



**DEFENCE FOI 151/23/24**

**STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982**

1. I refer to the request by MBV (the applicant), dated and received on 18 August 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

*...all documents, including records of meetings, text messages, signal messages, emails or records of calls relating to the processing of Defence FOI 743/22/23.*

**Background**

2. On 8 September 2023, Defence sought the applicant's written agreement to extend the period for dealing with the request until 1 October 2023, in accordance with section 15AA [extension of time with agreement] of the FOI Act. Defence did not receive a response from the applicant.

**FOI decision maker**

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

**Documents identified**

4. I have identified forty-five (45) documents as falling within the scope of the request.
5. The decision in relation to each document is detailed in the schedule of documents.

**Exclusions**

6. Mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

**Decision**

7. I have decided to:
  - a. release one (1) document in full;
  - b. partially release forty-four (44) documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act on the grounds that the deleted material is considered exempt under sections 33 [Documents affecting national security, defence or international relations], 42 [Documents subject to legal professional privilege], 47C [Public interest conditional exemptions – deliberative material], 47E [Public interest conditional exemptions – certain operations of agencies] and 47F [Public interest conditional exemptions – personal privacy] of the FOI Act; and
  - c. remove irrelevant material in accordance with section 22 of the FOI Act.

## **Material taken into account**

8. In making my decision, I have had regard to:
  - a. the terms of the request;
  - b. the content of the identified documents in issue;
  - c. relevant provisions of the FOI Act;
  - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
  - e. advice received from the Royal Australian Air Force (RAAF), Department of the Prime Minister and Cabinet (PM&C) and relevant third parties.

## **REASONS FOR DECISION**

### **Section 22 – Access to edited copies with exempt or irrelevant matter deleted**

9. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.
10. The documents contain exempt material as well as information that does not relate to the request.
11. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

### **Section 33(a)(i) – Documents affecting national security, defence or international relations**

12. Section 33(a)(i) of the FOI Act 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...*

13. In regard to the terms ‘would, or 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.*

...

5.31 *The meaning of 'damage' has three aspects:*

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

14. In regard to 'security of the Commonwealth', the Guidelines provide at paragraph 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*
- (b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations (see definition in s 4(5)).*

15. I have identified material within the documents, which would, or could reasonably be expected to, disclose patterns of travel, including destinations and departure details. Further, the release of this information could reasonably be expected to allow anticipation of future patterns of movement, thereby placing the personal safety of members of Parliament at risk. It is reasonable to expect that this information may cause targets for adverse actions and, therefore, disclosing travel information would increase any potential threat to these individuals. In my view, the release of the relevant information would adversely impact and cause damage to the security of the Commonwealth.

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

#### **Section 42 – Documents subject to legal professional privilege**

17. Section 42(1) of the FOI Act states:

*A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

18. I find that some of the documents contain legal advice, which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

19. The Guidelines provide, at paragraph 5.129, that in considering whether LPP exists, the following factors should be considered:

- whether there is a legal adviser-client relationship*
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- whether the advice given is independent*
- whether the advice given is confidential*

20. I am satisfied that the legal adviser-client relationship had been established, as the advice was provided by lawyers, who were acting in their capacity as independent professional advisers.
21. I am satisfied that the specific material contained in the documents was created for the dominant purpose of giving or receiving legal advice, and that advice was provided independently. I also note there is no evidence to suggest that privilege has been waived by the client or the legal adviser.
22. Finally, I am satisfied the advice was provided in confidence, given the disseminating legal marker attached to the documents. Further, I note that while the material in question is contained in documents being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed at paragraph 5.148 of the Guidelines, which provides that '[m]odern organisations often work in teams and several people may need to know about privileged communications...'.
23. Accordingly, I am satisfied that the relevant information is exempt under section 42 of the FOI Act.

#### **Section 47C – Public interest conditional exemptions - deliberative processes**

24. Section 47C(1) of the FOI Act states:

*A document is conditionally exempt if its 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.*

25. Upon examination of the documents, I found that they contained information relating to internal processes of PM&C, including how they engage with other areas and portfolio holders. When consulting PM&C, they contended that the relevant information should be conditionally exempt under section 47C of the FOI Act.
26. I have considered whether the information was purely factual. I have taken into account the Guidelines, at paragraph 6.66, which clarify 'purely factual material' that would not be regarded as deliberative matter as:
  - a. content that is merely descriptive;
  - b. incidental administrative content;
  - c. procedural or day to day content;
  - d. the decision of 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 purpose of, a deliberative process.

27. Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material. The Guidelines, at paragraph 6.73, state that:

*‘[p]urely 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.*

28. Accordingly, I am satisfied that the relevant information meets the definition of deliberative material, and that where the content is purely factual, it is embedded in, or intertwined with the deliberative content and cannot be excised. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

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

29. Section 47E of the FOI Act states:

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

...

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

30. The Guidelines, at paragraph 6.123, provide that:

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

31. In the case of *‘ABK’ and Commonwealth Ombudsman [2022]* AICmr 44, the Information Commissioner (IC) found that where the direct contact details of agency staff are not publicly known, they should be conditionally exempt under section 47E(d). The IC made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

32. I am satisfied that were the contact details of Defence personnel made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels. Further, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of names, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of Defence.

33. Additionally, I have found that the documents contain information relating to the operational processes for managing FOI requests, and other related matters. In order to determine if the disclosure would, or could reasonably be expected to have a substantial, adverse effect on the proper and efficient conduct of the operations of Defence, I have considered the functions of the FOI team and the relevant area within RAAF.

34. I consider that the relevant information would, or could reasonably be expected to release information about the internal workings and processes of these teams, which would impact the ability of these areas to undertake their usual functions, including the ability to have frank discussions about relevant processes. This could reasonably be expected to prejudice the effectiveness of each area's current operations in relation to undertaking their usual functions.
35. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.' Given that the direct contact details within the documents are not publicly available and that more appropriate communication channels are already available, and that there are established processes within Defence to allow line areas to undertake their usual functions, I am satisfied that release of the information could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.
36. Accordingly, I am satisfied that all staff information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

#### **Section 47F – Public interest conditional exemptions - personal privacy**

37. 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).*

38. 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.*

39. I found that the documents contain the personal information of a number of individuals. This includes their names, email address and job title, which if disclosed, would reasonably identify the third parties.
40. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors in accordance with section 47F(2):
  - 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;
  - d. the effect the release of the personal information could reasonably have on the third party.
41. I find that the specific personal information listed is not well known, individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the document and the information is not readily available from publicly accessible sources.

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

**Public interest considerations - sections 47C, 47E(d) and 47F**

43. Section 11A(5) of the FOI Act states:

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

44. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

*(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*

*(b) inform debate on a matter of public importance;*

*(c) promote effective oversight of public expenditure.*

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

46. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request are that release of this information could reasonably be expected to prejudice:

- the protection of an individual's right to privacy;
- the interests of an individual or a group of individuals;
- the management function of an agency; and
- the personnel management function of an agency.

47. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the names, email addresses and phone numbers of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.

48. Additionally, while I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of the material contained within the documents, particularly those that refer to both PM&C's and Defence's internal processes which allow PM&C and Defence to undertake its operational activities in an expected and lawful manner.

49. Further, Defence has an obligation to protect the personal information of third parties that it holds, and I find that the public interest in protecting this information far outweighs the public interest in releasing this information.

50. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.
51. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to you. Accordingly, I find that the information is exempt under sections 47C, 47E(d) of 47F of the FOI Act.

**FURTHER INFORMATION**

52. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

**Carolyn Terry**

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Associate Secretary Group