



Australian Government
Department of Defence

FOI 434/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Mr Asher Hirsch from *Right to Know*, under the *Freedom of Information Act 1982* (FOI Act), for access to:

“ the Memorandum of Understanding (MoU) for the transfer of four Australian Defence Force C-130 Hercules aircraft to Indonesia signed in July 2012.”

FOI decision maker

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

Documents identified

3. I have identified the document matching the description of the request.

Decision

4. I have decided to deny access to the document on the grounds the material is considered exempt under sections 33(a) and (b) [Documents affecting national security, defence or international relations] and section 47G [Conditional exemption – Business] of the FOI Act.

Material taken into account

6. In making my decision, I had regard to:
- the terms of the request;
 - the content of the identified document in issue;
 - relevant provisions in the FOI Act;
 - the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines);
 - advice from International Policy Division and Defence Legal; and
 - advice from the Australian Embassy Jakarta.

Reasons for decision

Section 22 (where documents are being denied in full)

7. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

Subsection 33(a) – Documents affecting national security, defence or international relations

Subsection 33(b) – Documents communicated in confidence to the Commonwealth

8. Section 33(a) of the FOI Act exempts documents that would, or could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth.

9. Subsection 33(b) of the FOI Act exempts information communicated in confidence to the Australian Government or agency by another government or one of its authorities.

10. It is a matter of Australian practice that bilateral arrangements are not released to other third parties without the consent of both Participants.

11. As a matter of customary practice, the information communicated and subsequently contained in all Defence Arrangements are negotiated in confidence. The documents are accordingly also subsequently treated and handled as being confidential between the Participants, which the Participant nations to an Arrangement have a legitimate expectation will be maintained. This is particularly the case concerning Defence and Security related Arrangements, where the public release of such documents may impact upon, and potentially undermine, the trusted relationship between the Participant nations and/or wider international negotiations and dealings with other nations if they become, or are made, aware of those confidential arrangements between the two nations.

12. The release of this document would damage Australia's ability to maintain a good working relationship with Indonesia, other governments and international organisations. The disclosure of the information would also likely diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or agency less willing to cooperate with Australian agencies in the future.

13. I have therefore determined that this material is exempt under section 33(a) and 33(b) of the FOI Act.

Sections 47G - Public interest conditional exemptions - Business

14. Upon examination of the documents, I also identified information specifically pertaining to the business, commercial or financial affairs (business information) of a third party, that being the Indonesian government. The Guidelines advise that under section 47G of the FOI Act a document is conditionally exempt if it discloses information:

“concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of that information:

- 1. Would or could reasonably be expected to, unreasonably effect ... that organisation or undertaking in respect of its lawful business, commercial or financial affairs"*

15. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

16. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the 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 note that disclosure may promote some of the objectives of the FOI Act, as information held by Government is a national resource.

17. In accordance with subsection 47G(3) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of business information, I had regard to:

- a. the extent to which the information is well known;
- b. whether the person or organisation to whom the business information relates is known to be associated with the matters dealt with in the information;
- c. the availability of the information from publicly accessible sources; and
- d. whether the documents contain business information about Defence and the government of Indonesia only or whether they contain business information about the applicant.

18. Against these four criteria, I found that:

- a. although the fact that Australia and Indonesia have a Defence relationship is known to the general public (although perhaps not "well known"), the specific detail of the commercial arrangements to enable this is not;
- b. this information is not readily accessible from publicly available sources; and
- c. the documents do not contain business information about the applicant.

19. I note that the word "could" in this provision requires no more than a degree of reasonableness to be applied to deciding whether disclosure would cause the circumstances specified.

20. The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. I am satisfied that the effect of disclosing the identified material would have an adverse effect on the professional, commercial and financial affairs of a third party.

21. Also, it could reasonably be expected that other governments could reduce their cooperation with Defence if they believed that the status of their arrangements or conditions of their commercial contracts may be publicly released against their wishes.

22. Noting the above findings, I have decided that disclosure of the specific information would be an unreasonable disclosure of business information belonging to another country and that the factors against disclosure outweigh the factors for disclosure.

23. Accordingly, I consider that the material is conditionally exempt pursuant to section 47G of the FOI Act.

24. None of the factors listed in section 11B(4) of the FOI Act (Irrelevant Factors) were taken into account when making my decisions under the Public Interest or Business conditional exemptions.

A handwritten signature in black ink, appearing to read 'Rachelle Warner', with a stylized, cursive script.

Rachelle Warner
Accredited Decision Maker
Strategic Policy & Intelligence Group

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