



PB31948048

DEFENCE FOI 352/22/23—STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by Chris Douglas [the applicant], dated and received on 7 January 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

“...a copy of the contract (if not specially referred to as a contract, then any document that relates to the purchase) entered into by Australia to purchase the replacement aircraft for Growler A46-311 from the USA (“replacement aircraft”). If the contract does not specify the price paid for that aircraft, then any document that identifies the cost of the aircraft is also requested.

In addition... any analysis or cost breakdown obtained or undertaken by the Department of Defence that identifies how the cost of the replacement aircraft was derived”

Background

2. On 27 January 2023, Defence sought an extension from the applicant to a 30 day extension of the statutory deadline. On 28 January 2023, the applicant agreed to the extension in accordance with section 15AA [extension of time with agreement] of the FOI Act.

3. On 21 February 2023, the period for processing the request was further extended by 30 days under section 15(7) [extension of processing period to consult foreign entity] of the FOI Act. On 03 April 2023 Defence applied to the Information Commissioner (IC) for an extension of time to process the request given the complexity of the request.

4. On 04 April 2023, the delegate of the IC agreed to extend the period for Defence to deal with the request until 07 May 2023 under section 15AB [extension of time for complex or voluminous requests] of the FOI Act.

FOI decision maker

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

Documents identified

6. I have identified six (6) documents as falling within the scope of the request. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

7. Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers that fall within the scope of the FOI request, including duplicates of documents and documents sent to or from the applicant, are excluded. Defence has only considered final versions of documents.

Decision

8. I have decided to:
 - a. release two (2) documents in full
 - b. partially release four (4) 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 sections 47C [Public interest conditional exemptions–deliberative process], 47E [Public interest conditional exemptions-certain operations of agencies] and 47F [Public interest conditional exemptions-personal privacy] of the FOI Act
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

9. In making my decision, I have had regard to:
 - a. the terms of the request
 - b. the content of the identified documents in issue
 - c. relevant provisions of 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 third party via consultation with Navy International Programs Office (NIPO), Washington DC (USA).

Reasons for Decision

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

10. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.

11. Document one (1), two (2), three (3) and five (5) contains exempt material and information such as staff signatures and PMKeyS numbers that do not relate to the request.

12. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and therefore release the documents to you in an edited form.

Section 47C – Public interest conditional exemptions – deliberative processes

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

- (1) *A document is conditionally exempt if its disclosure under this 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 processes involved in the functions of:*

- (a) *an agency; or*

- (b) a Minister; or
- (c) the Government of the Commonwealth.

14. I identified information within document three (3) as being deliberative in nature. The deliberative processes contained within the document are subject to ongoing consideration and evaluation in the context of contractual negotiations and performance evaluation.

15. Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material. The Guidelines, at paragraph 6.73, state that:

[p]urely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

16. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines at 6.66 which clarifies 'purely factual material' that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive
- b. incidental administrative content
- c. procedural or day to day content
- d. the decision of conclusion reached at the end of the deliberative process
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposed of, a deliberative process.

17. Defence relies on frank and honest consultation, and opinions during the procurement process. Costing documentation or documents that include information about options available to Defence, could inhibit frank and candid advice in the future.

18. I am satisfied that document three (3) contains matter that meets the definition of deliberative material, and that where the content is purely factual, it is embedded in, or intertwined with the deliberative content and cannot be excised.

19. Therefore, I have decided that the information is conditionally exempt under section 47C of the FOI Act.

Section 47E(a) – Public interest conditional exemptions – certain operations of agencies

20. Section 47E(a) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) *prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*

21. The Guidelines, at paragraph 6.100, provide that:

In the context of this exemption, a prejudicial effect could be regarded as one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.

22. Upon examination of document three (3), I identified information for which a claim under section 47E(a) of the FOI Act is warranted. I considered that the material found within the document contains information on subject matter expert modelling and testing which determines our capability needs and outcomes. Disclosing the information would have a disadvantageous effect on our current and future capability preservation, impacting the Australian Defence Force's preparedness.

23. Accordingly, I am satisfied that information contained within document three is conditionally exempt under section 47E(a) of the FOI Act.

Section 47E(d) Public interest conditional exemptions – certain operations of agencies

24. Section 47E(d) of the FOI Act states:

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 the agency.*

25. The Guidelines, at paragraph 6.123, provide that:

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner.

26. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.' Given that the direct contact details within documents numbers one (1), two (2) and three (3) are not publicly available and that more appropriate communication channels are already available, I am satisfied that release of the information would not lead to any efficiencies.

27. In addition, on review of documents one (1), three (3) and five (5) I found that they contained information relating to the capability of the EA-18G Growler. If the information was disclosed, it would have a substantial adverse effect on the proper and efficient conduct of operations of the department from a capability perspective. Release of this information would provide potential adversaries with insight into our current and future levels of airborne capability.

28. In the case of 'ABK' and *Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner (IC) found that where the direct email addresses and phone numbers of agency staff are not publicly known, they should be conditionally exempt under section 47E(d). The IC made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted

directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

29. Accordingly, I am satisfied that all staff and capability information contained within the documents are conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions – personal privacy

30. Section 47F(1) of the FOI Act states:

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).

31. The FOI Act shares the same definition of ‘personal information’ as the *Privacy Act 1988* (Cth). The Guidelines provide that:

6.128 Personal information means 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.*

32. I found that the information in document one (1) contains personal information of another person. This includes their name and position which would reasonably identify a third party.

33. My assessment, in conjunction with advice from NIPO, considered the following factors in accordance with section 47F(2):

- 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
- d. the effect the release of the personal information could reasonably have on the third party.

34. In considering the factors above, I have taken into account the fact that I could not reasonably predict the effect the release of the personal information could have on the third party, nor do I know the extent to which the information is well known. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Public interest considerations – sections 47C, 47E and 47F

35. Section 11A(5) of the FOI Act states:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

36. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

- 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.

37. 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, in my view, disclosure of this information would not increase public participation in the Defence process (see section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (see section 3(2)(b) of the FOI Act).

38. 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:

- an agency's ability to obtain confidential information
- an agency's ability to obtain similar information in the future
- the interests of an individual or a group of individuals
- the management function of an agency
- the effectiveness of testing or auditing procedures.

39. While I consider that release of the material removed under sections 47C, 47E and 47F may be of some interest to the applicant, disclosure of the conditionally exempt material would not inform public debate on any matter in any meaningful way. The public interest is better served in protecting Defence's deliberative processes, the privacy of individuals and their personal information/opinion, or the efficient conduct of the agency contained within the documents, from release to the public at large.

40. 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 sections 47C, 47E, and 47F of the FOI Act.

41. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.

Further information

42. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

PR Davies, CSC
Group Captain

Accredited Decision Maker
Royal Australian Air Force
Department of Defence