



**Australian Government**  
**Australian Submarine Agency**

**ASA FOI 008/23/24**

**STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982**

1. I refer to the request by [REDACTED] (the applicant), dated and received on 21 September 2023 by the Australian Submarine Agency (ASA), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

*...I seek access to briefings, notes, papers, cablegrams, emails or other documents that relate to the United States Congressional Research Service Report entitled “Navy Virginia-Class Submarine Program and AUKUS Submarine Proposal: Background and Issues for Congress” (excluding copies of the publicly released report).*

**Background**

2. On 3 October 2023 the period for dealing with the request was extended from 20 October 2023 until 20 November 2023 under section 15(6) [extension of processing period to comply with requirements of section 27A] of the FOI Act to enable consultation with third party in accordance with section [27A] of the FOI Act.

**FOI decision maker**

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

**Documents identified**

4. I have identified 27 documents as falling within the scope of the request.
5. The decision in relation to each document is detailed in the schedule of documents.

**Exclusions**

6. 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.

**Decision**

7. I have decided to:
  - a. release one (1) document in full;
  - b. partially release twenty-one (21) 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 [deliberative processes], 47E [Public interest conditional exemptions – certain

operations of agencies] and 47F [Public interest conditional exemptions - personal privacy] of the FOI Act;

- c. refuse access to five (5) documents on the grounds that the documents are considered exempt under section 33 [Documents affecting national security, defence or international relations] of the FOI Act; and
- d. remove irrelevant material in accordance with section 22 of the FOI Act.

### **Material taken into account**

8. 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. consultation with ASA International and Strategic Policy, and Department of Foreign Affairs and Trade; and
  - f. advice received as part of third party consultation.

### **REASONS FOR DECISION**

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

9. 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.
10. Upon examination of the documents, I have identified material that it is exempt from disclosure under the FOI Act, including phone contact details, as well as irrelevant information which does not relate to the request.
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 international relations of the Commonwealth*

13. 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.*

14. In regard to ‘security of the Commonwealth’, the Guidelines provide at paragraph 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 (see definition in s 4(5)).*

15. I have identified material in the documents which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth by exposing the processes and means employed to protect Australia. The exempt material contains sensitive information about Australia’s capabilities that could potentially allow bad actors with hostile intentions to exploit the security of the Commonwealth. In making this information publically known, non-allied states with Australia could take steps or devote resources to exploit weaknesses causing damage to Australia’s security. Release of such information is not within the national security interest and could inhibit future negotiations between the Australian Government and a foreign government.

16. In regard to ‘international relations of the Commonwealth’, the Guidelines provide at paragraph 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.*

17. I have identified documents that contain information which, if released would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth. This is because the documents contain information relating to Australia's relationship with foreign governments and release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect ASA's ability to deliver on its obligations to protect Australia's interests, and government and foreign officials may be less willing to engage with Australian government officials in the future.
18. Accordingly, I am satisfied that the documents are exempt under section 33(a) of the FOI Act.

#### **Section 47C – Public interest conditional exemptions - deliberative processes**

19. 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.*

20. I find that the documents contain material which was produced for the purpose of providing opinion and advice for consideration in the decision making process. There is a risk, if the information were released would impede the smooth operation of ASA business, including the ability for ASA to present and communicate frank preliminary advice at the highest levels Government.
21. I considered whether the information is purely factual material, in relation to section 47C(2)(b) of the FOI Act. I considered paragraph 6.66 of the Guidelines which states 'purely factual material' that would not be regarded as deliberative matter as:
  - content that is merely descriptive;
  - incidental administrative content;
  - procedural or day to day content;
  - the decision or conclusion reached at the end of the deliberative process;
  - matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.
22. I also considered Guidelines paragraph 6.73, that:

*...purely 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.*

23. Accordingly, I am satisfied that the 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.

**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. In the case of *'ABK' and Commonwealth Ombudsman [2022]*, 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.

27. 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.

28. 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.

29. Accordingly, I am satisfied that the information is 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 contains personal information of other persons. This includes their names, contact numbers and email addresses which would reasonably identify a third party/parties.

33. In my assessment of whether the disclosure of personal information is unreasonable, I 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. I found that the specific personal information listed is not well known, individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the document and the information is not readily available from publicly accessible sources.

35. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

## **Public interest considerations – section 47C, 47E(d) and 47F**

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 interests of an individual or a group of individuals;
  - the management function of an agency; and
  - the personnel management function of an agency.
40. 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.
41. 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 sections 47C, 47E(d) and 47F of the FOI Act.

#### **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.
43. Where there is duplicated information across a number of documents, I have removed these pages from the document pack and identified them in the Schedule of Documents.



Director Ministerial and Parliamentary Services  
Accredited Decision Maker  
Australian Submarine Agency