

DEFENCE FOI 098/21/22 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by Mr Alan Ashmore under the *Freedom of Information Act 1982* (FOI Act) for access to:

I am seeking all documents including the initial brief/direction, and all aspects of the development of this policy by the Defence Department up to and including 31 December 2019.

Documentation to include every document/s including internal emails and minutes of meeting/s pertaining to the development of this policy.

Background information provided by applicant -

On 5 February 2020 the Prime Minister announced the Government, instead of calling a Royal Commission into Veteran Suicide would appoint a National Commissioner for Defence and Veteran Suicide Prevention to inquire into suicides of serving and former ADF members.

At that press conference then Defence Minister Lynda Reynolds thanked, “the officials of Defence and DVA for their expertise, dedication and passion for developing this policy over the summer months.

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. I identified 20 documents as matching the description of the request.

Decision

4. I have decided to deny access to all documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds the material is considered exempt under section 34 [Cabinet documents], section 42 [Documents subject to Legal Professional Privilege] and section 47C [public interest conditional exemptions - Deliberative processes] of the FOI Act.

Material taken into account

5. In making my decision, I had regard to:
- a. the terms of the request. Because the terms of the request were potentially very broad, I have had particular regard to the background that the applicant has provided to help confine and give certainty to the request, which I have read as seeking Defence’s documents relevant to the decision to appoint a National Commissioner for Defence and Veteran Suicide Prevention, instead of calling a Royal Commission into Veteran Suicide.
 - b. relevant provisions in the FOI Act;
 - c. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and

- d. advice provided by the Department of the Prime Minister and Cabinet (PM&C) with governance of documents related to Cabinet processes.

Reasons for decision

Section 22 – Access to edited copies with exempt or irrelevant mater deleted

6. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

Section 34 – Cabinet documents

7. I have identified 2 documents directly prepared for consideration by Cabinet.

8. Section 34 of the FOI Act exempts a document if the document has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be submitted and it was brought into existence for the dominant purpose of submission for consideration by the Cabinet, or a draft document to which the proceeding requirements apply.

9. It is my view that the majority of the documents identified in the Schedule contribute to the set of documents brought into existence for the dominant purposes described under section 34 of the FOI Act. However, consultation with PM&C confirmed that 2 of the documents identified in the Schedule are most closely described by the exemptions set out under section 34 of the FOI Act, so as to support the application of the special, absolute exemption that section 34 provides. These are the documents identified as:

- a. Schedule item 14, which I have decided should be subject to a claim of exemption under paragraph 34(1)(c) of the FOI Act, as this document was brought into existence for the dominant purpose of briefing a Minister on a submission to Cabinet; and
- b. Schedule item 15, which I have decided should be subject to a claim of exemption under paragraph 34(1)(d) of the FOI Act, as it is a draft of a document that forms a Cabinet submission, an official record of Cabinet or a Cabinet briefing.

10. In light of the above, I have decided to exempt 2 documents under section 34 of the FOI Act.

Section 42 - legal professional privilege

11. I have identified 18 documents containing legal material for which a claim of legal professional privilege is warranted.

12. Subsection 42(1) of the FOI Act exempts a document if the document would be exempt from production in legal proceedings on the grounds of legal professional privilege. A document is exempt from production on the grounds of legal professional privilege if all of the following apply:

- a. there exists a solicitor-client relationship;
- b. there have been confidential communications which are recorded in the document;
- c. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
- d. the privilege has not been waived.

13. I am satisfied that the legal adviser/client relationship has been established, as the advice was provided by a qualified lawyer, who was acting in their capacity as a professional adviser. I am satisfied that the specific material relevant to this request was created for the dominant purpose of a client seeking legal advice from Defence Legal. I note that legal professional privilege is the client's privilege to waive and I am satisfied that the waiver has not occurred.

14. Further, I am satisfied that the specific material contained in the relevant document was created for the dominant purpose of giving legal advice, and there is no reason to doubt the legal advisers' independence in providing such advice. I note that legal professional privilege is the client's privilege to waive and I am satisfied that the waiver has not occurred.

15. Some material in the scope of the request is communication between a legal practitioner and a client area made in confidence in relation to matters which might be reasonably expected to give rise to litigation.

16. The above considerations would normally require that the entire documents subject to the claim of legal professional privilege be exempted from release. I have considered whether it might be possible to sever and release material relevant to the applicant from privileged matters discussed in the correspondence. In this situation, I do not consider it possible to exempt portions of the material only.

17. In the case of the exempted material, there were two main categories of legally privileged material:

- a. Documents in which a client area was tasking a legal practitioner to provide legal advice on a particular matter.
- b. Documents in which legal practitioners discuss the scope and direction of instructions, with a view to providing that advice.

