

NOTICE OF FILING

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Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
File Number: VID519/2021
File Title: SENATOR REX PATRICK v AUSTRALIAN INFORMATION
COMMISSIONER
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 18/10/2021 10:32:33 AM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

No. VD519 of 2021

Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law & Human Rights

Senator Rex Patrick

Applicant

Australian Information Commissioner

Respondent

Affidavit of: **Stella Maree Majury**

Address: Level 2/31 Ebenezer Place, Adelaide, South Australia, 5001

Occupation: Legislation Advisor to Senator Rex Patrick

Date: 14 October 2021

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I Stella Maree Majury of Level 2, 31 Ebenezer Place affirm:

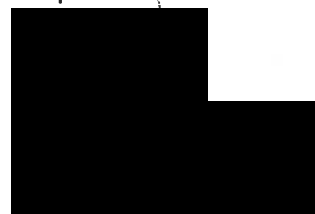
1. This affidavit is filed in the Applicant's application for an order under r 40.51(1) of the *Federal Court Rules 2011* seeking a protective costs order in these proceedings.
2. The Applicant is a senator for South Australia in the Federal Parliament. He has been a senator for South Australia since November 2017.
3. The Applicant uses the system created by the *Freedom of Information Act 1982 (Cth)* (**FOI Act**), to obtain information that assists him to execute the accountability and transparency aspects of his oversight role as a Senator and to assist his constituents.
4. I have read "Appendix A" to the Amended Originating Application in this proceeding and agree with its contents. It summarises the state of FOI applications which the Applicant has made and that have been referred to the Australian Information Commissioner ("IC") for merits review. As at 1 September 2021, the Applicant had 23 current applications for review with the IC. Two of the applications had been with the IC for more than two years, 12 for more than one year, six for more than six months and three for under six months (together the **Applications**).
5. At the date of swearing this affidavit, the 23 FOI applications remain with the IC and the Applicant has not received a determination on them. The Applicant now has two applications which have been with the IC for more than two years, 15 for more than one year, three for more than six months and three for under six months.

Purpose of the litigation

6. The Applicant has filed this proceeding to obtain resolution of the Applications. More broadly, a decision in this proceeding will clarify expectations as to the reasonableness of timeframes within which the IC performs his or her function.
7. A decision in this matter is likely to have broad public application given the number of FOI applications currently with the IC, and the purpose to which organisations and individuals use information obtained under the FOI process.
8. The Applicant has no private purpose and will obtain no personal gain in bringing these proceedings, nor in the FOI requests which are the subject of these proceedings. They are all requests made in his capacity as a Senator for South Australia to fully advocate issues for the Australian public and South Australian's.
9. The Applicant does not seek any monetary compensation in this proceeding.

The applicant's financial exposure in this litigation

10. Any fees and costs in relation to this litigation are the Applicant's personal responsibility, except where others have agreed to cover the cost or provide their work for no fee.
11. I anticipate that the Applicant will not pay any fees for his legal representation in this proceeding. As the solicitor representing the Applicant, I work within the Applicant's office. I hold a current practising certificate as an Australian Lawyer in the Australian Capital Territory.



12. Counsel appearing on the Applicant's behalf, Tiphonie Acreman, acts on a pro bono basis. For the first 6 weeks of her engagement, Ms Acreman was engaged on the basis that she would not seek recovery of her fees from me beyond any amounts recovered from the Respondent. Ms Acreman has since agreed to act on a pro bono basis, including not issuing any invoices for work carried out in the first 6-week period.
13. The Australia Institute, and independent public policy think tank, paid the court's application fee when the proceeding was filed.
14. The most significant contingent cost the Applicant will be exposed to is the prospect of an adverse costs order. If an adverse costs order is made in this proceeding it is likely to be significant. Counsel has estimated in the order of \$20,000 to \$40,000. While the Applicant has received and will continue to receive pro bono legal assistance and representation, this does not extend to any costs that may be ordered. Any cost order will be paid for by the applicant personally.

Delay and information generally

15. I believe the length of time taken by the IC to determine the Applications has undermined their utility and undermines meeting the objectives of the FOI legislation in relation to the positive right of access to documents. These objectives are public in nature – they promote good governance within Australia's representative democracy.
16. The utility and value of information available through the FOI system declines as a function of time, with the decay rapid in some circumstances.
17. Many different organisations and individual members of the public make applications under the FOI system for a range of different reasons. Information obtained through the FOI process is integral to informed and effective public participation in Government processes, and proper discussion and scrutiny of Government policy and decision making.
18. For members of the public to participate in Government processes they need to engage in the process from an early point in time, preferably before a course of action is locked in and certainly before any decision is actually made. Engagement can occur in a number of ways, through direct consultation, an organisation/association, lobbyists, a Member of Parliament or the media. A similar situation occurs in relation to scrutiny, discussion, comment and review of Government activities.
19. Politics and policy development are dynamic. Information is the currency of power in these domains. Lengthy delay in the granting of access to information serves to undermine the objectives of the FOI Act. Delay is the enemy of access to information, and its effective use and value.

Effect of delay in the Applications

20. In the absence of any review decision or determination by the IC, the Applicant is unable to benefit from a decision to grant further access to documents requested or otherwise progress his FOI application through the review processes of the Administrative Appeals Tribunal (AAT). IC review is one part of an already lengthy process to obtain information which begins with the lodging of an FOI application, and can end in appeal in the court by either the applicant or the government body which holds the information.



21. If the IC were to make an adverse finding on the Applicant's review application and he was dissatisfied with that finding, the Applicant could apply to the AAT for review of that determination. Alternatively, if the IC were to make a finding under s 54W(b) of the FOI Act that the administration of the FOI Act made it desirable that the Applicant's FOI application be considered by the AAT, he could proceed to file in the AAT.
22. The Applications are effectively in limbo because the IC will not make any determination on them.
23. This leads to adverse impacts on the public debate regardless of whether the Applicant is successful in his application. At worst it results in a delay to the Applicant receiving documents to which he is entitled under the FOI legislation. But, even where an application for review is unsuccessful, the delay factors into decision-making on how and when to engage in some aspects of the public debate. An applicant for review is entitled to a timely outcome, adverse or otherwise.
24. Delays in the IC making a determination or decision on the Applications has negative effects on the potential for early public engagement in Government decision making processes.
25. In some instances, the Applicant sought documents at an early stage in the Government decision-making process, but the decision to which the documents were relevant was made by the Government while his FOI application was stalled with the IC. This has resulted in the Government making the decision without the opportunity for properly informed public engagement in the process.
26. In some instances, the delay has extended beyond a timeframe where scrutiny, discussion, comment and review have any real meaning, even if the Government decision has not been announced. The public discourse has moved on and other issues and discussions dominate, or officials have moved on to other roles, or Ministers have changed (sometimes more than once) or an election has occurred.
27. The effects of delay on applications and the utility of information being sought can be illustrated by reference to some examples of applications for IC review which the Applicant has made.

Examples of Matters Before the IC for Greater than Six Months

MR19/00010 – Future Submarine Project

28. Matter MR19/00010 is an example of a matter that has been before the IC for more than two years.
29. This matter relates to a request to the Department of Defence for Future Submarine Project Integrated Master Schedule (as was in force at the time of signing the Design and Mobilisation Contract and provides baseline information) and Project Earned Value Management Reports (generated regularly throughout the project to report actual progress).
30. The information within these Reports would provide information on project performance and progress and allow the public to track the progress of the project against a baseline.

31. Key dates in respect of this matter are as follows:

Original Request

- 22 Oct 2018: Original FOI request made (Annexure SMM1).
- 6 Dec 2018: After consultation, access was denied in full to 13 documents (Annexure SMM2).

IC Review

- 21 Dec 2018: Application made for IC Review (Annexure SMM3).
- 02 January 2019: (+13 days) IC acknowledges IC Review request (Annexure SMM4).
- 20 May 2020 (+507 days): IC requests submissions by 10 Jun 2020 (Annexure SMM5).
- 09 Jun 2020 (+19 days): Submission provided to IC (Annexure SMM6).
- 06 Jul 2020 (+28 days): IC advises that matter is being considered for referral to the Inspector General of Intelligence and Security (IGIS) (Annexure SMM7).
- 14 Jul 2020 (+9 days): IC advises the matter has been referred to the IGIS under s55B of FOI Act (Annexure SMM8).
- 10 Nov 2020 (+121 days): IC provides a copy of redacted IGIS advice (Annexure SMM9).
- 12 January 2021 (+63 days): IC informs the Applicant that the review is progressing to a decision of the IC (Annexure SMM10).

32. Despite around 10 months passing since the IC has received all of the information necessary to make a decision on the application for review, the matter is yet to be finalised

33. On 16 September 2021 the Prime Minister announced that the Government would terminate the French based future submarine project. Consequently, the predominant value and utility of the requested information has been substantially, if not fully, eroded by events. The Applicant still requires the Department to provide the documents if they are appropriate for release under the FOI system and does not wish to withdraw his request.

34. If documents ought to have been released under this request, the delay in progressing the request has resulted in the public being limited in their ability to understand the status of the Future Submarine Project. Further, the delay dampened the potential for any further release of updated Earned Value management reports to provide for an ongoing understanding of how the project was tracking.

MR20/00054 – Greater Sunrise Oil

35. Matter MR20/00054 is an example of a matter that has been before the IC for more than 1 year.

36. This matter relates to a request to the Department of Foreign Affairs and Trade for documents (briefs/cablegrams/correspondence) relating to oil/gas processing options for the Greater Sunrise oil and gas fields that lie between Australia and Timor-Leste.

37. The upstream options for Greater Sunrise include processing in Australia, processing in Timor-Leste and offshore processing. Each option will offer different benefits/costs for the citizens of Timor-Leste and Australia, and the many companies intending to participate in the project. Access to these documents will provide for more informed public debate of these issues.

38. Key dates in respect of this review are as follows:

Original Request

- 11 September 2019 – Original FOI request made (Annexure SMM11).
- 18 December 2019 – After scope discussions and two extensions of time, an access refusal decision was made (Annexure SMM12).

IC Review

- 22 January 2020: Applicant applies to OAIC for a review of the decision (Annexure SMM13).
- 23 January 2020 (+1 day): OAIC acknowledge the request (Annexure SMM14).
- 11 March 2020 (+48 days): OAIC write to applicant noting the matter is awaiting allocation of a case officer (Annexure SMM15).
- 19 November 2020 (+253 days): OAIC inform the applicant the Department intends to make a new decision in the matter (Annexure SMM16).
- 12 January 2021 (+54 days): OAIC informs Applicant they will receive the revised decision once it is provided to OAIC (Annexure SMM17).
- 7 October 2021 – (+269 days) OAIC provides a new case officer for the review. The new case officer states that the revised decision that was promised has not been received (Annexure 18).

39. Despite around 9 months passing since the IC advised the Applicant that the Department was making a revised decision, which seems to have caused the IC to pause the review, no revised decision has been made nor has the IC made a decision on application. In the meantime, the deliberations on the Greater Sunrise project continue and the public is potentially shut out of obtaining information it has a right to and which will better inform a policy discussion on the issue.

MR20/00424 – National Radioactive Waste

40. Matter MR20/00424 is a further example of a matter that has been with the IC for more than 1 year.
41. MR20/00424 relates to a request to the Department of Industry for the decision brief around the selection of the site for the National Radioactive Waste Management Facility (NRWMF), a facility to permanently dispose of low-level radioactive waste and temporarily store intermediate level radioactive waste.
42. The selection of Napandee, located in the district Council of Kimba in South Australia, as the site for Australia's NRWMF is a matter of considerable public controversy.
43. On 13 February 2020, the Government introduced a *National Radioactive Waste Management Amendment (Site Selection, Community Fund and Other Measures) Bill 2020* into the Parliament. The Bill was intended, in part, to specify Napandee as the site of the NRWMF and to enable the acquisition of additional land for the facility.
44. On 21 April 2020, the Applicant made an application to the IC for review of a deemed refusal of his FOI request by the Department. The deemed refusal was the result of the Department not making a decision within the timeframe specified in the FOI Act, despite a number of extensions of time.

45. The Bill was debated in the House of Representatives on 11 June 2020 and in the Senate around a year later, on 21 June 2021. The Applicant participated in the Senate debate and moved a number of amendments to the Bill.
46. On passing the Bill, the Senate removed the site selection schedule to the Bill. It therefore became necessary once again for the Minister to make a statutory decision on site selection.
47. The Bill was finally passed in both houses on 22 June 2021 and received assent on 29 June 2021 to become Act No. 59 of 2021.
48. On 11 August 2021, the Minister announced that he had made a decision to issue notices of intention to declare Napandee as the proposed site for the NRWMF. A decision to declare Napandee as the proposed site for the NRWMF may be imminent.
49. The delay in resolution of the Applicant's FOI application has denied, and continues to deny, the public an opportunity to engage in a fully informed debate on the appropriateness of locating the NRWMF at Napandee (whether those members of the public supported or opposed the decision). Further, the Applicant was not in a position to consider information which may yet be obtained through the FOI process throughout the passage of the Bill through the Parliament.
50. Key dates in respect of this matter are as follows:

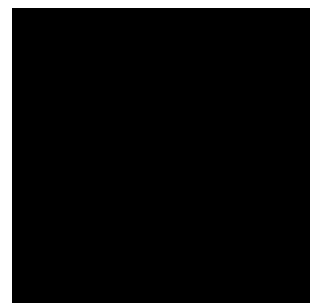
Original Request

- 4 February 2020: Original FOI request made (Annexure SMM19).
- 16 April 2020: After a number of extensions the request became a deemed refusal.

IC Review

- 21 April 2020: Applicant refers matter to IC for review (Annexure SMM20).
- 21 April 2020: Department makes a partial access decision in the matter (received 24/04/2021) (Annexure SMM21).
- 28 April 2020 (+4 days): IC acknowledges the request for review (Annexure SMM22).
- 1 July 2020 (+64 days): IC informs the Applicant it is awaiting a further response from the Department (Annexure SMM23).
- 12 January 2021 (+195 days): IC informs the Applicant he will be contacted in relation to the next steps in the matter (Annexure SMM24).

51. Despite around 9 months passing since the IC advised the Applicant that he would be contacted in relation to next steps, he is yet to be informed and has not received any resolution of his application.



Examples of Matters Before the IC for Less than Six Months

MR21/00551 – University of Queensland COVID Grant

52. The delay the Applicant is experiencing with his IC review applications is ongoing and affects applications which were made less than 6 months ago. At 1 September 2021, there were three such applications, the most recent of which is MR21/00551, which relates to an FOI request to the Department of Health for University of Queensland COVID grant documents.
53. The IC review was lodged on 21 June 2021 in relation to a Department of Health decision made on 12 May 2021 (Annexure SMM25).
54. On 18 August 2021, the Applicant's office received an email sent on behalf of the IC which advised that the IC has decided to commence a review of the Department's decision (Annexure SMM26). Under the heading, "next steps", the following was stated:
- At this stage, your matter is awaiting further consideration by a review adviser. Due to the number of IC review applications on hand, this may take up to 12 months. The review adviser will review any documentation or submissions provided by the Department in support of its decision of 12 May 2021. The review adviser will then contact you to advise you of their view on the next appropriate steps in the matter.*
55. My understanding of this email is that the IC has decided to review the Department's decision and, at least at this point, has elected not to exercise the discretion under paragraph 54W(b) of the FOI Act despite there being up to a 12-month delay in allocating a review officer to the file. This appears to equate to up to 12 months of delay in the review process even being commenced by the IC.
56. Emails in similar terms were sent on the same day to the Applicant's office on behalf of the IC in relation to the two other matters lodged with the IC less than 6 months ago, that is MR21/00422, MR21/00340 and MR21/00551.
57. Annexed and marked 'SMM27' are copies of three emails received from the IC relating to MR21/00422, MR21/00340 and MR21/00551.

Applications Decided

58. Two further examples of IC review applications made by the Applicant are provided below. Both applications have been resolved so they do not appear in Appendix A to the Originating Application and do not form part of this proceeding. Nevertheless, they illustrate the broader effects of delay in the IC review process, the impact of delay on the effectiveness of the FOI system and the importance to applicants receiving decisions in FOI matters promptly.

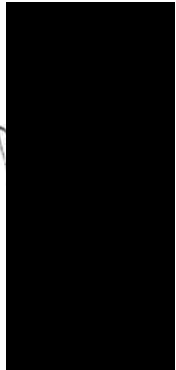
Matter MR18/00712 – Collins Class Full Cycle Docking

59. MR18/00712 relates to an FOI request to the Department of Defence for:

The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018.

60. The possibility of the Government shifting Collins submarine full cycle dockings from South Australia to Western Australia was first revealed with the document that was partially released under this FOI request.
61. There has been significant public debate and controversy in respect of the future location of Collins submarine full cycle docking. A decision on the location of full cycle docking facilities has significant economic and employment implications for the people of South Australia and Western Australia, and implications for national security and budgetary outcomes.
62. On 28 May 2018, the Applicant made the FOI application to the Department of Defence (Annexure SMM28).
63. On 6 August 2018, the Department determined to grant partial access to the document (received 10/08/2018) (Annexure SMM29).
64. On 23 September 2018, the Applicant lodged an application for IC review of the Department's partial access decision (Annexure SMM30).
65. Almost three years later, on 17 August 2021, the IC varied the Department's decision and granted access to the entire document, with limited exemptions (received 18/08/2021). The document was provided to the Applicant on 14 September 2021 (Annexure SMM31).
66. Two days later, the Government announced that it would retain full cycle docking of Australia's Collins-class submarines in South Australia. So, the document which was the subject of the review relates to a Government decision which has now been made and the utility of the information has been lost.

MR18/00588 – Competitive Evaluation Process

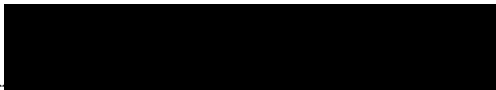
67. MR18/00588 illustrates the length of time which can be required in the broader FOI process for resolution and eventual access to information.
 68. In 2015, the Australian Government commenced the Competitive Evaluation Process (CEP) to select an international partner to design and build the next generation of Australian submarines. As part of that evaluation framework the CEP required proponents to provide certain 'deliverables' to the Department of Defence, including a total Australian Build Price and the total sustainment cost from year one to year 40. On 26 April 2016, the Government announced French company DCNS (now Naval Group) as the preferred international partner for the design of the submarines.
 69. On 16 June 2018, the Applicant made an FOI application to the Department of Defence for information relating to the total Australian Build Price and the total sustainment cost from year one to year 40 in Naval Group's CEP response (Annexure SMM32). The Applicants request was driven by the public controversy relating to the cost of the French program.
 70. On 11 July 2018, the Department determined to refuse access to the information (received 16/07/2018) (Annexure SMM33).
 71. On 09 August 2018, the Applicant lodged an application for IC review of Department's access refusal decision (Annexure SMM34).
 72. On 13 August 2020, the IC set aside the Department's refusal and granted access to the information (Annexure SMM35).
- 

- 73. On 9 September 2020 the Department applied to the Administrative Appeals Tribunal for a review of the IC decision. The matter is still on foot as the Tribunal has reserved its decision (Annexure SMM36).
- 74. On 16 September 2021 the Prime Minister announced that the Government would terminate the French based future submarine project due to the new agreement between the USA, UK and Australia (AUKUS). Consequently, the predominant value and utility of the information has been overtaken by events.
- 75. It has been three years and two months (38 months) since the Department issued its access refusal decision and the FOI application is still unresolved. The associated IC review has taken over two years of this 38 months.
- 76. I believe that the proper functioning of the FOI system is important to the promotion of Australia's representative democracy. The delays experienced by applicants for IC review in obtaining resolution of their applications adversely affects public participation in Government processes, and is contrary to principles of increased scrutiny, discussion, comment and review of Government activities which is the primary objective of the FOI system.

Affirmed by the deponent
 at Level 2, 31 Ebenezer Place, Adelaide
 in South Australia
 on 15 October 2021
 Before me:



Signature of deponent



Signature of witness

Kim York, Justice of the Peace

Kim Anita York
 Justice of the Peace for
 South Australia
 ID No. 31093

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM1

The following 1 page are the annexure SMM1 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/MP

Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610

By email: foi@defence.gov.au

Dear FOI Team,

This is an application for access to documents under the *Freedom Of Information Act 1982* (the FOI Act).

I seek access to the following documents:

- The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period.
- The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract.

Should you have any questions in relation to this request, please don't hesitate to contact my constituent manager, Mr Michael Tudor Tsourtos (Michael.TudorTsourtos@aph.gov.au), who has carriage of this request on my behalf.

Yours sincerely,



Rex Patrick
22 October 2018

Electorate Office
Level 2, Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM2

The following 5 pages are the annexure SMM2 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Australian Government

Department of Defence

BN1556605

FOI 155/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Senator Rex Patrick under the *Freedom of Information Act 1982* (FOI Act), for access to:

*“[Item] 1. The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period; and
[Item] 2. The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract”*

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 13 documents as matching the description of the request.

Decision

4. I have decided to:

- deny access to 11 documents on the grounds that the deleted material is considered exempt under section 47(1)(b) [Documents disclosing trade secrets or commercially valuable information] and 47G [Public interest conditional exemptions-business affairs] of the FOI Act; and
- deny access to two documents on the grounds that the deleted material is considered exempt under section 33(a)(ii) [Documents affecting national defence], section 47(1)(b) [Documents disclosing trade secrets or commercially valuable information] and 47G [Public interest conditional exemptions-business affairs] of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in 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. the Commonwealth Procurement Rules; and
- f. advice received from officers within the department from the Future Submarine Program Office [FSPO].

Reasons for decision

Section 33 – Documents affecting national security, defence or international relations

6. Subparagraph 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

7. In regards to the terms ‘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.

5.28 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

8. Upon examination of the documents, I identified material which upon release ‘could reasonably be expected to, cause damage to the defence of the Commonwealth’ by making public certain considerations in the project management plan for the Future Submarine Program.

9. In light of the above, I have decided that the specified material identified is exempt pursuant to section 33 of the FOI Act.

Section 47 – Documents disclosing trade secrets or commercially valuable information

10. Section 47 of the FOI Act provides that a document is exempt from disclosure requirements ‘if its disclosure under the Act would disclose (a) trade secrets; or (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’.

11. In regards to the terms ‘commercial value’ and ‘destroyed or diminished’, the Guidelines provide:

5.203 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have ‘exchange value’, in the sense that it can be sold as a trade secret or intellectual property. 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 — for example, if it lowers the cost of production or allows access to markets not available to competitors*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether the information is still current or out of date (out of date information may no longer have any value)*
- *whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.*

5.204 The time and money invested in generating information will not necessarily mean that it has commercial value. Information that is costly to produce will not necessarily have intrinsic commercial value.

5.205 The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — must be established separately by satisfactory evidence. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known. Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.

12. Upon examination of the documents, I identified material the development of which depended on the developer's experience in designing and constructing submarines, including scheduling and cost attribution information. This information is considered valuable intellectual property by the developer, and is not generally known information. Release of this information could reasonably be expected to provide Naval Group SA's competitors with critical and sensitive information, including scheduling structures and detailed cost breakdowns, that would otherwise only be known to limited individuals within the Commonwealth, Lockheed Martin, and Naval Group.

13. In light of the above, I have decided that the specified material identified is exempt pursuant to section 47(1) of the FOI Act.

Section 47G – Business affairs

14. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

15. 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.

16. Upon examination of the documents I identified information that has been provided in confidence and in the expectation that it would not be made publically available. This information is the subject of live and ongoing contractual negotiations. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the administration of procurement processes.

17. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.

Section 47G - Public interest considerations

18. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

19. In determining whether to release the conditionally exempt material, 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; or
- c) promote effective oversight of public expenditure.

20. I found that 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).

21. 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 is that the release of this information could reasonably be expected to prejudice:

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

22. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In particular, I consider the release of the business information of third parties could reasonably be expected to prejudice the operations of an agency. I also consider that release of material which contributes to a live process could reasonably be expected to prejudice the outcome of that process. I consider that the public interest is better served in this case by maintaining the confidentiality of the business information provided to the Commonwealth.

23. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47G of the FOI Act.

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

Third party consultation

25. I decided to consult with Naval Group S.A. regarding their information which was contained in the document. In response to this consultation, Naval Group S.A. has objected to the release of their business information. I agree with Naval Group S.A's objections.

Section 22

26. 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 documents would be meaningless and of little or no value once the exempt material is removed.

ChrisHorscroft Digitally signed by ChrisHorscroft
Date: 2018.12.06 10:21:45 +11'00'

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM3

The following 1 page are the annexure SMM3 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-OAI/RP

Office of the Australian Information Commissioner
Attention: FOI Coordinator
GPO Box 5218
SYDNEY NSW 2001

By email: enquiries@oaic.gov.au

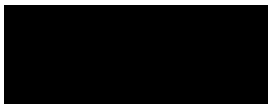
Dear Information Commissioner,

Re: Request for Review

I seek review of FOI Decision FOI 155/18/19 made by the Department of Defence under Part VII of the *Freedom of Information Act 1982* (the FOI Act).

The decision made by the Department of Defence is not the correct or preferable decision. I will provide submissions in relation to this before or in response to a case officer being assigned to this review.

Yours sincerely,



Rex Patrick
21 December 2018

Electorate Office
Level 2, Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM4

The following 2 pages are the annexure SMM4 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Tudor Tsourtos, Michael (Sen R. Patrick)
Sent: Thursday, 14 October 2021 12:46 PM
To: Majury, Stella (Sen R. Patrick); Verlato, Maximilian (Sen R. Patrick)
Subject: FW: MR19/00010 - Your IC review application [SEC=UNCLASSIFIED]

Follow Up Flag: Follow up
Flag Status: Flagged

From: FOIDR [<mailto:foidr@oaic.gov.au>]
Sent: Wednesday, 2 January 2019 5:14 PM
To: Patrick, Rex (Senator)
Subject: MR19/00010 - Your IC review application [SEC=UNCLASSIFIED]

Our reference: MR19/00010
 Agency reference: FOI 155/18/19; BN1556605

Senator Rex Patrick

By email: Senator.Patrick@aph.gov.au

Your IC review application about an FOI decision by the Department of Defence (FOI 155/18/19; BN1556605)

Dear Senator Patrick

Thank you for your correspondence seeking to lodge an IC review application with the [Office of the Australian Information Commissioner](#) (the OAIC) about the Department of Defence (the Department).

Please note:

- If you have submitted a request to the Department for internal review of its decision and it has not yet provided you with an internal review decision, please advise by return email.
- You will be advised about the next steps in the IC review process once your application has been assessed by a senior member of the FOI team. Depending on the issues you have raised, this may take up to 4 – 8 weeks
- If your circumstances change, or your request has been resolved directly with the Department, please advise us by email as soon as practicable.
- Information about the way we handle your personal information is available in our [privacy policy](#).

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote the reference number at the top of this email.

Yours sincerely



Intake and Early Resolution Team
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM5

The following 3 pages are the annexure SMM5 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Rachel Ranjan <rachel.ranjan@oaic.gov.au>
Sent: Wednesday, 20 May 2020 11:26 AM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: Senator Patrick's applications for IC review of decisions of the Department of Defence MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437 [SEC=OFFICIAL]
Attachments: Submission - FOI 155-18-19 final.pdf; Submissions to OAIC - FOI 409 1819 [MR19 00437].pdf

Our references: MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437
 Department of Defence references: 502/17/18; 424/17/18; FOI 477/17/18; FOI 155/18/19 BN1556605; FOI 409/18/19

Dear Mr Verlato

I refer to the above matters.

This email provides you with the status and next steps in relation to Senator Patrick's five applications for IC review of decisions of the Department of Defence.

In summary,

1. MR18/00588: the matter has progressed to a decision of the Information Commissioner.
2. MR18/00620: the OAIC has provided the Department's submissions for Senator Patrick's consideration and is currently ascertaining the scope of the third party's objections to disclosure of the documents at issue. The matter may then progress to a decision of the Information Commissioner.
3. MR18/00712: the OAIC will share Senator Patrick's submissions with the Department and proceed to referring the matter to the IGIS. The matter may then progress to a decision of the Information Commissioner.
4. MR19/00010: the OAIC has **attached** the Department's submissions for Senator Patrick's consideration and invites Senator Patrick to provide any response by **10 June 2020**. The matter may then have to be referred to the IGIS.
5. MR19/00437: the OAIC has **attached** the Department's submissions for Senator Patrick's consideration and invites Senator Patrick to provide any response by **10 June 2020**. The matter may then have to be referred to the IGIS.

| | Our reference | Agency reference | Request | Scope | Status | Next steps |
|---|---------------|------------------|---|---|--|---|
| 1 | MR18/00588 | 502/17/18 | Documents relating to the final cost estimate template DCNS submitted in response to the Future Submarine Competitive Evaluation Process. | <p><i>Decision:</i> Primary decision of 11 July 2018</p> <p><i>Documents:</i> Documents 1 and 2 (excluding 'goods and services to be delivered for the totals, or any</p> | <p>The OAIC has received submissions from both parties in this matter. The matter has progressed to a decision by the Information Commissioner</p> | <p>The Information Commissioner will decide the matter under s55K of the FOI Act.</p> |

| | | | | assumptions used to determine the totals') | under s55K of the FOI Act. | |
|---|------------|--------------------------|---|--|--|---|
| | | | | <i>Exemptions: ss 47, 47C and 47G</i> | | |
| 2 | MR18/00620 | 424/17/18 | Transactional summary reports (international and domestic) for work related travel of Defence employee Ms Lara De Masson since July 2017. | <i>Decision:</i> Primary decision of 5 July 2018 <i>Documents:</i> Documents 1, 2 and 3 <i>Exemptions: s 47F</i> | The OAIC has received open and closed submissions from the Department in this matter. The OAIC has shared the Department's open submissions with the applicant. | The OAIC is currently conducting inquiries with the Department to ascertain whether the third party wishes to object to disclosure of the documents in full or in part. The matter may then proceed to a decision of the Information Commissioner. |
| 3 | MR18/00712 | FOI 477/17/18 | The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018. | <i>Decision:</i> Primary decision of 6 August 2018 <i>Documents:</i> Document 1 <i>Exemptions: ss 33(a)(i), 47C, 47G</i> | The OAIC has received submissions from both parties in this matter. | The OAIC will share the applicant's submissions with the Department. The OAIC will proceed to refer this matter to the IGIS. |
| 4 | MR19/00010 | FOI 155/18/19; BN1556605 | The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period; and The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract. | <i>Decision:</i> Primary decision of 6 December 2018 <i>Documents:</i> Documents 1 to 13 <i>Exemptions: ss 33(a)(ii), 47(1)(b) and 47G</i> | The OAIC has received an open and a closed submission from the Department. Please find attached the Department's open submissions. | The OAIC invites the applicant to provide any response to the Department's open submission by 10 June 2020 . The OAIC may then proceed to refer this |

| | | | | | | |
|---|------------|---------------|--|---|--|--|
| | | | | | | matter to the IGIS. |
| 5 | MR19/00437 | FOI 409/18/19 | <p>The Incoming Government Brief as prepared for the Liberal national Coalition insofar as the brief relates to the naval shipbuilding program or naval sustainment program.</p> <p>The Incoming Government Brief as prepared for the Labor Party insofar as the brief relates to the naval shipbuilding program or naval sustainment program.”</p> <p>Excluding private email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents, and documents sent to and from you.</p> <p>Furthermore, Defence only considers final versions of documents.</p> | <p><i>Decision:</i> Revised decision of 12 November 2019</p> <p><i>Documents:</i> Documents 2 to 6</p> <p><i>Exemptions:</i> ss 33(a)(ii), 33(a)(iii), 34, 47C and 47E(d)</p> | <p>The OAIC has received a submission from the Department on 12 November 2019.</p> <p>Please find attached the Department's submissions.</p> | <p>The OAIC invites the applicant to provide any response to the Department's submission by 10 June 2020.</p> <p>The OAIC may then proceed to refer this matter to the IGIS.</p> |

Yours sincerely



Dr Rachel Ranjan | Assistant Director
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
+61 2 9284 9878 | rachel.ranjan@oaic.gov.au

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ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM6

The following 13 pages are the annexure SMM6 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-OAI/RP

Office of the Australian Information Commissioner
Level 3, 175 Pitt Street
Sydney NSW 2000

BY EMAIL: enquiries@oaic.gov.au

Dear Commissioner,

RE: MR 19/00010

1. I have sought and been refused access under Freedom of Information laws to the following Future Submarine Project documents:
 - The future submarine Integrated Master Schedule as was in force at the time of signing the Design and Mobilisation Contract – purportedly exempt under s33(1)(ii), s47(1)(b) and s47G.
 - The project earned value management reports for the future submarine project for the last six month period - purportedly exempt under s47(1)(b) and s47G.
2. The access refusal decision was made on 06 December 2019.
3. On 21 December 2019 I sought a review of that decision by the Information Commissioner.
4. This 01 March 2019 I provided a preliminary submission to the Information Commissioner (which this submission replaces).
5. On 29 April 2019 Defence made a submission which included new exemption claims of s45 and s47¹, which I understand to apply to all documents.

