



## ASA FOI 010/23/24

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

1. I refer to the request by [REDACTED] (the applicant), dated and received on 9 November 2023 by the Australian Submarine Agency (ASA), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

*... I would like to request the Australian Submarine Agency's finalised briefing documents prepared for the Senate Budget Estimates of the Foreign Affairs, Defence and Trade Committee, 23 – 27 October 2023.*

#### Background

2. On 30 October 2023, the applicant submitted a request under the FOI Act to the ASA in the following terms:

*... I would like to request all documents prepared for the purposes of briefing materials, for the Senate Budget Estimates hearings of the Foreign Affairs, Defence and Trade Committee, 23 – 27 October 2023.*

3. On 9 November 2023, the applicant revised the scope of the request.

#### 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 two (2) documents as falling within the scope of the request.

#### 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. The ASA has only considered final versions of documents.

#### Decision

7. I have decided to:

- (a) release one (1) document in full; and

- (b) partially release one (1) document 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], 34 [Cabinet documents], 47C [Public interest conditional exemptions – deliberative processes], 47E [Public interest conditional exemptions – certain operations of agencies], 47F [Public interest conditional exemptions – personal privacy], and 47G [Public interest conditional exemptions - business] 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); and
  - e. consultation with the relevant ASA Line Areas.

### **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. 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(a)(iii) – Documents affecting national security, defence or international relations**

11. Section 33(a)(iii) 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:*

*...*

*(iii) the international relations of the Commonwealth*

12. 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.*

*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.*

13. In regard to 'international relations', 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.*

14. Upon examination of the documents, I identified information, which if released, could reasonably be expected to damage international relations. That is because the documents contain information relating to views and engagement of New Zealand, Southeast Asia and the Pacific and their support of AUKUS partners. Release of this sensitive information could damage relationships and diminish the confidence that other countries have in Australia and our ability to build understanding and assurance on the AUKUS partnership. In releasing their views, this could make those countries less willing to cooperate with Australian agencies in the future. Any damage to international confidence or our close relationship with the Indo-Pacific would have a serious impact on the ASA's ability to deliver Australia's conventionally armed nuclear powered submarine program.

15. Accordingly, I am satisfied that the information is exempt under section 33(a)(iii) of the FOI Act.

### **Section 34 – Cabinet documents**

16. 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*
- (a) *it is an official record of cabinet; or*
- (b) *it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*
- (c) *it is a draft of a document to which paragraph (a), (b) or (c) applies.*

17. 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).*

18. Upon examination of the documents, I find that specific material in the scope of the request contains information that was 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.

19. The Guidelines state that agencies should consult the Department of the Prime Minister and Cabinet of Australia (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.

20. Accordingly, I am satisfied that the relevant information be exempt under section 34(2) of the FOI Act.

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

21. 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.*

22. 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.*

23. Upon examination of the documents, I have identified deliberative matters – 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. These documents contain the opinions of officials, and advice or recommendations prepared during the course of a deliberative process. The disclosure of the redacted information would jeopardise the Agency’s ability to operate efficiently and effectively, including its ability to present frank and fearless advice to its senior leadership and to Government.

24. 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**

25. 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.*

26. 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.*

27. The documents within the scope of this request contain the names and direct phone numbers of ASA personnel. 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.

28. I am satisfied that were the contact details of ASA personnel 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 the ASA.

29. 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 document 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.

30. Accordingly, I am satisfied that all personnel information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

### **Section 47F – Public interest conditional exemptions - personal privacy**

31. 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).*

32. The FOI Act shares the same definition of 'personal information' as the *Privacy Act 1988* (Cth). The Guidelines, at paragraph 6.128, provide that:

*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.*

33. I found that one document contains personal information of other persons. This includes their full names which would reasonably identify the third parties.

34. 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; and

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

35. 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.

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

### **Section 47G – Public interest conditional exemptions - business**

37. Upon examination of the documents, I identified business information belonging to third parties that provided information in answer to their financial affairs.

38. Section 47G of the FOI Act states:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*
- (a) *would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or*
  - (b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

39. Where access has been denied under section 47G(1)(a) of the FOI Act, I consider that the disclosure of the specified material contained in the documents would have an unreasonable and adverse effect on the lawful business affairs of a third party organisation. The information provides details of business arrangements, and the disclosure of this material would result in the release of information that is not in the public domain. The release of this material would have the effect of exposing commercial sensitivities of that third party organisation to their competitors, which would harm their business.

40. Accordingly, I am satisfied that the specified information contained in these documents is conditionally exempt under section 47G of the FOI Act. My public interest considerations are detailed below.

#### **Public interest considerations - sections 47C, 47E(d), 47F and 47G**

43. 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.*

44. 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;*

45. In my view, disclosure of this information would not increase public participation in 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).

46. 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;
- the interests of an individual or a group of individuals; and
- the personnel management function of an agency.

47. With regard to conditional exemption 47C of the FOI Act, there is no public interest in releasing matters of opinion that would reasonably affect the ASA's ability to conduct its business. In addition, the disclosure of material which the ASA may currently be considering, could unduly impact the management functions of the Agency.

48. With regard to conditional exemption section 47E(d) of the FOI Act, it is in the public interest that the 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 and direct phone numbers of ASA personnel can reasonably be expected to prejudice the management and personnel management functions of the 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, as the public interest against their disclosure outweighs the public interest in their release.

49. With regard to conditional exemption section 47F of the FOI Act, I do not see any public interest in the release of third party personal information that the ASA has obtained in the course of conducting its usual operations. The ASA has an obligation to protect third party information it holds from public disclosure through a process such as FOI, and there is a general public expectation that their own personal information would not be released through a similar process. The names of third parties should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.

50. With regard to conditional exemption section 47G of the FOI Act, and given the Agency's requirement to maintain strong links with industry, it is imperative that ASA be able to collect and retain sensitive commercial information without its commercial partners fearing that the material so obtained would be released without authorisation. This information may be of some interest to the applicant, however its disclosure would not inform public debate on any matter of public importance in any meaningful way.

51. 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.

52. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and on balance it is against the public interest to release the information to you.

53. Accordingly, I find that the information is exempt under section 47C, 47E(d), 47F and 47G of the FOI Act.



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Accredited Decision Maker

Australian Submarine Agency