



DEFENCE FOI 623/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by CR (the applicant), dated and received on 18 January 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

Training, procedure and policy materials relating to the handling of FOI requests.

Background

2. On 14 February 2024, Defence wrote to the applicant seeking their agreement to extend the period for dealing with the request until 18 March 2024 in accordance with section 15AA [extension of time with agreement] of the FOI Act. The applicant refused Defence's request.
3. On 22 February 2024, Defence applied to the Information Commissioner for further time to deal with the request. On 1 March 2024, under section 15AC [decision not made on request within time—deemed refusal] of the FOI Act, the Information Commissioner allowed Defence to deal with the request until 18 March 2024.

FOI decision maker

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

Documents identified

5. I have identified eight (8) documents as falling within the scope of the request.
6. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

7. Signatures 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. release five (5) documents in full;
 - b. 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 47 [Documents disclosing trade secrets or commercially valuable information], 47E [public interest conditional exemptions - operations of agency], 47F [public

interest conditional exemptions - personal privacy] and 47G [Public interest conditional exemptions--business] of the FOI Act; and

- c. remove irrelevant material in accordance with section 22 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 received following consultation with relevant external parties; and
 - f. advice received from subject matter experts within Governance Group.

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. The documents contain exempt material and information 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 the applicant in an edited form.

Section 47 – Documents disclosing trade secrets or commercially valuable information

13. Section 47 of the FOI Act states:
 - (1) *A document is an exempt document if its disclosure under this Act would disclose:*
 - ...
 - (b) *any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*

14. The Guidelines state that:

Information having a commercial value

5.204 To be exempt under s47(1)(b) a document must satisfy two criteria:

- *the document must contain information that has a commercial value either to an agency or to another person or body, and*
- *the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

5.205 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. ... The following factors may assist in deciding in a particular case whether information has commercial value:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates ...*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether the information is still current ...*
- *whether disclosing the information would reduce the value of a business operation or commercial activity ...*

...

5.207 The second requirement of s47(1)(b)...must be established separately by satisfactory evidence. ... It must be established that the disclosure would destroy or diminish the commercial value of the information.

15. Upon examination of the documents, I identified information that has a commercial value which would be, or could reasonably be expected to be, diminished if it were disclosed. The documents contain valuable commercial information developed for the purposes of training, and arises from a commercial and competitive contract entered between Defence and an external service provider. Disclosure of the material would reveal detailed information about a service providers approach to developing and delivering training which could be used by their competitors who might want to compete for its work.
16. Further, in making my decision I have taken into consideration the submissions of the affected body, and I am satisfied that the information has an 'exchange value' in that it is the intellectual property of an organisation, and could be sold for a fee. The development of the material involved considerable time and effort by the external service provider and its disclosure could be used to give its competitors a competitive advantage or 'leg up' in designing competing FOI training.
17. I am satisfied that the material is not currently widely known or publicly available, that the information is still current and its commercial value would be lost if it were released.

18. Accordingly, I consider that the release of the information would, or could reasonably be expected to, diminish commercial value, and is exempt under section 47(1)(b) of the FOI Act.

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

19. Section 47E 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.

20. 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.

21. 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.
22. 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.
23. In addition, I have found that the documents contain information relating to the operational processes of Defence, particularly the methods used by the Freedom of Information Directorate to adhere to statutory obligations under the FOI Act while upholding the security of the organisation. In order to determine if the disclosure would, or could reasonably be expected to have a substantial, adverse effect on the proper and efficient conduct of the operations of Defence, I have considered the functions of the relevant area within Governance Group.
24. I consider that the relevant information would, or could reasonably be expected to release information about the internal workings and processes of the area, which would impact the ability of these areas to undertake their usual functions, including the ability to have frank discussions about relevant strategies and processes. This could reasonably be expected to prejudice the effectiveness of each area's current operations in relation to undertaking their usual functions.

25. 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 more appropriate communication channels are already available and 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.
26. Accordingly, I am satisfied that the information is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

27. 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).

28. 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.

29. I found that the documents contain personal information of another person. This includes their name and place of employment which would reasonably identify the third party.
30. 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.
31. I found that the personal information relating to the third parties is not readily available from publicly accessible sources and could reasonably identify or cause harm to the individual.
32. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Section 47G – Public interest conditional exemptions – business

33. Section 47G(1)(a) of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

34. I note that the use of the word ‘could’ in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.

35. The Guidelines explain, at paragraph 6.188:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

36. The Guidelines also state, at paragraph 6.184:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

37. The Guidelines go on to provide, at paragraph 6.192, ‘[t]he term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.

38. Upon examination, I found that the documents contain information that if disclosed, would have an unreasonable adverse effect on an external service providers commercial and competitive training functions, which is an area that this service provider competes with a range of commercial firms to undertake work in exchange for a fee. I am of the view that disclosure would allow those competitors to draw upon the opposing parties intellectual property and use it to obtain an unfair advantage in winning that work. The corresponding disadvantage would have an unreasonable adverse effect on the external service provider’s business affairs and their ability to continue to win this training work.

39. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

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

40. 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.

41. 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.

42. 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).

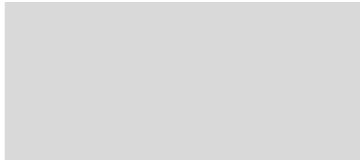
43. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request are that release of this information could reasonably be expected to prejudice:

- the protection of an individual's right to privacy;
- 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; and
- the management function of an agency.

44. 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.

45. 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 Defence's internal processes which allow Defence to undertake its operational activities in an expected and lawful manner.

46. Additionally, Defence has an obligation to protect the personal information of third parties that it holds, and I find that the public interest in protecting this information far outweighs the public interest in releasing this information.
47. Further, while I acknowledge that documents concerning Defence's training and policies regarding the handling of FOI requests may broadly promote the objects of the FOI Act, I find that the significant harm to the external service provider in delivering this training outweighs the public interest in disclosing this information.
48. 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.
49. 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, 47F and 47G of the FOI Act.



Luke
Decision Maker
Governance Group
Department of Defence

3 April 2024