Future Submarine Project

6. The Future Submarine Project is not a defence capability, rather it is an activity which aims to deliver a defence capability. This is an important distinction in the context of the s33(1)(ii) claim.
7. Like any other project, it is a collaborative enterprise that is carefully planned to achieve a particular aim. The only real link to a 33(1)(ii) '*damage to the defence*

¹ Thought to mean s47(1)(a)

Electorate Office
Level 2, Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

of the Commonwealth” FOI resides in unique information² relevant to the submarine and its operation after the first submarine is delivered to the Royal Australian Navy in September 2034.

Documents Requested

8. Relevant to the documents that have been requested:

Integrated Master Schedule

- a. All projects are broken down into manageable tasks (work packages) that are sequenced and appropriately resourced. An Integrated Master Schedule (IMS) provides interested parties a view and understanding of the work package sequencing, timing, interdependencies and milestones.
- b. As the project progresses work is carried out in accordance with the Integrated Master Schedule. Work packages are commenced (sometimes after tenders) and completed – the timing of which, and the associated consumption of resources as tasks are conducted, should align with the Integrated Master Schedule if the project is proceeding as planned.
- c. The IMS is the foundation of the performance measurement baseline and is used to track progress, forecasts, and changes throughout program execution.
- d. The Submarine Design and Mobilisation Contract says of the IMS³:

The Integrated Master Schedule (IMS) is an integrated, networked schedule containing CoA approved data such as significant program interface milestones and mutually agreed milestones from the Contractor, CSI and Commonwealth schedules necessary to support program execution. The IMS is vertically traceable to the Contract Work Breakdown Structure (CWBS), and associated Statement of Work (SOW). The IMS shall be used to verify attainability of contract objectives, to evaluate progress toward meeting program objectives, and to integrate the program Contract master Schedule (CMS) activities with all related components.

It goes on to say this about its content:

The IMS shall contain the contract milestones and any, mutually agreed milestones, from contract award to the completion of the contract.

² Despite submarines attracting an air of secrecy, there is considerable information in the public domain about the roles and capabilities of submarines.

³ The Submarine Design and Mobilisation Contract is in the public domain, albeit partially redacted. DID-PM-IMS deals with the Integrated Master Schedule.

The IMS shall be traceable to the CWBS and associated individual CWBS & schedules.

The IMS shall be logical network-based and is vertically and horizontally traceable to the cost/schedule reporting instrument used to address variances, per EVPR (if applicable).

It shall be accompanied by a document identifying the products required to support/deliver the contract milestones and mutually agreed milestones. It shall include fields and data that enable the user to access the information by product, process, or organizational lines.

Contract Milestones and Agreed Milestones Definitions, along with the definition for successful completion of the milestone.

A top-level schedule of contract milestones and mutually agreed milestones reflective of the primary stakeholders (Contractor, CSI & Commonwealth) Project Master Schedule for the duration of the program.

Earned Value Management Report

- a. The Integrated Master Schedule (along with the Integrated Master Plan) forms the foundation to implement an Earned Value Management System. Earned Value Management is a well known technique for measuring a projects performance and progress – by measuring the actual costs of the work performed and the actual time to do it then comparing it to what was planned.
- b. As an application example - Project A has been approved for a duration of one year and with the budget of X. It was also planned that the project spends 50% of the approved budget and expects 50% of the work to be complete in the first six months. If now, six months after the start of the project, a project manager would report that he has spent 50% of the budget, one can initially think, that the project is perfectly on plan. However, in reality the provided information is not sufficient to come to such a conclusion. The project can spend 50% of the budget, whilst finishing only 25% of the work, which would mean the project is not doing well; or the project can spend 50% of the budget, whilst completing 75% of the work, which would mean that project is doing better than planned.
- c. An Earned Value Management report is a report of the measured project performance and progress.

- d. The Submarine Design and Mobilisation Contract states the following on the content of the Earned Value Management Reports⁴:

Format 1 provides data to measure cost and schedule performance by summary level Work Breakdown Structure (WBS) elements.

Format 2 provides a similar measurement by organisational or functional cost categories.

Format 3 provides the Performance Measurement Baseline (PMB) and records any changes to the PMB implemented in the reporting period. The PMB is the time phased budget baseline plan against which performance is measured.

Format 4 provides manpower loading forecasts for correlation with the budget plan and cost estimate predictions.

Format 5 is a narrative report used to explain significant cost and schedule variances and other identified Contract problems.

S33(a)(ii) Claim

9. Defence claim that release of the Integrated Master Schedule(s) would, or could, reasonably be expected to cause damage to the defence of the Commonwealth.
10. The Information Commissioner must be convinced that it is reasonable to expect⁵ that damage will occur to the Defence of Australia. The Department states this will occur in two ways:
 - Directly by supplying detailed information on the delivery schedule of future capability well in advance of that capability being available,
 - Indirectly by affecting the Department's contracting ability to deliver major capability platforms through commercial partners.

Supplying Detailed Information on the Delivery Schedule

11. The submission by Defence is that making public the delivery date of each submarine would somehow cause damage to the Defence of the Commonwealth.
12. The argument does not stand up to scrutiny, noting that the general delivery schedule for major capabilities can be found in the Defence Integrated Investment Plan. Additionally, in the Auditor General's annual Major Projects

⁴ The Submarine Design and Mobilisation Contract is in the public domain, albeit partially redacted. DID-PM-EVPM deals with Earned Value Management Plan for the Project.

⁵ See FOI Guidelines at 5.17

Review (which I cannot tender because it is subject to Parliamentary Privilege) provides the following information publically for each project:

- a. Initial Material Release date
- b. Initial Operational Capability date
- c. Final Material Release date
- d. Final Operational Date

13. Figure 1, which is Figure 2.2 of the 2017 Naval Shipbuilding Plan, shows the delivery date of the future submarine and now better fidelity is available.

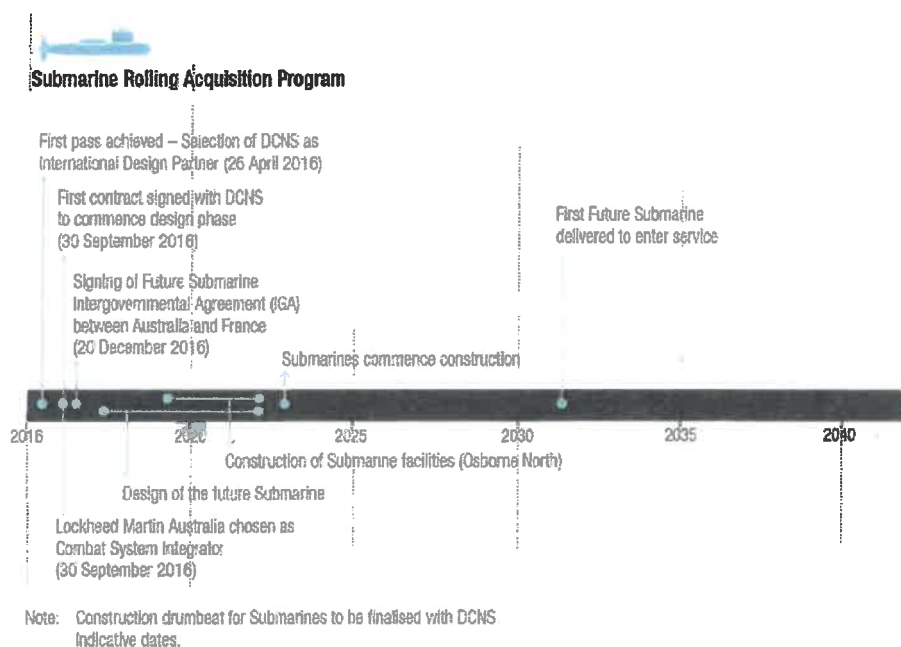


Figure 1 - Future Submarine Delivery Details

14. Defence has stated publically that the project will endeavour to deliver the first future submarine for operational test and evaluation in September 2032 and that test and evaluation will take a nominal period of two years, meaning that the first submarine will be cleared for operations by September 2034.
15. Defence has also stated publically that it is building capacity in the future submarine shipyard to permit a nominal two year drumbeat.
16. Defence also submits that furnishing the delivery dates of the future submarine in combination with the withdrawal dates of existing submarine capabilities could pose a threat to Australian interests.

17. This statement is fallacious and fails to acknowledge the successive policies of Australian Governments that there will be no capability gap between the existing Collins Class submarines and the future submarine ... and a significant Collins Class submarine Life Of Type Extension (LOTE) program underway. Defence has made it clear that LOTE work will be conducted during a Full Cycle Docking and that the Collins Class submarines have a 10 year operating cycle between Full Cycle Dockings, so on completion the submarine will have up to 10 years of service. This LOTE Program has been traversed in detail in Parliamentary oversight forums but can also be found in multiple public domain papers, such as the Australian Strategic Policy Institute Special Report 'Thinking through submarine transition'⁶ which discusses the transition from the current Collins Class submarine to the Future Submarine in detail, starting with the first LOTE submarine being HMAS Farncomb in 2026.

Inhibit Transfer of Technology

18. Defence purports:

Additionally, release of the information could reasonably be expected to inhibit the transfer of technology information to Australia, which is essential to the Government's strategic goal of achieving a regionally superior sovereign submarine capability.

19. Technology Transfer is an activity that can take place during the conduct of a work package. Revealing the point in time that a work package will be undertaken (which will inevitably be revealed anyway as the work takes place) does nothing to reveal the technology itself. The claim that there would be sufficient detail in any schedule that would reveal proprietary information that would reasonably give rise to the expectation stated, is at best highly unlikely.

Refusal of Naval Group to Provide Confidential Information to Defence

20. Defence purports:

The first of the indirect impacts of releasing the information is the substantial adverse effect this would have on the competitive viability of Naval Group. This impact is expected to result in at best a reluctance and most likely refusal of Naval Group to supply commercially confidential information to the Department in the future. Therefore directly impacting the ability to obtain essential project information during the development of a critical strategic platform.

⁶ <https://s3-ap-southeast-2.amazonaws.com/ad-aspi/2018-10/SR%20128%20Thinking%20through%20sub%20transition.pdf?hBI2AlicfCmWfzSWQTwaTl5fiQoCzkm>

21. The purported damage to Defence could only occur as described immediately above if the information being released was truly confidential to Naval Group. The claims are misleading in almost every aspect. The schedule for the Australian project has relevance to that project and only that project. Naval Group is, and will continue to, provide information to the Department under a contract. They will deliver information as per the contract, nothing more, and assuming the project is properly run, nothing less. Information regarding the project schedule and reports about the project having met that schedule, noting the reports cover actual past events, cannot impact on the competitive viability of Naval Group. Defence is improperly conflating its s33(a)(ii) claim with its s45, s47 and s47G claims.

22. I shall address the erroneous s45, s47 and s47G claims below.

Risk to the Department's Reputation

23. Defence purports:

Beyond the immediate risk to the commercial position of Naval Group, the release of the documents also pose a risk to the Department's reputation amongst its commercial partners and suppliers. If the documents were released under the FOI Act and either commercial damage was incurred by Naval Group, or viewed as having been incurred, then it is likely that Department's reputation as a contracting partner would be damaged. This may cause other contractors to refuse to deal with the Department on projects where confidential commercial information is involved. Additionally, the Department's contracting partners may start factoring in additional cost for the loss of confidential information into future contracts. Given the extent of the commercial damage likely to be incurred, these costs are likely to be significant.

24. The Department's obligations are to comply with all Australian law, including FOI law. This obligation must override any consideration of reputation. The Department cannot withhold information it is obliged by law to release. Defence contracting partners, who contract with Defence subject to Australian law, understand this. Again, Defence conflates its s33(a)(ii) claim with its s45, s47 and s47G claims (addressed below).

General Statement about Commercial Related Claims

Scattergun Approach

25. It is noted that Defence has employed a scatter gun in this review claiming multiple exemptions centred on commercial interests.

Foreground Intellectual Property

26. Both the Integrated Master Schedule (dated 17 September 2017 and 25 October 2018) and the Earned Value Management reports (dated between April 2018 and October 2018) are deliverables under the Submarine Design and Mobilisation Contract signed on the 30 September 2016 and having been paid for, are clearly the property of the Commonwealth.

27. The Design and Mobilisation Contract says this of the IMS⁷:

The IMS should be statused/updated monthly in accordance with the Contractor's management control system and shall be submitted no less frequently than monthly. All updates to the IMS require CoA approval prior to implementation. When subcontractor schedule data reflects a different status date than the Contractor's schedule status date, these status dates shall be described in the analysis section of the IMS.

28. It is default practice in Commonwealth contracts for foreground intellectual property (IP) rights to be vested in the Commonwealth. Noting both document type's purpose, they are unlikely to contain any background IP.

S45 Claim

29. The Department makes a claim that the documents attract a s45 exemption, that is their disclosure under the FOI Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

30. In reliance on the decision of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at [443], the FOI Guidelines state at [5.159] that to found an action for a breach of confidence in equity, the following four 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.

31. The documents which are the subject of my request belong to the Commonwealth and are standard Project Management tools. Their ownership and likely contents could not give rise to all four criteria above.

⁷ The Submarine Design and Mobilisation Contract is in the public domain, albeit partially redacted.

32. Besides, noting the positive right afforded to me by the FOI for access to documents, the Department has an obligation to show that each of the criteria is met. They have not done this and so their claim for exemption must fail.

S47(1)(a) and (b) Claim

33. The Department makes a claim that the disclosure of both the Integrated Master Schedule and Earned Value Management reports would disclose a trade secret or 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.

Integrated Master Schedule

34. The Integrated Master Schedule is a contractual deliverable that is a) specific to the future Submarine Project and b) provides interested parties a view and understanding on the work package sequencing, timing, independencies and milestones. The Future Submarine Design and Management Contract DID-PM-IMS requires the IMS to be created using a network capable Commercially Off the Shelf scheduling software application⁸. It cannot reasonably be considered to be a trade secret of Naval Group.

35. The notion that the schedule has commercial value is also flawed. Naval Group have been paid to produce a schedule for the future submarine, a specific and unique submarine program. This schedule is specific to Australia's future submarine program and cannot have a commercial value in any market, other than Australia where the commercial value has already been recovered by way of payment. As such its commercial value has been realised and cannot be diminished by disclosure.

36. Naval Group purports:

Naval Group competitors would have access to critical and sensitive information which would otherwise be known to limited people within the Commonwealth of Australia, Lockheed Martin and within Naval Group;

37. With respect to a claim that information is "critical", this characteristic does not ground an s47 claim.

38. With respect to the claim that information is "sensitive", the Integrated Master Schedule is, as has been described, a high level outline of work package sequencing, timing, interdependencies and milestones. It is highly unlikely that

⁸ The Submarine Design and Mobilisation Contract is in the public domain, albeit partially redacted.

that the Integrated Master Schedule would contain information that would meet the quality of sensitive (for which a specific redaction could cure).

39. Naval Group purports:

The IMS Documents are marked as "For Official Use Only", meaning that the intention is that the documents not be disclosed beyond a need-to-know basis to persons who do not have appropriate authority to view documents of this classification.

40. Classification and delimiting markings on a document are not in themselves conclusive of the status of the information contained within them. Indeed, such markings confirm that the documents belong to the Commonwealth and do not contain commercially sensitive information. The decision maker must make an independent assessment of that claim in light of the available evidence⁹.

41. Naval Group purports:

The IMS Document are a critical and current element of Naval Groups ability to successfully perform its obligations under its contractual arrangements for the FSP.

42. There can be no question that the Integrated Master Schedule is a critical document (and disclosure will make it no less critical) that guides both the Commonwealth and Naval Group in the timing of the projects execution, it does not have any impact or influence on Naval Groups ability. Furthermore critical is not a grounds for FOI exemption.

Earned Value Management Reports

43. As has been explained, Earned Value Management is a standard industry project technique for measuring project performance and progress.

44. Earned Value Management Reports rarely, if ever, disclose trade secrets or contain information that has commercial value necessary to invoke s47. These reports simply show progress against a Project Plan, which may include high level information relating to work packages and explanations on deviations, not the detail of how the work is actually being performed. These reports provide readers with an indication as to whether the Project is on time and within cost.

45. Naval Group purports:

⁹ OAIC FOI Guidelines, paragraph 5.47

... Naval Group has expended significant resources and time to deconstruct parts of the FSP to develop the detailed breakdown of costs schedule contained in the EVPR documents.

It is clear from the Design and Mobilisation contract that the reports are of a Commonwealth specified format (see para 8d) and Naval Group are just required to populate the reports and they are paid to do so. The numbers represent the state of the Australian Government's project, not Naval Group's.

The detailed allocation of broken-down expenditure to each of these specific elements of the FSP have been prepared from Naval Group's significant experience in those matters.

The Commonwealth has engaged them for their experience. Whilst they have experience in such matters, their experience is not unique in the market (other submarine manufacturers will use Earned Value Management – noting it is an internationally utilised Project Management measuring tool.

If these EVPR Documents were to be disclosed, it would disclose Naval Group's methodology for expenditure allocation to pricing of work.

Earned Value Project Management is governed by standards, not proprietary methods. In Australia EVM has been codified as standards AS 4817-2003 and AS 4817-2006. The Future Submarine Design and Management Contract¹⁰ DID-PM-EVMP confirms that AS 4817-2006 is to used, and the Defence supplement to AS 4817-2006.

Accordingly the competitive advantage and commercial value to Naval Group in having developed those expenditure break downs can reasonably expected to be significantly diminished if disclosed.

Again, Earned Value Project Management is governed by standards.

46. Defence make arguments that flow from Naval Groups consultation which have been addressed directly.
47. Neither the Integrated Master Schedule nor the Earned Value Management reports are trade secrets or have a commercial value which could be destroyed or diminished if the information were disclosed.

¹⁰ The Submarine Design and Mobilisation Contract is in the public domain, albeit partially redacted.

s47G Claim

48. The Department makes a claim that the disclosure of both the Integrated Master Schedule and Earned Value Management reports *“could reasonably be expected to prejudice the future supply of information to the Commonwealth”*.
49. As has been dealt with above, the documents that are the subject of this review are foreground IP delivered to the Commonwealth under contract by a supplier fully aware that, consistent with Defence procurement policy that promotes transparency and accountability, this information is subject to the FOI Act, court demands and requirements to provide such information to a House of Parliament.

Public Interest

50. The S47(1) and (2) and the S47G exemptions claimed by Defence are conditional. If the Information Commissioner finds that any of those exemptions is warranted, she must grant access to it unless in the circumstances access would, on balance, be contrary to the public interest (see - s11A(5)).
51. There is considerable public interest in the release of the documents. The Submarine Project bears the responsibility of delivering a crucial submarine capability for the Royal Australian Navy. Any delay in the delivery of this project will jeopardise national security and involve an increase in cost associated with keeping the Collins Class submarines in service. The Project is also proposing to spend \$89.7B (out turned) for acquisition. Even a small percentage cost overrun will involve extremely large sums of taxpayer’s money.
52. The Integrated Master Schedule and Earned Value management reports would permit the reader to understand the status of the Future Submarine Project and address the rumour and inuendo currently associated with the project. The release of the requested information would promote the objects of the FOI Act by enhancing the scrutiny of Government decision making and promoting effective oversight of public expenditure. It is hard to reconcile the claims of the original decision maker who could not understand how these Project oversight tools would not be useful in scrutinising Defence activities.
53. The Future Submarine Project has already suffered delays.
- a. The Strategic Partnering Agreement between the Commonwealth and Naval Group was signed 16 months late.
 - b. A critical milestone, a Systems Requirements Review, that was originally due in March 2019 was reschedule to October 2019 but still has not been concluded.

54. Neither Defence, nor Naval Group, have been forthcoming with information regarding delays. Both are sensitive to delays – there is huge political and public interest in the project and potential for embarrassment, however that is not grounds to not disclose the information.
55. The very loose interpretation of the FOI exemptions adopted by both Defence and Naval Group are likely centred about the huge reluctance to have made public 1) a baseline schedule against which the projects progress can be measured or 2) project performance measurement information which can give near real time insight into the current schedule and cost progress of the program.

Submission Summary

56. The exemptions have not been made out. The Information Commissioner should set aside the original decision and grant access to the requested information in full.

Yours sincerely,

A solid black rectangular box redacting the signature of Rex Patrick.

Rex Patrick

9 June 2020

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM7

The following 4 pages are the annexure SMM7 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Rachel Ranjan <rachel.ranjan@oaic.gov.au>
Sent: Monday, 6 July 2020 9:18 AM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: RE: Senator Patrick's applications for IC review of decisions of the Department of Defence MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437 [SEC=OFFICIAL]

Our references: MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437
 Department of Defence references: 502/17/18; 424/17/18; FOI 477/17/18; FOI 155/18/19 BN1556605; FOI 409/18/19

Dear Mr Verlato

I refer to the above matters.

This email provides you with the status of Senator Patrick's five applications for IC review of decisions of the Department of Defence.

In summary,

1. MR18/00588: the matter has progressed to a decision of the Information Commissioner.
2. MR18/00620: the matter has progressed to a decision of the Information Commissioner.
3. MR18/00712: the matter has been prepared for the Information Commissioner to consider whether to refer the matter to the IGIS. The matter may then progress to a decision of the Information Commissioner.
4. MR19/00010: the matter has been prepared for the Information Commissioner to consider whether to refer the matter to the IGIS. The matter may then progress to a decision of the Information Commissioner.
5. MR19/00437: Senator Patrick's submissions of 29 June 2020 will be shared with the Department. The matter may then be prepared for the Information Commissioner to consider whether to refer the matter to the IGIS. The matter may then progress to a decision of the Information Commissioner.

Yours sincerely



Dr Rachel Ranjan | Assistant Director
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9878 | rachel.ranjan@oaic.gov.au

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From: Rachel Ranjan
Sent: Wednesday, 20 May 2020 11:56 AM
To: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Subject: Senator Patrick's applications for IC review of decisions of the Department of Defence MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437 [SEC=OFFICIAL]

Our references: MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437
 Department of Defence references: 502/17/18; 424/17/18; FOI 477/17/18; FOI 155/18/19 BN1556605; FOI 409/18/19

Dear Mr Verlato

I refer to the above matters.

This email provides you with the status and next steps in relation to Senator Patrick's five applications for IC review of decisions of the Department of Defence.

In summary,

1. MR18/00588: the matter has progressed to a decision of the Information Commissioner.
2. MR18/00620: the OAIC has provided the Department's submissions for Senator Patrick's consideration and is currently ascertaining the scope of the third party's objections to disclosure of the documents at issue. The matter may then progress to a decision of the Information Commissioner.
3. MR18/00712: the OAIC will share Senator Patrick's submissions with the Department and proceed to referring the matter to the IGIS. The matter may then progress to a decision of the Information Commissioner.
4. MR19/00010: the OAIC has **attached** the Department's submissions for Senator Patrick's consideration and invites Senator Patrick to provide any response by **10 June 2020**. The matter may then have to be referred to the IGIS.
5. MR19/00437: the OAIC has **attached** the Department's submissions for Senator Patrick's consideration and invites Senator Patrick to provide any response by **10 June 2020**. The matter may then have to be referred to the IGIS.

| | Our reference | Agency reference | Request | Scope | Status | Next steps |
|---|---------------|------------------|---|---|--|---|
| 1 | MR18/00588 | 502/17/18 | Documents relating to the final cost estimate template DCNS submitted in response to the Future Submarine Competitive Evaluation Process. | <p><i>Decision:</i> Primary decision of 11 July 2018</p> <p><i>Documents:</i> Documents 1 and 2 (excluding 'goods and services to be delivered for the totals, or any assumptions used to determine the totals')</p> <p><i>Exemptions:</i> ss 47, 47C and 47G</p> | The OAIC has received submissions from both parties in this matter. The matter has progressed to a decision by the Information Commissioner under s55K of the FOI Act. | The Information Commissioner will decide the matter under s55K of the FOI Act. |
| 2 | MR18/00620 | 424/17/18 | Transactional summary reports (international and domestic) for work related travel of Defence employee Ms Lara De Masson since July 2017. | <p><i>Decision:</i> Primary decision of 5 July 2018</p> <p><i>Documents:</i> Documents 1, 2 and 3</p> <p><i>Exemptions:</i> s 47F</p> | <p>The OAIC has received open and closed submissions from the Department in this matter.</p> <p>The OAIC has shared the Department's</p> | The OAIC is currently conducting inquiries with the Department to ascertain whether the third party wishes to object to |

| | | | | | | |
|---|------------|--------------------------|--|--|---|--|
| | | | | | open submissions with the applicant. | disclosure of the documents in full or in part. The matter may then proceed to a decision of the Information Commissioner. |
| 3 | MR18/00712 | FOI 477/17/18 | The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018. | <i>Decision:</i> Primary decision of 6 August 2018 <i>Documents:</i> Document 1 <i>Exemptions:</i> ss 33(a)(i), 47C, 47G | The OAIC has received submissions from both parties in this matter. | The OAIC will share the applicant's submissions with the Department. The OAIC will proceed to refer this matter to the IGIS. |
| 4 | MR19/00010 | FOI 155/18/19; BN1556605 | The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period; and The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract. | <i>Decision:</i> Primary decision of 6 December 2018 <i>Documents:</i> Documents 1 to 13 <i>Exemptions:</i> ss 33(a)(ii), 47(1)(b) and 47G | The OAIC has received an open and a closed submission from the Department. Please find attached the Department's open submissions. | The OAIC invites the applicant to provide any response to the Department's open submission by 10 June 2020. The OAIC may then proceed to refer this matter to the IGIS. |
| 5 | MR19/00437 | FOI 409/18/19 | The Incoming Government Brief as prepared for the Liberal national Coalition insofar as the brief relates to the naval shipbuilding program or naval sustainment program. The Incoming Government Brief as prepared for the Labor Party insofar as the brief relates to the naval shipbuilding program or naval sustainment program." Excluding private email addresses, signatures, PMKeys numbers and mobile | <i>Decision:</i> Revised decision of 12 November 2019 <i>Documents:</i> Documents 2 to 6 <i>Exemptions:</i> ss 33(a)(ii), 33(a)(iii), 34, 47C and 47E(d) | The OAIC has received a submission from the Department on 12 November 2019. Please find attached the Department's submissions. | The OAIC invites the applicant to provide any response to the Department's submission by 10 June 2020. The OAIC may then proceed to refer this matter to the IGIS. |

telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents, and documents sent to and from you. Furthermore, Defence only considers final versions of documents.

Yours sincerely



Dr Rachel Ranjan | Assistant Director
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
+61 2 9284 9878 | rachel.ranjan@oaic.gov.au

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**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM8

The following 5 pages are the annexure SMM8 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Rachel Ranjan <rachel.ranjan@oaic.gov.au>
Sent: Tuesday, 14 July 2020 4:16 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: RE: Senator Patrick's applications for IC review of decisions of the Department of Defence MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437 [SEC=OFFICIAL]

Our references: MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437
 Department of Defence references: 502/17/18; 424/17/18; FOI 477/17/18; FOI 155/18/19 BN1556605; FOI 409/18/19

Dear Mr Verlato

I refer to the above matters.

This email provides you with a further update on Senator Patrick's five applications for IC review of decisions of the Department of Defence:

1. MR18/00588: the matter is now progressing to a decision of the Information Commissioner.
2. MR18/00620: the matter is now progressing to a decision of the Information Commissioner.
3. MR18/00712: Under s 55ZB of the FOI Act, the IC has requested that the IGIS appear and give evidence on the damage that would, or could reasonably be expected to, be caused to the security of the Commonwealth if access to the document were given in accordance with the request (s 55ZB(2)(a)(i)).
4. MR19/00010: Under s 55ZB of the FOI Act, the IC has requested that the IGIS appear and give evidence on the damage that would, or could reasonably be expected to, be caused to the security of the Commonwealth if access to the document were given in accordance with the request (s 55ZB(2)(a)(i)).
5. MR19/00437: Submissions from the Department are due on 20 July 2020.

Yours sincerely



Dr Rachel Ranjan | Assistant Director
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9878 | rachel.ranjan@oaic.gov.au

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From: Rachel Ranjan
Sent: Monday, 6 July 2020 9:48 AM
To: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Subject: RE: Senator Patrick's applications for IC review of decisions of the Department of Defence MR18/00588; MR18/00620; MR18/00712; MR19/00010; MR19/00437 [SEC=OFFICIAL]

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Dear Mr Verlato

I refer to the above matters.

