



Reference: Objective ID: **R33290995**

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

1. I refer to the email of 8 February 2018, in which Ms Mona Krombholz sought an internal review under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the Accredited Decision Maker's decision dated 31 January 2018.

2. The applicant's request was for access to the following documents under the FOI Act:

*"...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."*

## **Contentions**

3. In her application, the applicant requested an internal review on the original decision. In summary, the applicant contended decision to exempt material under subsection 47E(d) [public interest conditional exemptions – operations of an agency], section 47F [public interest conditional exemptions – personal privacy] and section 47G [public interest conditional exemptions – business information] of the FOI Act.
4. The applicant also contended the decision to deny 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.
5. The applicant advised that she wrote to both Senator Payne and the Honourable Michael Keenan MP on 4 November 2015 and again on 3 February 2016. On those dates she also emailed a copy of her correspondence to the Minister for Defence.
6. The applicant stated that she had received confirmation in telephone discussions with Senator Payne’s Chief of Staff that the correspondence she had sent had been read by Senator Payne. Further, the applicant contended she had received confirmation from Minister Keenan’s office that her letter had been received.
7. Noting the applicant’s contentions above, she requested an explanation as to why the original decision failed to identify any documents matching Item 3. The applicant confirmed that she was not seeking copies of correspondence sent by her.
8. The applicant noted the original decision advised that the contents of Item 1 Serial 2 (a 13 page executive summary) was the same as a document that was subject to review rights in another FOI request and as such, only one page of the document was considered. The applicant stated that it was not clear to her why only one page was released. She contended that although the contents may be similar to another FOI request, she is interested in the date and recipients of particular correspondence.
9. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents.

## **Outcome of fresh searches – one document identified**

10. Upon receipt of the internal review, my office requested fresh searches to be conducted. Searches were carried out by Office of the Secretary (OSEC), Office of the Chief of the Defence Force (OCDF), Defence Legal and Defence Ministerials
11. OSEC was tasked to conduct fresh searches in Defence’s document record keeping management system known as Objective, emails, hard copy files and the Secretary’s correspondence tracker using the following search parameters:
  - a. “Mona Krombholz”;
  - b. “Krombholz vs Commonwealth”;
  - c. “Commonwealth Ombudsman”;
  - d. “Ministerial correspondence”;
  - e. “Senator Payne”; and
  - f. “Michael Keenan”.

12. OSEC advised that after extensive searches no further documents matching the Item 3 could be located.

13. OCDF was tasked to conduct fresh searches in Defence's document record keeping management system known as Objective, emails and hard copy files using the following search parameters:

- a. "Mona Krombholz";
- b. "Krombholz vs Commonwealth";
- c. "Commonwealth Ombudsman";
- d. "Ministerial correspondence";
- e. "Senator Payne"; and
- f. "Michael Keenan".

14. OCDF advised that after extensive searches no documents matching Item 3 were found.

15. Defence Legal was tasked to conduct fresh searches in Defence's document record keeping management system known as Objective, emails and hard copy files using the following search parameters:

- a. "Mona Krombholz";
- b. "Krombholz vs Commonwealth";
- c. "Commonwealth Ombudsman";
- d. "Ministerial correspondence";
- e. "Senator Payne"; and
- f. "Michael Keenan".

16. Defence Legal advised that after extensive searches no documents matching Item 3 could be located.

17. Defence Ministerials was tasked to conduct fresh searches in Defence's Ministerial workflow systems PDMS, DPAWS and Lotus Notes using the following search parameters:

- a. "Mona Krombholz";
- b. "Krombholz vs Commonwealth";
- c. "Commonwealth Ombudsman";
- d. "Ministerial correspondence";
- e. "Senator Payne"; and
- f. "Michael Keenan".

18. Defence Ministerials advised that after extensive searches one document matching Item 3 was identified. This document is described as a ministerial advice.

### **Reviewing officer**

19. I am authorised to make this internal review decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

### **Documents subject to internal review**

20. Taking into account the applicant's contentions the scope of her FOI request and the document identified at paragraph 17 above, 14 documents are the subject of this internal review. Further detail is provided below.

21. Six documents were identified that match the description of Item 1 of the request. Item 1 Serial 1, a 56 page investigation report with 23 attachments, has been considered as part of this internal review as it is no longer subject to review rights under section 27A(6) [consultation – documents affecting personal privacy] of the FOI Act. This document was released to the applicant under FOI 191/17/18 on 15 February 2018.

22. Taking into account the scope of Item 2, I have interpreted ‘*any report*’ as seeking access to ‘any investigation report’. I identified seven documents as matching the description of Item 2 of the request.

23. One document was identified which matches the description of Item 3.

### **Internal review decision**

24. After careful consideration, I have decided to uphold the original decision by partially releasing Item 1 Serials 2 to 6 and Item 2 Serials 7 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 subsection 47E(d) and/or section 47F and/or section 47G of the FOI Act.

25. I have decided to uphold the decision under FOI 191/17/18 to partially release Item 1 Serial 1 in accordance with section 22 of the FOI Act, on the grounds that the deleted material is considered exempt under subsection 47E(d) and/or section 47F and/or section 47G of the FOI Act.

26. In relation to Item 3, I have varied the decision by releasing one document intact.

27. Further to the above, irrelevant material such as mobile telephone numbers and signatures has been removed in accordance with subparagraph 22(1)(b)(ii) of the FOI Act.

