



DEFENCE FOI 223/24/25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by James Smith (the applicant), dated and received on 20 September 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

Please provide the following extracts from Adecco Contract ID CN3923195:

- *Clauses: 1.1, 1.3, 4.1, 4.2, 4.3, 7.1, 7.2, 7.3, 7.4, 7.5, 8.1, 8.5, 10.1 and 10.2*
- *Attachments: A, B, C and P*

Background

2. On 15 October 2024, the period for dealing with the request was extended from 20 October 2024 until 19 November 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 a business in accordance with section 27 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 six 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. Clauses in the Condition of Contract outside of those specifically requested are excluded from this request. Defence has only considered final versions of documents.

Decision

7. I have decided to:
 - a. partially release four 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 47 [Documents disclosing trade secrets or commercially valuable information], 47D [Public interest conditional exemptions – financial or property interests of the Commonwealth], 47E [Public interest conditional exemptions – certain operations of agencies] and 47G [Public interest conditional exemptions – business] of the FOI Act;
 - b. refuse access to two documents on the grounds that the documents are considered exempt in full under sections 47 [Documents disclosing trade secrets or commercially valuable information], 47D [Public interest conditional exemptions – financial or property interests of the Commonwealth]

and 47E [Public interest conditional exemptions – certain operations of agencies]; and

- c. 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. advice provided by Defence People Group (DPG); and
 - f. consultation with third parties.

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. The documents identified in the schedule of documents as being released in part contain exempt and irrelevant material such as contract clauses that do not relate to the request.
- 11. Where whole pages are considered to be exempt in full, these pages have been removed from the released document pack.
- 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. 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.
- 14. In the case of documents identified in the schedule of documents as being refused in full, I have decided to refuse access to the documents as they would be meaningless and of little or no value once the exempt material is removed.

Section 47 – Documents disclosing trade secrets or commercially valuable information

15. Section 47 of the FOI Act states:

(1) *A document is an exempt document if its disclosure under this Act would disclose:*

...

(b) *any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

16. The Guidelines state that:

Information having a commercial value

5.234 *To be exempt under s 47(1)(b) a document must satisfy 2 criteria:*

- *the document must contain information that has a commercial value either to an agency or to another person or body and*
- *the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

5.235 *It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. ... The following factors may assist in deciding in a particular case whether information has commercial value:*

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates ...*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether the information is still current ...*
- *whether disclosing the information would reduce the value of a business operation or commercial activity ...*

...

5.237 *The second requirement of s47(1)(b) must be established separately by satisfactory evidence. ... It must be established that the disclosure would destroy or diminish the commercial value of the information.*

17. Upon examination of the documents, I identified information that has a commercial value which would be, or could reasonably be expected to be, diminished if it were disclosed. I identified the study to contain valuable commercial information of the Commonwealth and third parties. This information, being the fees charged by the third party in providing services to the Commonwealth under the contract, is not in the

public domain and could impact the Commonwealth's ability to effectively manage existing contracts and engage in future contract negotiations. Release of this information could also reasonably be expected to provide competitors of third parties with sensitive information that would otherwise only be known to limited parties, thus conferring an unfair competitive advantage.

18. Accordingly, I consider that the release of the information would, or could reasonably be expected to, diminish commercial value, and is exempt in full under section 47(1)(b) of the FOI Act.

Section 47E - Public interest conditional exemptions - certain operations of agencies

19. 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.

20. The Guidelines, at paragraph 6.115, provide that:

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner.

21. The documents contain information regarding commercial and contractual matters between Defence and a service provider. Disclosure of this information would, or could, substantially adversely affect the conduct of operations of Defence by providing insight into the details and structure of the contract, and give commercial advantage to potential market competitors.
22. I have also considered that disclosure could reasonably be expected to adversely impact the Defence's ability to negotiate effectively to obtain value-for-money outcomes on behalf of the Commonwealth. The need for contracted recruitment services will remain in place for the foreseeable future and the Commonwealth must be able to achieve value for money during future negotiations with potential providers. I consider that disclosure of this information could reasonably be expected to adversely affect any such negotiations, unduly weaken the Commonwealth's position, and prejudice the frank and open supply of information to the Commonwealth.
23. The Guidelines provide, at paragraph 6.115, that I should consider whether disclosure of the documents '*would, or could reasonably be expected to effect the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner.*' Given the aggregate of information contained in the documents identified in the schedule of documents could provide sufficient information to circumvent recruitment processes, or undermine future procurement processes for these services, I am satisfied that release of the documents could reasonably effect the agency's 'proper and efficient' operations.
24. After weighing all of the above I consider that, on balance the public interest factors against disclosure outweigh the factors for disclosure. Accordingly, I am satisfied that

the documents are, in full or in part, conditionally exempt under section 47E(d) of the FOI Act.