This email provides you with the status of Senator Patrick's five applications for IC review of decisions of the Department of Defence.⁵¹

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From: Rachel Ranjan

Sent: Wednesday, 20 May 2020 11:56 AM

To: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>

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| 3 | MR18/00712 | FOI 477/17/18 | The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018. | <p><i>Decision:</i> Primary decision of 6 August 2018</p> <p><i>Documents:</i> Document 1</p> | The OAIC has received submissions from both parties in this matter. | <p>The OAIC will share the applicant's submissions with the Department.</p> <p>The OAIC will proceed to</p> |

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| | | | | <i>Exemptions: ss 33(a)(i), 47C, 47G</i> | | refer this matter to the IGIS. |
| 4 | MR19/00010 | FOI 155/18/19; BN1556605 | The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period; and The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract. | <i>Decision:</i> Primary decision of 6 December 2018 <i>Documents:</i> Documents 1 to 13 <i>Exemptions: ss 33(a)(ii), 47(1)(b) and 47G</i> | The OAIC has received an open and a closed submission from the Department. Please find attached the Department's open submissions. | The OAIC invites the applicant to provide any response to the Department's open submission by 10 June 2020 . The OAIC may then proceed to refer this matter to the IGIS. |
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Yours sincerely



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GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
+61 2 9284 9878 | rachel.ranjan@oaic.gov.au

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**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM9

The following 3 pages are the annexure SMM9 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Virginia Newell <virginia.newell@oaic.gov.au>
Sent: Tuesday, 10 November 2020 5:04 PM
To: Verlato, Maximilian (Sen R. Patrick)
Cc: Tudor Tsourtos, Michael (Sen R. Patrick)
Subject: RE: MR19/00010 - IC Review - Senator Patrick & Department of Defence [SEC=OFFICIAL]
Attachments: LETTER - 19102020 - MR19 00010 - IGIS to Aust Information Commissioner (redacted)(2).pdf

Our ref: MR19/00010
 Agency ref: FOI 155/18/19

Dear Mr Verlato,

I am writing in relation to the above referenced IC review.

IGIS evidence relevant to this IC review

On 27 October 2020, you asked if Senator Patrick could be provided with a copy of the evidence provided to Information Commissioner in relation to this IC review, by the Acting Inspector-General of Intelligence and Security, under Division 9 of the *Freedom of Information Act 1983*.

On the same day, I wrote to the office of the IGIS seeking their view as to whether or not their evidence could be shared with both of the parties to this IC review.

I am writing to provide you with a redacted version of the IGIS evidence in relation to this IC review (attached).

Please note that I have also provided a copy of the redacted version of the IGIS evidence to the Department of Defence.

Preferred contact

I note that Mr Tsourtos is still listed by Senator Patrick as the preferred contact officer in relation to this IC review. I'd be grateful if you could confirm if I should continue to cc him on emails relating to this IC review.

Please do not hesitate to call me if you have any queries in relation to this IC review.

Regards,



Virginia Newell | Senior Review Adviser (Legal)
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9624 | virginia.newell@oaic.gov.au

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From: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Sent: Tuesday, October 27, 2020 9:51 AM
To: Virginia Newell <virginia.newell@oaic.gov.au>
Subject: RE: MR19/00010 - IC Review - Senator Patrick & Department of Defence [SEC=OFFICIAL]

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good Morning Virginia,

Thank you for your email.

Senator Patrick is wondering whether he could be provided with a copy of the advice from the IGIS.

Max Verlato

Constituent Officer

Office of Rex Patrick | Senator for South Australia

(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | Tel: 08 8232 1144

www.rexpatrick.com.au



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From: Virginia Newell <virginia.newell@oaic.gov.au>

Sent: Monday, 26 October 2020 11:10 AM

To: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>

Subject: MR19/00010 - IC Review - Senator Patrick & Department of Defence [SEC=OFFICIAL]

Dear Mr Verlato

I am writing to inform you that on 19 October 2020, the Acting Inspector-General of Intelligence and Security, responded to the Information Commissioner's request, in relation to this review, for evidence in accordance with s 55ZB of the *Freedom of Information Act 1982*.

This means that this review is now able to proceed to a decision of the Information Commissioner under s 55K of the FOI Act.

On reviewing the file, I noted that Senator Patrick wrote to us on 2 July 2020. I am treating this email as a submission and I have shared it with the Department today and asked them to consider if they need to make a submission in response.

Please don't hesitate to contact me if you would like to discuss this email.

Regards



Virginia Newell | Senior Review Adviser (Legal)
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9624 | virginia.newell@oaic.gov.au

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MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM10

The following 6 pages are the annexure SMM10 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Tuesday, 12 January 2021 4:50 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: Update on IC Matters [SEC=UNOFFICIAL]
Attachments: Senator Patrick - IC review update - January 2021.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr Verlato

An update on the IC review applications listed in your email is attached.

Kind regards



Raewyn Harlock | Director (A/g)
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9802 | raewyn.harlock@oaic.gov.au

f | | | [Subscribe to Information Matters](#)

From: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Sent: Tuesday, December 22, 2020 2:56 PM
To: FOIDR <foidr@oaic.gov.au>
Subject: Update on IC Matters

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good Afternoon,

Senator Patrick would like an update on all his matters with the Information Commissioner, namely:

MR18/00712
 MR19/00010
 MR19/00116
 MR19/00125
 MR19/00437
 MR19/00755
 MR20/00176
 MR20/00209
 MR20/00291
 MR20/00424
 MR20/00054
 MR20/00544
 MR20/00604
 MR20/00610
 MR20/00612

MR20/00615
MR20/00613
MR20/00760

Kind regards,

Max

Max Verlato
Constituent Officer
Office of Rex Patrick | Senator for South Australia
(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | Tel: 08 8232 1144
www.rexpatrick.com.au



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If you are not the intended recipient, any use or copying of any part of this information is unauthorised. If you have received this email in error, we apologise for any inconvenience and request that you notify the sender immediately and delete all copies of this email, together with any attachments.

| Our reference | Agency and reference | Request | Next steps |
|---------------|-----------------------------------|---|--|
| 1 MR18/00712 | Defence FOI477/17/18 | The initial draft discussion document delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whaley at Senate Estimates on 23rd May 2018. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 2 MR19/00010 | Defence FOI 55/18/19 | 1. The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period 2. The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 3 MR19/00116 | Services Australia LEX40946 | Documents relating to the independent review by KPMG of the Serco pilot program | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 4 MR19/00125 | DISER LEX 62197 | 1 document, comprising 64 folios falling outside the scope of FOI request LEX 59522/59523 made 30.1.2017 | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 5 MR19/00437 | Defence FOI 09/18/19 | The Incoming Government Brief prepared for the Liberal National Coalition insofar as the brief relates to the naval shipbuilding program or naval sustainment program. The Incoming Government Brief as prepared for the Labor Party insofar as the brief relates to the naval shipbuilding program or naval sustainment program. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 6 MR19/00755 | DAWE LEX-2697 | 1. Copy of the limited tender documentation provided to EAA insofar as that document requests an understanding of the corporate entity involved and any related entities. 2. Copy of the 'Due Diligence Report for matter: Eastern Australia Agriculture Pty Ltd (300007091) dated 14 July 2017', as mentioned in the list of attachments to the document. 3. Copy of the 'Due Diligence Report for matter: Eastern Australia Agriculture Pty Ltd (300007092) dated 14 July 2017', as mentioned in the list of attachments to the document. | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |

| | | | | |
|---|------------|-------------------------|---|---|
| 4. Copy of the request from the department from the Australian Government Solicitor, asking them to undertake and complete the due diligence reports mentioned in points 2 and 3. | | | | |
| 7 | MR20/00176 | Australian War Memorial | <p>All 2019 emails and letters between the Australian War Memorial (including to and from Craig Stockings) and the DFA T that discuss suggested content changes / variations / inclusions / omissions by DFAT for the proposed official history of Australia's East Timor operations.</p> <p>Copy of report by the Secretary of the Department of the Prime Minister and Cabinet (Mr Philip Gaetjens) prepared for the Prime Minister into the administration of the Community Sport Infrastructure Grant Program by former Minister for Sport the Honourable Senator Bridget McKenzie</p> <p>Preliminary draft report into possible use of South Australia's desalination plant to provide an offset for water extracted from the River Murray</p> | <p>The OAIC will contact you in relation to next steps following review of the documents and submissions.</p> <p>This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act.</p> <p>The OAIC will contact you in relation to next steps following review of the documents and submissions.</p> <p>The OAIC will contact you in relation to next steps following review of the documents and submissions.</p> |
| 8 | MR20/00209 | DPM&C | <p>1. Copy of brief provided by the Department of Industry, Science, Energy and Resources to the Minister for the purposes of briefing him for the decision on the location for a National Radioactive Waste Management Facility.</p> <p>2. A copy of the decision and the decision reasoning by the Minister.</p> | <p>DFAT has proposed making a revised decision under s 55G. When the revised decision is received, we will contact you to clarify next steps.</p> |
| 9 | MR20/00291 | DAWE | <p>1. All briefs for 2017 /2018 prepared by DFAT for the Minister of Foreign Affairs which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).</p> <p>2. Any cablegrams sent in 2019 from Australia's Embassy in Timor-Leste to DFAT which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).</p> <p>3. Any correspondence exchanged during 2019 between DFAT the Department of Energy and the Environment which discuss the oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).</p> | |
| 10 | MR20/00424 | DISER LEX 65378 | | |
| 11 | MR20/00054 | DFAT LEX 517 | | |

| | | | | |
|----|------------|----------------------|---|--|
| 12 | MR20/00544 | AGD FOI20/3 | Correspondence, briefing materials and advice sent by the Attorney-General and/or the Attorney-General's Department to the Prime Minister and/or the Department of Prime Minister and Cabinet that contain advice in relation to the administration of the Community Sport Infrastructure Grant Program by the Former Minister for Sport the Hon Bridget McKenzie | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 13 | MR20/00604 | DISER LEX 65469 | Suspension and extension of exploration permits in relation to Bright Petroleum Pty Ltd. Bright Petroleum Pty Ltd is the holder of Exploration Permit for Petroleum (EPP) numbers 41 and 42. In relation to EPP 41 and 42, a suspension and extension of the permits under the OPGGSA was granted on each of these dates: 07/08/2019, 13/09/2018...access to each of the documents that contain the assessments conducted by NOPTA that were provided to the Joint Authority for the aforementioned EPP 41 and 42 | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 14 | MR20/00610 | Treasury FOI 2702 | On the 15.11.2019 the Treasurer issued a press release stating he had granted conditional approval for China Mengniu Dairy Company Limited to acquire Bellamy Australia Ltd. 1. The full decision of the Treasurer 2. The full conditions imposed (in the event that they are not recorded as part of the decision). | The OAIC will contact you in relation to next steps following review of the documents and submissions |
| 15 | MR20/00612 | Treasury FOI 2672 | Ministerial submissions and any other briefings provided by the DOT between 1.1.2020 and 29.2.2020 to the Treasurer concerning the economic and/or budgetary implications of Covid 19 outbreak in China (including briefing relating to planning, preparations and actions to deal with the coronavirus in Australia) | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 16 | MR20/00615 | Treasury FOI 2704 | Department of Treasury ministerial submissions MS20-000183, Economic Impacts - Novel Coronavirus, submitted to the Treasurer in Jan 2020. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 17 | MR20/00613 | Treasury FOI 2706 | Treasury modelling and/or assessments of the economic impacts of COVID 19 outbreak provided by the Treasury | The OAIC will contact you in relation to next steps following review of the documents and submissions. |

| | | | | | |
|----|------------|-------|-------|---|---|
| 18 | MR20/00760 | DISER | 66573 | <p>Documents relating to the Snowy 2.0 Project.</p> <ul style="list-style-type: none"> • The AIP Plans for the project and all associated AIP reports, • The project master schedule (as at contract signature), • The current project master schedule, • The Milestone Payment Schedule. | <p>The OAIC will contact you in relation to next steps following review of the documents and submissions.</p> |
|----|------------|-------|-------|---|---|

**FEDERAL COURT OF AUSTRALIA
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MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM11

The following 1 page is the annexure SMM11 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/MV

The Director, Freedom of Information and Privacy Law Section
Legal Division
Department of Foreign Affairs and Trade
R.G. Casey Building, John McEwen Crescent
BARTON ACT 0221

By email: foi@dfat.gov.au

Dear FOI Coordinator,

This letter serves as a request for the purposes of the *Freedom of Information Act 1982*.

I seek access to:

1. All briefs for the 2016/2017, 2017/2018 and 2018/2019 financial years prepared by the Department of Foreign Affairs and Trade for the Minister of Foreign Affairs which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).
2. Any cablegrams sent in 2019 from Australia's Embassy in Timor-Leste to the Department of Foreign Affairs and Trade which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).
3. Any correspondence exchanged during 2019 between the Department of Foreign Affairs and Trade and the Department of Energy and the Environment which discuss the oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste)

Should you have any questions in relation to this request, please contact Mr Max Verlato (Maximilian.Verlato@aph.gov.au) from my office, who has carriage of this request on my behalf.

Yours sincerely,



Rex Patrick
11/09/2019

Electorate Office
Level 2, 31 Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM12

The following 5 pages are the annexure SMM12 referred to in the affidavit of Stella Maree Majury made on _ October 2021 before me:



Australian Government
Department of Foreign Affairs and Trade

FOI Reference: LEX517
File No: 19/26666

18 December 2019

Senator Rex Patrick

By email: Maximilian.Verlato@aph.gov.au; Michael.TudorTsourtos@aph.gov.au

Dear Senator Patrick

Re. Freedom of Information Request

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

On 18 September 2019 you made your initial request to the Department of Foreign Affairs and Trade (the department). On 21 October 2019 you revised your FOI request to:

- 1. All briefs for the 2017/2018 financial year prepared by the Department of Foreign Affairs and Trade for the Minister of Foreign Affairs which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).*
- 2. Any cablegrams sent in 2019 from Australia's Embassy in Timor-Leste to the Department of Foreign Affairs and Trade which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).*
- 3. Any correspondence exchanged during 2019 between the Department of Foreign Affairs and Trade and the Department of Energy and the Environment which discuss the oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste).*

I am an officer authorised under section 23 of the FOI Act to make decisions in relation to FOI requests.

With regards to part 3 of your FOI request, searches conducted by the department found no documents relevant to your request. I am therefore unable to meet your request in accordance with the provisions of section 24A(1)(b)(ii) of the FOI Act.

I have identified documents relevant to parts 1 and 2 of your request and, after careful consideration of them, I have decided to exempt all documents in full.

In making my decision I have taken into account your request and the documents that fall within its scope, the FOI Act, and the guidelines issued by the Australian Information Commissioner under [section 93A of the FOI Act](#). The reasons for my decision are set out below. Sections of the FOI Act referenced in my decision letter can be found online at www.legislation.gov.au

Irrelevant material

Some material contained within the documents captured by your request is either irrelevant or falls outside the scope of your request ([section 22\(1\)\(a\)\(ii\) of the FOI Act](#)) as it does not address any of the three parts of your request.

Material exempt under section 33 of the FOI Act

Some material is exempt as its release would or could reasonably be expected to cause damage to Australia's international relations ([section 33\(a\)\(iii\) of the FOI Act](#)). The exempt material includes information, which if disclosed, would reveal Australia's proposed strategies in a series of bilateral and multilateral negotiations. In my opinion, release of this material would, or could reasonably be expected to damage Australia's international relations and would restrict the ability of the Australian government to maintain good working relationships with the Government of Timor-Leste.

Some material is exempt as it comprises information provided to the Australian Government by representatives of a foreign government, on the presumption of confidentiality ([section 33\(b\) of the FOI Act](#)). In this case, the exempt material comprises confidential communications from representatives of the Government of Timor-Leste.

I consider any release of this material would raise doubts about Australia's ability to protect information provided on a clear understanding of confidence, and reduce the willingness of representatives of foreign governments to share information, or engage in similar discussions with Australian officials in future. The protection of discussions between the department and its overseas government partners, including maintaining confidentiality over the flow of information is a primary consideration of our diplomatic missions. I am satisfied that disclosure would damage Australia's international relations and have a substantial adverse impact on the department's ability to conduct its core business of advancing Australia's national interests.

Material conditionally exempt under section 47E(d) of the FOI Act

Some material is conditionally exempt as its release would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the department ([section 47E\(d\) of the FOI Act](#)). The exempt material comprises information covering discussions provided confidentially from foreign officials and the Australian Government's consideration of such material.

Australian diplomats advocate, promote and protect Australia's interests vigorously overseas. This requires engaging with key interlocutors and influential thinkers to develop a full understanding of their priorities and perspectives and to effectively convey Australia's global, regional and bilateral responsibilities.

I am satisfied that should such material be released, the department's ability to obtain such information in future would be compromised as there will likely be a reluctance from foreign governments and key interlocutors to provide and discuss confidential matters with Australia. This will negatively impact on the department's ability to accurately assess situations and pursue Australia's interests internationally, which is a core function of the department.

Material conditionally exempt under section 47G of the FOI Act

Some material is conditionally exempt as its disclosure would, or could reasonably be expected to, unreasonably affect an entity, adversely in respect of its lawful business, commercial or financial affairs (section 47G(1)(b) of the FOI Act). The exempt material comprises information obtained through confidential discussions with businesses.

I am satisfied that the businesses concerned would have had a reasonable expectation that the Australian Government would not use this information for other purposes, in particular by not disclosing this information publically. Disclosure of the information would unreasonably affect the organisations in their lawful business, commercial and financial affairs. I can find no overriding public interest in disclosing these details.

Public interest test

Section 11A(5) of the FOI Act requires access be given to a conditionally exempt document unless access would, on balance, be contrary to the public interest.

For the reasons discussed above, I have found certain documents to contain material, which is conditionally exempt under sections 47E(d) and 47G of the FOI Act.

In applying the public interest test, I have considered the FOI Guidelines, and the public interest factors favouring disclosure set out in section 11B(3) of the FOI Act. In this matter, the following public interest factors in favour of disclosure are relevant:

- promoting the objects of the FOI Act, including:
 - revealing reasons for or information relevant to government decision-making
 - increasing public participation in Government processes
 - enhancing scrutiny of government decision-making
- informing debate in relation to government activities

However, I am satisfied that the factors in favour of disclosure are outweighed by the following public interest factors against disclosure, which include:

- prejudice to the department's ability to obtain confidential information from foreign governments in the future, which is necessary for the department to pursue Australian interest internationally
- damage to Australia's international relations with other countries
- prejudice to the department's ability to assess situations and provide advice to the Australian Government
- inhibit departmental officers from providing frank and comprehensive written briefing to Ministers, including discussing stakeholder engagement, which is a proper and efficient function of the department
- prejudice the department's ability to have open discussions with businesses to inform its analysis and reporting to the Australian Government.

In forming this view, I have not taken into account any of the irrelevant factors specified in section 11B(4).

I therefore find that giving access to the conditionally exempt material would be contrary to the public interest.

Your review rights are set out in the Attachment for your reference.

Should you have any queries regarding this matter please contact the FOI and Privacy Law Section by email to foi@dfat.gov.au

Yours sincerely



David Nethery
Assistant Secretary
Southeast Asia Maritime Branch

Attachment**Your review rights*****Internal review***

You may apply for internal review of the decision (section 54 of the FOI Act). The internal review application must be made within 30 days of the date of this letter.

Where possible, please attach reasons why you believe review of the decision is necessary.

The internal review will be carried out by another officer within 30 days.

Any request for internal review should be directed via email to foi@dfat.gov.au or addressed to:

Freedom of Information and Privacy Law Section
Department of Foreign Affairs and Trade
R G Casey Building
John McEwen Crescent
Barton ACT 0221
Australia

Australian Information Commissioner

You may apply within 60 days of the date of this letter to the Australian Information Commissioner to review my decision (section 54L of the FOI Act).

You may also make a complaint to the Australian Information Commissioner about the Department's actions in relation to this decision (section 70 of the FOI Act). Making such a complaint about the way the Department has handled your FOI request is a separate process to seeking review of my decision.

Further information on applying for an Australian Information Commissioner review is available at: https://www.oaic.gov.au/freedom-of-information/foi-review_process

Further information about how to make a complaint is available at:
<http://www.oaic.gov.au/freedom-of-information/foi-complaints>

**FEDERAL COURT OF AUSTRALIA
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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM13

The following 1 page is the annexure SMM13 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/MV

Director of FOI Dispute Resolution
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Director,

This is an application for review of FOI Decision LEX-517 (made by the Department of Foreign Affairs and Trade – the "Department") under Part VII of the *Freedom of Information Act 1982* (the FOI Act). *Attached* is a copy of that decision.

The decision made by the Department is not the correct or preferable decision. I will submit my arguments in relation to the claimed exemptions once a case officer has been allocated to this matter.

My office asked the Department to send me a schedule of documents found to be within the scope of my request. To date we have not received a schedule from the Department. I would be grateful if the Information Commissioner could ask/insist/compel the Department to provide me with a schedule of documents.

Should you have any questions in relation to this request, please don't hesitate to contact my Constituent Officer, Mr Max Veriato (Maximilian.Veriato@aph.gov.au), who has carriage of this request on my behalf.

Yours sincerely,



Rex Patrick

22111 2020

Electorate Office
Level 2, 31 Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

**FEDERAL COURT OF AUSTRALIA
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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM14

The following 2 pages are the annexure SMM14 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Thursday, 23 January 2020 8:53 AM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: RE: Review of FOI Decision LEX-517 by DFAT [SEC=OFFICIAL]

Our reference: MR20/00054
Agency reference: LEX 517

Mr Max Verlato
Office of Senator Rex Patrick
Senator for South Australia

By Email: Maximilian.Verlato@aph.gov.au

Your IC review application about an FOI decision by the Department of Foreign Affairs and Trade

Dear Mr Verlato

Thank you for your correspondence seeking to lodge an IC review application with the [Office of the Australian Information Commissioner](#) (the OAIC) about the Department of Foreign Affairs and Trade (the Department).

I note that your FOI request was split into three parts, with parts one and two being dealt with together, and part three being dealt with separately. With this in mind, we may decide to split your IC review application into two. I have flagged this to be reviewed during assessment and we will let you know how we decide to proceed. For the time being, your reference number MR20/00054 relates to all three parts.

Please note:

- You will be advised about the next steps in the IC review process once your application has been assessed by a senior member of the FOI team.)
- If your circumstances change, or your request has been resolved directly with the Department, please advise us by email as soon as practicable.
- Information about the way we handle your personal information is available in our [privacy policy](#).

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote the reference number at the top of this email.

Yours sincerely

Stephanie Mayhew



Intake and Early Resolution Team
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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From: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Sent: Wednesday, 22 January 2020 1:54 PM
To: FOIDR <foidr@oaic.gov.au>
Subject: Review of FOI Decision LEX-517 by DFAT

Good Afternoon,

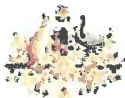
Please find *attached* a letter from Senator Rex Patrick requesting a review of decision LEX-517 by the Department of Foreign Affairs and Trade.

Also *attached* is the decision.

Kind regards,

Max

Max Verlato | **Constituent Officer**
Office of Rex Patrick | **Senator for South Australia**
(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | TEL: 08 8232 1144



REX PATRICK
Centre Alliance
Senator for South Australia

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ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM15

The following 2 pages are the annexure SMM15 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Wednesday, 11 March 2020 1:22 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: MR20/00054 - Your application for Information Commissioner review of Department of Foreign Affairs and Trade's decision [SEC=OFFICIAL]

Our reference: MR20/00054
Agency reference: LEX 517

Maximilian Verlato

Sent by email: Maximilian.Verlato@aph.gov.au

Your application for Information Commissioner review of Department of Foreign Affairs and Trade's decision

Dear Mr Verlato

I write you as the authorised representative of Senator Rex Patrick.

I refer to your request for Information Commissioner review (IC review) of a decision made by the **Department of Foreign Affairs and Trade (the Department)** on 18 December 2019 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

Commencement of IC review

The Information Commissioner has decided to commence review of the Department's decision of 18 December 2019. The Office of the Australian Information Commissioner (OAIC) is currently considering your IC review application and is conducting inquiries with the Department.

It is our understanding that you wish to seek review of the exemptions applied under ss 22(1)(a)(ii), 33, 47E(d) and 47G(1)(b) of the FOI Act to the documents falling within the scope of Part 1 and 2 of the FOI request.

The next steps

At this stage, your matter is awaiting allocation to a review officer. Due to the number of IC review applications on hand, this may take up to 12 months. Once allocated, the review officer will review any documentation or submissions provided by the Department in support of its decision of 18 December 2019. The review officer will then contact you to advise you of their view on the next appropriate steps in the matter.

Further information about [the steps in the Information Commissioner review process](#) is available in [Part 10](#) of the FOI Guidelines at [\[10.100\]](#).

Please note, during an IC review the OAIC will generally share the submissions you provide with the respondent.

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote OAIC reference MR20/00054.

Yours sincerely

Hannah Kreiselmaier



Intake and Early Resolution Team
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM16

The following 1 page is the annexure SMM16 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Thursday, 19 November 2020 7:10 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: MR20/00054 - IC review - Department of Foreign Affairs and Trade (DFAT ref: LEX 517) [SEC=OFFICIAL]

Dear Mr Verlato

I refer to your application, on behalf of Senator Patrick, for Information Commissioner review of an FOI decision made by the Department of Foreign Affairs and Trade on 18 December 2019. The FOI request sought documents generally relating to oil/gas processing options for the Greater Sunrise oil and gas field.

Following discussions with the Office of the Australian Information Commissioner, the Department has indicated it will revise its original decision of 19 December 2019 and made a new decision. The Department has consented to the following statement being provided to you.

The Department of Foreign Affairs and Trade has indicated that it is revising its decision in this matter under section 55G of the Freedom of Information Act 1982. It is intended that this revised decision will assist to resolve the matters raised by the Senator in his request for review of the department's decision dated 18 December 2019.

The Department of Foreign Affairs and Trade thanks Senator Patrick for his patience in this matter.

We will contact you to advise of next steps in this IC review when the Department has made its new decision.

Kind regards



Raewyn Harlock | Director (A/g)
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9802 | raewyn.harlock@oaic.gov.au

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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM17

The following 6 pages are the annexure SMM17 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Tuesday, 12 January 2021 4:50 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: Update on IC Matters [SEC=UNOFFICIAL]
Attachments: Senator Patrick - IC review update - January 2021.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr Verlato

An update on the IC review applications listed in your email is attached.

Kind regards



Raewyn Harlock | Director (A/g)
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9802 | raewyn.harlock@oaic.gov.au

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From: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Sent: Tuesday, December 22, 2020 2:56 PM
To: FOIDR <foidr@oaic.gov.au>
Subject: Update on IC Matters

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good Afternoon,

Senator Patrick would like an update on all his matters with the Information Commissioner, namely:

MR18/00712
 MR19/00010
 MR19/00116
 MR19/00125
 MR19/00437
 MR19/00755
 MR20/00176
 MR20/00209
 MR20/00291
 MR20/00424
 MR20/00054
 MR20/00544
 MR20/00604
 MR20/00610
 MR20/00612

MR20/00615
MR20/00613
MR20/00760

Kind regards,

Max

Max Verlato
Constituent Officer
Office of Rex Patrick | Senator for South Australia
(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | Tel: 08 8232 1144
www.rexpatrick.com.au



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| Our reference | Agency and reference | Request | Next steps |
|---------------|---|--|--|
| 1 | MR18/00712 Defence FOI477/17/18 | The initial draft discussion document delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on <u>23rd May 2018</u> . 1. The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period 2. The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract Documents relating to the independent review by KPMG of the Serco pilot program | The OAIC will contact you in relation to next steps following review of the documents and submissions. This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 2 | MR19/00010 Defence FOI 55/18/19 | | |
| 3 | MR19/00116 Services Australia LEX40946 | | |
| 4 | MR19/00125 DISER LEX 62197 | 1 document, comprising 64 folios falling outside the scope of FOI request LEX 59522/59523 made 30.1.2017 | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 5 | MR19/00437 Defence FOI 09/18/19 | The Incoming Government Brief prepared for the Liberal National Coalition insofar as the brief relates to the naval shipbuilding program or naval sustainment program. The Incoming Government Brief as prepared for the Labor Party insofar as the brief relates to the naval shipbuilding program or naval sustainment program. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 6 | MR19/00755 DAWE LEX-2697 | 1. Copy of the limited tender documentation provided to EAA insofar as that document requests an understanding of the corporate entity involved and any related entities. 2. Copy of the 'Due Diligence Report for matter: Eastern Australia Agriculture Pty Ltd (3000007091) dated 14 July 2017', as mentioned in the list of attachments to the document. 3. Copy of the 'Due Diligence Report for matter: Eastern Australia Agriculture Pty Ltd (3000007092) dated 14 July 2017', as mentioned in the list of attachments to the document. | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |

| | | | | |
|----|------------|---|--|--|
| | | 4. Copy of the request from the department from the Australian Government Solicitor, asking them to undertake and complete the due diligence reports mentioned in points 2 and 3. | | |
| 7 | MR20/00176 | Australian War Memorial | All 2019 emails and letters between the Australian War Memorial (including to and from Craig Stockings) and the DFA T that discuss suggested content changes / variations / inclusions / omissions by DFAT for the proposed official history of Australia's East Timor operations. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 8 | MR20/00209 | DPM&C | Copy of report by the Secretary of the Department of the Prime Minister and Cabinet (Mr Philip Gaetjens) prepared for the Prime Minister into the administration of the Community Sport Infrastructure Grant Program by former Minister for Sport the Honourable Senator Bridget McKenzie | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 9 | MR20/00291 | DAWE | Preliminary draft report into possible use of South Australia's desalination plant to provide an offset for water extracted from the River Murray | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 10 | MR20/00424 | DISER LEX 65378 | 1. Copy of brief provided by the Department of Industry, Science, Energy and Resources to the Minister for the purposes of briefing him for the decision on the location for a National Radioactive Waste Management Facility. 2. A copy of the decision and the decision reasoning by the Minister. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 11 | MR20/00054 | DFAT LEX 517 | 1. All briefs for 2017 /2018 prepared by DFAT for the Minister of Foreign Affairs which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste). 2. Any cablegrams sent in 2019 from Australia's Embassy in Timor-Leste to DFAT which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste). 3. Any correspondence exchanged during 2019 between DFAT the Department of Energy and the Environment which discuss the oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste). | DFAT has proposed making a revised decision under s 55G. When the revised decision is received, we will contact you to clarify next steps. |

| | | | | |
|----|------------|----------------------|--|--|
| 12 | MR20/00544 | AGD FOI20/3 | Correspondence, briefing materials and advice sent by the Attorney-General and/or the Attorney-General's Department to the Prime Minister and/or the Department of Prime Minister and Cabinet that contain advice in relation to the administration of the Community Sport Infrastructure Grant Program by the Former Minister for Sport the Hon Bridget McKenzie | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 13 | MR20/00604 | DISER LEX 65469 | Suspension and extension of exploration permits in relation to Bright Petroleum Pty Ltd. Bright Petroleum Pty Ltd is the holder of Exploration Permit for Petroleum (EPP) numbers 41 and 42. In relation to EPP 41 and 42, a suspension and extension of the permits under the OPGSA was granted on each of these dates: 07/08/2019, 13/09/2018...access to each of the documents that contain the assessments conducted by NOPTA that were provided to the Joint Authority for the aforementioned EPP 41 and 42 | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 14 | MR20/00610 | Treasury FOI 2702 | On the 15.11.2019 the Treasurer issued a press release stating he had granted conditional approval for China Mengniu Dairy Company Limited to acquire Bellamy Australia Ltd. 1. The full decision of the Treasurer 2. The full conditions imposed (in the event that they are not recorded as part of the decision). | The OAIC will contact you in relation to next steps following review of the documents and submissions |
| 15 | MR20/00612 | Treasury FOI 2672 | Ministerial submissions and any other briefings provided by the DOT between 1.1.2020 and 29.2.2020 to the Treasurer concerning the economic and/or budgetary implications of Covid 19 outbreak in China (including briefing relating to planning, preparations and actions to deal with the coronavirus in Australia) | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 16 | MR20/00615 | Treasury FOI 2704 | Department of Treasury ministerial submissions MS20-000183, Economic Impacts - Novel Coronavirus, submitted to the Treasurer in Jan 2020. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 17 | MR20/00613 | Treasury FOI 2706 | Treasury modelling and/or assessments of the economic impacts of COVID 19 outbreak provided by the Treasury | The OAIC will contact you in relation to next steps following review of the documents and submissions. |

| | | | | | |
|----|------------|-------|-------|---|---|
| 18 | MR20/00760 | DISER | 66573 | <p>Documents relating to the Snowy 2.0 Project.</p> <ul style="list-style-type: none"> • The AIP Plans for the project and all associated AIP reports, • The project master schedule (as at contract signature), • The current project master schedule, • The Milestone Payment Schedule. | <p>The OAIC will contact you in relation to next steps following review of the documents and submissions.</p> |
|----|------------|-------|-------|---|---|

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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM18

The following 2 pages are the annexure SMM18 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Lachlan Merrigan <lachlan.merrigan@oaic.gov.au>
Sent: Thursday, 7 October 2021 9:27 AM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: MR20/00054 Rex Patrick and Department of Foreign Affairs and Trade - Update from respondent [SEC=OFFICIAL]

Dear Senator Patrick

I refer to the above IC review application and note that I have assumed carriage of this matter at the OAIC. I would be grateful if you could direct all future correspondence to me.

