



ASA FOI 035/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 28 May 2024 by the Australian Submarine Agency (ASA), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

Dates: 1 March 2023 - 28 May 2024

Documents sought: Reports and briefings related to the review of locations referred to in the Australian Submarine Agency's fact sheet titled 'Nuclear Stewardship and Waste' published in March 2023 and consultation process:

"As an initial step, Defence - working with relevant agencies including the Australian Radioactive Waste Agency - will undertake a review in 2023 to identify locations in the current or future Defence estate that could be suitable to store and dispose of intermediate-level waste and high level waste, including spent fuel. The outcomes of the review will inform a more detailed process which will include consultation and engagement with community and Indigenous groups, and consideration of wider social license and economic implications"

Source: <https://www.asa.gov.au/aucus/nuclear-stewardship-waste>

Exemptions and redactions: I am not seeking personally identifying information for persons other than senior Department, Defence and Australian Government staff, MPs and Senators. I am happy to receive redacted copies.

Background

2. On 24 June 2024, with the applicant's written agreement ASA extended the period for dealing with the request from 27 June 2024 until 11 July 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act.
3. On 8 July 2024, with the applicant's written agreement ASA further extended the period for dealing with the request from 11 July 2024 until 27 July 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act.

FOI decision maker

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

Documents identified

5. I have identified eight (8) documents as falling within the scope of the request.
6. 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 contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. ASA has only considered final versions of documents.

Decision

8. I have decided to:
 - a. partially release two (2) 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 33 [Documents affecting national security, defence or international relations]; and 47C [Public interest conditional exemptions – deliberative processes] of the FOI Act;
 - b. refuse access to six (6) documents on the grounds that the documents are considered exempt under sections 33 [Documents affecting national security, defence or international relations]; 34 [Cabinet documents]; and 47C [Public interest conditional exemptions – deliberative processes] of the FOI Act; and
 - 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 the Department of Prime Minister and Cabinet (PM&C) on Cabinet related material;
 - f. advice from the Safeguards and Security Branch of the ASA; and
 - g. advice from the Australian Radioactive Waste Agency (ARWA).

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. Documents 3, 4, 7 and 8 contain exempt material and information (*e.g. names of staff below SES level, telephone numbers and signatures*) that does not relate to the request.
12. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.
13. Additionally, where a decision maker denies access to a document, section 22(1) of the FOI Act requires that they consider releasing the document with exempt matter deleted, if possible.
14. Paragraph 3.98 of the Guidelines provides that:

...an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant.
15. I have considered disclosing documents 1, 2, 5 and 6 to you with deletions, but have decided to refuse access to these documents as they would be meaningless and of little or no value once the exempt material is removed.

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

16. Section 33 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:*
 - (i) *the security of the Commonwealth;*
 - (ii) *the defence of the Commonwealth; or*
 - (iii) *the international relations of the Commonwealth...*

17. In regard to the terms ‘would, or 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.

...

Security of the Commonwealth: [Damages]

5.31 *The meaning of 'damage' has three aspects:*

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

International Relations: [Damages]

5.37...*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*

18. **Additionally, the Guidelines state:**

Security of the Commonwealth

5.29 *The term 'security of the Commonwealth' broadly refers to:*

- (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests*
- (b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations.*

Defence of the Commonwealth

5.34 *The FOI Act does not define 'defence of the Commonwealth'. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:*

- meeting Australia's international obligations*
- ensuring the proper conduct of international defence relations*
- deterring and preventing foreign incursions into Australian territory*
- protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

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. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

19. **The documents in question contain information pertaining to the operation and life cycle of conventionally-armed nuclear-powered submarines.**
20. **I find that disclosure of the documents exempted under section 33(a)(i) of the FOI Act would cause, or could reasonably be expected to cause, damage to the security of the Commonwealth by making public details of a future ASA capability that is highly classified.**

