



DEFENCE FOI 388/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by Mr James Smith (the applicant), dated and received on 29 October 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

1. the quarterly Afghanistan Inquiry Implementation Oversight Panel Reports to the Defence Minister that have not yet been released under FOI (i.e. Report number 11 and 12).

2. any responses by the Minister, the Dept of Defence, or ADF to any of those reports (i.e. Report number 1 to 12).

3. copies of all documents initiating, requesting or establishing the report by Andrew Hocking into organisational "lessons learnt" during the Afghanistan Campaign (which ultimately became the report known as "Preparing for the future: key organisational lessons from the Afghanistan campaign").

4. copies of all documents which in any way set, changed, altered, edited or commented on the scope, terms, issues, matters or topics of the report referred to in item 3 above.

FOI decision maker

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

Documents identified

3. I have identified one (1) document in relation to Item 1 of the request, three (3) documents in relation to Item 3 and one (1) document in relation to Item 4.

4. I did not identify any documents in relation to Item 2.

5. One document identified with regard to Item 3 and one document with regard to Item 4 have previously been released under a separate FOI. These documents, the Afghanistan Inquiry Implementation Oversight Panel Quarterly Reports 3 and 4, were published on the Defence FOI Disclosure log on 21 December 2022 and are publicly available. They can be found at the following link:

- [Freedom of information disclosure log | About | Defence](#) – FOI 491/21/22

6. As the documents are publicly available, I have not considered access as part of my decision.

Exclusions

7. Personal email addresses, signatures and PMKeyS 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

8. I have decided to:
- a. partially release three 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(a)(ii) [Documents affecting national security, defence or international relations], 45 [Documents containing material obtained in confidence], 47C [Public interest conditional exemptions - deliberative processes] and 47E(d) [Public interest conditional exemptions - certain operations of agencies] of the FOI Act; and
 - b. refuse Item 2 of the request under section 24A [requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act.

Material taken into account

9. 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);
 - e. advice from the Afghanistan Inquiry Implementation Oversight Panel Secretariat; and
 - f. the Terms of Reference for the Afghanistan Inquiry Implementation Oversight Panel.

REASONS FOR DECISION

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

10. 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.
11. Two documents contain exempt material and information (*PMKeys number and signatures*) that does not relate to the request.
12. 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 24A – Requests may be refused if documents cannot be found, do not exist or have not been received

13. Section 24A(1) of the FOI Act states:

- (a) *An agency or Minister may refuse a request for access to a document if:*
 - (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found; or*
 - (ii) *does not exist.*

14. Paragraph 3.94 of the Guidelines advises the detail this statement of reasons should include to refuse a request under section 24A(1):

...the statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search...

15. To ensure all reasonable steps have been taken in relation to this request, every reasonable avenue of locating potential documents matching Item 2 of the request has been exhausted.
16. Personnel searched for documents containing "Implementation Oversight Panel". No records were found matching the scope of Item 2 of the applicant's request.
17. I am satisfied that all reasonable steps have been taken to locate the documents sought by the applicant. I am satisfied that the documents cannot be found or do not exist, and refuse the request under section 24A(1) of the FOI Act.

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

18. Section 33(a)(ii) of the FOI Act states:

A document is an exempt document if disclosure of the document under this Act:

- (b) *would, or could reasonably be expected to, cause damage to:*
 - (ii) *the defence of the Commonwealth...*

19. 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.*

20. In regard to 'defence of the Commonwealth', the Guidelines, at paragraph 5.34, refer to previous Administrative Appeals Tribunal (AAT) decisions which provide that the term includes:

- a. meeting Australia's international obligations;
- b. ensuring the proper conduct of international defence relations;
- c. deterring and preventing foreign incursions into Australian territory; and
- d. protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.

21. I have determined that the document contains information that the exposure of could prejudice the effectiveness of the Australian Defence Force. This is because the information pertains to core military capabilities and its release could expose information that external entities could utilise to hinder capability. Such action could result in damage to the defence of the Commonwealth.

22. Accordingly, I find that this material is exempt under section 33(a)(ii) of the FOI Act.

Sections 45 – Documents containing material obtained in confidence

23. Section 45 of the FOI Act states:

(b) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency of the Commonwealth), for breach of confidence.

24. In relation to a breach of confidence, the Guidelines further explain:

Breach of Confidence

i.158 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

i.159 To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

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

25. Upon examination of the document, I have determined that disclosure of the redacted information would breach the confidence of the person the information was obtained from and could be a basis for an action to be brought against the Commonwealth. The relevant information was obtained on the basis of a mutual understanding of confidence to ensure frank and open conversations with key stakeholders. I believe disclosure of this information could negatively impact the willingness of stakeholders to provide such views in the future. This may have an adverse effect on the future supply of information in similar situations.
26. Accordingly, I find that the relevant material is exempt pursuant to section 45 of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

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

*(1) 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.*

28. Upon examination of the document, I have identified deliberative matter – that is in the nature of, or relating to either opinion, advice or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the purpose of a deliberative process of Defence.
29. The redacted information contains opinions, advice, recommendations and supporting material that was gathered through consultation and remains under consideration.
30. 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.*
31. I am satisfied that the documents contains matter that 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.
32. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

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

33. Section 47E(d) of the FOI Act states:

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

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

34. 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.

35. In the case of 'ABK' and Commonwealth Ombudsman [2022] AICmr 44, the Information Commissioner (IC) found that where the direct email addresses and phone numbers 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.

36. 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.

37. The Guidelines advise, 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 document are not publicly available and that more appropriate communication channels are already available, 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.

38. Accordingly, I am satisfied that all staff information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

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

39. 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.

40. 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;
- (d) allow a person to access his or her own personal information.

41. In my view, disclosure of this information would not increase public participation in Defence processes (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).
42. 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:
 - an agency's ability to obtain confidential information;
 - an agency's ability to obtain similar information in the future;
 - the management function of an agency; and
 - the personnel management function of an agency.
43. 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 document, particularly those still under consideration by Defence.
44. Further, it is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. 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.
45. 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.
46. 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 and 47E(d) of the FOI Act.

FURTHER INFORMATION

47. 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.

Jason
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by Jason
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Date: 2023.11.20
18:32:55 +11'00'

Mr Jason Woods

Accredited Decision Maker

ADF Headquarters

Department of Defence