



Reference: FOI 687/22/23

FOI 687/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the email of 04 September 2023, in which Andrew Quilty (the applicant) sought an internal review under section 54 of the *Freedom of Information Act 1982* (Cth) (FOI Act) of the Accredited Decision Maker's decision dated 28 July 2023.

2. The applicant's request was for access to the following documents under the FOI Act:

...all such response letters from the leadership of both Combined Team Uruzgan and Joint Task Force 633 to the AIHRC between 2009 and 2014.

Background:

Between 2009 and 2014, via its office in Tarin Kowt, the Afghan Independent Human Rights Commission (AIHRC) made numerous inquiries into incidents involving Australian military forces in Uruzgan and neighbouring provinces that it claimed resulted in civilian casualties. The inquiries were fielded by ADF legal officers based in Tarin Kowt, who then passed them up the chain of command.

Most AIHRC inquiries received written responses signed by senior leaders from either Combined Team Uruzgan or Joint Task Force 633.

Background

3. On 26 April 2023, the applicant submitted a request for documents under the FOI Act.

4. On 09 August 2023, the applicant was provided the original decision.

Original Decision

5. The original decision identified seven documents. The decision:

a. partially released seven documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act on the grounds that the deleted material was considered exempt under sections 33(a)(i), 33(a)(iii) [documents affecting national security, defence or international relations], 47E(d) [public interest conditional exemptions – certain operations of agencies] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act; and

b. removed irrelevant material in accordance with section 22 of the FOI Act.

Contentions

6. In their application for internal review, the applicant contended:

While I have been provided with seven documents pertaining to my original request, I believe there are other relevant documents which have not been provided.

To recap, I requested letters from senior leadership at Joint Task Force (JTF) 633 addressed to the Afghan Independent Human Rights Commission (AIHRC) in response to letters from the AIHRC regarding complaints made against the Australian Defence Force between 2009 and 2014.

From the seven documents provided to me on 9 August 2023, the earliest letter was signed by Air Commodore C.J. Sawade, Deputy Commander Joint Task Force 633 on 14 August 2012. I don't believe, however, that this was the first letter of its nature sent by senior ADF officials to the AIHRC in the specified time period.

My original request refers to letters of the nature described above between 2009 and 2014. If it was not obvious that the request referred to ALL such letters, I would like to make that clear now.

7. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents.

Reviewing officer

8. I am authorised to make this internal review decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

Documents subject to internal review

9. Taking into account the applicant's contentions and the additional one document uncovered from fresh searches which was deemed in scope, the one new document is the subject of this internal review.

Internal review decision

10. After careful consideration, I have decided to vary the original decision by partially releasing an additional document identified as part of the fresh searches. This document is being released in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act on the grounds that the deleted material is considered exempt under sections 33(a)(i) [documents affecting the security of the Commonwealth], 47E(d) [public interest conditional exemptions – certain operations of agencies] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

11. Further to the above, material considered irrelevant to the scope of the request has been removed under section 22 of the FOI Act.

Material taken into account

12. In arriving at my decision, I had regard to:

- a. the scope of the applicant's request and the subsequent internal review application;
- b. the original decision;
- c. the content of the document subject to the internal review;
- d. relevant provisions in the FOI Act;
- e. the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
- f. the outcome of fresh searches; and
- g. advice from Headquarters Joint Operations Command (HQJOC).

Findings and reasons

Searches

13. As part of the internal review, fresh searches were undertaken by the following areas:

- Army Headquarters (AHQ);
- Afghanistan Inquiry Response Task Force (AIRTf);
- Office of Chief of the Defence Force (OCDF); and
- Headquarters Joint Operations Command (HQJOC).

14. The searches were undertaken at the following locations:

- Objective (Defence's document and records management system) on both the Defence Protected Network and Defence Secret Network; and
- G drive.

15. The following terms were used in the searches:

- AIHRC;
- Employee name;
- Afghanistan Independent Human Rights;
- Uruzgan;
- Joint Task Force 633; and
- JTF 633.

16. The fresh searches resulted in the one new document. The decision in relation to the release of this document is below.

Section 33(a)(i) – Documents affecting the security of the Commonwealth

17. Section 33(a)(i) of the FOI Act relevantly states:

A document is an exempt document if disclosure of the document under this Act:
 (a) *would, or could reasonably be expected to, cause damage to:*
 (i) *the security of the Commonwealth*

18. Upon examination of the documents, I formed the view that disclosure of the information would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

19. In relation to section 33(a)(i) of the FOI Act, the Guidelines state:

5.29 The term 'security of the Commonwealth' broadly refers to:
 (a) *the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests...*

5.30 A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

20. Paragraph 5.16 of the Guidelines provide that the term 'reasonably expected' requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27, the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur, which can be supported by evidence or reasoning. A mere allegation or possibility of damage will be insufficient for the purposes of the exemption

21. I identified operational material regarding a classified mission, which, if released, could reasonably be expected to cause damage to the security of the Commonwealth. The

release of this information, combined with other information publically available (the mosaic theory), is capable of disclosing the nature and details of the classified mission that occurred. Further, it may allow an adversary to construct a timeline of events subsequently informing and revealing Australian Defence Force (ADF) operational capabilities, timeframes and response times. This information could be used by an adversary to harm the ADF's current and future operations thereby damaging the security of the Commonwealth.

