



DEFENCE FOI 578/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by James Smith (the applicant), dated and received on 22 December 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

I request copies of all correspondence between the Department of Defence, ADF or Minister for Defence with the Afghanistan Inquiry Implementation Oversight Panel.

Background

2. On 22 December 2023, the applicant submitted a request under the FOI Act to Defence in the following terms:

I request copies of all correspondence between the Department of Defence, ADF or Minister for Defence with the Afghanistan Inquiry Implementation Oversight Panel.

3. On 5 January 2024, Defence formally consulted with the applicant in accordance with section 24AB of the FOI Act.
4. On 8 January 2024, the applicant revised the scope of the request as follows:

...email correspondence (including any attachments to those emails)...

... "to" and "from" fields for the email addresses of the three Panel members being Panel Members Dr. Vivienne Thom, Mr. Robert Cornall AO and Prof. Rufus Black.

5. On 19 February 2024, the Office of the Australian Information Commissioner (OAIC) issued a direction to make a revised decision under section 55G [Procedure in IC review – revocation or variation of access refusal decision] of the FOI Act by 11 March 2024.

Scope of external review

6. In view of the OAIC's correspondence of 19 February 2024, six (6) documents matching the scope of the applicant's request have become the subject of an external review process.
7. The purpose of this correspondence is to provide the applicant with a revised decision under section 55G the FOI Act.

FOI decision maker

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

Documents identified

9. I have identified six (6) documents as falling within the scope of the request.

10. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

11. 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.

Revised Decision under section 55G of the FOI Act

12. I have decided to:
 - a. partially release three (3) 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 47E [Public interest conditional exemptions--certain operations of agencies] and 47F [Public interest conditional exemptions--personal privacy] of the FOI Act;
 - b. refuse access to three (3) documents on the grounds that the documents are considered exempt under section 47C [Public interest conditional exemptions--deliberative process] of the FOI Act;
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

13. 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 received from Defence subject matter experts within the Afghanistan Inquiry Response Task Force (the Task Force); and
 - f. responses received following consultation with relevant third parties.

REASONS FOR DECISION

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

14. 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.
15. The documents contain exempt material and information that does not relate to the request.

16. 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.
17. In addition, where a decision maker denies access to a document, section 22(1) of the FOI Act requires that they consider releasing the document with exempt matter deleted, if possible.
18. Paragraph 3.98 of the Guidelines provides that:

...an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant.

19. Accordingly, I have considered disclosing the documents to you with deletions, but have decided to refuse access to the documents as they would be meaningless and of little or no value once the exempt material is removed.

Section 47C – Public interest conditional exemptions - deliberative processes

20. 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.*

21. Upon examination of the documents, I have identified deliberative matter – that is 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.
22. The documents contains opinions, advice, recommendations and supporting material that was gathered through consultation and remains under consideration.
23. 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.
24. 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 that it cannot be excised.
25. Therefore, I have decided that the relevant material is conditionally exempt under section 47C of the FOI Act.

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

26. 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:

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

27. 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.

28. 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.

29. 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.

30. 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, 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.

31. 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

32. 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).

33. 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.

34. I found that the documents contain personal information of other persons. This includes their names, phone numbers and email addresses which would reasonably identify third parties.
35. 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; and
 - d. the effect the release of the personal information could reasonably have on the third party.
36. I found that the 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.
37. The release of the names, ranks and opinions of individuals identified in the documents could reasonably be expected to cause harm to their privacy. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act

Public interest considerations - sections 47C, 47E and 47F

38. 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.

39. 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.

40. 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).
41. 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;
 - 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.
42. While I accept there is public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining confidentiality of the material contained within the document, particularly those still under consideration by Defence.
43. 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 direct contact details 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.
44. 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.
45. 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 and 47F of the FOI Act.

FURTHER INFORMATION

46. 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.

COL Alison Kaine
Accredited Decision Maker
Associate Secretary Group
Department of Defence