Since our last contact on 13 January 2021, the OAIC has continued to liaise with the Department of Foreign Affairs and Trade (the Department) to facilitate the provision of a revised decision under s 55G of the FOI Act.

Given the length of time since the Department first foreshadowed the provision of a s 55G revised decision, the OAIC has asked the Department to provide you with an update in this matter, which I have inserted below:

As previously indicated, the Department of Foreign Affairs and Trade is revising its decision in this matter under section 55G of the Freedom of Information Act 1982. It is intended that this revised decision will assist to resolve the matters raised by Senator Patrick in his request for review of the department's decision.

In preparing this revised decision, the department has undertaken additional searches, identified and collated relevant documents, and conducted an initial review of the documents.

The department's processing of the revised decision has been impacted by the ACT lockdown.

The department is continuing to progress the revised decision within the current work arrangements.

The department thanks Senator Patrick for his patience in this matter.

The OAIC will continue to liaise with the Department and will advise you when we receive any further updates in relation to this IC review.

The OAIC appreciates your continued patience in this matter.

Regards
 Lachlan



Lachlan Merrigan | Review Adviser (Legal)
 Significant and Systemic Reviews and Regulatory Advice
 Freedom of Information Regulatory Group
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | [oaic.gov.au](https://www.oaic.gov.au)
 +61 2 9284 9722 | lachlan.merrigan@oaic.gov.au

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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM19

The following 1 page is the annexure SMM19 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/MV

FOI Coordinator
Legal Branch
Department of Industry, Science, Energy and Resources
GPO Box 2013, Canberra ACT 2601

By email: FOI@industry.gov.au

Dear FOI Coordinator,

This is an application for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

By way of background, on 1 February 2020 former Minister for Resources and Northern Australia, the Honourable Senator Matthew Canavan (the "Minister"), announced that the Napandee site near Kimba, South Australia, was chosen as the appropriate location for a National Radioactive Waste Management Facility (the "decision").

Noting the above, I seek access to:

1. A copy of the brief provided by the Department of Industry, Science, Energy and Resources to the Minister for the purposes of briefing him for the decision on the location for a National Radioactive Waste Management Facility.
2. A copy of the decision and the decision reasoning by the Minister.

Should you have any questions in relation to this request, please don't hesitate to contact me or my Constituent Officer, Mr Max Verlato (Maximilian.Verlato@aph.gov.au), who has carriage of this request on my behalf.

Yours sincerely,

Rex Patrick
04 / 02 / 2020

Electorate Office
Level 2, 31 Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

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SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM20

The following 1 page is the annexure SMM20 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/MV

Director of FOI Dispute Resolution
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Director,

This is an application for review of FOI Decision 65378 (made by the Department of Industry, Science, Energy and Resources) under Part VII of the *Freedom of Information Act 1982* (the FOI Act).

A deemed refusal has occurred in relation to this FOI request. I attach an email that shows agreement to this fact by the Department.

I am seeking an Information Commissioner review, which I may or may not terminate on receipt of the Department's late decision.

Should you have any questions in relation to this request, please don't hesitate to contact my Constituent Officer, Mr Maximilian Verlato (Maximilian.Verlato@aph.gov.au), who has carriage of this request on my behalf.

Yours sincerely,



Rex Patrick

21/04/2020

Electorate Office
Level 2, 31 Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

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SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM21

The following 8 pages are the annexure SMM21 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Australian Government
**Department of Industry, Science,
 Energy and Resources**

Our ref: LEX 65378

Senator Rex Patrick
 Senator for South Australia
 C/o Mr Max Verlato
 Constituent Officer
 Office of Senator Patrick

By email: Maximilian.Verlato@aph.gov.au

Dear Senator Patrick

Freedom of Information Act 1982 – Notice of Decision

I refer to your correspondence, received by the Department of Industry, Science, Energy and Resources (the department) on 4 February 2020, for access under the *Freedom of Information Act 1982 (FOI Act)* as follows:

1. *A copy of the brief provided by the Department of Industry, Science, Energy and Resources to the Minister for the purposes of briefing him for the decision on the location for a National Radioactive Waste Management Facility.*
2. *A copy of the decision and the decision reasoning by the Minister.*

Background

On 4 March 2020 you were notified that you were liable to pay a charge for the processing of your request in the amount of \$305.45. On 13 March 2020 the department received a deposit in the amount of \$76.35 for the processing of your request. Pursuant to section 31 of the FOI Act, this had the effect of extending the FOI processing period by nine days (being the period between the issuing of the charges notice and payment of the charge).

In relation to the second part of your request, on 3 March 2020, the Minister for Resources, Water and Northern Australia has separately provided you with a copy of the record of the Minister's assessment of the preferred site, which was also published on the department's website. Therefore, the documents have not been included in this decision.

On 18 March 2020 the department was granted a 14 day extension under section 15AB of the FOI Act for the processing of your FOI request by the Office of the Australian Information Commissioner (OAIC).

On 27 March 2020 you agreed to an extension to 14 April 2020 under section 15AA of the FOI Act for the processing of your FOI request.

On 14 April 2020 the department sought and you agreed to a further extension to 16 April 2020 under section 15AA of the FOI Act to finalise your FOI request.

industry.gov.au

Industry House - 10 Binara Street, Canberra City, ACT 2601
 GPO Box 1013 Canberra ACT 2601 ABN: 74 599 608 295

On 16 April 2020 the department wrote to you to advise that due to the current pandemic the department was not in a position to provide you with a decision on that day as it had anticipated. You were advised that although the decision would be deemed to be refused under the FOI Act from 16 April 2020, the department would continue to process your request and do its best to provide you with a decision in this matter soon as practicable.

Decision

I am an authorised decision maker under section 23 of the FOI Act.

I am satisfied that all reasonable searches have been undertaken for documents relevant to your request. I am advised that the department has in its possession three documents that are relevant to your request. These documents are described in the Schedule of Documents at Attachment A.

I have decided to:

- grant access to one documents in part; and
- exempt two documents in full.

I have found that two of the three documents contain material which is fully exempt under section 34(1)(a) of the FOI Act, as Document 2 and 3 were submitted to Cabinet for consideration.

Further, I have also found that Document 1 is exempt in part under section 47C and section 22 of the FOI Act. As disclosure would reveal deliberative processes involved in the functions of the agency and it contains material that is irrelevant to your request.

The reasons for my decision are set out below, as required by section 26 of the FOI Act, in Part A of the Annexure.

Following the department's deemed refusal decision as at 16 April 2020, the department has processed a refund to you of \$76.35 being the FOI deposit. The refund has been made to the bank account used to pay the FOI deposit. No further FOI charges are payable in relation to this decision.

Please find the documents released under the FOI Act attached with this decision.

If you are dissatisfied with my decision, your review rights are set out in Part B of the Annexure.

Yours sincerely


Kathleen O'Kane
A/g General Manager
Radioactive Waste Management Taskforce

 April 2020

Enclosures

Annexure (Part A – Statement of Reasons and Part B – Review Rights)
Attachment A – Schedule of Documents
Attachment B – Methods of Payment

industry.gov.au
Industry House - 10 Binara Street, Canberra City, ACT 2601
GPO Box 2013 Canberra ACT 2601 ABN: 74 599 608 295

Annexure
Part A – Reasons for Decision (section 26 FOI Act)
Request: Senator Rex Patrick – 4 February 2020 (LEX 65378)
Decision Maker: Kathleen O'Kane, A/R General Manager, Radioactive Waste Management Taskforce

1. Evidence/Material on which my findings were based

1.1 In reaching my decision, I relied on the following information and documentary evidence:

- the FOI Act;
- the contents of the documents described in Attachment A;
- your correspondence setting out the particulars of your request;
- the documents identified to be within the scope of the request;
- consultation with departmental officers as to the nature of the documents;
- consultation with the Department of Prime Minister and Cabinet; and
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

2. Section 22 – Deletion of exempt or irrelevant material

2.1 Subsections 22(1) and (2) of the FOI Act permit an agency to decide to provide a copy of a document (modified by redaction) edited to remove information that would reasonably be regarded as irrelevant to the request (edited copy).

Scope

(1) *This section applies if:*

- (a) *an agency or Minister decides:*
 - (i) *to refuse to give access to an exempt document; or*
 - (ii) *that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and*
- (b) *it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:*
 - (i) *access to the edited copy would be required to be given under section 11A (access to documents on request); and*
 - (ii) *the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and*
- (c) *it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:*
 - (i) *the nature and extent of the modification; and*
 - (ii) *the resources available to modify the document; and*
- (d) *it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.*

Access to edited copy

(2) *The agency or Minister must:*

- (a) *prepare the edited copy as mentioned in paragraph (1)(b); and*
- (b) *give the applicant access to the edited copy.*

Irrelevant material

- 2.2 On 24 February 2020, the department advised you that unless you indicated otherwise, the following information would be treated as out of scope and deleted under section 22 of the FOI Act:
- the names, signatures and contact details of departmental staff who are not in the Senior Executive Service (SES);
 - the mobile phone numbers of SES officers; and
 - the names, signatures and contact details of ministerial staff below the level of Chief of Staff.
- 2.3 On 24 February 2020, Mr Max Verlato of your office confirmed that the names and contact details of third parties and other Commonwealth staff can be excluded from the scope of your request.
- 2.4 One of the documents (Document 1) contains the names and contact details of certain departmental offers. I consider that to provide you with full access to this document would disclose information that does not fall within the scope of your FOI request. Accordingly, I have decided that the irrelevant information will be deleted under subsection 22(1) of the FOI Act and an edited copy of the document, with the irrelevant information deleted, will be provided to you.
- 2.5 The deletions are identified in the Schedule of Documents in Attachment A.

3. Section 34 – Cabinet documentsFully exempt material

- 3.1 For the following reasons, I am satisfied that Documents 2 and 3 are exempt in full.
- 3.2 In accordance with the Cabinet Handbook, and as noted in the Commissioner's Guidelines, an agency is required to consult with the Department of the Prime Minister and Cabinet (PM&C) on any Cabinet-related material identified as being within the scope of a request. The department has undertaken consultation with PM&C in relation to the identified Cabinet-related material and that consultation has informed this decision.
- 3.3 Section 34 of the FOI Act relevantly provides:
- (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;*
- 3.4 Following consultation with PM&C, I am satisfied that Document 2 and 3 are supporting documents which were submitted to Cabinet as part of a Cabinet item and brought into existence for Cabinet consideration.
- 3.5 Accordingly, I have formed a view that the material is of such a nature that it is exempt in full under section 34 (1)(a) of the FOI Act and will not be released.

4. Section 47C – Deliberative Matter

Partially exempt material

4.1 Section 47C of the FOI Act relevantly provides:

(1) *A document is conditionally exempt if 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.*

(2) *Deliberative matter does not include either of the following:*

- (a) *operational information (see section 8A);*
- (b) *purely factual material.*

4.2 In accordance with the current Administrative Arrangements Order, the Minister is responsible for the administration of the *National Radioactive Waste Management Act 2012* (Cth), and radioactive waste management is a matter falling within the portfolio responsibilities of the department.

4.3 Document 1, being a brief to the then Minister for Resources and Northern Australia, contains information in the nature of advice that was prepared for the Minister, for the purposes of assisting the Minister to assess the preferred site for the facility. I am satisfied that this information:

- comprises deliberative matter relating to the deliberative processes involved in the functions of the department, the Minister and the Australian Government;
- is not 'operational information' as defined in section 8A of the FOI Act;
- is not 'purely factual' material, and to the extent that some of the information may be considered factual in nature, that information is an integral part of the deliberative content and purpose of the documents, or is otherwise so intertwined with the deliberative content such that it is impractical to separate it.

4.4 I therefore find that Document 1 contains material that is also conditionally exempt under subsection 47C(1) of the FOI Act.

Public interest test

4.5 Subsection 11A(5) of the FOI Act requires that access to a conditionally exempt document must be given to an FOI applicant unless disclosure of the document at that time would, on balance, be contrary to the public interest. I have considered section 11B of the FOI Act (which sets out factors favouring access, as well as factors that must not be taken into account), and Part 6 of the FOI Guidelines, when applying the public interest test.

4.6 I have considered the following relevant factors in favour of disclosure:

- promoting the objects of the FOI Act, including facilitating access to government information generally;
- informing debate on matters of public importance;
- increasing scrutiny and discussion in relation to government decisions and activities; and
- promoting oversight of government expenditure.

- 4.7 However, I consider that these factors are outweighed by the public interest factors against disclosure. In order to effectively support the Minister in the administration of his functions (including matters relating to the administration of the *National Radioactive Waste Management Act*), it is important that the department is able to provide frank advice, and express candid opinions, in relation to sensitive matters on a confidential basis. If the material contained in the document were to be disclosed, this would have longer term implications for the future working relationship between the department and the Minister. In particular, concerns about the potential disclosure of confidential information to the public may result in future briefs and reports being tailored to potential audiences other than the Minister. As a consequence, this is likely to:
- prejudice the ability of the department to provide the Minister with comprehensive, frank and fearless advice on important issues arising within the Minister's portfolio;
 - give rise to a risk of future briefs and reports being tailored to potential external audiences other than the Minister, thereby compromising the quality and value of those documents and making them less relevant to their specific purpose (which is to provide the advice necessary to fully inform decisions by the Minister);
 - impede the effective and productive working relationship between the Minister and the department, including by undermining the level of confidence the Minister has in the department's ability to provide candid advice and opinions;
 - compromise the department's role in advising and assisting the Minister generally; and
 - adversely impact on the Minister's ability to make fully informed decisions.
- 4.8 I am satisfied that in the circumstances, disclosure of the deliberative material at this time would, on balance, be contrary to the public interest. I therefore find that the deliberative material in Document 1 is exempt from disclosure under subsection 47C(1) of the FOI Act. Accordingly, I have decided to release the remaining balance of the documents to you.
- 5. Publication**
- 5.1 Section 11C of the FOI Act requires agencies to publish documents released through an FOI request on our website within 10 days of release, except in certain circumstances including when the documents contain personal or business information that would be unreasonable to publish.
- 5.2 The documents being released to you do not contain any personal or business information that would be unreasonable to publish. As a result, they will be published on our disclosure log within 10 days of the documents being released to you.

Part B – Review Rights

Application for Internal Review

Section 54 of the FOI Act gives you the option to apply for a departmental internal review of my decision. If you make an application for internal review it will be conducted by an officer of the department (other than me) appointed by the Secretary of the department to conduct a review and make a completely fresh decision on the merits of the case.

Application for a review of the decision must be made within 30 days after the day of receipt of this letter, or within 15 days of receipt of the documents to which this decision relates (whichever is the longer period). You do not have to pay any fees or processing charges for an internal review, except for charges relating to the provision of any additional relevant material located as a result of the review (for example photocopying). While a specific form is not required, it would assist the decision maker if your application specifies the grounds on which you consider the decision should be reviewed.

Application for a review of a decision should be addressed to:

FOI Coordinator
Department of Industry, Science, Energy and Resources
GPO Box 2013
CANBERRA ACT 2601

or by e-mail to: FOI@industry.gov.au.

Review by the Australian Information Commissioner

If any decision on internal review were not satisfactory to you, section 54L of the FOI Act gives you the right to apply for review of my decision by the Information Commissioner.

An application for review by the Information Commissioner may be made regardless of whether the decision was the subject of a departmental internal review. An application for review by the Information Commissioner must be made within 60 days of receipt of this notice. There is no fee for review by the Information Commissioner.

You must apply in writing and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au

An application form is available on the website at www.oaic.gov.au. Your application should include a copy of this notice and your contact details. You should also set out why you are objecting to the decision.

Complaints to the Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Australian Information Commissioner will make a completely independent investigation of your complaint. A complaint to the Australian Information Commissioner must be made in writing and can be lodged online using the Information Commissioner Complaint Application form on the Australian Information Commissioner's website at www.oaic.gov.au.

Request for Access under the Freedom of Information Act 1982 (Cth)
Department of Industry, Science, Energy and Resources
FOI Applicant: Senator Rex Patrick (LEX 65378)
SCHEDULE OF DOCUMENTS

| Doc No | Description of document | Pages | Decision | Reasons |
|---------------|--------------------------------|--------------|-----------------|---|
| 1. | Ministerial brief MS20-000063 | 6 | Release in part | Section 47C – Deliberative material Section 22 – Irrelevant material |
| 2. | Site Assessment Report | 178 | Exempt in full | Section 34(1) (a) – Copy of material submitted to Cabinet |
| 3. | Community Sentiment Report | 70 | Exempt in full | Section 34(1) (a) – Copy of material submitted to Cabinet |

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM22

The following 3 pages are the annexure SMM22 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Tuesday, 28 April 2020 9:39 AM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: RE: IC Review - LEX 65378 - Department of Industry Decision [SEC=OFFICIAL]

Our reference: MR20/00424
Agency reference: LEX 65378

Maximilian Verlato
Office of Senator Rex Patrick
Senator for South Australia

Your IC review application about an FOI decision by the Department of Industry, Science, Energy and Resources

Dear Mr Verlato

Thank you for your correspondence seeking to lodge an IC review application with the [Office of the Australian Information Commissioner](#) (the OAIC) about the Department of Industry, Science, Energy and Resources (the Department).

Please note:

- You will be advised about the next steps in the IC review process once your application has been assessed by a senior member of the FOI team.
- If your circumstances change, or your request has been resolved directly with the Department, please advise us by email as soon as practicable.
- Information about the way we handle your personal information is available in our [privacy policy](#).

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote the reference number at the top of this email.

Kind regards

Stephanie Mayhew



Intake and Early Resolution Team
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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From: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Sent: Friday, April 24, 2020 4:30 PM
To: FOIDR <foidr@oaic.gov.au>
Subject: Re: IC Review - LEX 65378 - Department of Industry Decision

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good Afternoon,

I refer to my email below (dated 21 April 2020) sending a letter from Senator Rex Patrick seeking an IC review of a deemed refusal by the Department of Industry FOI decision LEX 65378.

I note that this matter is currently on foot with the OAIC as a result of the Senator's letter.

The Department has now made what we think is a s55G decision (see attached).

Senator Patrick would like to apply under Part VII of the FOI Act to have this decision reviewed as it is not the correct or preferable decision.

Senator Patrick will provide submissions once a case officer has been allocated to the matter.

We would appreciate acknowledgement of this request.

Kind regards,

Max

Max Verlato | Constituent Officer
Office of Rex Patrick | Senator for South Australia
(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | TEL: 08 8232 1144



REX PATRICK
Centre Alliance
Senator for South Australia

From: Verlato, Maximilian (Sen R. Patrick)
Sent: Tuesday, 21 April 2020 1:57 PM
To: FOIDR
Subject: Re: IC Review - LEX 65378 - Department of Industry

Good Afternoon,

Please find *attached* a letter from Senator Rex Patrick and an email attachment to that letter.

Kind regards,

Max

Max Verlato | Constituent Officer
Office of Rex Patrick | Senator for South Australia
(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | TEL: 08 8232 1144



REX PATRICK
Centre Alliance
Senator for South Australia

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MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent.

ANNEXURE SMM23

The following 3 pages are the annexure SMM23 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: Rachel Ranjan <rachel.ranjan@oaic.gov.au>
Sent: Wednesday, 1 July 2020 5:24 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: Senator Patrick's three applications for IC review of decisions of the Department of Industry, Innovation and Science [SEC=OFFICIAL]
Attachments: LEX 62528 - OAIC Submissions - Signed.pdf

Our references: MR19/00125; MR20/00424; MR20/00604
 Agency references: LEX 62197; LEX 65378; LEX 65469

Dear Mr Verlato

This email provides you with the status and next steps in relation to Senator Patrick's three applications for IC review of decisions of the Department of Industry, Innovation and Science.

In summary,

1. MR19/00125: the OAIC has attached the Department's submissions and invites any submissions in response. The matter may then progress to a decision of the Information Commissioner.
2. MR20/00424: the OAIC is awaiting the Department's response to the OAIC's request for processing documentation and the documents at issue. The OAIC will assess the Department's response and then determine how to progress this IC review.
3. MR20/00604: the OAIC will commence review.

| Our reference | Agency reference | Agency | Request | Scope | Next steps |
|---------------|------------------|--|--|---|--|
| 1 MR19/00125 | LEX 62197 | Department of Industry, Innovation and Science | On 30 January 2017 the Department received an FOI request which was assigned the number LEX 59522/59523. In the FOI decision reasoning (dated 1 September 2017) the Department made reference to one document consisting of 64 folios, although the bulk of that document fell outside the scope of the request (i.e. s22 FOI Act). This letter is a request for the purposes of the Freedom of | <i>Decision:</i> Primary decision of January 2019 <i>Documents:</i> Document 1 <i>Exemptions:</i> ss 47C, 47E(d) | The OAIC invites the applicant to make any final submissions in response to the Department's submissions (attached) by 22 July 2020. The matter may then progress to a decision of the Information Commissioner. |

| | | | | | | |
|---|------------|-----------|--|---|--|--|
| | | | | Information Act 1982 for the complete document of 64 folios. | | |
| 2 | MR20/00424 | LEX 65378 | Department of Industry, Innovation and Science | <p>1. A copy of brief provided by the Department of Industry, Science, Energy and Resources to the Minister for the purposes of briefing him for the decision on the location for a National Radioactive Waste Management Facility.</p> <p>2. A copy of the decision and the decision reasoning by the Minister.</p> | <p><i>Decision:</i> Primary decision of 21 April 2020</p> <p><i>Documents:</i> 1, 2 and 3</p> <p><i>Exemptions:</i> ss 22, 34(1)(a), 47C</p> | The OAIC is awaiting a response from the Department. |
| 3 | MR20/00604 | LEX 65469 | Department of Industry, Innovation and Science | <p>Suspension and extension of exploration permits in relation to Bright Petroleum Pty Ltd. Bright Petroleum Pty Ltd is the holder of Exploration Permit for Petroleum (EPP) numbers 41 and 42. In relation to EPP 41 and 42, a suspension and extension of the permits under the OPGGSA was granted on each of these dates: 07/08/2019, 13/09/2018...access to each of the documents that contain the assessments conducted by NOPTA that were provided to the</p> | <p><i>Decision:</i> Primary decision of 6 May 2020</p> <p><i>Documents:</i> 1 to 14</p> <p><i>Exemptions:</i> ss22, 45, 47(1)(b), 47G</p> | The OAIC will commence review. |

| | | | | | | |
|--|--|--|--|--|--|--|
| | | | | Joint Authority for the aforementioned EPP 41 and 42. | | |
|--|--|--|--|--|--|--|

Yours sincerely



Dr Rachel Ranjan | Assistant Director
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9878 | rachel.ranjan@oaic.gov.au

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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM24

The following 6 pages are the annexure SMM24 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Tuesday, 12 January 2021 4:50 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: Update on IC Matters [SEC=UNOFFICIAL]
Attachments: Senator Patrick - IC review update - January 2021.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr Verlato

An update on the IC review applications listed in your email is attached.

Kind regards



Raewyn Harlock | Director (A/g)
 Freedom of Information
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 +61 2 9284 9802 | raewyn.harlock@oaic.gov.au

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From: Verlato, Maximilian (Sen R. Patrick) <Maximilian.Verlato@aph.gov.au>
Sent: Tuesday, December 22, 2020 2:56 PM
To: FOIDR <foidr@oaic.gov.au>
Subject: Update on IC Matters

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Good Afternoon,

Senator Patrick would like an update on all his matters with the Information Commissioner, namely:

MR18/00712
 MR19/00010
 MR19/00116
 MR19/00125
 MR19/00437
 MR19/00755
 MR20/00176
 MR20/00209
 MR20/00291
 MR20/00424
 MR20/00054
 MR20/00544
 MR20/00604
 MR20/00610
 MR20/00612

MR20/00615
MR20/00613
MR20/00760

Kind regards,

Max

Max Verlato
Constituent Officer
Office of Rex Patrick | Senator for South Australia
(Electorate Office) Lvl 2/31 Ebenezer Place, Adelaide | Tel: 08 8232 1144
www.rexpatrick.com.au



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| Our reference | Agency and reference | Request | Next steps |
|---------------|-----------------------------------|---|--|
| 1 MR18/00712 | Defence FOI477/17/18 | The initial draft discussion document delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whitley at Senate Estimates on 23rd May 2018. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 2 MR19/00010 | Defence FOI 55/18/19 | 1. The Project Earned Value Management Reports for the Future Submarine Project for the past 6 month period 2. The Future Submarine Integrated Master Schedule as was in force at the time of the signing of the Design and Mobilisation Contract | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 3 MR19/00116 | Services Australia LEX40946 | Documents relating to the independent review by KPMG of the Serco pilot program | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 4 MR19/00125 | DISER LEX 62197 | 1 document, comprising 64 folios falling outside the scope of FOI request LEX 59522/59523 made 30.1.2017 | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 5 MR19/00437 | Defence FOI 09/18/19 | The Incoming Government Brief prepared for the Liberal National Coalition insofar as the brief relates to the naval shipbuilding program or naval sustainment program. The Incoming Government Brief as prepared for the Labor Party insofar as the brief relates to the naval shipbuilding program or naval sustainment program. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 6 MR19/00755 | DAWE LEX-2697 | 1. Copy of the limited tender documentation provided to EAA insofar as that document requests an understanding of the corporate entity involved and any related entities. 2. Copy of the 'Due Diligence Report for matter: Eastern Australia Agriculture Pty Ltd (3000007091) dated 14 July 2017', as mentioned in the list of attachments to the document. 3. Copy of the 'Due Diligence Report for matter: Eastern Australia Agriculture Pty Ltd (3000007092) dated 14 July 2017', as mentioned in the list of attachments to the document. | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |

| | | | | |
|----|------------|---|--|--|
| | | 4. Copy of the request from the department from the Australian Government Solicitor, asking them to undertake and complete the due diligence reports mentioned in points 2 and 3. | | |
| 7 | MR20/00176 | Australian War Memorial | All 2019 emails and letters between the Australian War Memorial (including to and from Craig Stockings) and the DFA T that discuss suggested content changes / variations / inclusions / omissions by DFAT for the proposed official history of Australia's East Timor operations. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 8 | MR20/00209 | DPM&C | Copy of report by the Secretary of the Department of the Prime Minister and Cabinet (Mr Philip Gaetjens) prepared for the Prime Minister into the administration of the Community Sport Infrastructure Grant Program by former Minister for Sport the Honourable Senator Bridget McKenzie | This review is progressing to a decision by the Information Commissioner under s 55K of the FOI Act. |
| 9 | MR20/00291 | DAWE | Preliminary draft report into possible use of South Australia's desalination plant to provide an offset for water extracted from the River Murray | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 10 | MR20/00424 | DISER LEX 65378 | 1. Copy of brief provided by the Department of Industry, Science, Energy and Resources to the Minister for the purposes of briefing him for the decision on the location for a National Radioactive Waste Management Facility. 2. A copy of the decision and the decision reasoning by the Minister. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 11 | MR20/00054 | DFAT LEX 517 | 1. All briefs for 2017 /2018 prepared by DFAT for the Minister of Foreign Affairs which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste). 2. Any cablegrams sent in 2019 from Australia's Embassy in Timor-Leste to DFAT which discuss oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste). 3. Any correspondence exchanged during 2019 between DFAT the Department of Energy and the Environment which discuss the oil/gas processing options for the Greater Sunrise oil and gas field (either onshore in Australia or in Timor-Leste). | DFAT has proposed making a revised decision under s 55G. When the revised decision is received, we will contact you to clarify next steps. |

| | | | | |
|----|------------|----------------------|---|--|
| 12 | MR20/00544 | AGD FOI20/3 | Correspondence, briefing materials and advice sent by the Attorney-General and/or the Attorney-General's Department to the Prime Minister and/or the Department of Prime Minister and Cabinet that contain advice in relation to the administration of the Community Sport Infrastructure Grant Program by the Former Minister for Sport the Hon Bridget McKenzie | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 13 | MR20/00604 | DISER LEX 65469 | Suspension and extension of exploration permits in relation to Bright Petroleum Pty Ltd. Bright Petroleum Pty Ltd is the holder of Exploration Permit for Petroleum (EPP) numbers 41 and 42. In relation to EPP 41 and 42, a suspension and extension of the permits under the OPGGSA was granted on each of these dates: 07/08/2019, 13/09/2018...access to each of the documents that contain the assessments conducted by NOPTA that were provided to the Joint Authority for the aforementioned EPP 41 and 42 | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 14 | MR20/00610 | Treasury FOI 2702 | On the 15.11.2019 the Treasurer issued a press release stating he had granted conditional approval for China Mengniu Dairy Company Limited to acquire Bellamy Australia Ltd. 1. The full decision of the Treasurer 2. The full conditions imposed (in the event that they are not recorded as part of the decision). | The OAIC will contact you in relation to next steps following review of the documents and submissions |
| 15 | MR20/00612 | Treasury FOI 2672 | Ministerial submissions and any other briefings provided by the DOT between 1.1.2020 and 29.2.2020 to the Treasurer concerning the economic and/or budgetary implications of Covid 19 outbreak in China (including briefing relating to planning, preparations and actions to deal with the coronavirus in Australia) | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 16 | MR20/00615 | Treasury FOI 2704 | Department of Treasury ministerial submissions MS20-000183, Economic Impacts - Novel Coronavirus, submitted to the Treasurer in Jan 2020. | The OAIC will contact you in relation to next steps following review of the documents and submissions. |
| 17 | MR20/00613 | Treasury FOI 2706 | Treasury modelling and/or assessments of the economic impacts of COVID 19 outbreak provided by the Treasury | The OAIC will contact you in relation to next steps following review of the documents and submissions. |

| | | | | | |
|----|------------|-------|-------|---|---|
| 18 | MR20/00760 | DISER | 66573 | <p>Documents relating to the Snowy 2.0 Project.</p> <ul style="list-style-type: none"> • The AIP Plans for the project and all associated AIP reports, • The project master schedule (as at contract signature), • The current project master schedule, • The Milestone Payment Schedule. | <p>The OAIC will contact you in relation to next steps following review of the documents and submissions.</p> |
|----|------------|-------|-------|---|---|

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VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM25

The following 1 page is the annexure SMM25 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Senator for South Australia

Our ref: NC-FOI/MV

Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear OAIC,

This is an application for review of FOI 2339 made to the Department of Health (the "Department") under Part VII of the *Freedom of Information Act 1982* (the FOI Act).

