



DEFENCE FOI 500/23/24

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 30 November 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

...a copy of Afghanistan Inquiry Implementation Oversight Panel Report 12 dated on or about 1 November 2023 as noted in item 11 of Afghanistan Inquiry Implementation Oversight Panel Report 11.

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 the request.

Exclusions

4. Duplicates of documents that fall within the scope of the FOI request, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

Decision

5. I have decided to:
 - a. 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 33(a)(ii) [Documents affecting national security, defence or international relations], 45 [Documents containing material obtained in confidence] and 47C [Public interest conditional exemptions - deliberative processes] of the FOI Act.

Material taken into account

6. 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

7. 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.
8. I am satisfied that the document contains exempt material and that it is reasonably practicable to remove it and release the document to you in an edited form.

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

9. Section 33(a)(ii) 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...*

10. 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.*

11. 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.
12. I have determined that the document contains information which 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.
13. 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

14. 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.

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 document, I have identified information which was provided in confidence and determined that disclosure of that 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.
17. 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

18. 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.*

19. 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.
20. The redacted information contains opinions, advice, recommendations and supporting material that was gathered through consultation and remains under consideration.
21. 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.*
22. 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.
23. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

Public interest consideration - section 47C

24. 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.*
25. 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.*
26. 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).
27. 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; and
 - the management function of an agency.
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 the material contained within the document, particularly those still under consideration by Defence and/or Government.
29. 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.
30. 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 section 47C of the FOI Act.

FURTHER INFORMATION

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

Mr Jason Woods

Accredited Decision Maker

ADF Headquarters

Department of Defence