22. In determining the extent to which the section 33(a)(i) exemption applies, paragraph 5.39 of the Guidelines stipulates:

When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.

23. In understanding the application of the mosaic theory, it is fundamental to understand that it is not just strategic documents that are covered by the operation of section 33(a)(i) of the FOI Act, but rather, key pieces of information that can be used in conjunction with the already wide range of information available to build up a complete picture. As stated by the Administrative Appeal Tribunal in *Milliss and National Archives of Australia* [2000] AATA 565 (11 July 2000) at paragraphs [21] and [22]:

...[I]n seeking to obtain access to material, a searcher may seek or be enabled to - with the smallest particle of intelligence, even though such particle may be innocuous standing alone, when used in conjunction with other pieces of intelligence - build up a picture, the likes of which the searcher was seeking to construct.

Thus information on its face or in conjunction with other material might, depending on the evidence, enable a person to ascertain by process of inference, induction or deduction, the identity of a source in question...

24. Importantly, when considering the release of sensitive information relating to ADF capabilities, it is essential to consider that documents released in response to an FOI request cannot be conditionally released, so must be considered as a release to the world at large. It is also essential to take into consideration both the environment in which the material will be released and the environment that ADF must undertake its essential functions.

25. Based on my consideration of the above, I am of the view that release of the date in the document could reasonably be expected to cause damage to the national security of the Commonwealth.

26. Accordingly, I am satisfied the relevant information in the document is exempt under section 33(a)(i) of the FOI Act.

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

27. Section 47E(d) of the FOI Act provides as follows:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

28. The Guidelines, at paragraph 6.123, provide that where the documents relate to certain operations of agencies, the decision maker must address whether the predicted effect must bear on the agency's 'proper and efficient' operations; that is, the agency is undertaking its expected activities in the expected matter.

29. The document is a letter from a staff member to the Afghanistan Independent Human Rights Commission (AIHRC). This letter contains names and contact details of the staff members.

30. Defence has established procedures to direct correspondence from members of the public through specific channels to ensure that workflows can be controlled and managed. Releasing the direct contact details of staff members would interfere with the procedures that are in place and would have a substantial adverse effect on the operations of the area, and Defence as a whole.

31. I am satisfied that if the names and contact details of Defence personnel were to be made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels.

32. Additionally, by providing the staff names, release of the information would, or could reasonably be expected to, affect the integrity and efficacy of internal processes and procedures used by Defence with respect to reporting lines. Members of staff may be reluctant to provide information in a frank and fearless manner and cooperate in providing information if they were aware that the material provided would be released to the world at large in response to an FOI request.

33. I have therefore decided that this material is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions – personal privacy

34. Section 47F(1) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

35. The FOI Act shares the same definition of 'personal information' as the *Privacy Act 1988* (Cth). The Guidelines provide that:

6.128 Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

36. I have found that the documents contain personal information of individuals other than the applicant. The document includes the names and other personal information of third parties, which if disclosed, could reasonably be expected to identify them.

37. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors in accordance with section 47F(2) of the FOI Act:

- a. the extent to which the information is well known;
- b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- c. the availability of the information from publicly accessible sources; and

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

38. I found that the personal information relating to the third parties is not readily available from publicly accessible sources and could reasonably identify or cause harm to the individuals or their close relations.

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

Public interest considerations – sections 47E(d) and 47F

40. I found that the following factors favour the disclosure of the documents:

- promote the objects of the Act.

41. I am satisfied that the disclosure of the documents would not increase public participation in government processes nor scrutiny or discussion of Defence activities. I also am of the view that disclosure would not promote effective oversight of public expenditure.

42. While I understand that there is a public interest in allowing a person to access documents about topical issues to do with Defence, it would be contrary to the public interest to prejudice the agency's management functions.

43. In accordance with paragraph 6.22 of the Guidelines, I have found that that following factors weigh against disclosure of the document:

- could reasonably be expected to prejudice the protection of an individual's right to privacy;
- could reasonably be expected to harm the interests of an individual or group of individuals;
- could reasonably be expected to prejudice the management function of an agency;
- could reasonably be expected to impede the flow of information between the agency and the AIHRC; and
- could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.

44. In coming to the above decision, I have not considered the factors listed in subsection 11B(4) [Irrelevant factors] of the FOI Act.

45. Accordingly, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the information. As such, it would be contrary to the public interest to release the information considered exempt under sections 47E(d) and 47F of the FOI Act.

Shan Gunawardena
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Associate Secretary Group