28. Please find a copy of the Item 3 approved for release. As I have upheld the decision on the remaining documents, I have not provided a further copy of the remaining material.

### **Material taken into account**

29. In arriving at my decision, I had regard to:

- a. the scope of the applicant’s request and subsequent internal review application;
- b. the original decision;
- c. the content of the documents subject to the internal review;
- d. relevant provisions in the FOI Act;
- e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
- f. the outcome of fresh searches.

### **Findings and reasons**

30. In making my decision I found material which I consider to be exempt under subsection 47E(d) of the FOI Act. Subsection 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 an agency.’*

31. Paragraph 6.123 of the Guidelines advise that, where the document relates to certain operations of agencies, the decision maker must address whether 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.

32. I consider the release of details on how the investigation it was conducted, as well material which could identify individuals involved in the inquiry, could reasonably be expected to have a substantial adverse effect on the way certain complaints received through Defence’s Public Interest Disclosure (PID) Scheme ’s is managed by Defence.

33. It is vital that Defence ensures the confidentiality of investigation records and the identity of complainants or individuals identified during the process of investigations is protected. Should this information be released it could reasonably be expected to affect the willingness and trust of individuals to provide information to Defence for the purpose of investigations into complaints. Further, could create a view that Defence lacked integrity in keeping the investigation details confidential and as such, it would affect the proper and efficient conduct of the operations of Defence.

34. The investigations conducted Defence regarding allegations of unacceptable behaviour which result in findings that require action are an important and critical element to the operations of Defence. Release of this material could reasonably be expected to affect Defence’s ability to investigate admissions made by individuals under the PID Act 2013. Furthermore, not only could it result in prejudice against the activities carried out by the Fraud Control and Investigations Branch but could also reasonably be expected to affect the ongoing operation of the Defence PID Scheme.

35. For the above reasons, this material is conditionally exempt under section 47E(d) of the FOI Act.

36. Noting the above, I have decided that the material is conditionally exempt under sections 47E(d) of the FOI Act.

37. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest considerations are set out below.

### **Section 47F**

38. Subsection 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)’.*

39. *‘Personal information’* is defined in section 4 of the FOI Act as *‘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*.

40. I found information contained in the documents, such as names and other identifying information, is personal information that would reasonably identify an individual, and satisfies the definition of ‘*personal information*’, in section 4 of the FOI Act.

41. The test of ‘*unreasonableness*’ implies a need to balance the public interest in disclosure of government-held information and protecting the privacy of individuals. I found for the reasons set out below that the disclosure of the above mentioned ‘personal information’ would be considered to be unreasonable.

42. The Guidelines issued by the Australian Information Commissioner note that ‘*the personal privacy exemption is designed to prevent the ‘unreasonable’ invasion of third parties’ privacy*’. 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 to be (or to have been) associated with the matters dealt with in the documents;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

43. Against those criteria, I found that:

- a. the specific information and details relating to the individuals is not well known to the broader community;
- b. the specific information is not readily available from publicly accessible sources; and
- c. the specific information is information that individuals would not wish to have disclosed without their consent.

44. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest considerations are set out below.

### **Section 47G – business**

45. Section 47G 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.*

46. I note the use of the word ‘could’ in this provision requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause the consequences specified.

47. Upon examination of the documents, I identified information such as business names and its employees which are connected to unsubstantiated allegations. As I have ascertained that this information is not in the public domain, I consider that the release of material that identifies a business that was involved in the investigation could affect its lawful business and future success.

48. The objects of the FOI Act are to give the Australian community access to information held by the Government, as information held by the Government is to be managed for public purposes, and is a national resource. Defence considers the release of information from a pro-disclosure position. That is not to say that Defence releases everything, but our position, as intended by the objects of the FOI Act, is to release unless there is an exemption that can be applied to the material. After careful deliberation, I considered section 47G could be applied to withhold this particular information.

#### **Public interest considerations – subsection 47E(d), section 47F and section 47G**

49. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines provided by the Information Commissioner, together with a range of factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

50. While I note that release of the exempt information may be of interest to the applicant, it would not inform public debate on any matter of public importance in any meaningful way, nor would it increase scrutiny or discussions of government activities.

51. While I accept there is a public interest in ensuring that Defence undertakes its management of investigations in a fair and proper manner, it would, on balance, be contrary to the public interest to breach the confidentiality of those involved in the investigation process.

52. There is also a strong public interest in Defence maintaining the integrity of investigations and protecting information that would harm the effectiveness in obtaining similar information in the future. Disclosure of this information would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence and the management of its personnel and would not, in my view, be in the public interest. Further, there is an expectation that Defence manages personal information in a sensitive way.

53. 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.

54. While release of the specific personal information considered exempt may be of some interest to the applicant, it would not in my view inform public debate on any matter of public importance in any meaningful way. Additionally, disclosure of the information would not promote oversight of public expenditure.

55. None of the factors listed in subsection 11B(4) of the FOI Act were taken into account when making my decision.

56. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the document that matches the scope of the request. I therefore decided that it would be contrary to the public interest to release the information considered exempt under subsection 47E(d), section 47F and section 47G of the FOI Act.

### **Further information**

57. I can confirm that the 13 page summary in which only one page was released (Item 1 Serial 2) relates to the applicant's other FOI request, number 191/17/18.

Mr Jarrod Howard  
Accredited Decision Maker – Internal Review