



DEFENCE FOI 626/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by Jenny (the applicant), dated and received on 19 January 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982 (Cth)* (FOI Act):

... I seek copy of the letters/documents of the Chair of the DDVA HREC to DVA and UniSA referred to in paragraph 30 of those Minutes, as well as the responses received by the Chair from UniSA and DVA referred to in paragraph 31 of those Minutes.

I also seek copy of any later correspondence between the DDVA HREC and DVA and/or UniSA about the MATES program

Background:

Defence FOI 371/23/24 released partial copy of the 16 October 2023 Minutes of the DDVA HREC.

In that released document the DDVA HREC stated about the MATES program:

“29. The Committee noted that due to recent media coverage and multiple emails from individuals regarding the release of personal data to third parties, a review of the project file was undertaken by the Secretariat. The outcome was:

- a. discrepancies between the approved data and that provided by DVA to the researchers were identified*
- b. there was reference to surveys being conducted and tailored over time however no requests for amendment to reflect changes to surveys have been received*
- c. the complaint that was referred to in the newspaper article was not reported to the DDVA HREC.*

30. As a result of the findings, the Chair wrote to the researchers and DVA, and requested further information regarding what data fields are being provided by DVA (including a description of the fields), copies of updated surveys and further information regarding the complaint that was referred to in the media article. They were also advised that no further data transfer was to occur until the matters identified above were resolved.

31. The University of South Australia and DVA have both provided a response however these have not addressed the requests for further information and provide contradictory information.

32. Members were advised that 33 individuals have contacted the HREC and have raised concerns about the release of their personal information to the University of South Australia. Another individual has contacted the HREC following receipt of the DVA response to the Freedom of Information request. The response shows that in addition to personal health information, the personal details of the individual

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including name, date of birth, gender and address are provided to the University of South Australia.

33. Members noted that the complaint that was submitted to the Office of the Australian Information Commissioner (OAIC) related to an individual who opted out of participation in the program and DVA do not fully implement the request. The Committee had significant concerns about the time frame in which it took to implement the request. As the complaint related to a data breach and the data would have continued to have been used for research purposes (and therefore within the scope of the ethics approval) an adverse notification should have been submitted to the DDVA HREC.

34. Members discussed the matter at length and agreed on the following:

a. it is unclear what data is being provided for provision of targeted health care and what is being provided for research purposes

b. no further analysis of the existing data should occur until the matters are resolved. If the matter remains unresolved by the next meeting, ethical approval will be suspended until it is able to be addressed.”

Background

2. On 19 February 2024, the applicant was notified that the period for dealing with this request was extended from 18 February 2024 until 19 March 2024 under section 15(6) [extension of processing period to comply with requirements of section 26A, 27 or 27A] of the FOI Act, to enable consultation with third parties in accordance with section 27 of the FOI Act.
3. On 13 March 2024, Defence sought to extend the period for dealing with this request from 19 March 2024 to 29 March 2024. The applicant requested and was provided with further explanations but ultimately did not respond within the approved time period.

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 nine 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. Personal email addresses, signatures, 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

8. I have decided to:
- a. partially release nine 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 exemption - certain operations of agencies] and 47G [Public interest conditional exemption – business] of the FOI Act; and
 - b. 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. Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines);
 - e. advice from Joint Health Command and Governance Group in Defence;
 - f. advice from the Department of Veterans' Affairs (DVA); and
 - g. submissions from third parties in relation to their business information.

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 identified in the schedule of documents as being released in part contain exempt and irrelevant material that does not relate to the request.
12. Where whole pages are considered to be exempt in full or irrelevant to the scope of the request, these pages have been removed from the released document pack.
13. 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.

