



Australian Government
Department of Defence

Objective Reference: BN 11094638

FOI 225/19/20 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Mr Christopher Cox under the *Freedom of Information Act 1982* (FOI Act), for access to:

“...the document or documents which show the formal agreement, including the financial arrangements, between the department of defence [sic] and banks or approved lenders who are part to the Defence home loan assistance scheme [sic] (DHOAS).”

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 identified three documents as matching the description of the request.

Decision

4. I have decided to deny access to documents of the request under sections 45(1) and 47E(d) of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:
- the terms of the request;
 - the content of the identified documents 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); and
 - advice received from officers within the Directorate of Relocations and Housing.

Reasons for decision

Section 45(1) – Documents obtaining material obtained in confidence

6. Under section 45(1) of the FOI Act a document is an exempt document if its disclosure would constitute a breach of confidence. I have decided to deny access to the documents as I have determined that they contain information of commercial value and if the documents were released it would constitute a breach of confidence.

7. I considered that the material would, or could reasonably be expected to cause damage to ongoing commercial relationships of the Commonwealth, specifically in relation to the financial arrangements communicated in confidence between Defence and financial institutions participating in the DHOAS.

8. In relation to a breach of confidence, the Guidelines, paragraphs 5.158 and 5.159, provide that:

5.158 A breach of confidence is the failure of a recipient to keep information, which has been communicated in circumstances giving rise to the obligation of confidence, confidential. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

5.159 To found an action for breach of confidence (which means that s45 would apply), the following five criteria must be satisfied in relation to the information:

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual understanding of confidence*
- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

9. Upon examination of the documents I formed the view that there exists an obligation between financial institutions participating in the DHOAS and the Department of Defence to maintain confidentiality of the financial arrangements in accordance with the Department of Finance, Commonwealth Procurement Rules, under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

10. The material being sought is of a confidential nature and was provided to the Commonwealth on the basis of a mutual understanding of confidence. Release of such information without the explicit agreement of Defence Bank, Australian Military Bank, National Australia Bank or any other loan provider declared in accordance with section 78(1) of the *Defence Home Ownership Assistance Scheme Act 2008* (DHOAS Act), could diminish the relationship with Defence and the Commonwealth.

11. Disclosure would breach confidence and undermine any trust in Defence's ability to protect commercial information and restrict the future flow of such information. If the information was made public it could lead to compensation being sought for loss or damage arising from disclosure.

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

12. On review of the documents, I found that they contained information concerning the proper and efficient conduct of the operations of Defence relating to the DHOAS, managed on behalf of Defence by the Department of Veteran's Affairs in accordance with the DHOAS Act.

13. 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 an agency.*

14. The information, if released, could affect the integrity and efficacy of the Department of Defence's internal processes and procedures regarding its commercial agreements with any commercial partner in relation to financial arrangements. The disclosure of the documents

would adversely affect commercial relationships and impede the proper and efficient conduct of the operations of Defence.

15. As such, I am satisfied that these documents are conditionally exempt under section 47E of the FOI Act.

16. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest considerations are set out below.

Public interest considerations – section 47G

17. In assessing whether disclosure is on balance, contrary to the public interest, I considered the Guidelines together with a range of factors set out in section 11B(3) of the FOI Act, which favours access to a document:

- (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.*

18. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the specific conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way.

19. There is also a strong public interest in not releasing information that would unreasonably affect the financial arrangements between Defence and its commercial partners. Given Defence's strong links with industry, it is imperative that Defence be able to enter commercial agreements and retain sensitive commercial information without fear that the material would be released without authorisation. If the information was made public it would have an adverse effect on Defence's ability to conduct and manage working relationships with its commercial partners in future.

20. 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 the release of this information could reasonably be expected to prejudice or harm:

- a. an agency's ability to obtain confidential information;
- b. an agency's ability to obtain similar information in the future; and
- c. the competitive commercial activities of an agency.

21. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making this decision.

41. Accordingly, I consider that, on balance the public interest factors against disclosure outweigh the factors for disclosure. I have therefore decided that it would be contrary to the public interest to release the information considered exempt under section 47E of the FOI Act.

Mrs Joanne Groves
Accredited Decision Maker
Associate Secretary Group