



Australian Government
Department of Defence

Reference: R32942024

FOI 144/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Ms Mona Krombholz under the *Freedom of Information Act 1982* (FOI Act), for access to:

“...In relation to Defence Fraud Control and Investigations Branch (FCIB) investigation (investigation) [Reference: IR-DWS01-DI-2014-54] undertaken consequent upon my public interest disclosure made to the Commonwealth Ombudsman under the Public Interest Disclosure Act 2013(Cth) [Reference: PID (2014-100004),

1. Any document recording any approval given by any Defence delegate (including the identity of the delegate who gave the approval) in relation to the investigation, including any approval given by the Secretary, Chief of Defence Force (CDF); Chief Audit Executive (renamed First Assistant Secretary Fraud Control (FASFC)); Inspector General of Defence (renamed Assistant Secretary Fraud Control (ASFC));

2. Any document recording the identity of any agency, including any officer of any agency, who received a copy of any report produced in relation to the investigation, including but not limited to correspondence with Clayton Utz and the Australian Government Solicitor; and

3. Any item of ministerial correspondence produced in relation to the investigation.

The date range for the request is 1 January 2014 to 16 October 2017. Documents are limited to those held by the office of the Secretary, office of the CDF, Audit and Fraud Division, office of Defence Legal, office of Defence People Group and office of Estate and Infrastructure Group.

excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents and documents sent to or from the applicant.”

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. Six documents were identified in response to Item 1 of the request. Item 1, Serial 1 was a 56 page investigation report that was considered in response the applicant’s previous request FOI 191/17/18. This document is prevented from being released in accordance with section 27A(6) of the FOI Act. As such, I have not considered this document as part of this FOI request.

4. Item 1, Serial 2 was a 13 page executive summary of the above investigation report (Item 1 Serial 1). Noting the contents of this document are the same as the document subject to review rights and another FOI request I have only considered one page of the document that indicates the approval given.
5. In relation to Item 2 of the applicant's request, I have interpreted 'any report' to be 'any investigation report'.
6. I identified seven documents as matching the description of Item 2 of the request. No documents were identified for Item 3.
7. I have added an FOI reference number and Item/Serial number to each of the documents.

Decision

8. I have decided to:
 - a. partially release 12 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 47F [public interest conditional exemptions-personal privacy] and/or section 47E(d) [public interest conditional exemptions-operations of an agency] and/or 47G [public interest conditional exemptions-business information] of the FOI Act; and
 - b. refuse access to Item 3 of the request under subparagraph 24A(1)(b)(ii)[Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act.
9. Further to the above, I have removed irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

10. In making my decision, I had regard to:
 - a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. relevant provisions in 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 from the Office of the Secretary and Chief of the Defence Force, Defence Legal, Audit and Fraud Division, Defence People Group and Estate and Infrastructure Group.

Reasons for decision

Section 47E – Certain operations of agencies

11. Subsection 47E(d) of the FOI Act provides as follows:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected, to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

12. Unauthorised disclosure of information potentially identifying the individuals involved in the investigation and information detailing how the investigation is conducted, could reasonably be expected to have a substantial adverse effect on the Department's management of other complaints that are received through the Defence's Public Interest Disclosure (PID) Scheme.

13. The release of information that could identify, or potentially identify a complainant, or other individuals identified during the course of Defence's investigation, could reasonably be expected to affect the willingness of individuals to provide information to Defence for the purpose of investigating complaints. This could reasonably result in a perception that Defence lacks integrity with respect to protecting the confidentiality of investigation records; thus affecting the proper and efficient conduct of the operations of Defence.

14. The disclosure of the information subject to this FOI application could reasonably be expected to affect Defence's ability to investigate disclosures made pursuant to the PID Act 2013. Release of PID information could result in prejudice against the activities of the Fraud Control & Investigations Branch and affect the ongoing operation of the Defence PID Scheme. Investigating allegations of unacceptable behaviour and actioning any findings are an essential aspect of Defence's operations.

15. Consequently, I have decided that the material is conditionally exempt under section 47E(d) of the FOI Act.

16. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest arguments are detailed below.

Section 47F - Personal privacy

17. Section 47F(1) conditionally exempts a document if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

18. Personal information is defined in section 4 of the FOI Act as having the same meaning as that defined in the *Privacy Act 1988* which is:

Information of 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.*

19. Upon examination of the documents, I found that they contained the names and other identifying information of individuals involved in the investigation. I consider that the release of such information would constitute an unreasonable disclosure of personal information. In accordance with subsection 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, I had regard to:

- a. the extent to which the information is well known;
- b. whether the person to whom the information relates is known or to have been associated with the matters dealt with in the documents; and

- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency or Minister considers relevant.

