- 15. In arriving at my decision, I had regard to the:
  - a. scope of the applicant's request;
  - b. original decision;
  - c. content of the documents subject to the internal review;
  - d. affected third party's objections to the release of the documents;
  - e. third party's request for internal review of the access grant decision;
  - f. relevant provisions in the FOI Act;

- g. *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and*
- h. advice provided by Submarine Group.

## Findings and reasons

### Section 33(a)(iii) – Documents affecting international relations

16. Section 33(a)(iii) of the FOI Act states:

*A document is an exempt document if disclosure of the document under this Act:*

*(a) would, or could reasonably be expected to, cause damage to:...*

*(iii) the international relations of the Commonwealth.*

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

*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 was 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.*

18. 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. The application of foreign relations, and the nature and context of “in confidence” communications does not deteriorate with time. Both issues require ongoing effort to maintain their effect.

19. Although Australia enjoys a solid working relationship with the country that provided the documents, release of this information could create a potential source of friction between the two nations. The detailed document was provided with an expectation of being treated “in confidence”. It is marked as “*Subject to Export Control Regulation*” and an End User Certificate (EUC) has been issued detailing the use and further distribution of the document. Release of the document under the FOI Act would be inconsistent with the terms of the EUC.

20. The disclosure of information, noting the context surrounding its communications, may adversely impact Australia's ability to negotiate in the future with foreign governments.

Australia's foreign counterparts would expect the government to protect and prevent the release of information communicated during these "in confidence" negotiations.

21. Taking the above findings into account, I am satisfied that the information removed from the document is exempt under section 33(a)(iii) of the FOI Act.

### **Section 47 – Documents containing trade secrets or commercially valuable information**

22. Section 47(1)(b) states:

*(1) A document is an exempt document if its disclosure under this Act would disclose: ...*

*(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.*

23. Where access has been denied under section 47 of the FOI Act, I considered that the material will adversely affect the business operations of that business.

24. The case of *Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information) [2020] AICmr 7* explains how the Information Commissioner assesses whether information has a commercial value:

*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.*

25. This is expanded upon in the Guidelines, which list a number of factors that may assist when determining whether information has a 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.*

26. The case of *Re Mangan and the Treasury [2005] AATA 898* recognises there is a strong public interest in businesses being able to pursue their lawful commercial activities in competitive markets.

27. The information detailed within the documents outlines the commercial position of the third party. It identifies their capabilities, products, and the context in which they are

prepared to provide their services and capabilities. The information is specialised and technical in the format in which it has been gathered and provided. The information is not commonly known or publicly available, and is current.

28. The information contains details of capabilities and services that are in the process of being negotiated and confirmed. Elements of these processes have not been finalised. Releasing the considerations of all of the options that the third party is capable of offering exposes their business capabilities and practices to their competitors.

29. The commercial value lies in the content of the third party's capabilities and the manner in which they can provide these capabilities. The transfer of submarine capability to the Commonwealth involves a number of different component, many of which are able to be offered in a variety of ways that the third party has developed, manufactured, and supplied. The documents contain details of costing issues and underlying influences associated with these capabilities.

30. The effect of releasing this information would be to limit the third party's negotiating position in future. The third party may choose to offer different trade terms to other foreign countries, but the terms being offered to the Commonwealth may be viewed as the baseline by other customers. The third party works internationally, foreign relations are an important facet of their business. The ability of the third party to only provide limited components of their commercial product to future foreign customers is reduced if the information is released. Not openly offering the same terms of trade to other foreign countries that are being offered to the Commonwealth could impact existing and future relationships that the third party is trying to establish, limiting business opportunities for them.

31. The manner in which the third party organises the project gives them a competitive advantage over their rivals. The ability of the third party to tailor the information to each client in an unrestricted manner gives the third party a commercial advantage. An essential element of the third party's business model is outlined in the documents, it offers smaller components of capability, on a case by case basis, in a specific manner, which creates a competitive advantage. This advantage would be lost if the documents were released.

32. The information is marked with protective dissemination limiting markers and is managed and stored with tight control measures. Taking the above findings into account, I am satisfied that the information removed from the document is exempt under section 47 of the FOI Act.