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

14. 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:

- (c) *have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency; and*
- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.*

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15. In relation to section 47E(c) of the FOI Act, the Guidelines provide:
- 6.102 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*
16. In relation to section 47E(c) of the FOI Act, I consider that disclosure could reasonably be expected to have an adverse effect on the health and wellbeing of Defence and DVA personnel.
17. The documents at issue contain the names and contact details of Defence and DVA personnel that are not in the public domain. Disclosure of material identifying staff details in could reasonably be expected to have an adverse effect on the health and wellbeing of these individuals.
18. Additionally, releasing details could adversely affect Defence's ability to conduct future activities if employees felt Defence lacked integrity with respect to protecting the confidentiality of their records; thus affecting the proper and efficient conduct of the operations of Defence. Consequently, this would result in a substantial adverse effect on the broader management of personnel.
19. I am satisfied that that there is a reasonable expectation that release would cause distress to the staff members by adversely affecting their physical and mental wellbeing. Therefore, disclosure could reasonably be expected to substantially adversely impact Defence's staff management function and responsibility to maintain appropriate workplace health and safety standards.
20. In relation to section 47E(d) of the FOI Act, the Guidelines provide:
- 6.115 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner.*
21. In relation to section 47E(d) of the FOI Act, I have identified that the documents convey key roles of senior and junior officials in Defence and DVA that were engaged in work related to Veterans' Medicines Advice and Therapeutics Education Services (MATES) program and/or with the Departments of Defence and Veterans' Affairs Human Research Ethics Committee (the Committee). The personal details of all officials are not well-known or otherwise publicly available. I have determined that there is a reasonable likelihood that if the information were to be disclosed, that the information could be used to solicit or harass Defence and DVA personnel, or to circumvent existing communication channels that support Defence's efficient operations.
22. I also identified that the documents partially comprise of deliberative and sensitive matters relating to research and the management of research programs. I consider that disclosure would, or could, reasonably be expected to have a substantial adverse impact on the proper and efficient conduct of Defence, by disclosing information regarding its thinking processes, methods or conduct that is not otherwise well-known.
23. Human Research Ethics Committees play a central role in facilitating and ensuring the conduct of ethical research. The Committee scrutinises the methodologies and operation of research programs to provide expert, independent advice to the researchers. The

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documents detail how the Committee scrutinised, considered and liaised with the MATES program to manage matters of concern, ensure compliance and make decisions about the program. It is reasonable to expect that disclosure of the information could impede the proper and efficient conduct of the Committee, and by extension, the proper and efficient conduct of Defence. I am satisfied that disclosure would reasonably be expected to prejudice Defence's ability to effectively undertake its operations

24. Further, consultation with third parties identified material that could prejudice the conduct of matters relating to the MATES program. Disclosure could inhibit the free exchange of information between the Committee and third parties. All Commonwealth agencies have a responsibility to properly manage and safeguard private and confidential information, especially that pertaining to individuals or businesses.
25. It is reasonable to expect that disclosure may be detrimental to the efficient operations of the Committee, and the broader agencies, including that disclosure could impact the effective management of information shared in confidence. I am satisfied that the outcome could reasonably be expected to substantially and adversely affect the proper and efficient conduct and operations of Defence.
26. In making my decision I have considered:
 - a. Paragraphs 6.110-111 of the Guidelines, which provide that an assessment conducted on a case-by-case basis, based on objective evidence, is required when considering whether it is appropriate to apply s47E(c). The type of objective evidence needed will depend on all the circumstances.
 - b. Paragraph 6.112 of the Guidelines and am satisfied that release of the information would not lead to any efficiencies in Defence processes.
27. In making my assessment, I have also considered that the FOI Act places no limitations on the use of information disclosed under the Act, and I am satisfied that that there is a reasonable expectation that releasing the identified information could reasonably be expected to negatively impact the health, wellbeing and work of Defence personnel, and to impact the efficient and effective operations of Defence.
28. Accordingly, I am satisfied that the information is conditionally exempt under sections 47E(c) and 47E(d) of the FOI Act.

Section 47G – Public interest conditional exemptions – business

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

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; or*
- (b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of*

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a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

30. 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.

31. The Guidelines provide:

6.177 Section 47G conditionally exempts documents where disclosure 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 (business information).

...