I seek to restrict the review to the following documents:

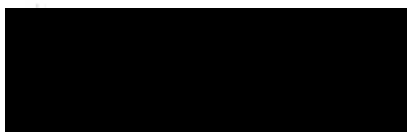
- 1, including enclosures
- 26 to 31, which I understand, after dialogue with the Department, to be documents from or relating to the University of Queensland
- 35 including enclosures
- 37 to 42, which I understand, after dialogue with the Department, to be documents from or relating to the University of Queensland.

The original decision in relation to these documents is not the correct or preferable one.

I will make submissions in this matter once a case officer has been allocated.

Should you have any questions in relation to this request, please don't hesitate to contact Mr Max Verlatto (Maximilian.Verlatto@aph.gov.au), of my staff, who has carriage of this request on my behalf.

Yours sincerely,



Rex Patrick
21/06/2021

Electorate Office
Level 2, 31 Ebenezer Place
Adelaide, SA, 5000
Phone: (08) 8232 1144
Email: Senator.Patrick@aph.gov.au

Parliament House
SG.35
Canberra, ACT 2600
Phone: (02) 6277 3785

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM26

The following 1 page is the annexure SMM26 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

Verlato, Maximilian (Sen R. Patrick)

From: FOIDR <foidr@oaic.gov.au>
Sent: Wednesday, 18 August 2021 2:50 PM
To: Verlato, Maximilian (Sen R. Patrick)
Subject: MR21/00551 - Your application for Information Commissioner review of DOH - Department of Health's decision [SEC=OFFICIAL]

Follow Up Flag: Follow up
Flag Status: Flagged

Our reference: MR21/00551
 Agency reference: FOI 2339

Mr Maximilian Verlato
 Sent by email: maximilian.verlato@aph.gov.au

Your application for Information Commissioner review of DOH - Department of Health's decision

Dear Mr Verlato

I refer to your application on behalf of Senator Rex Patrick for Information Commissioner review (IC review) of a decision made by the **Department of Health (the Department)** on 12 May 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

Commencement of IC review

The Information Commissioner has decided to commence review of the Department's decision of 12 May 2021. The Office of the Australian Information Commissioner (OAIC) is currently considering your IC review application and is conducting inquiries with the Department.

It is our understanding that you wish to seek review of:

- the exemptions applied under ss 47E(d) and 47F of the FOI Act to document 1 including enclosures
- the exemptions applied under ss 45, 47, 47E(d) and 47F of the FOI Act to documents 26 to 31
- the exemptions applied under s 47F of the FOI Act to document 35 including enclosures
- the exemptions applied under ss 45, 47G, 47C, 47, 47E(d) and 47F of the FOI Act to documents 37 to 42.

Please advise by **1 September 2021** if our understanding is correct, and whether you also wish to seek review of the deletions made under s 22(1)(a)(ii) to irrelevant information contained within document 41.

The next steps

At this stage, your matter is awaiting further consideration by a review adviser. Due to the number of IC review applications on hand, this may take up to 12 months. The review adviser will review any documentation or submissions provided by the Department in support of its decision of 12 May 2021. The review adviser will then contact you to advise you of their view on the next appropriate steps in the matter.

Your review matter will continue to progress through the initial stages of an IC review. The initial stages of an IC review may include assessment by a senior member of the team, conducting preliminary inquiries with the

agency, requesting submissions from the agency in support of their FOI decision or requesting the documents at issue.

Further information about [the steps in the Information Commissioner review process](#) is available in [Part 10](#) of the FOI Guidelines at [\[10.100\]](#).

Please note, during an IC review the OAIC will generally share the submissions you provide with the respondent.

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote OAIC reference MR21/00551.

Yours sincerely

Hannah Kreiselmaier



Intake and Early Resolution Team
Freedom of information Regulatory Group
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM27

The following 8 pages are the annexure SMM27 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:

From: [FOIDR](#)
To: [Verlato, Maximilian \(Sen R. Patrick\)](#)
Subject: MR21/00340 - Your application for Information Commissioner review of Department of the Prime Minister and Cabinet's decision [SEC=OFFICIAL]
Date: Wednesday, 18 August 2021 4:28:20 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Our reference: MR21/00340
Agency reference: FOI/2021/034

Mr Maximilian Verlato

Sent by email: maximilian.verlato@aph.gov.au

Your application for Information Commissioner review of Department of the Prime Minister and Cabinet's decision

Dear Mr Verlato

I refer to your application on behalf of Senator Rex Patrick for Information Commissioner review (IC review) of a decision made by the **Department of the Prime Minister and Cabinet (Department)** on 12 April 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

Commencement of IC review

The Information Commissioner has decided to commence review of the Department's decision of 12 April 2021. The Office of the Australian Information Commissioner (OAIC) is currently considering your IC review application and is conducting inquiries with the Department.

It is our understanding that you wish to seek review of the exemptions applied under s 47C of the FOI Act to the document at issue. Please advise by **8 September 2021** whether you also seek review of the deletions made by the Department under s 22 of the FOI Act to material it regarded as irrelevant to the request.

Procedural fairness step

Based on the terms of the request, the reasons for decision, the FOI Guidelines and recent cases, the OAIC requests that the parties please provide submissions/evidence relevant to the IC's consideration of the application of the deliberative processes exemption (s 47C) and the public interest test (s 11A(5)) of the FOI Act.

Deliberative processes exemption (s 47C)

The Department determined that the requested document contains deliberative matter which is not purely factual material.

It would be of assistance if the submissions of the parties would address:

1. whether all material in the document is deliberative or includes any purely factual

material (FOI Guidelines [6.70]-[6.74]) or material that is not deliberative such as content that is merely descriptive (FOI Guidelines [6.66]). In *Decmil Group Ltd and Department of Industry, Innovation and Science (Freedom of information)* [2019] AICmr 50 the Information Commissioner considered that documents including two draft Research and Development Tax Incentive Assessments contained deliberations in the form of advice and recommendations, and

2. whether the deliberative material relates to deliberative processes in the functions of the Department. In *Decmil Group Ltd and Department of Industry, Innovation and Science (Freedom of information)* [2019] AICmr 50 the Information Commissioner considered that the deliberations in two draft Research and Development Tax Incentive Assessments were provided to the delegate to inform decision-making under the Industry Research & Development Act 1986 (the IR&D Act).

Public interest test (s 11A(5))

Noting the passage of time, it would be of assistance if the submissions of the parties would address whether disclosure of the document at this time would, on balance, be contrary to the public interest.

I also invite the parties to provide any submissions or evidence relevant to:

- The basis for the Department's finding on 'the extent to which disclosure could reasonably be expected to prejudice the department's deliberative processes concerning the department's functions and activities'
- Whether the document has been provided to the Commonwealth or published, and
- Whether any material in the document at issue is otherwise available in the public domain.

Please provide a response by **8 September 2021**.

The next steps

At this stage, your matter is awaiting further consideration by a review adviser. Due to the number of IC review applications on hand, this may take up to 12 months. The review adviser will review any documentation or submissions provided by Department in support of its decision of 12 April 2021. The review adviser will then contact you to advise you of their view on the next appropriate steps in the matter.

Your review matter will continue to progress through the initial stages of an IC review. The initial stages of an IC review may include assessment by a senior member of the team, conducting preliminary inquiries with the agency, requesting submissions from the agency in support of their FOI decision or requesting the documents at issue.

Further information about [the steps in the Information Commissioner review process](#) is available in [Part 10](#) of the FOI Guidelines at [\[10.100\]](#).

Please note, during an IC review the OAIC will generally share the submissions you provide with the respondent.

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote OAIC reference MR21/00340.

Yours sincerely

Hannah Kreiselmaier

Intake and Early Resolution Team

Freedom of information Regulatory Group
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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From: [FOIDR](#)
To: [Verlato, Maximilian \(Sen R. Patrick\)](#)
Subject: MR21/00422 - Your application for Information Commissioner review of Department of Health's decision [SEC=OFFICIAL]
Date: Wednesday, 18 August 2021 3:44:11 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Our reference: MR21/00422
Agency reference: FOI 2181

Mr Maximilian Verlato

Sent by email: maximilian.verlato@aph.gov.au

Your application for Information Commissioner review of Department of Health's decision

Dear Mr Verlato

I refer to your application on behalf of Senator Rex Patrick for Information Commissioner review (IC review) of a decision made by the **Department of Health (the Department)** on 12 March 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

Commencement of IC review

The Information Commissioner has decided to commence review of the Department's decision of 12 March 2021. The Office of the Australian Information Commissioner (OAIC) is currently considering your IC review application and is conducting inquiries with the Department.

It is our understanding that you wish to seek review of the exemptions applied under ss 47C, 47E(d), 47G and 47F of the FOI Act.

Please let us know by **8 September 2021** whether you are also seeking review of the redactions made by the Department to material it considers irrelevant to the scope of the request under s 22(1)(a)(ii) of the FOI Act.

Procedural fairness step

Based on the terms of the request, the reasons for decision, the FOI Guidelines and recent cases, the OAIC requests that the parties please provide submissions/evidence relevant to the IC's consideration of the application of the deliberative processes exemption (s 47C) and the public interest test (s 11A(5)) of the FOI Act.

Deliberative processes exemption (s 47C)

The Department determined that some information was deliberative in nature and gathered as a basis for intended deliberations.

It would be of assistance if the submissions of the parties would address:

1. whether all material in the documents is deliberative or whether the documents include any purely factual material (*FOI Guidelines* [6.70]-[6.74]) or material that is not deliberative such as content that is merely descriptive (*FOI Guidelines* [6.66]). In *Decmil Group Ltd and Department of Industry, Innovation and Science (Freedom of information)* [2019] AICmr 50 the Information Commissioner considered that documents including two draft Research and Development Tax Incentive Assessments contained deliberations in the form of advice and recommendations, and
2. whether the deliberative material relates to deliberative processes in the functions of the Department. In *Decmil Group Ltd and Department of Industry, Innovation and Science (Freedom of information)* [2019] AICmr 50 the Information Commissioner considered that the deliberations in two draft Research and Development Tax Incentive Assessments were provided to the delegate to inform decision-making under the *Industry Research & Development Act 1986* (the IR&D Act).

Public interest test (s 11A(5))

Noting the passage of time, it would be of assistance if the submissions of the parties would address whether disclosure of the documents at this time would, on balance, be contrary to the public interest.

I also invite the parties to provide any submissions or evidence relevant to:

- The basis for the Department's finding on 'the extent to which disclosure could reasonably be expected to prejudice the department's deliberative processes concerning the department's functions and activities'
- Whether the documents have been provided to the Commonwealth or published, and
- Whether any material in the documents at issue is otherwise available in the public domain.

Please provide a response by **8 September 2021**.

The next steps

At this stage, your matter is awaiting further consideration by a review adviser. Due to the number of IC review applications on hand, this may take up to 12 months. The review adviser will review any documentation or submissions provided by the Department in support of its decision of 12 March 2021. The review adviser will then contact you to advise you of their view on the next appropriate steps in the matter.

Your review matter will continue to progress through the initial stages of an IC review. The initial stages of an IC review may include assessment by a senior member of the team, conducting preliminary inquiries with the agency, requesting submissions from the agency in support of their FOI decision or requesting the documents at issue.

Further information about [the steps in the Information Commissioner review process](#) is available in [Part 10](#) of the FOI Guidelines at [\[10.100\]](#).

Please note, during an IC review the OAIC will generally share the submissions you provide with the respondent.

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote OAIC reference MR21/00422.

Yours sincerely

Hannah Kreiselmaier

Intake and Early Resolution Team

Freedom of information Regulatory Group
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au



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From: [FOIDR](#)
To: [Verlato, Maximilian \(Sen R. Patrick\)](#)
Subject: MR21/00551 - Your application for Information Commissioner review of DOH - Department of Health's decision [SEC=OFFICIAL]
Date: Wednesday, 18 August 2021 3:59:17 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Our reference: MR21/00551
Agency reference: FOI 2339

Mr Maximilian Verlato

Sent by email: maximilian.verlato@aph.gov.au

Your application for Information Commissioner review of DOH - Department of Health's decision

Dear Mr Verlato

I refer to your application on behalf of Senator Rex Patrick for Information Commissioner review (IC review) of a decision made by the **Department of Health (the Department)** on 12 May 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

Commencement of IC review

The Information Commissioner has decided to commence review of the Department's decision of 12 May 2021. The Office of the Australian Information Commissioner (OAIC) is currently considering your IC review application and is conducting inquiries with the Department.

It is our understanding that you wish to seek review of:

- the exemptions applied under ss 47E(d) and 47F of the FOI Act to document 1 including enclosures
- the exemptions applied under ss 45, 47, 47E(d) and 47F of the FOI Act to documents 26 to 31
- the exemptions applied under s 47F of the FOI Act to document 35 including enclosures
- the exemptions applied under ss 45, 47G, 47C, 47, 47E(d) and 47F of the FOI Act to documents 37 to 42.

Please advise by **1 September 2021** if our understanding is correct, and whether you also wish to seek review of the deletions made under s 22(1)(a)(ii) to irrelevant information contained within document 41.

The next steps

At this stage, your matter is awaiting further consideration by a review adviser. Due to the number of IC review applications on hand, this may take up to 12 months. The review adviser will review any documentation or submissions provided by the Department in support of its decision of 12 May 2021. The review adviser will then contact you to advise you of their view on the next appropriate steps in the matter.

Your review matter will continue to progress through the initial stages of an IC review. The initial stages of an IC review may include assessment by a senior member of the team, conducting preliminary inquiries with the agency, requesting submissions from the agency in support of their FOI decision or requesting the documents at issue.



Further information about [the steps in the Information Commissioner review process](#) is available in [Part 10](#) of the FOI Guidelines at [\[10.100\]](#).

Please note, during an IC review the OAIC will generally share the submissions you provide with the respondent.

Should you wish to follow up on this matter, please contact the OAIC enquiries line on 1300 363 992 or email foidr@oaic.gov.au and quote OAIC reference MR21/00551.

Yours sincerely

Hannah Kreiselmaier

 **Intake and Early Resolution Team**
 Freedom of information Regulatory Group
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
 1300 363 992 | foidr@oaic.gov.au
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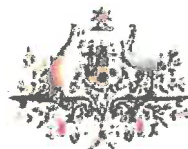
VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM28

The following 1 page is the annexure SMM28 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/RP

Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610

By email: FOI@Defence.gov.au

Dear Sir/Madam,

This is an application for access to documents under the *Freedom of Information Act 1982* (the FOI Act). I seek access to:

- The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018.

Should you have any questions in relation to this application, please contact Mr Michael Tudor Tsourtos (Michael.TudorTsourtos@aph.gov.au) from my office, who has carriage of this matter on my behalf.

Yours sincerely,



Rex Patrick
27 May 2018

Electorate Office
Level 2, Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM29

The following 4 pages are the annexure SMM29 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Australian Government
Department of Defence

R35187026

FOI 477/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Senator Rex Patrick under the *Freedom of Information Act 1982* (FOI Act), for access to:

"The "initial draft discussion document" delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018."

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 one document as matching the description of the request.

Decision

4. I have decided to partially release the 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 47E [public interest conditional exemptions-certain operations of agencies], 47G [public interest conditional exemptions-business affairs] and section 33(a)(i) [Documents affecting national security] of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in 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. advice received from departmental officers and consultation with affected third party.

Reasons for decision

Section 33 – Documents affecting national security, defence or international relations

6. Subparagraph 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

7. In regards to the terms ‘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.

5.28 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

8. Upon examination of the documents, I identified material which upon release 'could reasonably be expected to, cause damage to the defence of the Commonwealth' by making public the capabilities of Defence assets and workforce.

9. In light of the above, I have decided that the specified material identified is exempt pursuant to section 33 of the FOI Act.

Section 47E – Certain operations of agencies

10. Section 47E of the FOI Act provides that a document is conditionally exempt from disclosure requirements 'if its disclosure under the Act would, or could reasonably be expected to, do any of the following: prejudice the effectiveness of procedures or methods for the conduct of test, examinations or audits by an agency and, in particular have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.'

11. I found that the document identified contains statements of the planning assumptions and constraints made in the hypothesis analysis, and that these statements are relevant to ongoing examinations of basing options. The disclosure of these statements could reasonably be expected to prejudice the agency's ability to properly consider the options without adversely affecting current operations.

12. Taking the above into consideration, I have decided that the document is conditionally exempt under subsection 47E of the FOI Act.

Section 47G – Business affairs

13. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

14. 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.

15. Upon examination of the documents I identified information on operating assumptions and constraints provided by ASC as part of the hypothesis analysis. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the conduct of studies into basing options.

16. Businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate information on its operating constraints for future studies could reasonably be expected to be reduced.

17. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.

Sections 47E and 47G - Public interest considerations

18. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

19. 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; or
- c) promote effective oversight of public expenditure.

20. I found that 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).

21. 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 is that the release of this information could reasonably be expected to prejudice:

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

22. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In particular, I consider the release of the business information of third parties could reasonably be expected to prejudice the operations of an agency. I also consider that release of material which contributes to a study which was provided exclusively to test a hypothesis that may become the basis for a further study could reasonably be expected to prejudice the outcome of such processes. I consider

that the public interest is better served in this case by maintaining the confidentiality of the operational and business information provided.

23. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47E and 47G of the FOI Act.

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

Third party consultation

25. I decided to consult with ASC regarding their information which was contained in the document. In response to this consultation, ASC has objected to the release of their business information. I do not agree with all of ASC's objections.



Digitally signed by ChrisHorscroft
Date: 2018.08.06 16:29:28 +10'00'

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM30

The following 2 pages are the annexure SMM30 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Senator for South Australia

Our ref: NC-FOI/MV

Information Commissioner
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

MR18/00712 – IGIS Submission Response

Dear Director,

Thank you for allowing me to respond to the submissions from the Inspector General of Intelligence and Security (IGIS).

S33(a)(I) and (II) Exemption

Relevant to the IGIS submission is one of the questions currently before the Information Commissioner, namely - could or would disclosure of certain parts of the document reasonably be expected to cause damage to the security and/or Defence of the Commonwealth?

The IGIS does not assist the Commissioner in this regard stating that she is "not appropriately qualified to give evidence on the central issue of what harm, if any, may be caused by the disclosure of the document in question".

Threats Posed by Foreign Intelligence Services

Information released under Federal FOI legislation is made publicly available. Threats posed by Foreign Intelligence Services have no bearing on this review in that, provided it is established that the harm threshold in relation to the content is not met, it does not matter about the nature of the threat environment.

Federal FOI legislation is intended to promote Australia's representative democracy by contributing towards increasing public participation in Government processes, with a view to promoting better-informed decision-making and increasing scrutiny, discussion, comment and review of the Government's activities.

The National Security apparatus' ultimate purpose is to protect Australia's representative democracy. National security is a means to an end, not the end itself. Shutting down a very important tool that underpins our representative democracy in the face of a national security threat may facilitate the very thing that the perpetrators seek to achieve.

Electorate Office
Level 2, 31 Ebenezer Place
Adelaide, SA, 5000
Phone: (08) 8232 1144
Email: Senator.Patrick@aph.gov.au

Parliament House
SG.35
Canberra, ACT 2600
Phone: (02) 6277 3785

Australia has appropriate remedies for espionage and foreign interference. A significant amount of money is spent on our security services who act with significant power. Perpetrators of espionage can be dealt with by way of Division 91 of the Criminal Code and perpetrators of foreign interference can be dealt with by way of Division 92 of the Criminal Code.

It is therefore appropriate that the Information Commissioner leaves dealing with foreign threats to the appropriate authorities and conduct the review in accordance with law focusing on the tests associated with the exemptions claimed.

Yours sincerely,



Rex Patrick

23/19/2020

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM31

The following 23 pages are the annexure SMM31 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Rex Patrick and Department of Defence (Freedom of information) [2021] AICmr 39 (17 August 2021)

Decision and reasons for decision of Acting Freedom of Information Commissioner, Elizabeth Hampton

| | |
|--------------------|---|
| Applicant | Rex Patrick |
| Respondent | Department of Defence |
| Decision date | 17 August 2021 |
| Application number | MR18/00712 |
| Catchwords | Freedom of Information — Whether disclosure would cause damage to the security of the Commonwealth — Whether documents contain deliberative matter prepared for a deliberative purpose — Whether disclosure would unreasonably affect an organisation in respect of its lawful business affairs — Whether contrary to the public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A(5), 33(a)(i), 47C and 47G |

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I vary the decision of the Department of Defence (the Department) of 6 August 2018. I substitute my decision that:
 - The material on page 18 of the document that the Department no longer contends is exempt under s 33(a)(i) of the FOI Act, is not exempt.
 - The material on pages 7, 9, 10, 11, 12, 16, and 17 of the document that the Department no longer contends is conditionally exempt under s 47G of the FOI Act, is not conditionally exempt.
 - The material on pages 10 and 18 of the document that the Department no longer contends is conditionally exempt under s 47E of the FOI Act, is not conditionally exempt.

- The material on pages 9 and 10 of the document that the Department found exempt under s 33(a)(i) is exempt under that provision.
 - The material on pages 9, 10, 11, 12, 16 and 17 of the document that the Department contends is conditionally exempt under s 47C is conditionally exempt under that provision however, giving the applicant access to the relevant material at this time would not, on balance, be contrary to the public interest.
 - The material on pages on 3, 4, 6, 7, 8, 9, 13, 14, 15, 16, 17 and 18 of the document that the Department contends is conditionally exempt under 47G is not conditionally exempt under s 47G.
2. No later than 28 days after the expiration of the affected third parties review rights, the Department must provide the applicant with a copy of the document, edited under s 22 of the FOI Act only to the extent necessary to delete exempt material.

Background

3. On 28 May 2018, the applicant applied to the Department for access to:

The “initial draft discussion document” delivered to Defence relating to the shifting of Collins Class Submarine full cycle docking from SA to WA referred to in the testimony of Mr Stuart Whiley at Senate Estimates on 23rd May 2018.
4. The Department located a single document that fell within the scope of the FOI request.
5. On 21 June 2018, the Department undertook third party consultation with an affected third party (ASC) under s 27 of the FOI Act.¹ ASC responded to the Department and objected to the disclosure of the document.
6. On 6 August 2018, the Department made a decision on the applicant’s FOI request. The Department decided to give the applicant access to the document in part, relying on the damage to national security exemption (s 33), prejudice the effectiveness of testing, examining or auditing methods exemption (s 47E(a)), certain operations of agencies exemption (s 47E(d)) and the business affairs exemption (s 47G(1)(b)) of the FOI Act.
7. On 24 September 2018, the applicant sought IC review of the Department’s decision under s 54L of the FOI Act.

Scope of the review

8. During the course of this IC review, the Department advised that it no longer relies on ss 33(a)(ii)² and s 47E³. The Department maintained its exemption contention under

¹ Under s 27 of the FOI Act, where it appears to the agency that the organisation concerned might wish to make an exemption contention that the document is exempt under s 47, or the document is conditionally exempt under s 47G and access to the document would, on balance, be contrary to the public interest, the agency must not decide to give access to the document without giving the organisation a reasonable opportunity to make submissions in support of the exemption contention, and without having regard to any submissions so made.

² In relation to information on pages 9, 10 and 18 of the Document.

³ In relation to information on pages 10 and 18 of the Document.

s 47G(1)(b).⁴ The Department also contends that part of the document is exempt under the exemption in ss 33(a)(i),⁵ 47C⁶ and 47G(1)(a).

9. Under s 55ZB of the FOI Act, before determining that a document is not an exempt document under s 33, I must request that the Inspector-General of Intelligence and Security (IGIS) give evidence on the damage that would, or could reasonably be expected to, occur following disclosure of the document.
10. On 10 July 2020, I wrote to the IGIS in respect of the document in this case.
11. On 28 July 2020, the then IGIS, the Hon. Margaret Stone AO FAAL provided the following evidence:

Taking into account the nature of the document, the basis of the submission by the Department of Defence and my qualification, as Inspector-General of Intelligence and Security, I have come to the view that I am not appropriately qualified to give evidence on the central issue of what harm, if any, may be caused by the disclosure of the document in question. Matters pertaining to the location of submarine docking facilities are outside my area of expertise. However, I am of the view that I am qualified to give evidence in relation to the part of the Department of Defence's 16 April 2020 submission concerning the threat posed by Foreign Intelligence Services.

...

The statement made by the Department of Defence about the activity of Foreign Intelligence Services in relation to Australia is consistent with the general comments on the threat of foreign interference made by the Director-General of Security in his Annual Threat Assessment delivered on 24 February 2020. In particular, the Director-General of Security stated that:

Almost every sector of our community is a potential target for foreign interference, particularly:

- our parliamentarians and their staff at all levels of government;
- government officials;
- the media and opinion-makers;
- business leaders; and
- the university community

Regardless of the methods employed by hostile services and nation states, Australia is currently the target of sophisticated and persistent espionage and foreign interference activities from a range of nations.

He also said that:

Hostile foreign intelligence services are being directed to target us:

- because of our strategic position and alliances;
- because of our leadership in science and technology;
- because of the unique expertise that exists across our economy; and
- because we are comprehensively retooling our defence force and the defence industrial base.

⁴ In relation to information on pages 3, 4, 6, 7, 8, 9, 13, 14, 15, 16, 17 and 18 of the Document.

⁵ In relation to information on pages 9 and 10 of the Document.

⁶ In relation to information on pages 9, 10, 11, 12, 16 and 17 of the Document.

I provide evidence to you that these statements made by the Director-General of Security are consistent with the intelligence reports and assessments that my office has access to in the course of overseeing the activities of the Australian intelligence agencies.

12. In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified, or that I should give a decision adverse to the IC review applicant (s 55D(1)).
13. Therefore, the issues to be decided in this IC review are whether:
 - a. the material that the Department contends to be exempt under s 33(a)(i) of the FOI Act is exempt under that provision
 - b. the material the Department contends to be conditionally exempt under s 47C is conditionally exempt under that provision, and if so, whether giving the applicant access to conditionally exempt documents at this time would, on balance, be contrary to the public interest (s 11A(5)) and
 - c. the material that the Department contends to be conditionally exempt under s 47G of the FOI Act is conditionally exempt under that provision, and if so, whether giving the applicant access to conditionally exempt document at this time would, on balance, be contrary to the public interest (s 11A(5)).
14. In making my decision, I have had regard to the following:
 - the Department's decision and reasons for decision of 6 August 2018
 - the document at issue
 - the evidence of the Inspector-General of Intelligence and Security dated 27 July 2020
 - the FOI Act, in particular ss 11A(5), 33(a)(i), 47C and 47G
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular paragraphs [5.25] – [5.54], [6.52] – [6.88] and [6.180] – [6.213]
 - relevant case law, in particular *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945*, *Bell and Secretary, Department of Health (Freedom of information) [2015] AATA 494*, *Rovere and Secretary, Department of Education and Training [2015] AATA 462*, *Nick Xenophon and Department of Defence (Freedom of information) [2019] AICmr 53*, *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information) [2019] AICmr 38*, *'PM' and Department of Industry, Innovation and Science (Freedom of information) [2018] AICmr 70*, *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information) [2018] AICmr 39*, *'GI' and Department of the Prime Minister and Cabinet [2015] AICmr 51*, *Wulf von der Decken and Services Australia [2020] AICmr 55*, *Australian Broadcasting Corporation and Civil Aviation Safety Authority [2015] AICmr 21*, and
 - the parties' submissions.

Damage to the security of the Commonwealth (s 33(a)(i))

15. The Department contends material on pages 9 and 10 of the document is exempt under s 33(a)(i).
16. As discussed in the FOI Guidelines and IC review cases,⁷ for a document to be exempt under s 33(a)(i), it would need to be shown that disclosure would or could reasonably be expected to cause damage to the security of the Commonwealth. The term 'security of the Commonwealth' includes the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests.⁸
17. The FOI Guidelines relevantly explain:

It is well accepted that securing classified government information forms part of the security of the Commonwealth. The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time. Where a request is received for classified government information, the documents must be considered both individually and collectively. The Information Commissioner believes that it might be safer for the FOI decision maker to err on the side of non-disclosure provided the interests of other citizens are able to be protected. Where there is doubt, this should be in favour of non-disclosure.⁹

18. The FOI Guidelines further state:

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.

[citation omitted]

Submissions

19. In his submissions, the applicant raises 3 key issues in relation to the material the Department contends is exempt under s 33(a)(i). The first is in relation to the security classification markings applied to the document; the second is whether the material has otherwise been publicly released by the Department; and the third is whether the threat of foreign interference should be considered in relation to the material the Department contends is exempt under s 33(a)(i).

Security classifications

20. The applicant submits:

There are three levels of classification that relate to national security; Confidential, Secret and Top Secret, these are supplemented by the classification of Protected.

⁷ Generally, see Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) at [5.24]-[5.33]; 'OZ' and *Department of Defence (Freedom of information)* [2018] AICmr 49; 'OL' and *Department of Home Affairs (Freedom of information)* [2018] AICmr 36; 'LD' and *Department of Defence* [2017] AICmr 32; *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445; 'HK' and *Department of Defence* [2015] AICmr 72.

⁸ FOI Guidelines [5.29].

⁹ FOI Guidelines [5.33] (footnotes omitted).

The document under review was undoubtedly generated by professional Defence Industry personnel in accordance with obligations to apply protective security markings of 'confidential', 'secret' or 'top secret' to any documents (or for an aggregation of the documents) which would or could reasonably be expected to cause damage to the defence of the Commonwealth. However, for the document under review, no such protective security markings were applied.

It is not explained how documents without protective markings (other than "ASC Commercial in Confidence") are suddenly regarded as damaging to the defence of the Commonwealth in the face of an FOI request.

