



ASA FOI 002/24/25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 17 July 2024 by the Australian Submarine Agency (ASA), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

... The Australian Submarine Agencies has made an application to ARPANSA for a licence for a controlled industrial facility at HMAS Stirling. I seek access to elements of that application as follows:

- *The radioactive waste management plan*
- *The environmental protection plan*
- *The decommissioning plan*

Background

2. On 9 August 2024, the period for dealing with the request was extended from 16 August 2024 until 15 September 2024 under section 15(6) [extension of processing period to comply with requirements of section 26A, 27 or 27A] of the FOI Act to enable consultation with AECOM in accordance with section 27 of the FOI Act.
3. On 12 September 2024, with the applicant's written agreement ASA extended the period for dealing with the request from 15 September 2024 until 30 September 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act.
4. On 27 September 2024, with the applicant's written agreement ASA extended the period for dealing with the request from 30 September 2024 until 4 October 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act.
5. On 2 October 2024, with the applicant's written agreement ASA extended the period for dealing with the request from 4 October 2024 until 15 October 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act.
6. On 21 October 2024, ASA applied to the Information Commissioner for further time to deal with the request. On 22 October 2024, under section 15AC [decision not made on request within time—deemed refusal] of the FOI Act, the Information Commissioner allowed for ASA to deal with the request until 14 November 2024.

FOI decision maker

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

Documents identified

8. I have identified three documents as falling within the scope of the request.

Exclusions

9. 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

10. I have decided to:
 - a. partially release three 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; and
 - b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

11. 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 AECOM, the Australian Nuclear Science and Technology Organisation, the Australian Radiation Protection and Nuclear Safety Agency, the Australian Radioactive Waste Agency, the Department of Defence, and the governments of the United Kingdom and United States of America; and
 - f. advice received from subject matter experts within the ASA.

REASONS FOR DECISION

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

12. 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.

13. The documents contain exempt material and information that does not relate to the request. I am satisfied that it is reasonably practicable to remove this material and release the documents to you in an edited form.

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

14. Section 33(a) 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*

15. 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]

5.32 The meaning of ‘damage’ has 3 aspects:

- i. that of safety, protection or defence from something that is regarded as a danger. The Administrative Appeals Tribunal (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.*

...

Defence of the Commonwealth: [Damages]

5.36 The FOI Act does not define ‘defence of the Commonwealth’. Previous 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: [Damages]

5.40 ... *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.*

16. Additionally, the Guidelines state:

Security of the Commonwealth

5.30 *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 (see definition in s 4(5)).*

International Relations

5.39 *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 to protect the follow 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.*

- 17. I find that disclosure of the information exempt 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. The specified information contains operational information about critical defence infrastructure, essential to the delivery of the Optimal Pathway and sustainment of Australia's future nuclear-powered submarine capability.
- 18. The Controlled Industrial Facility (CIF) is vital to the establishment of the Submarine Rotational Force-West (SRF-West). SRF-West will help Australia build the necessary operational capabilities and skills to become 'sovereign ready' so that we can safely and securely own, operate, maintain and regulate our fleet of nuclear-powered submarines. Releasing confidential information about the organisation and operation of the CIF could allow hostile nations to develop strategies to interfere with the operation of the facility or exploit weaknesses which would have significant strategic consequences for Australia. It is necessary that certain aspects of defence infrastructure and operational capabilities remain confidential to safeguard Australia's security interests to ensure the protection of Australia and its population from activities that would be hostile to the Commonwealth's interests.
- 19. I also find that disclosure of the information 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. The specified information contains information regarding HMAS *Stirling*, its infrastructure and operations.

20. The CIF will be required to support SRF-West and to maintain Australia's conventionally armed, nuclear-powered submarines. The security of this infrastructure is essential to the successful delivery of the Optimal Pathway and Australia's future military capabilities. The release of this information could prejudice the effectiveness of the Australian Defence Force (ADF) and the safety of ADF personnel. This is because the release of the specified material could expose valuable information to external entities which could be utilised to hinder essential defence capabilities. Such action could reasonably be expected to result in damage to the defence of the Commonwealth.
21. 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 ADF capability and effectiveness. Having particular regard to the nature of the information within these documents, this consideration adds weight to the assessment that the release of this material could reasonably be expected to cause damage to the security and defence of the Commonwealth.
22. Additionally, I find that disclosure of the documents and information exempt 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. The documents contain operational information, in various stages of development, about essential defence infrastructure. This information is still in development and has not yet been consulted with the AUKUS partners.
23. The support and confidence of our international AUKUS partners is integral to the success of the delivery of the Optimal Pathway. Australia will be drawing on the significant expertise and support of the AUKUS partnership to become sovereign ready and safely steward our nuclear-powered submarines through their life cycles including the safe and secure management of low-level radioactive waste produced during operation and maintenance. The premature release of the documents prior to proper consultation, appropriate review and vetting processes could significantly diminish the confidence the AUKUS partners have in Australia's ability to properly develop and manage sensitive operational information. This could reasonably be expected to impact the AUKUS partners' willingness to cooperate and share information with the ASA in the future.
24. Accordingly, I am satisfied that the documents and specified information is exempt under section 33(a)(i) and section 33(a)(iii) of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

25. 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.*

26. Upon examination of the documents, I have identified deliberative material – 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.
27. The information provides the details of ongoing, confidential negotiations between the ASA and other government agencies regarding the ongoing operation of the CIF. Release of the deliberative matter at this time would prejudice the standing of the ASA in these negotiations and could substantially affect the trust and good working relationships the ASA has established with the agencies.
28. 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.

29. Accordingly, I am satisfied that the specified information 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. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

Public interest considerations - sections 47C

30. 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.

31. 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 documents 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.*

32. 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).


33. 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; and
 - the management function of an agency.
34. 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 documents. Releasing the deliberative material would unreasonably affect the ASA's ability to effectively conclude the negotiations it is undertaking with other government agencies and may hinder future dealings with these agencies should our reputation as a trusted and reliable partner be compromised. In addition, the disclosure of the material could impact the management functions of the Agency which could lead to compromising the timely delivery of the Optimal Pathway.
35. 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.
36. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to you. Accordingly, I find that the information is exempt under section 47C of the FOI Act.

FURTHER INFORMATION

37. 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.



Acting Director, Ministerial and Parliamentary Services
Australian Submarine Agency
14 November 2024