20. Against those criteria, I found that:

- a. the specific personal information is not well known to the general community;
- b. the persons to whom the information relates is not known by the general community to have been associated with the matters dealt with in the documents; and
- c. the personal information is not readily available from publicly accessible sources.

21. Noting the findings against the above criteria, I have decided that the disclosure of this information would be an unreasonable disclosure of personal information belonging to other persons. Accordingly, I consider this material to be conditionally exempt under section 47F of the FOI Act.

22. Section 11A (5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'. My public interest arguments are detailed below.

Section 47G – Business

23. Subsection 47G conditionally exempts a document if its disclosure under the FOI 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 adversely affect the business or commercial or financial affairs; or
- b. could reasonably be expected to prejudice the future supply to the Commonwealth.

24. I note that the use of the word 'could' in this provision requires no more than a degree of reasonableness to be applied in deciding whether disclosure would cause the consequences specified. The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself.

25. Upon examination of the documents, I identified business names and employees of the business in connection with unsubstantiated allegations. I determined that this information is not publicly available. Any material identifying a specific business that was involved in the investigation could affect their lawful business and future profitability.

26. I am satisfied that the effect of disclosing the identified material could have an adverse effect on the mentioned companies. Consequently, I have decided that the material is conditionally exempt under section 47G of the FOI Act.

27. Section 11A (5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'. My public interest arguments are detailed below.

Public interest considerations – section 47E, 47F and 47G

28. I have found that the identified documents are conditionally exempt under sections 47E, 47F and 47G of the FOI Act.

29. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objectives of the FOI Act, as information held by the government is a national resource.

30. While I note that the release of the information being withheld may be of interest to the applicant, it would not inform public debate on any matter of public importance in any meaningful way.

31. 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:

- a. the protection of an individual's right to privacy;
- b. the interests of an individual or a group of individuals;
- c. an agency's ability to obtain confidential information;
- d. an agency's ability to obtain similar information in the future;
- e. the management function of an agency; and
- f. the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.

32. It is reasonable to consider that individuals and businesses named in investigation records maintained by Defence expect protection of their privacy, identity and business information. Such individuals would therefore expect Defence to maintain a high level of confidentiality in respect to documents that may lead to their identity being disclosed. This is particularly relevant where the allegations were not substantiated. Any allegations of wrongdoing could significantly affect the profitability of a business.

33. Releasing information about a public interest disclosure, or others involved in the allegations or its investigation, could reasonably be expected to adversely impact on the agency's ability to gain the confidence of the complainant, or other current or future complainants, and the provision of relevant information in the future. Release could prejudice the protection of a public interest discloser. Further, this could significantly undermine any investigative process and undermine the ability of the department to handle complaints in the future.

34. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47E, 47F and 47G of the FOI Act.

35. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

Reasons for decision - Section 24A(1) - Requests may be refused

36. Section 24A(1) of the FOI Act states:

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

37. Paragraph 3.84 of the Information Commissioner Guidelines advises what detail this statement of reasons needs to include to refuse a request under section 24A(1):

The statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search.

38. To ensure that "all reasonable steps" have been taken in this request, every reasonable avenue of locating the documents has been exhausted. The details of these searches are outlined below.

39. The Office of the Secretary and Chief of the Defence Force, Defence Legal, Audit and Fraud Division, Defence People Group and Estate and Infrastructure Group conducted searches of Objective, Defence's corporate records management system. Searches were conducted using the applicant's name, the investigation number and the timeframe as stated in the FOI request as parameters. In addition, a search was conducted of Defences Parliamentary Workflow System (DPAWS) and Lotus Notes, Defence's previous system used for tracking ministerial correspondence. The terms used to conduct these searches were:

- a. IR-DWS01-DI-2014-54
- b. PID (2014-100004)
- c. Mona Krombholz
- d. Commonwealth Ombudsman
- e. Krombholz v commonwealth
- f. INV-DWS01-DI-2014-6

40. While documents were identified using the above terms they did not match the terms of the request.

41. I am satisfied that "all reasonable steps" have been taken to locate documents matching Item 3 of the request. I am satisfied that the documents cannot be found or do not exist, and have therefore decided to refuse access to Item 3 of the request under section 24A(1) of the FOI Act.

Further Information

42. Some of the documents matching the scope of this request contained a dissemination limiting marker, as the documents are approved for public release the marker has been struck through.

43. Where documents indicate the Investigation Report (Item 1 Serial 1) and/or Executive Summary (Item 1 Serial 2) is attached, a further copy of Item 1 Serial 2 has not been provided. As mentioned in paragraph 3 above, Item 1 Serial 1 has not been considered as part of this FOI request.

Mrs Melissa Davidson
Accredited Decision Maker
Associate Secretary Group