[citations omitted]

Publicly available information

21. The Department submits:

The information marked on [pages 9 and 10] outline the capabilities of Defence's assets and workforce. The information comprises a timeline for completion of these capabilities. Whilst broad knowledge of the Collins fleet exists in the public domain, detailed information about fleet availability and maintenance periods are considered sensitive and are not discussed in detail. If this information was released, it would convey detailed information regarding submarine availability (and therefore Australia's maritime capability) which could impact Australia's national security. Further, a decision on the life of type extension activities for the Collins class fleet have not yet been taken by Government and speculation about the scope and timing of such decisions could undermine our national security interests.

Australia's future submarines capability is a core element of the Commonwealth's maritime defence strategy. Disclosure of this information would provide potential adversaries of Australia with significant information on the Commonwealth's current and future defence maritime capabilities and potential weaknesses.

22. In response to the Department's submissions, the applicant referred me to the following publicly available statement issued by the Navy:

Defence claim that the document may reveal "detailed information about fleet availability and maintenance periods" which "are considered sensitive and not discussed in detail".

The Information Commissioner's attention is drawn to the Coles Review which looked at Collins Submarine sustainment. The study recommended to the Navy that it publish an unclassified statement of "what the RAN requires from the Collins Class" to "enable a greater understanding of the requirement for all of those involved in the sustainment program". The Navy did so stating it needed:

...two deployable submarines consistently available, with four submarines available to the Fleet Commander and of these four, three submarines consistently available for tasking with one in shorter term maintenance and two submarines in long term maintenance and upgrade.

[citations omitted]

23. The applicant also referred me to other publicly available material which discusses the Collins submarines including the ASC annual report and a number of articles.¹⁰

¹⁰ ASC Annual Report 2019: https://www.asc.com.au/assets/downloads/Annual_Report_2019.pdf; <https://www.anao.gov.au/work/performance-audit/future-submarine-program-transition-to-design>; <https://www.aspistrategist.org.au/what-exactly-is-the-collins-life-of-type-extension-part-1-a-policy-gap/>; <https://www.aspistrategist.org.au/what-exactly-is-the-collins-life-of-type-extension-part-2-a-mindset/>; <https://www.aspi.org.au/report/thinking-through-submarine-transition>

24. The applicant submits:

...It is not reasonable for Defence to advance an exemption claim in relation to information and topics over which its officials know have been discussed in a public forum.

Threat of foreign interference

25. The Department also submits:

Foreign Intelligence Services are currently assessed as posing an extreme threat to Sovereign Capability and Commonwealth Strategic Interests. These adversaries are highly active in pursuing access to information relating to Australia's current and future maritime capabilities in order to advance their own interest and undermine Australian capabilities. Release of this information may be used to directly, or indirectly, damage Australian Interests.

26. The applicant essentially submits that the Defence official 'fails to appreciate the balance that exists in a democracy between the need for openness and transparency and public participation in decisions of Government with the need to protect truly sensitive information' and that 'If the information were truly sensitive the ASC writer would have clearly labelled the material with the relevant classification marking 'confidential', 'secret' or 'top secret'".

27. As noted above at [9], under s 55ZB of the FOI Act, before determining that a document is not an exempt document under s 33, I must request that the IGIS give evidence on the damage that would, or could reasonably be expected to, occur following disclosure of the document.

28. In relation to the Department's submission regarding the threat of foreign interference, the IGIS states:

The statement made by the Department of Defence about the activity of Foreign Intelligence Services in relation to Australia is consistent with the general comments on the threat of foreign interference made by the Director-General of Security in his Annual Threat Assessment delivered on 24 February 2020.

29. In response to the evidence from the IGIS in relation to threats posed by foreign intelligence services, the applicant submits:

Information released under Federal FOI legislation is made publicly available. Threats posed by Foreign Intelligence Services have no bearing on this review in that, provided it is established that the harm threshold in relation to the content is not met, it does not matter about the nature of the threat environment.

Federal FOI legislation is intended to promote Australia's representative democracy by contributing towards increasing public participation in Government processes, with a view to promoting better-informed decision-making and increasing scrutiny, discussion, comment and review of the Government's activities.

The National Security apparatus' ultimate purpose is to protect Australia's representative democracy. National security is a means to an end, not the end itself. Shutting down a very important tool that underpins our representative democracy in the face of a national security threat may facilitate the very thing that the perpetrators seek to achieve.

Australia has appropriate remedies for espionage and foreign interference. A significant amount of money is spent on our security services who act with significant power. Perpetrators of espionage can be dealt with by way of Division 91 of the Criminal Code and perpetrators of foreign interference can be dealt with by way of Division 92 of the Criminal Code.

It is therefore appropriate that the Information Commissioner leaves dealing with foreign threats to the appropriate authorities and conduct the review in accordance with law focusing on the tests associated with the exemptions claimed.

Consideration

30. While I acknowledge the applicant's submissions that security classifications provide some guidance on the sensitivity of the material contained within it, I am not satisfied that they are determinative of whether a document is exempt from release under s 33(a)(i) of the FOI Act.¹¹ As discussed above at [16], the relevant test is whether disclosure would or could reasonably be expected to cause damage to the security of the Commonwealth.
31. I have examined an unedited copy of the document, the publicly available material provided by the applicant and other publicly available material which discusses the Collins class submarines.¹² While the material does generally discuss the Collins submarines, it does not specifically disclose the material exempted by the Department. I am satisfied that the exempt material is not publicly available.
32. In forming my view as to whether the material on pages 9 and 10 of the document is exempt under s 33(a)(i) of the FOI Act, I have considered the evidence of IGIS and the submissions provided by both parties.
33. I am not persuaded by the applicant's submission that threats posed by foreign intelligence services have no bearing on this review. An agency is not required under the FOI Act to give a person access to a document if, at the time the request is made, the document is an exempt document.¹³ In this IC review I am required to determine whether s 33(a)(i) of the FOI Act applies to the material at pages 9 and 10 of the document. As noted in the FOI Guidelines, the assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time.¹⁴
34. Further, s 33(a)(i) of the FOI Act is not concerned with a reactive response to a threat of foreign interference such as through penalties under the Criminal Code. Instead, in determining whether a document is an exempt document under s 33, the wording of this section requires the decision maker to take a pre-emptive approach in assessing whether damage to the security of the Commonwealth would, or could reasonably be expected to occur as a result of the disclosure. I must be satisfied that disclosure of the exempt material 'would or could reasonably be expected to cause damage to the security of the Commonwealth'.
35. As discussed at [18] above, the use of the word 'could' in this provision is less stringent than 'would'. I have considered whether there is a reasonable expectation that the release of the material could reasonably be expected to cause damage to the security of the Commonwealth.

¹¹ See FOI Guidelines at [5.26]; see also *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833 where Justice Spender found that '[a]ny national security classification of a document is not by itself determinative of the matter'.

¹² For example, <https://www.afr.com/politics/federal/all-six-collins-submarines-set-to-have-their-lives-extended-20200504-p54po7>.

¹³ *Freedom of Information Act*, s 11A(4).

¹⁴ *FOI Guidelines* [5.33]; *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [66].

36. To this end, I am satisfied that the threats imposed by foreign intelligence services is a matter I must have regard to in making my decision. Based on my examination of the relevant material in the document and taking into account its content and the context provided, and without revealing the content of the material, I am satisfied that disclosure could reasonably be expected to cause damage to the security of the Commonwealth.

Findings

37. Accordingly, I am satisfied that the material on pages 9 and 10 of the document that the Department found to be exempt under s 33(a)(i) of the FOI Act, is exempt under this provision.

Deliberative processes (s 47C)

38. The Department contends material on pages 9, 10, 11, 12, 16 and 17 of the document is exempt under s 47C of the FOI Act.

39. As discussed in the FOI Guidelines and previous IC review decisions,¹⁵ the main requirements of this public interest are that a document:

- contains or relates to ‘deliberative matter’ (s 47C(1))
- was prepared for a ‘deliberative purpose’ (s 47C(1))
- the material is not ‘purely factual’ or non-deliberative (s 47C(2)), and
- it would be ‘contrary to the public interest to give access at this time (s 11A(5)).

40. The FOI Guidelines explain that ‘deliberative matter’ is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.¹⁶

41. In the Administrative Appeals Tribunal (AAT) decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945* (‘Wood’), Deputy President Forgie explained that the meanings of the words ‘opinion’, ‘advice’ and ‘recommendation’ all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.¹⁷

42. The FOI Guidelines further explain:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for

¹⁵ Generally, see *FOI Guidelines* [6.52]–[6.88]; *Jackson Gothe-Snape and Services Australia (Freedom of information) [2020] AICmr 19*; ‘PM’ and *Department of Industry, Innovation and Science (Freedom of information) [2018] AICmr 70*; ‘PK’ and *Department of Prime Minister and Cabinet (Freedom of information) [2018] AICmr 65*; *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information) [2017] AICmr 117*.

¹⁶ *FOI Guidelines* [6.63].

¹⁷ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945* at [39].

example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹⁸

43. In relation to 'purely factual material', the FOI Guidelines explain:

'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.

Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt.¹⁹

44. The Department submits:

The information is not purely factual. It contains options and recommendations that are currently being considered by the Department. The decision in relation to the location of docking of submarines is pending, but has not yet been made. The information contains material that is still being considered and deliberated upon within the Department.

45. I have examined an unedited copy of the relevant material. I agree with the Department's submission that the relevant material contains opinions and recommendations in relation to the location of docking of submarines that are currently being considered by the Department. I am also satisfied that the material is not purely factual in nature. Therefore, I am satisfied that the relevant material is deliberative matter for the purpose of s 47C of the FOI Act.

46. Accordingly, the material the Department contends is exempt under s 47C of the FOI Act is conditionally exempt under this provision.

Public interest (s 11A(5))

47. In finding that the document is conditionally exempt, I am therefore required to consider whether it would be contrary to the public interest to give the applicant access to conditionally exempt material at this time. Subsection 11A(5) of the FOI Act provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.

48. Subsection 11B(3) of the FOI Act provides a list of public interest factors favouring disclosure. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure,²⁰ as well as public interest factors against disclosure.²¹

49. The FOI Guidelines explain:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public in withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.²²

¹⁸ FOI Guidelines [6.58] (footnotes omitted).

¹⁹ FOI Guidelines [6.73] - [6.74] (footnotes omitted).

²⁰ FOI Guidelines [6.19].

²¹ FOI Guidelines [6.22].

²² FOI Guidelines [6.27].

Factors against disclosure

50. The Department submits:

If this information was released, it would impact the Department's ability to make decisions in relation to sensitive issues without additional undue pressure and bias from external parties. As noted in paragraph 6.56 of the FOI Guidelines, while identifiable harm is not a specific factor in determining whether a document can be considered deliberative, it may be relevant when assessing the public interest factors. Disclosure of the deliberative material contained in the document would harm the operation of the Department's business including the ability for the Department to present and communicate frank preliminary consideration and advice at the highest levels to the Government.

51. Based on the public interest factors against disclosure identified in the FOI Guidelines and the Department's submissions, I am satisfied the following public interest factor against disclosure applies to this IC review application:

- a. disclosure of the deliberative material contained in the document would harm the operation of the Department's business including the ability for the Department to present and communicate frank preliminary consideration and advice at the highest levels to the Government.

Factors favouring disclosure

52. In response to the Department's submissions, the applicant submits:

In the event the Information Commissioner makes a finding that the redacted material is in some way deliberative, there is considerable public interest in releasing it (see paragraph 4 of this submissions). The material in the document goes to a decision that will affect a significant number of direct and indirect workers, all taxpayers and all citizens in respect of national security.

...

The Defence official also makes a claim that disclosure would "*harm the operation of the Department's business including the ability for the Department to present and communicate frank preliminary consideration and advice at the highest levels to the Government*".

It's an oldie, rolled out often in FOI's that centre about politically sensitive topics, but it's not a goodie.

[applicant's emphasis]

53. Based on the on the public interest factors against disclosure identified in the FOI Guidelines applicant's submissions, I am satisfied the following public interest factors favouring disclosure apply to this IC review application:

- a. disclosure of the deliberative material would promote the objects of the FOI Act
- b. disclosure of the deliberative material would inform debate on a matter of public importance
- c. disclosure of the deliberative material would promote effective oversight of public expenditure.

Irrelevant considerations

54. Paragraphs 11B(4)(a)-(d) of the FOI Act provide that the following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
- a. access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - b. access to the document could result in any person misinterpreting or misunderstanding the document;
 - c. the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - d. access to the document could result in confusion or unnecessary debate.
55. The FOI Guidelines, to which I am required to have regard,²³ confirms that a decision maker must take care not to consider factors that are not relevant in the particular circumstances.²⁴

Balancing the public interest factors

56. The issue of frankness and candour, and how it relates to s 47C and the public interest, has been considered in previous IC review matters.²⁵ In *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51, former Australian Information Commissioner John McMillan, said:

... a more recent decision of the Administrative Appeals Tribunal, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 has held that 'A frankness and candour claim, made in circumstances where there is no (other) factor against access... cannot be a factor against access when applying the public interest test' (at 52). I read that as a comment only that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.²⁶

57. In *Wood, Forgie DP* examined the former Australian Information Commissioner's interpretation of *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 and said:

As I understand this passage, the Information Commissioner is directing attention back to the essential balance that must be struck between making information held by government available to the public so that there can be increased public participation leading to better-informed decision making and increased scrutiny and review of the government's activities and ensuring that government may function effectively and efficiently. If I am correct in my understanding, I would agree with his

²³ Section 11B(5).

²⁴ *FOI Guidelines* [6.23].

²⁵ See *'PK' and Department of Prime Minister and Cabinet (Freedom of information)* [2018] AICmr 65; *Victims of Financial Fraud and Department of the Treasury (Freedom of information)* [2018] AICmr 61; *William Summers and Department of the Prime Minister and Cabinet (Freedom of information)* [2018] AICmr 9; *Dan Conifer and Department of the Treasury (Freedom of information)* [2017] AICmr 133; and *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2017] AICmr 117.

²⁶ *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51 at [20].

doing so. The way in which s 11B is drafted indicates that such a balance must be struck.²⁷

58. It is accepted that there may be occasions where a public servant needs to be able to frame their advice to a minister freely and on the understanding that their advice will be confidential.²⁸ However, this does not mean there is always a need to keep advice provided to a minister confidential, as to do so would run counter to the FOI Act itself.²⁹

59. I note the FOI Guidelines relevantly explain:

The Information Commissioner considers that frankness and candour in relation to the s 47C conditional exemption may have some application as one public interest factor against disclosure in combination with other factors, and **possibly as the sole factor where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.**

Agencies should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities.

Public servants are expected to operate within a framework that encourages open access to information and recognises Government information as a national resource to be managed for public purposes (ss 3(3) and (4)). In particular, the FOI Act recognises that Australia's democracy is strengthened when the public is empowered to participate in Government processes and scrutinise Government activities (s 3(2)). In this setting, transparency of the work of public servants should be the accepted operating environment and fears about a lessening of frank and candid advice correspondingly diminished.³⁰

[emphasis added]

60. While frankness and candour claims may still be contemplated when considering deliberative material and weighing public interest, they should be approached cautiously and in accordance with ss 3 and 11B. Generally, the circumstances will be special and specific.³¹
61. In *'PM' and Department of Industry, Innovation and Science (Freedom of information) [2018] AICmr 70 ('PM')*, the Australian Information Commissioner considered whether the disclosure of the material contained in a brief from the Department of Industry, Innovation and Science to the Minister for Resources and Northern Australia would be contrary to the public interest. In finding that the disclosure of the relevant material would not be contrary to the public interest in that case, she said:

Having regard to the material at issue and the submissions of the Department, I do not consider that the disclosure of the material in this case would 'restrict the ability of the Department to make effective policy determinations and recommendations, and may instead be forced to supply purely objective information to ministers, rather than subjective elaborations based on policy' as the Department states. As the FOI Guidelines explain, the

²⁷ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945* at [69].

²⁸ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945* at [77]-[78].

²⁹ *Ibid.*

³⁰ *FOI Guidelines* [6.82] – [6.84] (footnotes omitted).

³¹ *FOI Guidelines* [6.82] – [6.85].

decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.^[25] Based on the information before me at this time, I am not persuaded that special and specific circumstances have been made out, such that a frankness and candour claim should weigh heavily against disclosure in this case.

62. I consider the guidance in 'PM' applies in this case. Having regard to the material at issue and the submissions of the Department, I am not satisfied that the disclosure of the material in this case would 'harm the operation of the Department's business including the ability for the Department to present and communicate frank preliminary consideration and advice at the highest levels to the Government' as the Department claims.
63. Further, I am also not persuaded that special and specific circumstances have been made out by the Department, such that a frankness and candour claim should weigh heavily against disclosure in this case.³² To this end, the Department has not explained, with any level of specificity, how disclosure of the material 'would harm the operation of the Department's business'. The FOI Guidelines explains that the decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.
64. With this in mind, it is noted above at [59], that it may be possible for frankness and candour to be the sole factor 'where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government'. However in this case, I am not persuaded that this high threshold has been established by the Department. As stated above at [12], it is the Department that bears the onus of establishing that its decision is justified or that I should give a decision adverse to the applicant (s 55D(1)).
65. I am satisfied that giving the applicant access to the relevant material would at this time would promote the objects of the FOI Act, inform debate on a matter of public importance and promote effective oversight of public expenditure. In this IC review application, having regard to the particular factual circumstances of the matter and the material in question, I have formed the view that the public interest factors favouring disclosure outweigh the factor against disclosure.
66. For the above reasons, I am not satisfied that the Department has discharged its onus under s 55D of the FOI Act of establishing that its contention to refuse access to the relevant material under s 47C is justified or that I should give a decision adverse to the applicant.

Findings

67. Giving the applicant access to the relevant material at this time would not, on balance, be contrary to the public interest.
68. The relevant material is not exempt under s 47C of the FOI Act.

³² See 'WD' and Department of the Prime Minister and Cabinet (Freedom of information) [2020] AICmr 61 (14 December 2020) at [48].

Business information (s 47G)

69. The Department also found the documents were conditionally exempt, in part, under s 47G(1)(b). During the course of the IC review, the Department submitted that the documents are also exempt, in part, under s 47G(1)(a).
70. As discussed in the FOI Guidelines and in IC review cases, a document is conditionally exempt under s 47G where disclosure would disclose information concerning the business, commercial or financial affairs of an organisation or undertaking (business information), where the disclosure of the information:
- would, or could reasonably be expected to, unreasonably affect the organisation or undertaking in respect of its lawful business, commercial or financial affairs (s 47G(1)(a))³³
 - could reasonably be expected to prejudice the future supply of information to the Commonwealth or any 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 (s 47G(1)(b)).³⁴

Business information

71. The FOI Guidelines explain that the business information exemption is intended to protect the interests of third parties dealing with the Government.³⁵ The operation of s 47G depends on the effect of disclosure rather than the precise nature of the information itself.³⁶ Notwithstanding this, the information must have some relevance to a person in respect of their business or professional affairs or to the business, commercial and financial affairs of the organisation.³⁷
72. The 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'.³⁸ Accordingly, in this IC review, for the s 47G conditional exemption to apply, the documents must concern ASC's money-making affairs.
73. In its reasons for decision, the Department said:
- Upon examination of the documents I identified information on operating assumptions and constraints provided by ASC as part of the hypothesis analysis.
74. I have examined an unedited copy of the document and I am satisfied that the relevant material comprises ASC's business information for the purposes of s 47G, as it relates to

³³ Generally, see *FOI Guidelines* [6.180] - [6.213]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2019] AICmr 5; 'PG' and *Department of Infrastructure, Regional Development and Cities (Freedom of information)* [2018] AICmr 60; *Chris Vedelago and Airservices Australia (Freedom of information)* [2018] AICmr 45; and *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39.

³⁴ Generally, see *FOI Guidelines* at [6.180]-[6.213]; *Macquarie Group Limited and Australian Securities and Investments Commission (Freedom of information)* [2019] AICmr 39; 'PX' and *Australian Federal Police (Freedom of Information)* [2019] AICmr 8; *Australian Broadcasting Corporation and Department of Communications and the Arts (Freedom of information)* [2018] AICmr 66 and *Stryker Australia Pty Ltd and Department of Health (Freedom of information)* [2017] AICmr 69.

³⁵ *FOI Guidelines* [6.185].

³⁶ *FOI Guidelines* [6.184].

³⁷ *FOI Guidelines* [6.184].

³⁸ *FOI Guidelines* [6.192].

ASC's business affairs, specifically, information relating to operating assumptions and constraints across ASC's business operations.

Unreasonable adverse effect (s 47G(1)(a))

75. In deciding whether disclosure of a document containing business information would be unreasonable for the purpose of s 47G(1)(a), a decision maker must balance the public interest and the private interests of the business.

76. The FOI Guidelines explain:

The presence of 'unreasonably' in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a); but this does not amount to the public interest test of s 11A(5) which follows later in the decision process.³⁹

77. The FOI Guidelines further explain:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business' activities pose a threat to public safety, damage the natural environment; or that a service provider has made false claims for government money may have a substantial adverse effect on that business but may be reasonable in the circumstances to disclose. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality. These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.⁴⁰

Submissions

78. As discussed at [5] above, the Department undertook third party consultation with ASC during the IC review. The Department also referred to ASC's response:

- the redacted information is commercially sensitive and intended for ASC's customer only;
- release of the redacted information will provide ASC's competitors with their commercially sensitive information including the methodology used by ASC in the document, as well as ASC's level of resources, estimating information and risk mitigation strategies;
- given the impending Government decision in relation to Full Cycle Docking, disclosure of the redacted information may give rise to industrial relations issues (and damage ASC's employee value proposition) which would lead to an adverse impact on ASC's ability to meet its contractual commitments to the Department relating to the maintenance and availability of Collins Class submarines;
- ASC's projected workforce profile is commercially sensitive and disclosure may have an adverse impact on ASC's business by disclosing information to employees and unions that is subject to change;

³⁹ FOI Guidelines [6.187] (footnotes omitted).

⁴⁰ FOI Guidelines [6.188] (footnotes omitted).

- release of the redacted information will prejudice the future supply of information to the Commonwealth as ASC will be unable to provide commercially sensitive information to the Commonwealth.

79. In response, the applicant submits:

Intended for ASC's Customer

...

ASC's customer is the Department of Defence, a Government department bound by the transparency requirements of responsible government. In *Egan v Willis [1998] HCA 71 (19 November 1998)* Gaudron, Gummow and Haynes JJ stated [emphasis added]:

In Lange v Australian Broadcasting Corporation, reference was made to those provisions of the Commonwealth Constitution which prescribe the system of responsible government as necessarily implying "a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament". The Court added:

"Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature."

In Australia, s 75(v) of the Constitution and judicial review of administrative action under federal and State law, together with freedom of information legislation, supplement the operation of responsible government in this respect.

The official's statement offers a proposition that is contrary to Australian Constitutional Principles and erroneous in law.

ASC Competitors

...

In 2003 the Commonwealth entered into a 25 year contract for the ongoing repair, maintenance and design upgrades of the Collins submarines' through life support. In 2012 the contract was replaced by an In Service Support Contract (ISSC). It has a number of 5 year performance periods, the latest commencing in 2017.

Noting the current contractual arrangements, the experience of ASC in Collins submarine sustainment, the investment that would be required to do the work and the fact that ASC is the design authority for the Collins Class submarines, the suggestion that a competitor is standing by to supplant ASC's role in the sustainment and upgrade of the Collins is fallacious at best. To assert that the information contained in the document under review provides a competitor an advantage does not stand up to even the lightest of scrutiny.

Industrial Relations Difficulties

...

That Collins Class submarine FCD work may be shifted is a matter of public record, as is the affect that such a move might have on the workforce. Indeed, I am informed by a senior and relevant union official that the unions representing workers at ASC have held discussions with ASC on this very topic.

Even if the document were to give greater clarity about workforce related matters, the document is a draft which presents options only. It is not a document that communicates a decision.

Workforce Profile

...

Workforce profiles at ASC are an issue traversed at every Senate Estimates, with changes and projected variances frequently reported in the media, which the Department will have to concede if asked. So benign is this sort of information that Naval Group PTY LTD recently provided a Senate Economic Committee hearing with a future workforce profile for the future submarine.

It must also be accepted that any workforce profile information in the document is hypothetical against options which have the potential to change.

ASC's current Enterprise Agreement¹⁶ with the Australian Manufacturing Workers Union, the Australian Workers Union and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia places a legal obligation on the company to inform its employees of any planned changes to the workforce profile.

The Defence official is misguided if he views the information as anything other than hypothetical.

Business Affairs Claim

The Defence officials arguments in relation to the effect the release of the information would have on ASC's business affairs are shallow and do not stand up to scrutiny.

[citations omitted]

80. Relevantly, in the AAT decision of *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 ('Bell'), Forgie DP explained that consideration of the public interest is relevant when determining whether disclosure would have an unreasonable adverse effect under s 47G. Forgie DP explained:

... Returning to s 47G(1)(a), it seems to me that the addition of a public interest test in s 11A(5) makes no difference to the continuing relevance of public interest when interpreting s 47G(1)(a). The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. It will be balanced against factors that may not be regarded as aspects of the public interest but as aspects relevant only to the interests of the person whose interests might be affected by disclosure. The outcome of balancing all of the relevant factors – public interest or otherwise – will resolve the issue of whether disclosure of a document under the FOI Act would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her business affairs or have another adverse effect described in s 47G(1)(a).⁴¹

81. In the decision of *Bell*, Forgie DP found that disclosure of documents containing details showing whether public money was used appropriately would not have an unreasonable adverse effect on the third party, due to 'the public interest in knowing whether public money was accounted for at the appropriate time in the manner required and the public interest in ensuring that public programmes are properly administered'.⁴²
82. Similarly, in the decision of *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39, former Australian Information Commissioner Pilgrim

⁴¹ [48].

⁴² *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 at [68].

found that material that related to services provided in offshore detention centres was not exempt under s 47G(1)(a):

I acknowledge that there are circumstances where the disclosure of business information may have an adverse effect on the lawful business, commercial or financial affairs of an organisation. However, although IHMS has contended that their business may be affected by the release of the information ... I consider that there is a strong public interest in ensuring that public programmes are properly administered, particularly as it relates to services provided in offshore detention centres which includes the provision of services to children.⁴³

83. In the decision of *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2019] AICmr 38, the Australian Information Commissioner found that material that related to the delivery of health services in offshore detention centres was not exempt under s 47G(1)(a):

With respect to the question of whether disclosure would have an unreasonable adverse effect on IHMS' lawful business, commercial or financial affairs, I have considered the Department's submissions in the present case. While I acknowledge that disclosure of the relevant material could reasonably be expected to have an adverse effect on the affairs of IHMS, I am not satisfied that such an effect would be an unreasonable adverse effect due to the nature of the information contained in the relevant material, the fact that public money was used to fund the delivery of health services in offshore detention centres by IHMS, and the significant public interest value in ensuring that service providers are properly performing their contractual obligations.⁴⁴

84. In *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53 I found that the final future submarine Australian Industry Plan submitted to Defence by Naval Group was not exempt under s 47G(1)(a):

I have considered the submissions provided by the Department and Naval Group. Although the Department and Naval Group submit that the information contained in the document is sensitive in nature, and that disclosure would adversely affect Naval Group's commercial relationship with the companies named in the relevant material, the Department and Naval Group have not provided any further evidence to support their contentions, nor have they adequately explained how or why disclosure of the relevant material would, or could reasonably be expected to, result in the outcome that the Department and Naval Group claims.

Further, Naval Group submitted the AIP as part of a competitive process in relation to the Future Submarine Program. The AIP comprises information relating to Naval Group's proposals as to how it intends to deliver various aspects of the Future Submarine Program if Naval Group was selected as the successful bidder. Given that the information in Naval Group's CEP proposal, which includes the AIP, was used to inform the Commonwealth's decision to select Naval Group as the most suitable partner for the delivery of the Future Submarine Program, I consider that disclosure would further transparency and accountability with respect to the information provided by Naval Group to persuade the Commonwealth that it is best placed to deliver the Future Submarines Program.⁴⁵

⁴³ *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39 at [33] (footnotes omitted).

⁴⁴ [79].

⁴⁵ [59]-[60].

Consideration

85. I have considered the submissions provided by the Department and ASC in this IC review. Although the Department and ASC submit that the information contained in the document is 'commercially sensitive', I am satisfied that there is strong public interest in releasing the information. As noted by the IC review applicant, the potential relocation of ASC employees is a matter of public significance and should be released to the public to ensure that appropriate scrutiny of government decision making can occur.
86. Based on the submissions of the parties I am satisfied that in this matter the public interest outweighs the private interest for the purpose of the unreasonableness test under s 47(1)(a) of the FOI Act. I agree with the applicant's submission that industrial relations issues associated with the potential relocation of the Collins Class submarine FCD work is a matter of public interest. Further, the document does not disclose any final decision on the relocation, but rather outlines its benefits and limitations. I also accept the applicant's submission that the workplace profile of ASC is the subject of wider public discussion through Senate Estimates. I am not persuaded by the submissions that the release of such information would have a detrimental effect on ASC's business affairs.
87. Accordingly, I am not persuaded that the Department has adequately discharged its onus in establishing that disclosure of the relevant material in this case could reasonably be expected to have an unreasonable adverse effect on ASC's lawful business, commercial or financial affairs.

Findings

88. The relevant material is not exempt under s 47G(1)(a).
89. As I have found that the relevant material is not exempt under s 47G(1)(a), it is unnecessary for me to consider whether giving access to conditionally exempt material would be contrary to the public interest for the purposes of s 11A(5).

Prejudice the future supply of information (s 47G(1)(b))

90. In relation to s 47G(1)(b), the FOI Guidelines explain:

This limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.

There must be a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government. In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information. Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.

Submissions

91. In its reasons for decision, the Department said:

Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the conduct of studies into basing options.

Businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate information on its operating constraints for future studies could reasonably be expected to be reduced.

92. The applicant submits:

It seems the decision misconstrues the FOI Act, ignoring the Act's requirement that the concern over future supply of information be related to *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.*

This exemption might reasonably be used in circumstances where the Civil Aviation Safety Authority was seeking the provision of adverse from an aircraft operator to assist in a surveillance audit or where the Australian Consumer Competition Commission was seeking information in relation to an investigation, but it cannot be used in circumstances where the information has been provided as part of a service for profit as is the case with this funded ASC study.

[Applicant's emphasis]

93. The applicant further submits:

The document covers the movement of work, FCD's, from one locality to another, both of which are under the control of the same organisation, ASC, and therefore cannot place their commercial activities at risk. The document itself acknowledges that numbers are estimates, there is additional work to support the activities which would diminish its value on top of which it's a framework for a hypothesis.

As a long term supplier to the Department and a Government Business Enterprise, ASC is very aware of the need for public scrutiny and the associated disclosure. ASC management regularly provide testimony to Senate Estimates hearings during which they disclose details about the company's operations and activities.

As a commercial entity ASC management are fully cognisant of the need to deliver what they have been contracted to provide and would make those deliveries. This document formed part of a commercial transaction and as such its disclosure would not affect the delivery of material under future commercial transactions.

