



DEFENCE FOI 429/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the application by James Smith (the applicant), dated and received on 5 November 2023 by the Department of Defence (Defence), for access to the following document under the *Freedom of Information Act 1982* (Cth) (FOI Act):

“...a copy of Afghanistan Inquiry Implementation Oversight Panel Report 07, in particular section 4 where redactions have been made on the basis of s45 exemptions.”

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.
4. I note the document requested was subject to Defence FOI 172/23/23 and was published on the Defence FOI Disclosure log on 21 December 2022.

Exclusions

5. Personal email addresses, signatures, PMKeyS numbers and 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

6. I have decided to partially release one 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 section 33 [documents affecting national security], section 45 [documents containing material obtained in confidence] and section 47C [public interest conditional exemptions – deliberative processes] of the FOI Act.

Material taken into account

7. 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 previous decision on the requested document as referenced above;
 - f. advice from the Afghanistan Inquiry Implementation Oversight Panel Secretariat; and

- g. Terms of Reference for the Afghanistan Inquiry Implementation Oversight Panel regarding the confidentiality section within.

Reasons for decision

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

8. Section 33(a) 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:

...

ii. the defence of the Commonwealth; or

iii. the international relations of the Commonwealth

9. 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.

Defence of the Commonwealth: [Damages]

5.35 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage ... However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

International Relations: [Damages]

5.37 ... The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

10. Additionally, the Guidelines state:

Defence of the Commonwealth

5.34 The FOI Act does not define 'defence of the Commonwealth'. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:

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

International relations

5.36 The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.

11. Upon examination of the documentation, I have identified material in the document which, upon release, could reasonably be expected to cause damage to the defence of the Commonwealth and the international relations of the Commonwealth, therefore, I find that it is exempt under sections 33(a)(ii) and 33(a)(iii).

12. I have determined that the document contains information about core military capabilities, the exposure of which could prejudice the effectiveness of the Australian Defence Force. The release of this information could also expose vulnerabilities which external entities could then utilise to hinder capability resulting in damage to the defence of the Commonwealth.

13. In addition, I have determined the material contains information that, upon release, would likely cause damage to the international relations of the Commonwealth, limiting or hindering any possible future interactions between the Commonwealth and its international partners.

Sections 45 – Documents containing material obtained in confidence

14. Section 45(1) of the FOI Act states:

(1) 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.

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

Breach of Confidence

5.158 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.

5.159 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.*

16. Upon examination of the material, I have formed the view that disclosure of the information would be a basis for an action to be brought against the Commonwealth for breach of confidence and for compensation to be sought for loss or damages arising from the disclosure. The redacted information was obtained on the basis of a mutual understanding of confidence to ensure frank and open conversations with both current and ex-service members

as well as non-serving personnel. Outside formal reporting obligations, I believe disclosure of this information could have a substantial adverse effect on the future supply of information in similar situations.

17. I have also considered the elapse of time from the date of the original request outlined in paragraph four and have formed the view that there is no change in the circumstances for which the information was received and/or could be disclosed.

18. In view of the above, I hold that the relevant material is exempt pursuant to section 45 of the FOI Act.

Section 47C – Public interest conditional exemptions – deliberative processes

19. Section 47C of the FOI Act conditionally exempts from disclosure, documents that would disclose deliberative matter.

20. Section 47C of the FOI Act specifically 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.*

Exceptions

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

- (a) operational information ...;*
- (b) purely factual material.*

21. Relevantly, the Guidelines at paragraph 6.52 state:

... Deliberative matter is content that is in the nature of, or relating to either:

- an 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 purposes of, a deliberative process of the government, an agency or minister.*

22. Upon examination of the documentation, 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.

23. The redacted information contains opinions, advice, recommendations and supporting material that was gathered through consultation. Defence is still in the process of considering this information, and is yet to make a decision on the recommendations. Consequently, I find the document contains deliberative matters and is conditionally exempt under section 47C(1) of the FOI Act.

24. Section 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 the time would, on balance, be contrary to the public interest. My public interest considerations are detailed below.

Section 47C - Public interest considerations

25. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, 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] of the FOI Act.

- (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.*

26. I consider the release of the material removed under section 47C may promote some of the objects of the FOI Act, as information held by Government is a national resource.

27. However, while the information may be of particular interest to the applicant, disclosure of this specific conditionally exempt material would not increase public participation in the Defence process, nor would it beneficially increase scrutiny or discussion of Defence activities and expenditure in any meaningful way.

28. 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 material contained within the documents, particularly those still under consideration by Defence.

29. 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 this information could reasonably be expected to prejudice:

- (a) the protection of an individual's right to privacy;*
- (b) an agency's ability to obtain confidential information;*
- (c) an agency's ability to obtain similar information in the future; and*
- (d) the management function of an agency.*

30. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the relevant information exempt under section 47C of the FOI Act.

Further Information

31. The document matching the scope of this request contained a dissemination limiting marker (DLM). Where a document has been approved for public release, the DLM has been struck through.

Philip Moss

Group Captain

Accredited Decision maker