



Australian Government
Department of Defence

Reference: BM16587289

FOI 561/19/20 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:

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

FOI DECISION MAKER

1. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

2. I identified one document as matching the description of the request, the Capability Acquisition and Sustainment Quarterly Performance Report, March 2020.

Decision

3. 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 Sections 33(a)(i) and (iii) [Documents affecting national security or international relations], Section 47E(d) [public interest conditional exemptions-certain operations of agencies] and 47G [public interest conditional exemptions-business affairs] of the FOI Act.

Material taken into account

4. 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); and
 - e. advice from officers within the department from Capability Acquisition and Sustainment Group.

Reasons for decision

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

5. 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, or information that would divulge information or matter communicated in confidence by or on behalf of a foreign government.

6. 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.

7. 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 international relations 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.

8. Upon examination of the document, 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.

9. The Guidelines state:

International Relations

5.36 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.

5.37 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are

supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

10. I further identified material in the document which upon release ‘could reasonably be expected to cause damage to the international relations of the Commonwealth’ by making public information which may diminish the confidence other countries may have that Australian agencies are able to keep certain information confidential.

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

Section 47E – Certain operations of agencies

12. 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.’

13. I found that the document identified contains 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.

14. 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 47G – Business affairs

15. 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.

16. 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.

17. 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 document 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.

18. 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 and Section 47G - Public interest considerations

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

20. 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.

21. 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.

22. 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.

23. 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].

24. 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.

25. 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 and 47G of the FOI Act.

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

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Kaye Uebel
Accredited Decision Maker
Capability Acquisition & Sustainment Group
June 2020