



Reference: FOI 561/19/20

Objective ID: BN20042441

## **FOI 561/19/20 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the email of 21 July 2020, in which [REDACTED] sought an internal review under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the Accredited Decision Maker's decision dated 6 July 2020.

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

*The Department of Defence's Capability Acquisition and Sustainment Quarterly Performance Report for the quarterly period to March 2020.*

### **Original Decision**

3. The original decision identified one document. The decision maker decided to partially release the 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 33(a)(i) and (iii) [Documents affecting national security or international relations], section 47E(d) [Public interest conditional exemptions – certain operations of agencies] and section 47G [Public interest conditional exemption – business] of the FOI Act.

### **Contentions**

4. In his application, the applicant requested an internal review of the following part of the document provided to him with the original decision:

1. *In relation to the Battlefield Command System project (LND0200PH2), the entries in the third, fourth, fifth and sixth columns of the table at the bottom of page 44 under the column headings IMR, IOC, FMR and FOC.*
2. *In relation to the ADF Identification Friend or Foe and Automatic Dependent Surveillance Broadcast project (JNT00090PH1), the entries in the fourth and sixth columns of the table at the bottom of page 50.*
3. *In relation to the Defence Satellite Communications Capability Program - UHF SATCOM project (JNT02008PH5A), the entries in the sixth column of the second table on page 54.*

4. *In relation to the Defence Satellite Communications Capability Program - Wideband Transportable Land Terminals project (JNT02008PH5Bl), the entries in the sixth column of the third table on page 54.*
  5. *In relation to the Defence Satellite Communications Capability Program - Combined Communications Gateway Geraldton (JNT02008PH5Bl.2A), the entries in the sixth column of the fourth table on page 54.*
  6. *In relation to the Defence Satellite Communications Capability Program - Satellite Ground Station - East and Wideband SATCOM Network Management (JNT02008PH5B2), the entries in the sixth column of the sixth table on page 54.*
  7. *In relation to the Airborne Early Warning and Control Interoperability Compliance Upgrade project (AIR05077PH5A), the entries in the fourth, fifth and sixth columns of the table at the bottom of page 56 under the headings IOC, FMR and FOC.*
  8. *In relation to the MQ-4C Triton Remotely Piloted Aircraft System project (AIR07000PH1B), the entries in the third, fourth, fifth and sixth columns of the table at the bottom of page 62 **under the headings IMR, IOC, FMR and FOC.***
  9. *In relation to the Battlefield Airlift - Caribou Replacement project (AIR08000PH2), the entries in the column or columns between the column headed IOC and the column headed Total Budget in the table at the bottom of page 64.*
  10. *In relation to the C-130J Block Upgrade project (AIR05440PH1), the entries in the third, fourth, fifth and sixth columns of the table at the bottom of page 68 under the headings **IMR, IOC, FMR and FOC.***
  11. *In relation to the Fixed Defence Air Traffic Control Surveillance Sensors project (AIR05431PH2), the entries in the column or columns between the column headed Milestone and the column headed Total Budget in the table at the bottom of page 70.*
5. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to that material.

## Reviewing officer

6. 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

7. Taking into account the applicant's contentions, this internal review will be limited to items 1-11 referenced at paragraph 4 above.

## Internal review decision

8. After careful consideration, I have decided to vary the original decision by partially releasing further information to the applicant. I have decided to partially release the 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 33(a)(ii) [Documents affecting defence] and section 47E(d) [Public interest conditional exemptions – certain operations of agencies] of the FOI Act.

9. The material requested by the applicant in the context of this internal review is made up of approved and forecast dates in relation to the eleven projects. This decision releases the approved dates only. The Department maintains the previous exemption claims over the remainder of the document as per the Statement of Reasons dated 26 June 2020 (SOR). The findings and reasons in support to these exemption claims is contained in the original SOR.

## Material taken into account

10. In arriving at my decision, I had regard to:

- a. the scope of the applicant's request and subsequent internal review application;
- b. the original decision;
- c. the content of the document subject to the internal review;
- d. relevant provisions in the FOI Act;
- e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the FOI Guidelines); and
- f. advice from Capability Acquisition and Sustainment Group (CASG).

## Findings and reasons

### Section 33(a)(ii) – Document affecting defence

11. Section 33(a)(ii) 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:*

*(ii) the defence of the Commonwealth...*

12. For this exemption to be claimed I must be satisfied that there is a 'real' and 'substantial' risk of damage occurring. It is insufficient that there merely be a possibility of such damage.

13. In regards to the terms, 'could reasonably be expected to' the Guidelines specify:

*5.16 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.*

14. The term damage is not defined within the FOI Act. The FOI Guidelines define damage in broad terms:

*'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.*

15. In determining the extent to which the section 33(a)(ii) exemption applies, 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.*

16. In evaluating the potential harmful effects of disclosing the forecast dates and following further advice from CASG, I found that the release of the forecast dates for the eleven projects could reasonably be expected to cause damage to the defence of the Commonwealth by making public information about current and anticipated military capability levels, and their preparedness. The release of this information would provide specific details of gaps in capabilities that could be targeted to exploit current and developing capabilities and thereby jeopardise the defence of the Commonwealth.

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

#### **Section 47E(d) – Certain operations of agencies (Conditional exemption)**

18. Section 47E(d) provides that a document is conditionally exempt:

*if its disclosure under this Act would, or could reasonably be expected to, do any of the following:...*

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.'*

19. The Guidelines at paragraph 6.123 advise that, where the document relates to certain operations of agencies, the decision maker must address whether the predicted effect must bear on the agency's 'proper and efficient' operations; that is, the agency is undertaking its expected activities in the expected manner.

20. Some of the forecasts dates relate to ongoing projects being reviewed by Defence, and may be changed. This process requires formal notifications to Government, and may result in Government endorsing a particular course of action. Releasing this information prior to this notification could hamper Government's consideration of the matter and thereby have a substantial adverse effect on the ability of Defence to make adjustments to the projects to meet the changing needs of Defence.

21. Such a release could also reduce the effectiveness of the Defence's capabilities, by releasing information that would enable identification of gaps in Defence capabilities and exploit these gaps.

22. Given the above, I find that the release of the relevant material could or would substantially affect the efficient operation of the Department of Defence. I have therefore decided that information contained within the document is conditionally exempt pursuant to section 47E(d) of the FOI Act.

#### **Public interest considerations – section 47E(d)**

23. 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.

24. Disclosure of the relevant information may promote some of the objects of the FOI Act, as information held by the Government is a national resource, as well as increase scrutiny or discussion of government activities.

25. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper way, I consider the potential risks to the defence of the Commonwealth that could be caused by prematurely releasing information about Defence capability gaps and hampering of Defence's 'proper and efficient' operations, outweighs the public interest factors against disclosure.

26. In coming to the above decision, I also considered section 11B(4) of the FOI Act. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the document. I therefore decided that it would be contrary to the public interest to release the information considered exempt, under section 47E(d) of the FOI Act.

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Ms Belinda Hayward  
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Associate Secretary Group