### **Section 47C – Deliberative processes (Conditional Exemption)**

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

*A document is conditionally exempt if its disclosure under the 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 process involved in the functions of...an agency.....*

34. The comments protected within the documents provide opinions or suggestions on the options available to progress the project. The information is not confirmed as fact, statistical data or formal reporting, rather, the information relates to contractors providing their opinions on the various options and the impact on the capability. The documents disclose the process of weighing up or evaluating competing arguments or considerations involved in the transfer of technology for the Future Submarine Program.

35. The Guidelines advise that:

*...no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.*

36. Whilst I am not required to consider whether harm will result from releasing the information, I will do so. The transition process is current and still being negotiated. Releasing the details of discussions regarding the negotiations would be detrimental to the transition process.

37. Opinions can be considered to differ from advice. Advice is provided in a professional capacity within the confines of a person's duties; whereas opinion infers a more emotive and instinctive response, not necessarily complying with the professional norms and guides that exist within that particular specialty, or being provided with the benefit of detailed analysis.

38. I referred to the case of *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information) [2017] AATA 269* where email trails and attached documents regarding the courses of action or options for an investigation were discussed and possible outcomes detailed. The documents were identified as deliberative and found exempt under s47C of the FOI Act by the Administrative Appeals Tribunal. Deputy President Forgie made comment on each document contested, however, regarding one of the many email trails found to be exempt stated:

*They reveal various strategies available to ASIC and issues that might be relevant in considering their relative merits. These are matters within the scope of ASIC's functions and are properly regarded as revealing ASIC's deliberative processes on those matters.*

39. Taking into account the above factors, I consider that the release of the information would be an unreasonable disclosure of deliberative information and is conditionally exempt under section 47C of the FOI Act.

#### **Section 47F – Personal privacy (Conditional Exemption)**

40. Section 47F(1) of the FOI Act states that

*A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

41. 'Personal information' is defined in section 4 of the FOI Act as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable

*(a) whether the information or opinion is true or not; and*

*(b) whether the information or opinion is recorded in a material form or not'.*

42. I found information contained in the documents, such as names, is personal information that would reasonably identify an individual, and satisfies the definition of 'personal information' in section 4 of the FOI Act.

43. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and protecting the privacy of individuals. I found for the reasons set out below that the disclosure of the above mentioned 'personal information' would be considered to be unreasonable.

44. The Guidelines note that *'the personal privacy exemption is designed to prevent the 'unreasonable' invasion of third parties' privacy'*. In accordance with section 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal 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 documents;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

45. Against those criteria, I found that:

- a. the specific information and details relating to the individuals is not well known to the broader community;
- b. the specific information is not readily available from publicly accessible sources; and
- c. the specific information is information that individuals would not wish to have disclosed without their consent.

46. Taking into account the above factors, I consider that the release of the information would be an unreasonable disclosure of personal information and is conditionally exempt under section 47F of the FOI Act.

#### **Section 47G (1)(a) – Business (Conditional Exemption)**

47. Section 47G of the FOI Act states:

*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...*

48. I note that 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.

49. The Guidelines explain:

*The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.*

50. The Guidelines also state:

*The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking.*

51. The Guidelines go on to state:

*The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.*

52. The documents contain the details regarding third party businesses. They identify specific business capabilities, programs, projected plans and proposed methods of undertaking this project. I consider that the affected documents contain the business information of the third party. I consider the documents in this request as being of similar stature to those considered by the Information Commissioner in *Paul Farrell and Department of Home Affairs (No 4)(Freedom of Information)[2019] AICmr 40*. In that case, the Information Commissioner confirmed that documents were gathered for business purposes, and the disadvantage to the relevant companies would outweigh the public benefit if the documents were released.

53. Where access has been denied to information in accordance with section 47G of the FOI Act, I considered that the material would, or could reasonably be expected to have an adverse effect on the identified third party business. The documents identify ongoing negotiations regarding the proposed transfer of processes for the Future Submarine Program. The positions of the Department and the third party have not been finalised. The intent of the confidentiality of the information and process is recognised by the dissemination limiting markers and the tight control in the handling and storage of the documents.