94. In the decision of *Wulf von der Decken and Services Australia* [2020] AICmr 55 at [30]-[31] the Australian Information Commissioner referred to the decision of *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 and found that where a contractual obligation to provide information exists, no claim of prejudice can be made:

In *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 ('ABC'), former Australian Information Commissioner McMillian discussed circumstances in which there may be alternate mechanisms through which information may be compulsorily obtained. Commissioner McMillian said:

... As Australian Government officials they would doubtless be aware of their official responsibilities and could be expected to participate diligently in reviews undertaken by CASA. CASA also has other options and strategies available to in [sic] the absence of coercive statutory powers to compel evidence. Two options in a broad spectrum are to take up with the Airservices Board or Executive Committee any failure by Airservices officers to provide willing assistance to a CASA review; or to consider exercising powers

conferred by the Regulations, such as the power in Division 172.F.5 to issue a show cause notice to suspend an ATS provider's approval to avert a likely adverse effect on the safety of air navigation.

While the factual circumstances differ, I am of the view that the reasoning in 'ABC' applies equally in this case. The FOI Guidelines explain that where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. As Services Australia said in its submissions, the employment services provider is required to notify Services Australia of issues relating to compliance with participation and mutual obligation requirements, incidents relating to inappropriate conduct, and other issues that may impact on a job seeker's participation in employment. It is contracted to do so by the Department of Jobs and Small Business. Accordingly, it is in the employment services providers' commercial interest to ensure that this information is accurately provided to the relevant Department in order to discharge its contractual obligations with the relevant Department.

Consideration

95. While I acknowledge the Department's submission that disclosure of the material 'could reasonably be expected to prejudice the future supply of information to Defence for the conduct of studies into basing options', the Department and ASC have not adequately explained how or why disclosure of the relevant material would, or could reasonably be expected to cause the 'the willingness of the business to provide accurate information on its operating constraints for future studies could reasonably be expected to be reduced' as the Department claims.
96. I accept the applicant's submission that the purpose of the information is to assist in the decision making of matters administered by the Department. I accept the applicant's submission that ASC has a long-term commercial relationship with the Department.
97. I have also considered ASC's status as Australia's sovereign-owned submarine sustainment and maritime services company, that is wholly owned by the Australian government and is represented by its shareholder, the Minister for Finance.⁴⁶ It is not established how the quality or quantity of business information provided by ASC could be hindered through the release of this information in these circumstances.

Findings

98. Accordingly, I am not persuaded that the Department has adequately discharged its onus in establishing that disclosure of the relevant material in this case could reasonably prejudice the future supply of information to the Commonwealth.
99. The relevant material is not exempt under s 47G(1)(b).
100. As I have found that the relevant material is not exempt under s 47G(1)(b), it is unnecessary for me to consider whether giving access to conditionally exempt material would be contrary to the public interest for the purposes of s 11A(5).

Elizabeth Hampton

Acting Freedom of Information Commissioner

17 August 2021

⁴⁶ <https://www.asc.com.au/about-us/>.

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#) page on our website.

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM32

The following 1 page is the annexure SMM32 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-FOI/RP

Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610

By email: FOI@Defence.gov.au

Dear Sir/Madam,

This is an application for access to documents under the *Freedom of Information Act 1982* (the FOI Act). I seek access to the following from the Final Cost Estimate Template that DCNS submitted in response to the Future Submarine Competitive Evaluation Process:

1. The total 'Australian Build Price' on the summary sheet
2. The total sustainment cost from year one to year forty including labour, material and other costs

In considering this request I ask the decision maker to appreciate the following:

- The CEP has concluded
- I do not seek access to the goods and services to be delivered for the totals, or any assumptions used to determine the totals
- Similar information has been provided in past requests to the Department (see FOI 301/17/18)

Should you have any questions in relation to this application, please contact Mr Michael Tudor Tsourtos (Michael.TudorTsourtos@aph.gov.au) from my office, who has carriage of this matter on my behalf.

Yours sincerely,



Rex Patrick
16 June 2018

Electorate Office
Level 2, Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM33

The following 4 pages are the annexure SMM33 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Australian Government
Department of Defence

R35031340

FOI 502/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Senator Rex Patrick under the *Freedom of Information Act 1982* (FOI Act), for access to:

“the following from the Final Cost Estimate Template that DCNS submitted in response to the Future Submarine Competitive Evaluation Process:

[Item] 1. The total 'Australian Build Price' on the summary sheet

[Item] 2. The total sustainment cost from year one to year forty including labour, material and other costs

In considering this request I ask the decision maker to appreciate the following:

- *The CEP has concluded*
- *I do not seek access to the goods and services to be delivered for the totals, or any assumptions used to determine the totals*
- *Similar information has been provided in past requests to the Department (see FOI 301/17/18)”*

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 two documents as matching the description of the request.

Decision

4. I have decided to deny access to two documents on the grounds that the deleted material is considered exempt under sections 47C [public interest conditional exemptions-deliberative processes] and 47G [public interest conditional exemptions-business affairs] of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in 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. the Commonwealth Procurement Rules; and
- f. advice received from officers within the department from the Future Submarine Program Office [FSPO].

Reasons for decision

Section 47C – Deliberative processes

6. Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure requirements 'if its disclosure under the 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 ... an agency'.

7. I have taken into account the Guidelines issued by the Australian Information Commissioner, noting that one consideration in the exemption under section 47C is whether the document includes content of a specific type, namely deliberative matter. I have determined that the material contained within the document for Item 1 is exempt under section 47C as it is deliberative.

8. I considered the question of purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines which state that 'purely factual material' that would not be regarded as deliberative matter would include:

- a. *content that is merely descriptive*
- b. *incidental administrative content*
- c. *procedural or day-to-day content*
- d. *the decision or conclusion reached at the end of the deliberative process*
- e. *matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.*

9. I have also taken into account that while purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to a live process and elaborates on its context, it may potentially come within the deliberative exemption.

10. I found that the document identified for Item 1 contains figures which are subject to ongoing consideration and deliberation by the FSPO and which are currently being considered in the context of ongoing contractual negotiations.

11. Taking the above into consideration, I have decided that the document is conditionally exempt under subsection 47C(1) of the FOI Act.

Section 47G – Business affairs

12. Where access has been denied to information under section 47G of the FOI Act, I considered that the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

13. 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.

14. Upon examination of the documents I identified information provided by DCNS as part of a submission in a procurement process, the CEP. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the administration of procurement processes.

15. In the section of the Commonwealth Procurement Rules (CPRs) dealing with the treatment of confidential information, paragraph 7.21 states:

“Submissions must be treated as confidential before and after the award of a contract...”

16. Businesses engage with Defence on the understanding that it will follow and fulfil its obligations and responsibilities under the CPRs issued by the Minister for Finance (Finance Minister) under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

17. Further, businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate figures to bid competitively for future projects could reasonably be expected to be reduced.

18. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.

Sections 47C and 47G - Public interest considerations

19. Section 11A(5) of the FOI Act requires an agency to allow access to a conditionally exempt document unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

20. 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; or
- c) promote effective oversight of public expenditure.

21. I found that 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).

22. 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 is that the release of this information could reasonably be expected to prejudice:

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

23. On balance, I consider the benefit to the public from disclosure is outweighed by the benefit to the public from withholding the information. In particular, I consider the release of the business information of third parties could reasonably be expected to prejudice the operations of an agency. I also consider that release of material which contributes to a live process which was provided exclusively for a deliberative process could reasonably be expected to prejudice the outcome of such processes. I consider that the public interest is better served in this case by maintaining the confidentiality of the deliberative and business information provided in a submission to a procurement process.

24. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47C and 47G of the FOI Act.

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

Section 22

26. 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.

Context Statement

27. As referred at paragraph 1 above, the applicant noted with their request that "*Similar information has been provided in past requests to the Department (see FOI 301/17/18)*".

28. In response, I can confirm that the subject matter of this present request varies substantially from the identified past FOI request with regards to its scale, complexities, scope and the current deliberative activities in relation to finalising the contractual documents. Furthermore, each FOI request is assessed on its merits on a case by case basis. In particular, the subject of this FOI request is currently part of a live process whereby it is appropriate that the documents be assessed within their own context and that of other associated activities underway at this time.

Digitally signed by
ChrisHorscroft
Date: 2018.07.11
15:41:29 +10'00'

Chris Horscroft
Accredited Decision Maker
Capability Acquisition and Sustainment Group

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM34

The following 5 pages are the annexure SMM34 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



REX PATRICK
Centre Alliance
Senator for South Australia

Our ref: NC-OAI/RP

Office of the Australian Information Commissioner
Level 3, 175 Pitt Street
Sydney NSW 2000

BY EMAIL: enquiries@oaic.gov.au

Dear Sir/Madam,

RE: Freedom of Information Review

1. Under Part VII of the Freedom of Information (FOI) Act, I seek review of the attached Defence FOI decision 502/17/18.

Background

2. On 16 June 2018 I made an FOI request to Defence for access to the following from the Final Cost Estimate Template that DCNS submitted in response to the Future Submarine Competitive Evaluation Process (CEP):
 1. The total 'Australian Build Price' on the summary sheet
 2. The total sustainment cost from year one to year forty including labour, material and other costs

I further ask the decision maker to appreciate the following:

- The CEP has concluded
 - I do not seek access to the goods and services to be delivered for the totals, or any assumptions used to determine the totals
 - Similar information has been provided in past requests to the Department (see FOI 301/17/18)
3. On 11 July 2018 Chris Horscoft, an authorised Decision Maker for Defence, made a decision identifying two documents within the scope but denied me access to them under s47C and s47G of the FOI Act.
 4. I address the purported exemptions below.

Electorate Office
Level 2, Ebenezer Place
Adelaide, South Australia 5000
Phone: (08) 8232 1144
Fax: (08) 8232 3744
Email: Senator.Patrick@aph.gov.au

Parliament House
Canberra, ACT 2600
Phone: (02) 6277 3713
Fax: (02) 6277 5834

S47C – Deliberative Process

5. The information sought is not deliberative material in that it is (Item 1) the final 'Australian Build Price' and (Item 2) the final total sustainment cost from year one to year forty including labour, material and other costs developed by then DCNS (now Naval Group) for presentation to the Commonwealth. Noting the requested information are dollar values, they are simply material facts, not opinion, advice or recommendations.

6. The decision maker makes, by inference, a claim that Item 1 is intended for the purpose of a deliberative process when he states it, "*contains figures which are subject to ongoing consideration and deliberation by the FSPO and which are currently being considered in the context of ongoing contractual negotiations*". This notion is rejected for the following reasons:
 - a. The Final Cost Estimate Template which contained the requested information was prepared in response to the Submarine CEP which, according to documents released to former Senator Xenophon in the AAT, was "*conducted to select an International Partner for the SEA 1000 Future Submarine Program*".
 - b. DCNS were selected as the International Partner in April 2016. At that point the CEP reached its conclusion.
 - c. The Commonwealth has subsequently signed a design and mobilisation contract which is being used, in part, to develop more detailed pricing information. It makes no sense that the Commonwealth would rely on less reliable information in the context "*of ongoing contractual negotiations*".

S47G – Business Affairs

7. The decision maker makes a claim that disclosure of the material could reasonably be expected to prejudice the future supply of information to the Commonwealth. He does so cherry picking from 7.21 of the Commonwealth Procurement Rules (CPRs) stating that "*Submissions **must** be treated as confidential before and after the award of a contract...*"

8. The decision maker erroneously attempts to impose an absolute exemption within a conditional exemption claim.

9. A full read of the 7.20 through 7.23 contextualises and clarifies the statement making it clear that there is a reasonable obligation placed on public official to properly protect and handle that information but that the requirement to maintain confidentiality is *should always be balanced against the public accountability and transparency requirements of the Australian Government. It is therefore important for officials to plan for, and facilitate, appropriate disclosure of procurement*

information. The rules go on to state that officials should include provisions in request documentation and contracts that alert potential suppliers to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees [my emphasis].

10. All documents in the possession of the Government are subject to FOI laws and the CPRs are subservient to this legislation, irrespective of an officials obligations (whether by way of CPR or Crimes Act provisions) to hold information confidential.
11. It is noted that the Department of Defence has properly released under FOI information provided in tender responses:
 - a. FOI 301/17/18 where Defence released the 'TOTAL' line item as listed on the Summary Price Schedule as submitted by Lurssen in their response to RFT 0226-16 (SEA 1180)
 - b. FOI 324/16/17, also MR17/00386 (still on foot), where Defence released a significant portion of the Australian Industry Plan submitted to Defence by DCNS in response to the Future Submarine CEP.
12. The decision maker also states that, *businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate figures to bid competitively for future projects could reasonably be expected to be reduced.*
13. The decision maker provides no supporting evidence that the release of Items 1 and 2 could affect the willingness of DCNS to provide similar information in future tenders.
14. It should be noted that the cost of a *pre-concept design* (Item 1) could have no commercial sensitivity noting it is the cost of a submarine that meets the top level requirements of a very high level set of unique requirements (which are not known to the public) and will never be built. It should be further noted the 'total sustainment cost from year one to year forty including labour, material and other costs' (Item 2) could also have no commercial sensitivity because it is a rough order costs for a submarine class that will never be built. None of the numbers requested have commercial value.
15. This FOI request was made on 16 June 2018 and the decision was made on the 16 July 2018. The decision maker did not, to my knowledge, elect to consult the purportedly affected company before coming to his conclusion. The view held is ill-informed and wrong.

16. It is an absurdity to suggest the release of the non-commercial numbers that are the subject of this request would deter DCNS (now Naval Group) from participating in future tenders.

Public Interest

17. There is considerable public interest in disclosing rough order submarine costs and submarine sustainment costs as laid out in the tender documents. It is important for the reason it promotes effective oversight of public expenditure.

18. First and foremost, the future submarine project is the largest ever expenditure of Australian taxpayers' money on a single project. It is important for there to be disclosure of information used by the Department to make a decision in relation to it.

19. In 2009, when the future submarine project was first announced it was to cost \$50 billion for acquisition and sustainment - see <https://www.anao.gov.au/work/performance-audit/future-submarine-competitive-evaluation-process>

20. The Australian Strategic Policy Institute did some analysis of the cost of the future submarine, suggesting \$36 billion was a more accurate figure. See https://s3-ap-southeast-2.amazonaws.com/ad-aspi/import/Policy_Analysis99_Submarine_costs_mk2.pdf?LSMPYHzy4_5qndcq_eijwiUZiv6liqGbl

21. In 2016 the Defence White Paper Integrated Investment Plan said the submarine acquisition alone was to be \$50 billion in out turned dollars – see <http://www.defence.gov.au/WhitePaper/Docs/2016-Defence-Integrated-Investment-Program.pdf> on page 89 (page 91 of the PDF).

22. After May 2018 Senate estimates, the Australian Strategic Policy did this piece <https://www.aspistrategist.org.au/senate-estimates-submarine-escalates/>

23. Further public discussion in the ever increasing budget has occurred. See <https://www.adelaidenow.com.au/news/south-australia/decision-on-35-billion-future-frigate-warship-fleet-expected-this-week/news-story/d45ccaad998f89eda68c54b31e1de418> where to see that it has been revealed that the German company TKMS' CEP offer came in at less than 20 billion.

24. There is public interest and controversy in the growing future submarine project costs. Understanding the *pre-concept design* price and the sustainment costs in the DCNS offer is important in value-for-money critiques of the program and appropriateness of the very large spend across the project.

25. There is an overwhelming public interest in releasing the requested information.

Yours sincerely,



Rex Patrick

09 August 2018

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM35

The following 20 pages are the annexure SMM35 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Australian Government

Office of the Australian Information Commissioner

Rex Patrick and Department of Defence (No 2) *(Freedom of information) [2020] AICmr 40 (13* *August 2020)*

Decision and reasons for decision of Australian Information Commissioner, Angelene Falk

| | |
|--------------------|---|
| Applicant | Senator Rex Patrick |
| Respondent | Department of Defence |
| Decision date | 13 August 2020 |
| Application number | MR18/00588 |
| Catchwords | Freedom of Information — Whether disclosure would disclose trade secrets or commercially valuable information — Whether documents contain deliberative matter prepared for a deliberative process — Whether disclosure would unreasonably affect an organisation in respect of its lawful business affairs — Whether disclosure would prejudice the future supply of information to the Commonwealth — (CTH) <i>Freedom of Information Act 1982</i> ss 47(1)(a), 47(1)(b), 47C, 47G(1)(a) and 47G(1)(b) |

Decision

1. Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I set aside the decision of the Department of Defence (the Department) of 11 July 2018.

Background

2. In 2015, the Australian Government commenced a Competitive Evaluation Process (CEP) to select an international partner to design and build the next generation of Australian submarines (the Future Submarines Program).
3. On 16 June 2018, the applicant applied to the Department for access to:

I seek access to the following from the Final Cost Estimate Template that DCNS submitted in response to the Future Submarine Competitive Evaluation Process:

1. The total 'Australian Build Price' on the summary sheet
2. The total sustainment cost from year one to year forty including labour, material and other costs
4. On 11 July 2018, the Department advised the applicant that it had identified two documents within scope of their request. The Department refused access to the two documents in full. In making its decision, the Department relied on the deliberative processes exemption (s 47C), and business affairs exemption (s 47G) of the FOI Act.
5. On 9 August 2018, the applicant sought IC review of the Department's decision under s 54L of the FOI Act.
6. Between 24 March and 7 April 2020, the Department undertook third party consultation with Naval Group (formerly known as Direction des Constructions Navales Services (DCNS)), under s 27 of the FOI Act. In response, Naval Group objected to disclosure of the documents.
7. During the course of the IC review, the Department submitted that the documents are also exempt under the trade secrets and commercially valuable information (s 47) exemption.

Scope of IC review

8. The issues to be decided in this IC review are:
 - whether the documents are exempt under s 47 of the FOI Act, and
 - whether the documents are conditionally exempt under ss 47C and 47G of the FOI Act, and if so, whether giving the applicant access to the documents at this time would, on balance, be contrary to the public interest (s 11A(5)).
9. In making my decision, I have had regard to the following:
 - the Department's decision and reasons for decision of 11 July 2018
 - the documents at issue
 - the FOI Act, in particular ss 47, 47C and 47G
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular paragraphs [5.196] – [5.208], [6.52] – [6.88], [6.180] – [6.213]
 - relevant case law, in particular *Kung Fu Wushu Australia Limited and Australian Sports Commission (Freedom of information)* [2018] AATA 157; *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34; *Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information)* [2020] AICmr 7; *Paul Farrell and Department of Home Affairs (No 5) (Freedom of information)* [2019] AICmr 65; *'OS' and Department of Health (Freedom of information)* [2018] AICmr 46; *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945; *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53; *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494; *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39; *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2019] AICmr 38; *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21, and

- the parties' submissions.

Trade secrets exemption (s 47(1)(a))

10. As discussed above at [7], during IC review the Department contended that the two documents are exempt under s 47(1)(a) of the FOI Act.
11. As discussed in the Guidelines and in IC review cases,¹ for a document to be exempt under s 47(1) it would need to be shown that disclosure would disclose a trade secret (s 47(1)(a)); or disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed (s 47(1)(b)). The term 'trade secret' is not defined in the FOI Act. The Federal Court has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.²

12. The Guidelines explain:

The Federal Court referred to the following test in considering whether information amounts to a trade secret:

- the information is used in a trade or business
- the owner of the information must limit its dissemination or at least not encourage or permit its widespread publication
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the information.³

13. The Guidelines also include a non-exhaustive list of factors that decision makers might regard as useful guidance. Those factors include the extent to which the information is known outside the business of the owner of that information.⁴

14. During the IC review, the Department contended that the documents were exempt under s 47 on the basis that the information 'amounts to trade secrets created and owned by DCNS'. The Department submits:

During the consultation process DCNS requested that the Department also claim the documents exempt under section 47 of the FOI Act, the trade secret or commercially valuable exemption...

DCNS provided the following in support of the exemption:

The knowledge and information that is necessary to estimate the cost of building and sustaining submarines has been developed by Naval Group over many

¹ Generally, see Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [5.196]-[5.203]; *Kung Fu Wushu Australia Limited and Australian Sports Commission (Freedom of information)* [2018] AATA 157; *The Wilderness Society South Australia Inc. and Department of the Environment Freedom of Information* [2016] AATA 653; *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43; *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131; *'DN' and Department of Agriculture* [2014] AICmr 123 and *Stanistreet and Therapeutic Goods Administration* [2014] AICmr 21.

² *Guidelines* [5.199]; *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* [2001] FCA 1375; (2001) 114 FCR 301.

³ *FOI Guidelines* [5.200].

⁴ *FOI Guidelines* [5.201].

decades. Naval Group protects its calculation and estimating methods, and puts significant effort and resources into developing price modelling techniques. The information in the Cost Estimates has a commercial value to Naval Group and would have a commercial value to its competitors such that the commercial value to Naval Group would be diminished by disclosure because for example: (a) customers of Naval Group might require the same costs as, or lower costs than, set out in the Cost Estimates; and (b) competitors of Naval Group would gain an understanding of Naval Group's cost estimating techniques which are likely to make them successful in tender bids of a similar nature to the Future Submarine Program (FSP) in the future. Given the highly competitive and sensitive nature of submarine building, the cost estimating techniques and calculation methods are not easily acquired or duplicated by a competitor other than by disclosure.

15. The applicant submits:

I accept the argument that methods for accurate cost estimations might fall within the definition of a trade secret, but I do not seek access to these methods, only the output of them. Revealing a total cost can give no insight as to propriety costing methods, if that were the case by (sic) the Government could not publish contract award notices on the Austender web site.

16. I have examined an unedited copy of the documents at issue. The material at issue comprises the total build price and total sustainment costs that Naval Group included in the Final Cost Estimate Template submitted in the Future Submarine Competitive Evaluation Process.

17. In *Kung Fu Wushu Australia Limited and Australian Sports Commission (Freedom of information)* [2018] AATA 157, Deputy President Humphries considered whether information relating to future directions of a Martial Arts App and information that was contended to be commercially valuable and not widely known should be considered a trade secret. DP Humphries was not satisfied that the material was exempt under s 47(1)(a) and said:

... In the first place, is not clear what trade KWA purports to engage in, such that it holds trade secrets in relation thereto...

... Even if KWA could be regarded as being in the *trade* of teaching Chinese martial arts, it is not clear how information in the documents in question is capable of being put to use by someone else involved in that trade. The Tribunal could not identify, and its attention was not drawn to, any document which might constitute a *trade secret* relating to the teaching of martial arts. In addition, KWA failed to demonstrate that information in the documents is specifically *secret*, as opposed to being merely confidential: per the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241; (1992) 36 FCR 111 at 122.⁵

18. The documents relate to the business of Naval Group. For this reason, I am satisfied that the first element of the Federal Court test discussed at [12] above that 'the information is used in a trade or business' has been met, the documents contain information used in Naval Group's business.

19. The second element of the Federal Court test discussed at [12] above is that 'the owner of the information must limit its dissemination or at least not encourage or permit its widespread publication'. In this case, for the information to be a trade

⁵ *Kung Fu Wushu Australia Limited and Australian Sports Commission (Freedom of information)* [2018] AATA 157 [30], [33]-[34].

secret, Naval Group must at least not encourage its widespread dissemination or publication.

20. The documents record the cost estimates provided to the Department by Naval Group. While a cost estimate may be provided on a confidential basis in a tendering process, information of this nature is not inherently 'secret' and may subsequently be provided to stakeholders both within and outside of Naval Group, such as subcontractors and Departmental staff. Cost estimates may also be used to inform stakeholders including the public of the monetary value of successful bids for contracts. For instance, on 5 March 2019, Naval Group published a press release that reveals the monetary value of the 'first phase of the Submarine Design Contract'.⁶ The Department has not established the second requirement of the test that Naval Group has not encouraged or permitted the widespread publication of information related to the cost estimates.
21. The third requirement of the Federal Court test discussed at [12] above is that disclosure of the information to a competitor would be liable to cause real or significant harm to the owner of the secret. In the circumstances of this case, given that the tendering process has concluded and Naval Group has been awarded the contract to build Australia's next generation of submarines, I do not consider that the disclosure of this information alone would enable competitors to cause Naval Group real or significant harm of the kind contemplated in the Federal Court test. Naval Group has argued that the publication of the costs would give competitors an advantage and future customers 'might require the same costs as, or lower costs than, set out in the Cost Estimate'. However, I am not satisfied that disclosure of total costs would cause such harm to Naval Group in circumstances where the estimated costs relate to a highly specialised, complex and sizeable project proposal, the cost estimates are not accompanied by detail on project specifications, and the estimates are based on information that is more than 2 years old. In particular, I am not satisfied that disclosure of the documents in this case could reasonably be expected to have any significant effect on Naval Group's operations. The Department has not established the third requirement of the test that disclosure of the information to a competitor would be liable to cause real or significant harm to Naval Group.
22. As the second and third requirements of the Federal Court test have not been met, the information on the total build price and total sustainment costs that Naval Group included in the Final Cost Estimate Template submitted in the Future Submarine Competitive Evaluation Process is not a trade secret.
23. The documents are not exempt under s 47(1)(a) of the FOI Act.

Commercially valuable information exemption (s 47(1)(b))

24. As discussed above at [7], the Department contends that the two documents are alternatively exempt under s 47(1)(b) of the FOI Act.
25. As discussed in the FOI Guidelines and IC review cases,⁷ for a document to be exempt under s 47(1)(b), it would need to be shown that the document contains commercially

⁶ Naval Group, *NAVAL GROUP SIGNS THE SUBMARINE DESIGN CONTRACT FOR AUSTRALIA'S ATTACK CLASS SUBMARINES* (5 March 2019) <<https://naval-group.com.au/2019/03/05/naval-group-signs-the-submarine-design-contract-for-australias-attack-class-submarines/>>.

⁷ See, *FOI Guidelines* at [5.196] – [5.198] and [5.204] – [5.208]; *'OS' and Department of Health (Freedom of information)* [2018] AICmr 48; *'NO' and National Library of Australia (Freedom of information)* [2018]

valuable information, and that the value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

26. The FOI Guidelines explain:

It is a question of fact whether information has a commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. 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 – for example, if it lowers the cost of production or allows access to markets not available to competitors
- whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information
- whether the information is still current or out of date (out of date information may no longer have any value)
- whether disclosing the information would reduce the value of a business operation or commercial activity – reflected, perhaps, in a lower share price.⁸

27. As noted above, the material at issue comprises the total build price and total sustainment costs that Naval Group included in the Final Cost Estimate Template submitted in the Future Submarine Competitive Evaluation Process.

28. During the IC review, the Department submit:

The information is used in trade or business, DCNS provided the information to the Department on the basis that it would be treated commercial in confidence and if disclosed to a competitor, the information would cause significant and ongoing harm to DCNS not only in the context of the current negotiations, but future tender bids and projects noting the documents include projected costs over a forty year period.

29. In *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 ('*McKinnon*') former Australian Information Commissioner McMillan found that s 47(1)(b) did not apply to documents relating to the running of Regional Processing Centres on the basis that neither the Department or Serco had stated what information in each document had commercial value to Serco, or why. While Serco stated that the information related to the 'internal business affairs' of Serco, the former Information Commissioner found that 'This by itself is not enough to establish that the information has commercial value for the purposes of s 47'.⁹

[AICmr 2](#); *Wushu Council Australia Limited and Australian Sports Commission (Freedom of information)* [2017] AICmr 26; *Stryker Australia Pty Ltd and Department of Health (Freedom of information)* [2017] AICmr 89.

⁸ FOI Guidelines [5.205].

⁹ *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 [43].

30. A further issue considered in *McKinnon* was the age of the information and the issue to which it relates. The documents considered by the former Information Commissioner were between 20 and 30 months old and related to a commercial negotiation that may have concluded. The Information Commissioner considered that:

For the exemption to apply I would need to be satisfied that the information still retained commercial value and that disclosure at this time would diminish that value. I am not able to be satisfied on those matters on the basis of the submissions received from the Department and Serco.¹⁰

31. I considered the Information Commissioner's analysis in *McKinnon* most recently in *Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information)* [2020] AICmr 7 and *Paul Farrell and Department of Home Affairs (No 5) (Freedom of information)* [2019] AICmr 65 (*Paul Farrell (No 5)*).
32. In *Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information)* [2020] AICmr 7 I considered the Information Commissioner's analysis of s 47(1)(b) in *McKinnon* in relation to documents comprising 35 individual procedures that form part of Serco's Policy and Procedure Manual (PPM). The policies and procedures provide Serco employees with detailed information and instructions about the delivery of detention services, including the management of people held in Immigration Detention Facilities. I found that the material that the Department found exempt under s 47 was not exempt. Having examined the documents at issue, I was not satisfied that the Department had identified the intrinsic commercial value of the documents apart from its assertion that disclosure would affect any future tender process and Serco's share price.
33. In *Paul Farrell and Department of Home Affairs (No 5) (Freedom of information)* [2019] AICmr 65 (*Paul Farrell (No 5)*) I considered the Information Commissioner's analysis of s 47(1)(b) in *McKinnon* in relation to documents relating to costs associated with the provision of garrison and welfare services on the Republic of Nauru by the Department's contracted service provider Canstruct International Pty Ltd. I found that the material that the Department found exempt under s 47 was not exempt.
34. While I accept that the nature of the material considered in these IC reviews was different to the documents at issue in this matter, the considerations about whether the documents contain information that has a commercial value are relevant to this IC review.
35. Based on my examination of the documents, it is apparent that the information on the total cost that Naval Group has estimated is the product of but does not contain any information as to Naval Group's 'calculation and estimating methods' or 'price modelling techniques'.¹¹ While the Department submits 'if disclosed to a competitor, the information would cause significant and ongoing harm to DCNS not only in the context of the current negotiations, but future tender bids and projects noting the documents include projected costs over a forty year period', beyond this assertion, the Department has not identified, with reasonable particularity, the commercial value of the documents, or how disclosure would reduce the value of business operations or commercial activity. In particular, having regard to the age of the documents, it is

¹⁰ *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 at [46].

¹¹ See for example, *'OS' and Department of Health (Freedom of information)* [2018] AICmr 46 in which the former Information Commissioner found that information which was current, highly technical and specialised was commercially valuable information as it was reasonably likely that an arm's length buyer would be prepared to pay to obtain the information given the level of detail in the particular document.

unclear that a genuine 'arm's-length' buyer would be prepared to pay to obtain this information.

36. For these reasons, I am satisfied that the total build price and total sustainment costs that Naval Group included in the Final Cost Estimate Template submitted in the Future Submarine Competitive Evaluation Process is not information that could be considered to have commercial value as required by s 47(1)(b).
37. As I have found that the material at issue in the documents is not commercially valuable, it is unnecessary for me to consider whether the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished by disclosure.
38. The material at issue in the documents that the Department contends is exempt under s 47(1)(b) is not exempt under this provision.