Section 47D – Public interest conditional exemptions – financial or property interests of the Commonwealth

25. Section 47D of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

26. Paragraph 6.90 of the Guidelines indicate that:

The financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities. An agency's property interests may be broader than merely buildings and land, and include intellectual property or the Crown's interest in natural resources.

27. In regards to the term 'substantial adverse effect,' the Guidelines state:

The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

28. Upon examination of the document, I identified conditionally exempt, commercially sensitive information, the disclosure of which would place the Commonwealth at a considerable commercial disadvantage. The publication of this material could jeopardise or significantly undermine negotiations on future contracts for recruitment services to the Australian Defence Force.

29. The need for contracted recruitment services will remain in place for the foreseeable future and the Commonwealth must be able to achieve value for money for the taxpayer during future negotiations with potential providers. I consider that disclosure of this information could reasonably be expected to adversely affect any such negotiations, unduly weaken the Commonwealth's position, and prejudice the frank and open supply of information to the Commonwealth.

30. Taking the above into consideration, I am satisfied that the relevant information is conditionally exempt under section 47D of the FOI Act.

Section 47G – Public interest conditional exemptions – business

31. Section 47G(1)(a) 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.

32. I note that the use of the word ‘could’ in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.

33. The Guidelines state, at paragraph 6.181:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

34. The Guidelines also explain, at paragraph 6.185:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest - preserving the profitability of a business. However, at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

35. The Guidelines go on to provide, at paragraph 6.191, ‘[t]he term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.

If a document is released it is reasonable to expect that the release of that information would unreasonably affect their business affairs in the following adverse ways:

a. Provide a competitive advantage to competitors who would use the information to capture the market which would impact the organisations ‘money making affairs.’

36. Upon examination of the documents, I identified business information belonging to a service provider to Defence.

37. 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 document would have an unreasonable adverse effect on the lawful business affairs of a third party organisation. The documents provide details of a business contract which are unique to the negotiating position of both parties. The disclosure of this material would result in the release of information that is not in the public domain and have the effect of exposing

commercial sensitivities of that third party organisation to their competitors, which would harm their business.

38. Further, in considering advice provided through third party consultation, and information already in the public domain, I am of the view that full release of documents identified would prejudice future tendering by the organisation as this information is considered to have high commercial value.
39. Accordingly, I am satisfied that the specified information contained in the documents is conditionally exempt under section 47G of the FOI Act. My public interest considerations are detailed below.

Public interest considerations - sections 47E, 47D and 47G

40. 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.

41. In determining whether to release the document, I considered the Guidelines, together with a range of factors that favour access to a document set out in section 11B(3) (public interest exemptions-factors favouring access) of the FOI Act. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to public interest. Specifically, I considered if disclosure of the documents would:

- (a) promote the objects of the FOI Act;
- (b) inform debate on a matter of public importance;
- (c) promote effective oversight of public expenditure.

42. In my view, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

43. Paragraph 6.233 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request is that the release of this information could reasonably be expected to prejudice:

- prejudice the competitive commercial activities of an agency;
- an agency's ability to obtain similar information in the future;
- the competitive commercial activities of an agency; and
- the management function of an agency.

44. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of material contained in the documents.

45. I find that the release of the information identified would inhibit the proper administration of public monies by jeopardising future Commonwealth negotiations and making commercially sensitive information available to Adecco's competitor organisations.
46. The need for contracted recruitment services will remain in place for the foreseeable future and the Commonwealth must be able to achieve value for money for the taxpayer during future negotiations with potential providers. I consider that disclosure of this information could reasonably be expected to adversely affect any such negotiations, unduly weaken the Commonwealth's position, and prejudice the frank and open supply of information to the Commonwealth.
47. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. I have found that at this time, release of the information identified would inhibit the proper administration of public monies by impeding the proper completion of ongoing negotiations.
48. While I consider that release of the material removed under sections 47E, 47D and 47G of the FOI Act may be of some interest to the applicant, its disclosure would not inform public debate on any matter of public importance in any meaningful way.
49. 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.
50. 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 47E, 47D and 47G of the FOI Act.

Fiona Peterson
Accredited Decision Maker
Defence People Group
Department of Defence