21. In addition, I have also taken into account the intelligence technique known as the ‘mosaic theory’. This theory holds that individual pieces of information, when combined with information already in the public domain, can generate a composite ‘mosaic’ which would lead to an adversary applying this information and therefore undermining ASA’s capability and effectiveness. Having particular regard to the nature of the information within these documents, I have decided that the release of this material could reasonably be expected to cause damage to the security of the Commonwealth.
22. I also find that disclosure of the documents exempt under section 33(a)(ii) of the FOI Act would cause, or could reasonably be expected to cause, damage to the defence of the Commonwealth by making public details of future ASA capability to meet Australia’s international obligations and ensuring the proper conduct of international defence relations regarding the operation and life cycle of conventionally-armed nuclear-powered submarines.
23. Furthermore, I find that disclosure of the documents exempted under section 33(a)(iii) of the FOI Act would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth. Having considered the Guidelines in relation to the request, I have identified material that contains information relating to Australia’s relationship with foreign governments. The document contains information communicated to Australia by foreign governments and their officials under the expectation that it would not be disclosed. The release of such information could harm Australia’s international standing and reputation. It could reasonably be expected to limit the Commonwealth’s ability to deal with those countries in relation to conventionally-armed nuclear-powered submarines and similar matters in the future. As such, any release of the information would cause a loss of trust and confidence in the Australian government and foreign officials may be less willing to engage with Australian government officials in the future.
24. In view of the above, I am satisfied that the documents are exempt under section 33(a) of the FOI Act.

Section 34 – Cabinet documents

25. Section 34(1)(a) of the FOI Act states:

A document is an exempt document if:

(a) Both of the following are satisfied:

- (i) It has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
- (ii) It was brought into existence for the dominant purpose of submission for consideration by the Cabinet...*

26. Additionally, the Guidelines state that:

Cabinet documents (s34)

5.55 The Cabinet exemption in s 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility

(fundamental to the Cabinet system) is not undermined. ... [T]his exemption is not subject to the public interest tests. The public interest is implicit in the purpose of the exemption itself.

27. I find that the material in the scope of this request includes a Cabinet submission that was brought into existence for the dominant purpose of consideration by Cabinet.
28. Furthermore, the Guidelines state that agencies should consult PM&C on any Cabinet-related material identified as being within the scope of a FOI request. Accordingly, PM&C have advised that they support the use of section 34 in relation to the specified material.
29. Based on the above reasoning, I consider the documents to be exempt under section 34(1)(a) and section 34(2) of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

30. 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.*

31. On examination of the document, I found they contain information relating to consultation that has taken place for the purposes of the deliberative processes involved in the functions of the ASA.

32. 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.

33. I am satisfied that the documents contain deliberative matter in the form of advice and recommendations that form part of a deliberative process within the ASA. The material was provided for consideration in the exercise of Government processes and subsequently used to inform a submission to Cabinet. The Government is still in the process of considering this information and I consider that disclosing this material would have a substantial and adverse effect on this process.
34. Accordingly, I am satisfied that the documents contain 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.
35. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

Public interest considerations - sections 47C

36. 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.

37. 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.

38. I note that disclosure of the requested documents may promote some of the objects of the FOI Act. However, in my view, disclosure of this information would not increase public participation in the ASA process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of ASA activities (section 3(2)(b) of the FOI Act).

39. 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 similar information in the future; and
- the management function of an agency.

40. While I accept there is a public interest in ensuring that the ASA undertakes its functions in a transparent and proper manner, there is a stronger public interest in maintaining the confidentiality of the material contained within the document, particularly those still under consideration by the Government. Releasing information would unreasonably affect the ASA's ability to produce confidential information or obtain independent advice for the purposes of deliberations and hinder the ASA's ability to provide robust advice to Government in the future. In addition, the disclosure of material which the ASA may be considering could unduly impact the management functions of the Agency and potentially prejudice a future decision of Government.

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.

42. Accordingly, I find that the information is exempt under section 47C of the FOI Act.



Assistant Director-General Government and Public Relations

Accredited Decision Maker

Australian Submarine Agency