



Reference: Objective ID: **R33290239**

FOI 250/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the email of 7 February 2018, in which Ms Verity Pane sought an internal review under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the Accredited Decision Maker's decision dated 5 February 2018.

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

"... Under FOI I apply for copy of the inquiry documents held by Defence that relate to the "Joint Inquiry into the facts surrounding the management of Mr Jesse Bird's case" that Defence undertook at the direction of the former Minister of Veterans' Affairs, Dan Tehan.

Where the documents in scope contain the personal information about a private individual (note personal information, not official information - official information includes details of any public servant carrying out their official duties and does not fall into the scope of personal information - and personal information about an individual is a narrower scope than information that may relate to an individual), that information may be redacted.

I note that this Joint Inquiry had a Ministerial press release http://minister.dva.gov.au/media_releases/2017/oct/va144.htm - where former Veterans' Affairs Minister Tehan stated:

"One such veteran was Jesse Bird. With the approval of his family, today I will show how Jesse's case highlights the need for us to continue to improve the current system... Departmental processes failed or simply did not exist to offer services to help Jesse... I asked the Departments of Veterans' Affairs and Defence and the Veterans and Veterans Families Counselling Service to thoroughly examine his case. They have conducted a review which looked at his experience with Defence and Veterans' Affairs. This occurred in consultation with his family.

I delivered a report on this investigation to Jesse's family on 15 September. Amongst other findings, the report into the management of Jesse Bird's case shows that while some aspects of process and management were within expectations, others were contrary to the Department of Veterans' Affairs policy and practice. The Department of Veterans' Affairs either did not or could not provide the support or proactive engagement Jesse needed."

I note that this report also received wide reporting in the media, and it appears an ABC journalist in particular was given access to parts of the Joint Inquiry report beyond just the recommendations (it was also reported parts of a draft report were

leaked to the media, before the Bird family had seen it)

<http://www.abc.net.au/news/2017-10-14/jesse-bird-veteran-affairs-inquiry-findsfailings/9050594> <http://www.abc.net.au/news/2017-08-18/jesse-bird-warned-he-wassuicidal-days-before-his-death/8816978> <http://www.abc.net.au/news/2017-07-20/dvaaccused-of-contributing-to-afghan-vets-suicide/8722974>

<http://www.theaustralian.com.au/news/inquirer/truth-must-be-told-about-diggerswho-served-and-suffered/news-story/a27efaf376cc10b6ba4bd23ed806ff9f>

<http://www.heraldsun.com.au/news/opinion/andrew-rule/jesse-birds-family-dontwant-more-returned-soldiers-dying-after-suffering-posttraumatic-stress/newsstory/210d8671206a5156fc1a85d57f2cd2ca> <http://www.smh.com.au/federalpolitics/political-news/australia-let-soldier-jesse-bird-down-government-concedes-20171024-gz75mj.html>

The fact that the former Veterans' Affairs Minister saw it appropriate to brief the media and disclose details of the Joint Inquiry report (both formally and informally), to table the recommendations in Parliament. and for a number of media outlets to make multiple new articles about the Joint Inquiry highlights that at both the Department and Ministerial level, disclosure was seen as promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government's activities in relation to matters under review by the Joint Inquiry, and that they were of general public interest or in the interest of a substantial section of the public.

I also note the Minister's statement regarding that the disclosures made were with the consent of the Bird family..."

Contentions

3. In her application, the applicant requested an internal review of the entire decision to refuse her access to a document that falls within the scope of her request.
4. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents.

Reviewing officer

5. 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

6. Taking into account the applicant's contentions, one document is the subject of this internal review. As noted in the original decision, some of the material in the document has already been released by the Department of Veterans' Affairs (DVA) under the FOI Act. As this material is publicly available, I have not considered it as part of this internal review.

Internal review decision

7. After careful consideration, I have decided to uphold the original decision by denying access to the document under section 47E(d) [public interest conditional exemption - operations of an agency] and/or section 47F [public interest conditional exemption – personal privacy] of the FOI Act.

Material taken into account

8. 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 document subject to the internal review;
 - d. relevant provisions in the FOI Act; and
 - e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines).

Findings and reasons

Section 47E(d) of the FOI Act

9. In making my decision I found material that was provided for the purpose of an inquiry, 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.’

10. In relation to subsection 47E(d) of the FOI Act, 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.

11. I consider the release of details on who conducted the joint inquiry, how 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 Defence’s management of inquiries.

12. It is important that Defence is able to manage its inquiries with honesty and integrity. Should this information be released it could affect future joint investigations as it would create a view that Defence lacked integrity in keeping the investigation details confidential. As such, it would affect the proper and efficient conduct of the operations of Defence.

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

14. 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 arguments are details below.

Section 47F

15. I have decided that the information contained in the documents is exempt from release as it reveals personal information of a deceased member of the Australian Defence Force and other third parties.

16. The Guidelines note that *'the personal privacy exemption is designed to prevent the 'unreasonable' invasion of third parties' privacy'*.

17. 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.

18. Against those criteria, I found that:

- a. the specific personal information relating to the individuals is not well known; and
- b. the specific personal information is not readily available from publicly accessible sources.

19. 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.

Public interest considerations – subsection 47E(d) and section 47F

20. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines 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.

21. I considered disclosure the specific information may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, it would not increase public participation in Defence processes nor would it increase scrutiny or discussion of government activities. Additionally, disclosure of the information would not promote oversight of public expenditure.

22. 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, given its sensitive nature, could reasonably be expected to prejudice or harm:

- a. the protection of an individual's right to privacy;

- b. the interests of an individual or group of individuals;
- c. the agency's ability to obtain confidential information; and
- d. an agency's ability to obtain similar information in the future.

23. While I accept there is a public interest in ensuring Defence carries out its functions in a transparent manner, there is also a strong public interest in maintaining the confidentiality of information.

24. My view is that it would be contrary to the public interest to disclose sensitive personal information of a deceased member and cause unnecessary distress to the family and third parties.

25. In coming to the above decision, I also considered subsection 11B(4) of the FOI Act. 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) and section 47F(1) of the FOI Act.

Mr Jarrod Howard
Accredited Decision Maker – Internal Review