18. Both these categories of documents contain matters relevant to Defence Legal's practice of law for its client. They fall squarely within the type of material that must not be released as it is subject to legal professional privilege and would normally be exempt from production in proceedings on that basis.

19. The documents are considered to fall within the scope of the applicant's request, which seeks information about the establishment of offices and bodies with legal or adjudicative powers. Without revealing the substance of any such advice, I consider it is reasonable to suppose that there would be a substantial likelihood of litigation in relation to any such entities and their performance of their functions, with the result that the documents would meet the dominant purpose test.

20. The disclosure of a legal matter between the legal advisors engaged in a Department and those staff in the role of the instructing client does not waive privilege in the matter. While the material in question contained in some of the documents has been disclosed to more than one person in the Commonwealth, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed in paragraph 5.148 of the Guidelines, which states: modern organisations often work in teams and several people may need to know about privileged communications. Those Guidelines also make clear that disclosure within the Commonwealth as required to satisfy *Legal Services Directions 2017* requirements does not waive privilege.

21. I find that the material identified would be exempt from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I am satisfied that the material identified is exempt under section 42(1) of the FOI Act.

Section 47C – Deliberative processes

22. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. At paragraph 6.52 the Guidelines state ‘Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister’.

23. I have identified 16 documents containing legal material which I consider would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of or for the purposes of, the deliberative processes involved in the functions of an agency, a Minister or the Government of the Commonwealth. I have therefore considered it appropriate to make a claim of exemption under section 47C of the FOI Act to avoid disclosing those deliberative processes, noting that I consider it would be adverse to the public interest to release those documents.

24. I have also exempted material that would reveal the development of management policies under section 47C, noting the need for officials to be able to frankly discuss and deliberate upon their approach to issues that confront them in the administration of particular judicial and administrative structures. It is my view that revealing portions of the documents that formed part of the deliberative process would, in turn, reveal inputs and methods that form part of those documents to which the section 34 exemption is specifically applied in my decision, enabling identification of the Cabinet material through a ‘mosaic’ approach. I do not consider that it would be appropriate to reveal the material subject to the section 34 claim of exemption in such a manner and so I have claimed the section 47C exemption to prevent that occurring through the release of the related and preliminary materials.

25. I am satisfied the material is deliberative matter and is exempt under section 47C of the FOI Act.

Section 47E – Documents affecting certain operations of an agency

26. Section 47E of the FOI Act, conditionally exempts document to the extent that disclosure would, or could reasonably be expected to

- a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
-
- c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

27. I have identified 2 documents that I consider warrant exemption under section 47E of the FOI Act because the release of the material contained in them would, in the case of document 10, prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency, and in the case of document 18, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

28. More generally, I note that documents subject to claims of exemption under sections 42 and 47C of the FOI Act also appear amenable to the exemptions contained in section 47E

of the FOI Act, noting that the open discussion of relative strengths and weaknesses of bodies tasked to deliver policy objectives in a deliberative process might be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency for the purpose of paragraph 47E(d) of the FOI Act. I have not claimed this exemption in relation to those documents as I do not wish to disclose the substance of advice in those for which section 42 exemption has been claimed. However, the sort of harm mentioned by section 47E appears to describe the 'real harm' that disclosure of the otherwise exempt material might prompt.

Public interest considerations

29. I have considered whether there might be a release of material for which section 47C or 47E exemption is claimed and decided that it would be adverse to the public interest to do so. My concern is greater than simply exposing the relevant offices or bodies to public comment. Instead, it appears that specific harm may flow from having any relative weaknesses of the offices or bodies revealed, with a risk to those bodies' ability to attain their objects due to diversion of resources to deal with repeat and regular challenge to their attempts to perform functions. Revealing information about any vulnerability of the structures might impede the trust of those individuals who are being asked to provide sensitive information to assist the offices and bodies, because they may question those bodies ability to protect their information or attain the objects sought and might become reluctant to provide information necessary for the efficient function.

30. For completeness, it is noted that the *Royal Commissions Act 1902* provides the Royal Commission with broad powers to control issues of disturbance of the Commission's processes (section 6O) and specific powers over publication of matters relevant to the Commission (section 6P).

31. I have decided that it would not be appropriate to release fragments of the documents. This is because the documents all contribute to a set of documents which consultation with the PM&C confirmed were brought into existence for the dominant purposes described under section 34 of the FOI Act. It is my view that revealing portions of the documents that formed part of the deliberative process would, in turn, reveal inputs and methods that form part of those documents to which the section 34 exemption applies.

IngridSingh
[electronic signature]

Ingrid Singh
Accredited Decision Maker
Defence Executive Support Group

 Digitally signed by IngridSingh
Date: 2021.11.03 18:33:20 +11'00'