



Objective Reference: AHQ/OUT/2024/BQ60944166

DEFENCE FOI 591/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the request by Simon Harris (the applicant), dated and received on 7 January 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

1. *Houston Review into Army Aviation (2016)*
2. *Yates Reviews into MRH90 (2020)*
3. *Briefing notes, speaking notes or script for or by MAJGEN Jobson for his briefing/meeting/conference to 16th Aviation Brigade on or about 11 October 2023.*

Background

2. On 31 January 2024, Defence wrote to the applicant seeking to extend the period for dealing with the request from 6 February 2024 until 27 February 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act. On 1 February 2024, the applicant refused this request.
3. On 29 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 21 March 2024.

Scope of external review

4. In view of the OAIC's correspondence of 29 February 2024, four documents matching the scope of the applicant's request have become the subject of an external review process.
5. The purpose of this correspondence is to provide the applicant with a revised decision under section 55G the FOI Act.

FOI decision maker

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

Documents identified

7. I have identified four documents as falling within the scope of the request.
8. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

9. Defence has only considered final versions of documents.

Revised Decision under section 55G of the FOI Act

10. I have decided to:

- a. partially release two 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 section 47E [Public interest conditional exemptions--certain operations of agencies] of the FOI Act;
- b. refuse access to two documents on the grounds that the documents are considered exempt under sections 33 [Documents affecting national security, defence or international relations] and 47E [Public interest conditional exemptions--certain operations of agencies] of the FOI Act; and
- c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

11. 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 Army Aviation Command.

REASONS FOR DECISION

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

12. 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.
13. The documents contain exempt material. I am satisfied that it is reasonably practicable to remove the exempt material and release the documents to you in an edited form.

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

14. Section 33 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*
 - (ii) *the defence of the Commonwealth; or*
 - (iii) *the international relations of the Commonwealth.*

15. 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.

Security of the Commonwealth: [Damages]

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.*

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.

16. Additionally, the Guidelines provide:

Security of the Commonwealth

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.*

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 terms includes:

- *meeting Australia's international obligations*
- *ensuring the proper conduct of international defence relations*
- *deterring 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.

17. I have identified material in Document 1, which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth. It would do so by making public the current and anticipated military capability levels, and their preparedness, arising from the performance of ongoing acquisition and sustainment activities.
18. Furthermore, I found that the document contains information that, if disclosed, may add to what is already known in the public domain. The release of this information could provide specific details of gaps in capabilities that could be targeted to exploit current and developing capabilities and thereby jeopardise the defence of the Commonwealth.
19. Upon examination of the document, I also found that it contains information that 'would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth'. The document contains information communicated in confidence on behalf of a foreign government. The disclosure of such information may diminish the confidence other countries may have that Australian agencies are able to keep certain information confidential.
20. Accordingly, I am satisfied Document 1 is exempt under section 33 of the FOI Act.

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

21. Section 47E(c) 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 management or assessment of personnel by the Commonwealth or by an agency

22. The Guidelines provide, at paragraph 6.113, that:

Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- an effect would reasonably be expected following disclosure*
- the expected effect would be both substantial and adverse.*

23. I find that Document 1 relates to the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety because the disclosure of information contained within the document would constitute an unreasonable disclosure of personnel management information.

24. Accordingly, I am satisfied that Document 1 is conditionally exempt under section 47E(c) of the FOI Act.

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

25. 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.

26. 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.

27. 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.

28. 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 direct contact details could, therefore, reasonably be expected to prejudice the operations of Defence.

29. Furthermore, I found that the documents contain statements and information of the intended course of action Defence proposes to undertake, and that these statements and information are relevant to ongoing capability management activity. The disclosure of these statements and information could reasonably be expected to prejudice Defence's ability to properly conduct its activities.
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, 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.
31. Accordingly, I am satisfied that the relevant information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

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

32. 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.

33. 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.

34. 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).
35. 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 interests of an individual or a group of individuals;

- 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.
36. 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 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.
37. 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 Defence's ongoing capability management activities which allow Defence to undertake its operational activities in an expected and lawful manner.
38. I note that while the release of the material contained within these documents would be of some interest to the applicant, it would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.
39. 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.
40. 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 47E(c) and 47E(d) of the FOI Act.

Mrs Joanne Groves
Accredited Decision Maker
Army Headquarters
Department of Defence