Deliberative processes exemption (s 47C)

39. The Department found the two documents exempt under s 47C of the FOI Act. As discussed above, the relevant material in the documents are the total build price and total sustainment costs that Naval Group included in the Final Cost Estimate Template submitted in the Future Submarine Competitive Evaluation Process.
40. As discussed in the FOI Guidelines and previous IC review decisions,¹² the main requirements of this public interest conditional exemption are that a document:
 - contains or relates to 'deliberative matter' (s 47C(1))
 - was prepared for a 'deliberative purpose' (s 47C(1))
 - the material is not 'purely factual' or non-deliberative (s 47C(2)), and
 - it would be 'contrary to the public interest' to give access at this time (s 11A(5)).
41. The term 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.¹³
42. In the Administrative Appeals Tribunal (AAT) decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 ('Wood'), Deputy President Forgie explains that the meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.¹⁴

¹² Generally, see *FOI Guidelines* [6.52]-[6.88]; *Paul Farrell and Department of Home Affairs (No 6) (Freedom of information)* [2019] AICmr 66; *John Power and Department of Human Services (Freedom of information)* [2019] AICmr 62; *Gold Coast Lifestyle Association and Department of Infrastructure and Regional Development and Cities (Freedom of information)* [2019] AICmr 59; *Margaret Simons and Department of Communications and the Arts (Freedom of information)* [2019] AICmr 55; *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53.

¹³ *Parnell and Attorney-General's Department* [2014] AICmr 71 [38].

¹⁴ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39].

43. The FOI Guidelines explain that a deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹⁵

44. The Department has the onus of establishing that its decision is justified or that I should give a decision adverse to the IC review applicant (s 55D(1)).

45. In its reasons for its decision, the Department said:

I have taken into account the Guidelines issued by the Australian Information Commissioner, noting that one consideration in the exemption under section 47C is whether the document includes content of a specific type, namely deliberative matter. I have determined that the material contained within the document for Item 1 is exempt under section 47C as it is deliberative.

... In found (sic) that the document identified for Item 1 contains figures which are subject to ongoing consideration and deliberation by the FSPO [Future Submarine Program Office] and which are currently being considered in the context of ongoing contractual negotiations.

46. During the IC review, the Department submit:

The documents in issue are a consolidation of the Department's "thinking process" of what components would be required for the submarine project and an estimate of the cost. The amounts referred to in the documents are estimates of the cost of the various components required to complete the project at that point in time. The contract is still the subject of negotiation between the parties and in these circumstances, the information contained in the documents is still being deliberated.

The deliberative process contained in the documents relates to the functions of the government of the Commonwealth as required by paragraph 6.60 of the FOI Guidelines issued by the Information Commissioner. The Future Submarines project is a core element of Australia's future maritime defence strategy. Releasing the information would have a negative impact upon a number of ongoing projects, with significant ramifications for the Department and the Commonwealth.

47. The Department referred to the third party's response to consultation:

In relation to the deliberative processes, DCNS provided the following submission:

The Cost Estimates set out preliminary estimates prepared by Naval Group during the Competitive Evaluation Process, which may not reflect the current position given the design of the FSP has matured since the Cost Estimates were prepared. Naval Group and the Commonwealth continue to develop cost estimates for the build of the Future Submarines. In addition, and in particular as a contract for

¹⁵ FOI Guidelines [6.58] (footnotes omitted).

sustainment has not yet been awarded, the Cost Estimates constitute no more than an opinion, advice or recommendation obtained, prepared or recorded in the course of the Competitive Evaluation Process undertaken by the Department of Defence in relation to the FSP. The Cost Estimates disclose a process of weighing up or evaluating competing considerations involved in the selection of a partner for the FSP.

48. The applicant submits:

The Department adopts an approach that tries to “consolidate” all material before government as deliberative, an interpretation that would render the FOI Act impotent.

I draw the Information Commissioner to her decision in *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53 (4 July 2019) whereby a Naval Group (formerly Direction des Constructions Navales Services) submission in the same tender evaluation was found not to be exempt and was ordered to be release to Mr Xenophon in full [Despite the argument adopted by the Department in this review, the Department had already released a substantial part of the tender submission to Mr Xenophon prior to the Information Commissioner making a final decision]. In that decision the Information Commissioner stated:

41. I accept the Department's submission that the {Australian Industry Plan} (sic) was provided to the Department as part of the CEP, which consists of a deliberative process, as it involves the selection of an international partner to design and build the next generation of Australian submarines. However, as I discussed above at [35], for the exemption under s 47C to apply to a document, it must also be shown that disclosure of the document would disclose ‘deliberative matter’.

42. I have examined an unedited copy of the document, and I am not satisfied that the material the Department contends is exempt under s 47C contains any opinion, advice or recommendations, nor is there a weighing up or evaluation of competing arguments or considerations.

49. In *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53 Acting Australian Information Commissioner Hampton found that material that the Department described as information ‘where Naval Group either proposed or intended to provide a recommendation to the Commonwealth’ that was included in the final future submarine Australian Industry Plan submitted to Defence by Naval Group was not ‘deliberative matter’:

I have examined an unedited copy of the document, and I am not satisfied that the material the Department contends is exempt under s 47C contains any opinion, advice or recommendations, nor is there a weighing up or evaluation of competing arguments or considerations.

Accordingly, although the AIP was provided to the Department as part of the deliberative process to determine the most suitable partner for the delivery of the Future Submarine Program, the relevant parts of the document that the Department contends is exempt under s 47C does not contain deliberative matter for the purposes of s 47C.¹⁶

¹⁶ *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53 [42]-[43].

50. I consider the approach taken in *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53 to be relevant to this case.
51. I have examined an unedited copy of the documents. I accept the Department's submission that the cost estimate was provided to the Department as part of the CEP, which consists of a deliberative process, as it involves the selection of an international partner to design and build the next generation of Australian submarines. However, as I discussed above at [41] and [42], for the exemption under s 47C to apply to a document, it must also be shown that disclosure of the document would disclose 'deliberative matter'.
52. I am not satisfied that the material the Department contends is exempt under s 47C contains any opinion, advice or recommendations, nor is there a weighing up or evaluation of competing arguments or considerations.
53. Accordingly, although the cost estimate was provided to the Department as part of the deliberative process to determine the most suitable partner for the delivery of the Future Submarine Program, the estimate of the total cost that the Department contends is exempt under s 47C is not deliberative matter for the purposes of s 47C. As Naval Group submit at [14], it is a cost that Naval Group has estimated using specialised methodology.
54. The material that the Department contends is exempt under s 47C is not conditionally exempt under this provision.
55. Having found that the relevant material is not conditionally exempt, I am not required to consider whether giving the applicant access to this material would be contrary to the public interest under s 11A(5).

Business affairs exemption (s 47G)

56. The Department also found the documents were conditionally exempt in full under s 47G(1)(b). During IC review, the Department submit that the documents are also exempt in full under s 47G(1)(a).
57. As discussed in the FOI Guidelines and in IC review cases, a document is conditionally exempt under s 47G where disclosure would disclose information concerning the business, commercial or financial affairs of an organisation or undertaking (business information), where the disclosure of the information:
- would, or could reasonably be expected to, unreasonably affect the 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 (s 47G(1)(a))¹⁷
 - could reasonably be expected to prejudice the future supply of information to the Commonwealth or any agency for the purpose of the administration of a law of the

¹⁷ Generally, see *FOI Guidelines* [6.180] - [6.213]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2019] AICmr 5; '*PG*' and *Department of Infrastructure, Regional Development and Cities (Freedom of information)* [2018] AICmr 60; *Chris Vedelago and Airservices Australia (Freedom of information)* [2018] AICmr 45; and *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39.

Commonwealth or of a Territory or the administration of matters administered by an agency (s 47G(1)(b)).¹⁸

Business information

58. The FOI Guidelines explain that the business information exemption is intended to protect the interests of third parties dealing with the Government.¹⁹ The operation of s 47G depends on the effect of disclosure rather than the precise nature of the information itself.²⁰ Notwithstanding this, the information must have some relevance to a person in respect of their business or professional affairs or to the business, commercial and financial affairs of the organisation.²¹
59. The 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’.²² Accordingly, in this IC review, for the s 47G conditional exemption to apply, the documents must concern the third party’s money-making affairs.
60. In its reasons for its decision, the Department said:

Upon examination of the documents I identified information provided by DCNS as part of a submission in a procurement process, the CEP.

61. I have examined an unedited copy of the document and I am satisfied that the relevant material comprises the third party’s business information for the purposes of s 47G, as it relates to the third party’s business affairs, specifically, its engagement in a tender process with the Department.

Unreasonable adverse effect (s 47G(1)(a))

62. In deciding whether disclosure of a document containing business information would be unreasonable for the purpose of s 47G(1)(a), a decision maker must balance the public interest and the private interests of the business.
63. The FOI Guidelines explain:

The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. A decision maker must balance the public and private interest factors to decide whether disclosure is

¹⁸ Generally, see *FOI Guidelines* at [6.180]-[6.213]; *Macquarie Group Limited and Australian Securities and Investments Commission (Freedom of information)* [2019] AICmr 39; *‘PX’ and Australian Federal Police (Freedom of Information)* [2019] AICmr 8; *Australian Broadcasting Corporation and Department of Communications and the Arts (Freedom of information)* [2018] AICmr 66 and *Stryker Australia Pty Ltd and Department of Health (Freedom of information)* [2017] AICmr 69;.

¹⁹ *FOI Guidelines* [6.185].

²⁰ *FOI Guidelines* [6.184].

²¹ *FOI Guidelines* [6.184].

²² *FOI Guidelines* [6.192].

unreasonable for the purposes of s 47G(1)(a); but this does not amount to the public interest test of s 11A(5) which follows later in the decision process.²³

64. The FOI Guidelines further explain:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business' activities pose a threat to public safety, damage the natural environment; or that a service provider has made false claims for government money may have a substantial adverse effect on that business but may be reasonable in the circumstances to disclose. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality. These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.²⁴

65. The Department submits:

The information within the documents is commercially sensitive to DCNS who are currently bidding for other new projects. As this information is not publically (sic) available, releasing it would give DCNS's competitors an unfair advantage by providing them with evidence of the costings that DCNS have submitted for this project, and their projected labour and material costs for the next forty years. Release of this information, noting that it contains estimates of costs over a forty year period, would enable DCNS's competitors to confidentially predict their cost estimates for future tender bids, placing them at a competitive advantage by enabling them to submit a lower tender bid for the known items. In these circumstances, the Department considers that releasing this information would have a direct impact on the supply of commercially sensitive information from DCNS as they will reduce the amount of information provided to the Department so as to prevent it from being released publically. (sic)

DCNS submitted their tender bid with the expectation that the information would be kept confidential. Businesses may be less willing to submit tender bids to the Commonwealth if they believe their commercially sensitive information will be released to their competitors. Businesses expend significant resources and time to develop detailed costs, drawing upon their expertise and experience, when submitting tender responses and during ongoing contract negotiations. If these were released publically (sic), it would disclose DCNS's methodology for expenditure allocation of pricing to work. DCNS provided the information to the Commonwealth in confidence and it was not anticipated that the information would be released under the FOI Act.

The decision of former Information Commissioner Timothy Pilgram (sic) in the case of *McKinnon and the Department of Immigration and Citizenship* [2012] AICmr 34 provides that for the exemption to apply, the information must hold some intrinsic commercial value

the commercial value the information has must be a type of commercial value that is capable of being 'destroyed or diminished' by disclosure.

²³ FOI Guidelines [6.187] (footnotes omitted).

²⁴ FOI Guidelines [6.188] (footnotes omitted).

In this matter, the commercial value of the information comes from the expertise and knowledge that DCNS has acquired over many decades to develop the costings. DCNS has put in significant effort and resources to develop the price modelling techniques that are contained within the documents. This capability would be diminished by its disclosure and release of the information would have a direct impact upon any negotiations that DCNS are involved in, as they may be pressured to match the costings provided in response to this CEP.

66. As discussed at [6] above, the Department undertook third party consultation during the IC review. The Department also referred to the third party's response:

In relation to the business affairs exemption, DCNS advised:

The Cost Estimates contain Naval Group business information, being information regarding how Naval Group estimates the cost and build of submarines generally, and in particular, what Naval Group estimated the cost of building and sustaining the FSP would be. The disclosure of such information to Naval Group's competitors would put Naval Group at a significant competitive disadvantage, particularly with respect to future competitive tender processes, as our competitors would be aware of, and could take into consideration, Naval Group's cost estimation techniques and pricing previously offered by Naval Group. Further, Naval Group's future customers could use the information set out in the Cost Estimates against Naval Group in order to pressure Naval Group to offer such pricing in future programs.

67. In relation to the public interest, in response to consultation by the Department, the Naval Group submits:

Disclosure is contrary to the public interest because it could be reasonably expected that disclosure of the Cost Estimates would prejudice the commercial activities of Naval Group by providing our competitors with an unfair insight into Naval Group's contracting practices and commercial positions. This disadvantage to Naval Group's business, through the disclosure of this commercially sensitive information, significantly outweighs any benefit to the public from disclosure and may prejudice an agency's (in this case the Department of Defence's) ability to obtain similar contractual arrangements in the future.

Significantly in this instance, and as noted above, Naval Group and the Commonwealth are continuing to design the Future Submarine and estimate the costs involved in the build and sustainment of the Future Submarines. Accordingly, the Cost Estimates contain details of ongoing negotiations and deliberations. Disclosure of the Cost Estimates would prejudice ongoing negotiations between Naval Group and the Commonwealth and could have a chilling effect on such negotiations with potentially adverse consequences for either or both parties and potentially, for Australia's future sovereign submarine capability.

68. The applicant submits:

The Department's argument that the release of the information would provide Naval Group's competitors with unfair advantage is flawed. The Information Commissioner should adopt the approach in *Sweeney and Australian Securities and Investments Commission* [2013] AICmr 68 (30 August 2013) where the issues

of how total costs might affect the business affairs of an entity were considered, noting I have similarly only requested total costs.

a. I make no request as to a breakdown of those costs. Whilst the request asks for total costs, “including labour, materials and other costs”, I seek to ensure they’re included in the total, I do not seek these as individual costs that might contribute to the total costs.

b. I do not seek access to assumptions made by Naval Group in relation to the costings. The assumptions would materially affect the total costs submitted by Naval Group, and would remain unknown.

c. The total cost has been totally invalidated by the passage of time. In its third party consultation Naval Group argues:

The Cost Estimates set out preliminary estimates prepared by Naval Group during the Competitive Evaluation Process, which may not reflect the current position given the design of the FSP has matured since the Cost Estimates were prepared. Naval Group and the Commonwealth continue to develop cost estimates for the build of the Future Submarines.

The total costs that I have requested relate to a fictitious submarine. I draw the Information Commissioner’s attention to the following:

a. The Competitive Evaluation Process was not aimed at eliciting and assessing a full design for the Future Submarine, or identifying firm cost and schedule data [See the ANAO’s audit into the Future Submarine Competitive Evaluation Process at paragraph 2 <https://www.anao.gov.au/work/performance-audit/future-submarine-competitive-evaluation-process>].

b. The cost was for a pre-concept design to meet Australian specific submarine requirements [Ibid at Paragraph 1.2].

c. The pre-concept design will never be used in any future commercial case and therefore cannot have the intrinsic commercial value.

I note that the Federal Government publishes total contract values in contract notices on AusTender in circumstances where the tender may well have been open with any and all members of the community being able to understand the full scope of supply under the contract. It does so without causing the business affairs of the winning entity to be harmed or discouraging future engagement by business entities in future tenders. The public interest demands the publication.

69. Relevantly, in the AAT decision of *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 (*‘Bell’*), Forgie DP explained that consideration of the public interest is relevant when determining whether disclosure would have an unreasonable adverse effect under s 47G. Forgie DP explained:

... Returning to s 47G(1)(a), it seems to me that the addition of a public interest test in s 11A(5) makes no difference to the continuing relevance of public interest when interpreting s 47G(1)(a). The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. It will be balanced against factors that may not be regarded as aspects of the public interest but as aspects relevant only to the interests of the person whose interests might be affected by disclosure. The outcome of balancing all of the relevant factors – public interest or otherwise – will resolve the issue of whether disclosure of a

document under the FOI Act would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her business affairs or have another adverse effect described in s 47G(1)(a).²⁵

70. In the decision of *Bell*, Forgie DP found that disclosure of documents containing details showing whether public money was used appropriately would not have an unreasonable adverse effect on the third party, due to ‘the public interest in knowing whether public money was accounted for at the appropriate time in the manner required and the public interest in ensuring that public programmes are properly administered’.²⁶
71. Similarly, in the decision of *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39, former Australian Information Commissioner Pilgrim found that material that related to services provided in offshore detention centres was not exempt under s 47G(1)(a):

I acknowledge that there are circumstances where the disclosure of business information may have an adverse effect on the lawful business, commercial or financial affairs of an organisation. However, although IHMS has contended that their business may be affected by the release of the information ... I consider that there is a strong public interest in ensuring that public programmes are properly administered, particularly as it relates to services provided in offshore detention centres which includes the provision of services to children.²⁷

72. In the decision of *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2019] AICmr 38, I found that material that related to the delivery of health services in offshore detention centres was not exempt under s 47G(1)(a):

With respect to the question of whether disclosure would have an unreasonable adverse effect on IHMS’ lawful business, commercial or financial affairs, I have considered the Department’s submissions in the present case. While I acknowledge that disclosure of the relevant material could reasonably be expected to have an adverse effect on the affairs of IHMS, I am not satisfied that such an effect would be an unreasonable adverse effect due to the nature of the information contained in the relevant material, the fact that public money was used to fund the delivery of health services in offshore detention centres by IHMS, and the significant public interest value in ensuring that service providers are properly performing their contractual obligations.²⁸

73. In *Nick Xenophon and Department of Defence (Freedom of information)* [2019] AICmr 53 Acting Australian Information Commissioner Hampton found that the final future submarine Australian Industry Plan submitted to Defence by Naval Group was not exempt under s 47G(1)(a):

I have considered the submissions provided by the Department and Naval Group. Although the Department and Naval Group submit that the information contained in the document is sensitive in nature, and that disclosure would adversely affect Naval Group’s commercial relationship with the companies named in the relevant material, the Department and Naval Group have not

²⁵ [48].

²⁶ *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [68].

²⁷ *Paul Farrell and Department of Home Affairs (No 3) (Freedom of information)* [2018] AICmr 39 [33] (footnotes omitted).

²⁸ [79].

provided any further evidence to support their contentions, nor have they adequately explained how or why disclosure of the relevant material would, or could reasonably be expected to, result in the outcome that the Department and Naval Group claims.

Further, Naval Group submitted the AIP as part of a competitive process in relation to the Future Submarine Program. The AIP comprises information relating to Naval Group's proposals as to how it intends to deliver various aspects of the Future Submarine Program if Naval Group was selected as the successful bidder. Given that the information in Naval Group's CEP proposal, which includes the AIP, was used to inform the Commonwealth's decision to select Naval Group as the most suitable partner for the delivery of the Future Submarine Program, I consider that disclosure would further transparency and accountability with respect to the information provided by Naval Group to persuade the Commonwealth that it is best placed to deliver the Future Submarines Program.²⁹

74. I have considered the submissions provided by the Department and Naval Group in this IC review. Although the Department and Naval Group submit that the information contained in the document is 'commercially sensitive' and 'would prejudice the commercial activities of Naval Group by providing our competitors with an unfair insight into Naval Group's contracting practices and commercial positions', the Department and the third party have not provided any further evidence to support their contentions, nor have they adequately explained how or why disclosure of the relevant material would, or could reasonably be expected to, 'prejudice ongoing negotiations between Naval Group and the Commonwealth'.
75. Further, Naval Group submitted the Cost Estimate Template as part of a competitive process in relation to the Future Submarine Program. The information relates to Naval Group estimated cost of what it proposes to deliver in relation to the Future Submarine Program if selected as the successful bidder. Given that the information in Naval Group's Cost Estimate Template was used to inform the Commonwealth's decision to select Naval Group as the most suitable partner for the delivery of the Future Submarine Program, I consider that disclosure would further transparency and accountability with respect to the information provided by Naval Group to persuade the Commonwealth that it is best placed to deliver the Future Submarines Program.
76. Accordingly, I am not persuaded that the Department has adequately discharged its onus in establishing that disclosure of the relevant material in this case could reasonably be expected to have an unreasonable adverse effect on Naval Group's lawful business, commercial or financial affairs.
77. The relevant material is not exempt under s 47G(1)(a).
78. As I have found that the relevant material is not exempt under s 47G(1)(a), it is unnecessary for me to consider whether giving access to conditionally exempt material would be contrary to the public interest for the purposes of s 11A(5).

Prejudice the future supply of information (s 47G(1)(b))

79. In relation to s 47G(1)(b), the FOI Guidelines explain:

²⁹ [59]-[60].

This limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.

There must be a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government. In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information. Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information

Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information in issue is routine or administrative (that is, generated as a matter of practice).³⁰

80. In its reasons for its decision, the Department said:

Upon examination of the documents I identified information provided by DCNS as part of a submission in a procurement process, the CEP. Disclosure of this information could reasonably be expected to prejudice the future supply of information to Defence for the administration of procurement processes.

In the section of the Commonwealth Procurement Rules (CPRs) dealing with the treatment of confidential information, paragraph 7.21 states:

"Submissions must be treated as confidential before and after the award of a contract..."

Businesses engage with Defence on the understanding that it will follow and fulfil its obligations and responsibilities under the CPRs issued by the Minister for Finance (Finance Minister) under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Further, businesses make submissions on the basis that they will be kept confidential. If this information were disclosed, the willingness of the business to provide accurate figures to bid competitively for future projects could reasonably be expected to be reduced.

81. The Department submits:

The Department maintains the position as stated in the original decision, that release of the material could reasonably be expected to prejudice the supply of future information to the Commonwealth.

82. In *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21, former Australian Information Commissioner McMillian discussed circumstances in

³⁰ *FOI Guidelines* [6.198] – [6.200] (footnotes omitted).

which there may be alternate mechanisms through which information may be compulsorily obtained. Information Commissioner McMillian said:

... As Australian Government officials they would doubtless be aware of their official responsibilities and could be expected to participate diligently in reviews undertaken by CASA. CASA also has other options and strategies available to in [sic] the absence of coercive statutory powers to compel evidence. Two options in a broad spectrum are to take up with the Airservices Board or Executive Committee any failure by Airservices officers to provide willing assistance to a CASA review; or to consider exercising powers conferred by the Regulations, such as the power in Division 172.F.5 to issue a show cause notice to suspend an ATS provider's approval to avert a likely adverse effect on the safety of air navigation.³¹

83. I have taken into account that Naval Group has objected to the release of the information they provided to the Department in the Final Cost Estimate Template. However, I consider that it is in the interests of a commercial entity to provide accurate cost estimates to the Department in a competitive tendering process. Accordingly, I am not persuaded that a claim of prejudice can be made under s 47G(1)(b) with respect to the documents.
84. I am not persuaded that the documents are conditionally exempt under s 47G(1)(b).
85. As I have found that the documents are not conditionally exempt, it is not necessary for me to consider whether the disclosure of the documents would be contrary to the public interest for the purposes of s 11A(5) of the FOI Act.

Whether the documents at issue are otherwise exempt under the FOI Act

86. In conducting an IC review of an access refusal decision, it is open to me under ss 55 and 55K of the FOI Act to change the basis on which the decision is made.³²
87. During the IC review, the Department did not contend that the documents at issue are subject to any other exemptions under the FOI Act.
88. Having regard to the nature and content of the material at issue and the parties' submissions, I do not consider it appropriate to consider whether the documents are exempt under another provision of the FOI Act.³³

³¹ *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [17].

³² Under s 55(2)(a) of the FOI Act, I may conduct an IC review in whatever way I consider appropriate. Under s 55K(2) of the FOI Act, for the purposes of implementing a decision on an IC review, I may perform the functions, and exercise the powers, of the person who made the IC reviewable decision.

³³ For instance, in the present case the nature and content of the material at issue and the submissions of the parties are not sufficient to establish that disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence (s 45). The FOI Guidelines provide that five criteria in relation to the information must be satisfied in order to found an action for breach of confidence: 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; and unauthorised disclosure of the information has or will cause detriment (see *FOI Guidelines* [5.159]).

Angelene Falk
Australian Information Commissioner
13 August 2020

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#) page on our website.

**FEDERAL COURT OF AUSTRALIA
ADMINISTRATIVE AND CONSTITUTIONAL LAW & HUMAN RIGHTS
MELBOURNE REGISTRY**

VID519/2021

SENATOR REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

ANNEXURE SMM36

The following 7 pages are the annexure SMM36 referred to in the affidavit of Stella Maree Majury made on 15 October 2021:



Administrative
Appeals Tribunal

Application for Review of Decision

Online Reference Number: **M3SMQJ**

Submission Date and Time: **9 Sep 2020 5:44:10 PM AEST (UTC+10:00)**

Terms and conditions

Privacy Notice

We collect information from you to process your application and to carry out the review under the *Administrative Appeals Tribunal Act 1975*. We give a copy of the application to the department or organisation that made the decision you want reviewed. We may also give a copy to any other person that is a party to the review. We may also advise any other person whose interests are affected by the decision under review that you have lodged an application for review.

For more information about what we do with information given to us during the review, including what information is usually made public and when information is kept confidential, see our fact sheet [Privacy and confidentiality at the AAT](#) and our [Privacy Policy](#).

Terms and Conditions

In using this online form, you acknowledge that:

- the time of lodgement for any online application is the time when the AAT receives the application;
- if you agree, the AAT will send documents relating to your application to you by email, and that there are risks in transmitting information by email and that, while the AAT strives to protect such information, we cannot guarantee the security or integrity of information transmitted by email or by any other means;
- you have read and understood the contents of the Privacy Notice above;
- you have read and understood the contents of the [Disclaimer](#);
- the AAT is not responsible for the loss of any unsaved information; and
- the AAT controls the operation of our online lodgement system and that it may not be available at all times or at any particular time.

I have read and understood the Terms and Conditions shown above, and agree to be bound by those Terms and Conditions *

Applicant

Applicant details

Are you applying as, or on behalf of, an individual or an organisation? *

Individual

Organisation

Organisation name *

Secretary, Department of Defence

ABN

68706814312

Street address

Country *

AUSTRALIA

Address Line 1 *

Campbell Park Offices

Address Line 2

Northcott Drive

Suburb *

CANBERRA BC

State *

ACT

Postcode *

2610

This address is also my postal address

Postal address

Country *

AUSTRALIA

Address Line 1 *

PO Box 7911

Address Line 2

Suburb *

CANBERRA BC

State *

ACT

Postcode *

2610

Contact details

The AAT prefers to use email as the primary method of contact. However, you may choose an alternative method if you prefer.

Preferred method for receiving correspondence *

Email

Email *

Belinda.Hayward@defence.gov.au

Landline *

0262662122

Mobile

Fax

Preferred daytime contact number *

Landline

Contact person

Title

Ms

Name

Belinda Hayward

Position in organisation

Special advisor - FOI

Interpreter

If you need an interpreter, we will arrange for a qualified interpreter to assist you free of charge. If you speak a particular dialect, please include this on the form.

Do you need an interpreter? *

No

Assistance

If you have a disability or special need and would like some assistance, we will try to make appropriate arrangements for you. Our offices (known as registries) have portable hearing loops and are wheelchair accessible.

Would you like some assistance because of a disability or other special need?

No

Representative

Representative

You can represent yourself at the AAT or any person you choose can represent you. If you tell us that you have a representative, we will send the letters and other documents about your case to your representative instead of sending them to you.

Do you have a representative? *

. Yes

Name *

Charine Bennett

Organisation

. Australian Government Solicitor

Country *

. AUSTRALIA

Address Line 1 *

4 National Circuit

Address Line 2

Suburb *

BARTON

State *

ACT

Postcode *

. 2601

The AAT prefers to use email as the primary method of contact. However, you may choose an alternative method if you prefer.

Preferred method for receiving correspondence *

. Email

Email *

charine.bennett@ags.gov.au

Landline *

0262537639

Mobile

Fax

0262537302

Preferred daytime contact number *

Landline

Decision

Decision details

Are you applying for a second review of a decision made by the AAT's Social Services & Child Support Division? *

No

If the type of decision you want reviewed is not listed, please select Other

What type of decision do you want reviewed? *

Freedom of information

Are you able to upload a copy of the decision? *

Yes

Please upload your decision now. You can upload one or more files containing the decision you want us to review.

The maximum size for any single file is 15 MB. The acceptable file formats are Microsoft Word documents (.doc and .docx), PDF files (.pdf), RTF files (.rtf) and JPEG, GIF or PNG image files.

You will have the opportunity later in the application to upload any additional documents, for example, any evidence or documents to support your claims.

Decision 1

Please select the copy of your decision

*

File: Rex Patrick and Department of
Defence (No 2) (Freedom of
information) [2020] AICmr 40 (13
Augu.pdf

Time limit

We ask you to tell us when you received the decision so we can check if your application has been lodged within the time limit.

Date you received the decision
you want reviewed
(dd/mm/yyyy) *

14 Aug 2020

Reasons for the application

You must tell us briefly why you want to have the decision reviewed. For example, you may think the decision was wrong and a different decision should be made, or the information you provided was not taken into account, or the law was not applied correctly.

We cannot start the review if you do not answer this question.

Why do you claim the decision is wrong? *

The Department considers that the correct or preferable decision is that the requested information is exempt from disclosure under the Freedom of Information Act 1982.

The decision also incorrectly omitted reference to the affected third party, Naval Group Australia, being a party to the review.

Documents

If there are any other documents you want to send us with your application, you can upload them here.

The maximum size for any single file is 15 MB. The acceptable file formats are Microsoft Word documents (.doc and .docx), PDF files (.pdf), RTF files (.rtf), Microsoft Excel spreadsheets (.xls and .xlsx) and JPEG, GIF or PNG image files.

Do you want to provide any additional documents now? *

No

Declaration and email confirmation

Declaration

I understand that, by submitting this form, I am making an application for a review of the decision(s) identified, and declare that the contents of this application are true to the best of my knowledge. *

Email confirmation

Where would you like us to send the email confirming that we have received your application? *

Both applicant's and representative's email addresses

Payment

An application fee of \$952 must usually be paid when you apply for a review of a decision under the *Freedom of Information Act 1982*.

However, no fee is payable if the decision you want reviewed is about a document relating to a decision that does not attract a fee when a person applies to the AAT for a review of that type of decision. Information about decisions that do not attract an application fee can be found on [our website](#). They include decisions about:

- Commonwealth workers' compensation,
- family assistance or social security payments,
- military compensation,
- the National Disability Insurance Scheme, and
- veterans' entitlements.

Do you believe your application is one in relation to which no fee is payable as explained above? *

No

The AAT can order that a reduced fee of \$100 is payable if we decide that paying the standard application fee would cause you financial hardship. To apply for a fee reduction on the grounds of financial hardship, you will need to fill out the [Request for Fee Reduction](#) form and send it to us.

Do you want to apply for a fee reduction on the grounds of financial hardship?

No

Fee payable

\$952.00

When a fee must be paid, we will not start the review until you pay the fee. The AAT may dismiss your application if you do not pay the fee within six weeks after lodging your application.

Do you want to pay your fee now? *

No

After we receive your application, we will contact you to explain what you may need to do in relation to the fee.