



Australian Government
Australian Submarine Agency

ASA FOI 009/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 11 October 2023 by the Australian Submarine Agency (ASA), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

1. *Any ministerial briefings/submissions that relate to disposal of operational nuclear waste for the Submarine Rotational Force-West.*
2. *Any ASA analysis/briefs/plans/letters that relate to disposal of operational nuclear waste for the Submarine Rotational Force-West.*
3. *Any ministerial briefings/submissions that relate to*
 - a. *a future facility for the disposal of operational nuclear waste or spent nuclear fuel from Australian flagged nuclear submarines.*
 - b. *disposal of operational nuclear waste or spent nuclear fuel from Australian flagged nuclear submarines.*
4. *Any analysis/briefs/plans/letters that relate to:*
 - a. *a future facility for the disposal of operational nuclear waste or spent nuclear fuel from Australian flagged nuclear submarines.*
 - b. *disposal of operational nuclear waste or spent nuclear fuel from Australian flagged nuclear submarines.*

Background

2. On 2 November 2023, with the applicant's written agreement, ASA extended the period for dealing with the request from 10 November 2023 until 24 November 2023 in accordance with section 15AA [Extension of time with agreement] of the FOI Act.

3. On 15 November 2023 with the applicant's written agreement ASA extended the period for dealing with the request from 24 November 2023 until 10 December 2023 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 ten (10) 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], 47C [Public interest conditional exemptions – deliberative processes] and 47E [Public interest conditional exemptions – certain operations of agencies] of the FOI Act;
- b. refuse access to eight (8) documents on the grounds that the documents are considered exempt under sections 34 [Cabinet documents], 33 [Documents affecting national security, defence or international relations], 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 received from ASA Safeguards and Non-proliferation; and
- f. advice received from Department of Prime Minister and Cabinet (DPMC) on Cabinet-related material.

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. 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.

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

12. 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...*

13. In regards 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.

14. 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.*

15. The documents in question contain information pertaining to the operation and life cycle of nuclear powered submarines.

16. 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.

17. 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.

18. 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 nuclear powered submarines.

19. 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 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.

20. 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

21. Section 34 of the FOI Act states:

(1) 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; or

(b) it is an official record of cabinet; or

(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or

(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

22. Additionally, the Guidelines state that:

5.61 Any document containing information which, if disclosed, would reveal Cabinet deliberations or a decision is exempt unless the deliberation or decision has been officially disclosed (s 34(3)). The words 'officially disclosed' are not defined in the FOI Act and should be given their ordinary meaning.

5.62 Agencies should also be aware that there is no requirement to provide access to an edited copy of a document that is exempt under s 34(1).

23. Upon examination of the documents, I identified three (3) documents that were brought into existence for the dominant purpose of submission for consideration by the Cabinet and were submitted to Cabinet. These documents contain information which, if disclosed, would reveal Cabinet deliberations that have not been officially disclosed.

24. The Guidelines state that agencies should consult the DPMC on any Cabinet-related material identified as being within the scope of an FOI request. DPMC have advised that they support the use of section 34 of the FOI Act in relation to the specified material.

25. Accordingly, I am satisfied that these three (3) documents are exempt under section 34(1) of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

26. 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.*

27. 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.

28. Upon the examination of the documents, I have identified deliberative matter – that is, content that is in the nature of, or relating to either opinion, advice or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the purpose of, a deliberative process of ASA. These documents contain opinions, advice, recommendations and supporting material that was gathered through consultation.

29. Consequently, I find the documents contain deliberative matters and are conditionally exempt under section 47C of the FOI Act.

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

30. 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.*

31. 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.

32. In the case of ‘*ABK and Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner (IC) found that where the direct names, 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.

33. I am satisfied that were the contact details of ASA personnel be made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels. Further, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of ASA personnel. Disclosure of names, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of ASA.

34. 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 the documents are not publicly available and that more appropriate communication channels are already available, I am satisfied that release of the information could reasonably be expected to lead to a change in ASA’s processes that would not lead to any efficiencies.

35. Accordingly, I am satisfied that the information is conditionally exempt under section 47E(d) of the FOI Act.

Public interest considerations – sections 47C and 47E(d)

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;*
- (d) *allow a person to access his or her own personal information.*

38. 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:

- the protection of an individual's right to privacy;
- an agency's ability to obtain confidential information;
- an agency's ability to obtain similar information in the future;
- the management function of an agency; and
- the personnel management function of an agency.

40. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, such as information held by the Government is a national resource. Further disclosure of some of the information redacted under section 47C of the FOI Act may increase scrutiny, debate and discussion of ASA activities, however, I am of the view that disclosure of the specific conditionally exempt material would not increase public participation in the ASA process.

41. It is in the public interest that ASA efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the names, email addresses and phone numbers of ASA personnel can reasonably be expected to prejudice the management and personnel management functions of ASA. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of ASA personnel should, therefore, not be disclosed under section 47E(d), as the public interest against their disclosure outweighs the public interest in their release.

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

43. 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

44. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

45. 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.

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Accredited Decision Maker

Australian Submarine Agency