54. I consider that releasing the information will cause three general effects that will be disadvantageous to the third party. These are:

- competitive disadvantage;
- signal to other customers; and
- ongoing negotiations.

55. Firstly, the third party’s competitors on similar large defence procurements around the world would be aware of significant detail of the commercial options which the third party has offered the Commonwealth. Such awareness would put the third party at a significant competitive disadvantage, particularly with respect to competitive tender processes, as the third party's competitors would be aware of, and could take into consideration, the options which the third party has offered the Commonwealth.

56. Secondly, the commercial and technical positions are not options which the third party would otherwise offer or consider in other arrangements, this includes other arrangements with foreign governments who may have their own sovereign requirements. Releasing the documents would have the effect of signaling to the third party's future customers, terms that the third party has agreed to provide, or is considering providing, to the Commonwealth. This could result in setting an informal baseline with respect to contracting terms and therefore, the third party being pressured to accept commercial and technical positions which it would otherwise be able to more readily resist.

57. Thirdly, the documents relate to negotiations which are continuing and are of significant importance to both the third party and the Commonwealth. Disclosure of the documents would release details of such negotiations to the public in a manner likely to prejudice the outcome of the negotiations and the willingness of the parties to freely deliberate the best method of transferring submarine capability to Australia. Releasing details of the positions being adopted by the parties in the midst of negotiations will not only provide a signal to other customers of the positions considered, it would provide them with the arguments being adopted by the parties as part of their negotiations.

58. Taking into account the above factors, I consider that the release of the information would be an unreasonable disclosure of business information and is conditionally exempt under section 47G of the FOI Act.

### **Public interest considerations – sections 47C, 47F and 47G**

59. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines together with a range of factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

60. The factors in favour of disclosing the information that I consider to be relevant are:

- a. promotes the objects of the FOI Act, as information held by the Government is a national resource;
- b. informing debate on a matter of public importance; and
- c. promotes effective oversight of public expenditure.

61. I note that the information is not the applicant's own personal information and no criminality or fraudulent behaviour is identified in the documents.

62. While I accept there is a public interest in ensuring that Defence manages the process of transition effectively and efficiently, it would, on balance, be contrary to the public interest to breach the confidentiality of private business discussions regarding the development of this project. Further, there is an expectation that Defence manages business information in a sensitive way.

63. Issues addressed in the documents relate to individual perceptions and opinions regarding the transition of the project, not specific fact. The process of transition is being negotiated and is not finalised. The negotiations include opinion that may be modified with further consideration. In my view, disclosure would cause a detriment to future business negotiations, as individuals may not provide candid information regarding possible options if they were aware that it could subsequently be released publicly.

64. The harm to the third party company can be considered to be the exposure and erosion of the third party's company information, practices, and future opportunities. Business offers suggested in this case would be publicly exposed and could limit the negotiation position of the third party in future business ventures. The release of this information could also be expected to enable competing businesses to match or counter the third party's current advantages.

65. 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. could reasonably be expected to prejudice the protection of an individual's right to privacy,
- b. an agency's ability to obtain confidential information
- c. an agency's ability to obtain similar information in the future
- d. the competitive commercial activities of an agency
- e. the interests of an individual or group of individuals.

66. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the document that matches the scope of the request. I therefore decided that it would be contrary to the public interest to release the information considered exempt, under sections 47C, 47F and 47G(1)(a) of the FOI Act.

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

### **Third party consultation**

68. I decided to consult with a third party regarding their business information which was contained in the documents. In response to this consultation, the third party has objected to the release of their business information. I do not agree with all of the objections made by the third party.

69. Section 27(7) of the FOI Act says that this Department must not consider disclosing to the applicant the documents in whole, or in part, until the results of all review or appeal provisions are known.

### **Further information**

70. During the internal review, a later version of document 8 was located that was signed on 19 December 2019. Consequently, this version of the document has been provided as part of this review.

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Special Advisor Freedom of Information