6.186...To find that s 47G(1)(a) applies, a decision maker needs to be satisfied that if the document was disclosed there would be an unreasonable adverse effect, on the business or professional affairs of an individual, or on the lawful business, commercial or financial affairs of an organisation or undertaking.

...

6.196 A document that discloses the kind of information described at [6.177] above will be conditionally exempt if the disclosure could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency (s 47G(1)(b)).

32. Upon examination of the documents, I identified information relating to the business functions of third parties. I consider that disclosure would, or could reasonably be expected to adversely affect third parties in respect of their lawful business and reputation.

33. The documents contain information about contractual arrangements and research activities engaged by third parties which is not publicly available. This information contains sensitive details about third parties’ business management plans, the release of which could disrupt strategic initiatives. This, in turn, could give competitors insights into the businesses’ practices, which could impact their competitive position. I consider that disclosure of this information would, or could have a substantial adverse effect on the future contacts with Defence and other agencies.

34. I consider that release could reasonably be expected to prejudice the future supply of information to Defence that was communicated in confidence and for the purpose of advancing Defence’s priorities. Releasing the business information that was communicated to Defence and government in confidence could reasonably be expected to diminish confidence in Defence’s ability to protect confidential information.

35. Finally, third parties engaging with Defence could be less willing to share sensitive business information for fear of impact to their business or professional affairs. This outcome would adversely affect Defence’s ability to administer and fulfil its mission and purpose; particularly in relation to engaging in research.

36. Accordingly, I am satisfied that the information is conditionally exempt under section 47G of the FOI Act.

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Public interest considerations - sections 47E and 47G

37. 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.

38. 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.*

39. 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).

40. Paragraph 6.233 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 adversely impact or prejudice:

- Defence's proper and efficient management functions;
- Defence's management of personnel;
- the fair treatment of individuals; particularly in relation to the conduct of the MATES Program;
- the interests of an individual or group of individuals;
- the protection of an individual's right to privacy
- the proper and efficient conduct of Defence, including engagement by personnel in ethical research activities;
- the financial interests of the Commonwealth, including the value for money able to be obtained for the purposes of funding research in Defence and DVA;
- Defence's ability to obtain confidential information, including in the future;
- the business interests or professional affairs of a third party; and
- that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

41. In favour of disclosure, I acknowledge it is the public interest that Defence efficiently and productively operates, and undertakes its functions in a transparent and proper manner. I consider there to be public interest in ensuring that Defence is accountable in its conduct and decision making to the public.

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42. While I consider the release of the material removed under sections 47E and 47G may be of interest to the applicant, disclosure of the conditionally exempt material would not inform the public debate on any matter of public importance in any meaningful way. There is also a strong public interest in maintaining the confidentiality of the material and the personal information of individuals identified in the documents.
43. In favour of non-disclosure, I consider Defence must be able to effectively and efficiently undertake, and execute, its roles and responsibilities to the fullest extent without risk to the implementation of policy objective, or to the business interests or professional affairs of third parties supporting Defence in its endeavours. It is in the public interest that Defence efficiently and productively operates particularly with regard to its policy objectives.
44. I have also considered disclosure of material has the potential to be used inappropriately to bypass well established, existing communication channels. Staff who are contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns. Further, I am satisfied that making the information publicly available it would be disruptive and could reasonably be expected to prejudice the efficient operations of Defence.
45. In relation to protecting the personal information of the individuals, I have also considered advice from relevant third parties that releasing the identities of personnel involved in the MATES program would place them at risk of harassment. I am therefore satisfied that it is in the public interest not to release information that would identify these individuals.
46. I am also satisfied that it is in the public interest to protect the commercial interests of third parties. The protection of this information allows businesses to maintain their competitive edge, prevents intellectual property theft and preserves trust with Defence. There is a strong public interest in not releasing information that would unreasonably affect Defence's ability obtain confidential information that would unreasonably affect Defence's ability to obtain confidential information in the future.
47. 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.
48. 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.
49. Accordingly, I find that the information is conditionally exempt under sections 47E and 47G the FOI Act.



Chris Owens
Media and Information Disclosure
Department of Defence

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