



Reference: FOI 098/21/22

STATEMENT OF REASONS – REVISED DECISION UNDER SECTION 55G OF THE FREEDOM OF INFORMATION ACT 1982

1. On 2 September 2021, Alan Ashmore (the applicant) requested access to the following documents under the *Freedom of Information Act 1982* (FOI Act):

“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.”

INFORMATION I AM SEEKING:

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 4 February 2020.

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

2. On 9 November 2021, the applicant was provided with a decision that refused access in full to 20 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 material was considered exempt under sections 34 [Cabinet documents], 42 [legal professional privilege] and 47C [deliberative processes] of the FOI Act.

Background

3. On 24 September 2021, the applicant was issued with a Notice of Practical Refusal advising that an unreasonably large number of documents had been identified as falling the scope of the request, being approximately 300 documents constituting approximately 1000 pages. It had been determined that the workload involved in retrieving the documents within scope, conducting consultation with various parties both internal and external to Defence and completing the decision making process, would involve a substantial and unreasonable diversion of the resources of the agency.

4. On 26 September 2021, the applicant agreed to amend the timeline for documents sought from, “up to and including 4 February 2020” to “up to and including 31 December 2019.”

5. On 3 October 2021, the applicant agreed to extend the period for processing his request under section 15AA of the FOI Act by 7 days.

6. On 17 January 2023, the Office of the Australian Information Commissioner (OAIC) advised the Department of Defence (Defence) that the applicant had sought an external review.

7. The purpose of this correspondence is to provide the applicant with a revised decision under section 55G [Procedure in IC review – revocation or variation of access refusal decision] of the FOI Act.

Documents subject to the revised decision

8. The 20 documents that formed the subject of the original decision are the subject of this revised decision under section 55G of the FOI Act.

The applicant's contentions

9. In their application for external review, the applicant provided the following contentions:

“The Prime Minister alone has the powers to call a Royal Commission as noted by Luke Gosling MP on 16 December 2019.

*The Prime Minister said **he**, (my emphasis), would activity [sic] consider calling a Royal Commission “over the Christmas (2019) break.”*

This was reported on - Channel 9 Sydney news – 9 November 2019, The Daily Telegraph – 28 November 2019, Contactairlandandsea on 2 December 2019, and Aspistrategist on 16 December 2019.

*Morrison again said **he**, (my emphasis), was considering a RC over the Christmas break on a Sydney radio station one week before Christmas 2019.*

I note that then Prime Minister Gillard called a Royal Commission into Institutional Child Abuse within hours of a Police whistle blower going public on the ABC's 730 and as I understand she did not call a Cabinet meeting before this announcement.

This is because only a prime Minister can call for a Royal Commission.

Therefore, in the repeated words of our Prime Minister, Defence's claim of “cabinet documents” cannot be sustained.

As noted above at the 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.” One assumes the words, “summer months,” has as its start date the 1st December.

On 24 September 2021 Defence advised me, “the Department of Defence (Defence) has considered this request and it has been revealed the scope of the request, in its current form contains a large amount of documents.

Specifically, in the initial searches Defence estimates approximately 300 sensitive documents and approximately 1000 pages that fall within the scope of this request.” This was for the period up to 4 February 2020.

On 9 November 2021 Defence advised they had identified 20 documents for the reduced period to 31 December 2019.

Assuming the comment by Linda Reynolds is correct I find it almost unbelievable that of the initial 300 documents identified that around 10% fell into 2019 and around 90% in 2020. Accordingly, I am querying if there is an error in one of the above two statements.

I have also been advised that DVA commenced work on developing this policy, “in November 2019.” Assuming Defence commenced at the same time I am staggered that so few documents were discovered up to and including 31 December 2019. I ask that you query the accuracy of this figure with Defence.”

Revised decision

10. I have decided to vary the original decision by:
 - a. granting partial access to 17 documents with material exempted on the basis of sections 42 [legal professional privilege], 47E(c) [public interest conditional exemptions - certain operations of agencies] and 47F [public interest conditional exemptions - personal privacy] of the FOI Act; and
 - b. refusing access to 3 documents on the basis that the information is exempt under sections 34 [cabinet documents] and 42 [legal professional privilege] of the FOI Act.
11. Further to the above, mobile numbers and signatures which are considered irrelevant to the request have been removed under section 22 [Access to edited copies with exempt or irrelevant matter deleted] of the FOI Act.
12. A schedule of the documents outlining the basis upon which each document was exempted is attached along with a copy of the documents in the form approved for release.

Material taken into account

13. In making my decision, I had regard to:
 - a. the terms of the request;
 - b. the content of the documents falling within scope of the request;
 - c. the applicant’s contentions;
 - 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. advice from the relevant line area.

Findings and Reasoning

Section 22 – Access to edited copies with irrelevant matter deleted

14. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.

15. The documents contain information which the applicant has not requested. I have decided to remove this irrelevant material and release the documents to the applicant in an edited form.

Section 34 – Cabinet documents

16. Section 34 of the FOI Act states:

- (1) A document is an exempt document if:*
- (a) Both of the following are satisfied;*
 - (i) It has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
 - (ii) It was brought into existence for the dominant purpose of submission for consideration by the Cabinet or*
 - (b) It is an official record of the Cabinet; or*
 - (c) It was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*
 - (d) It is a draft of a document to which paragraph (a), (b) or (c) applies.*

17. Whilst I note the applicant's contentions, I maintain that the documents identified in the original decision are exempt under section 34 of the FOI Act. The documents were brought into existence for the dominant purpose of submission for consideration by Cabinet and were submitted to Cabinet.

Section 42 - legal professional privilege

18. Section 42(1) of the FOI Act provides:

“A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.”

19. The Guidelines, at paragraph 5.129, provide that determining whether a communication is privileged requires consideration of:

- a. whether there is a legal adviser-client relationship*
- b. whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- c. whether the advice given is independent*
- d. whether the advice given is confidential*

20. I am satisfied that a legal adviser/client relationship has been established, as the advice was provided by qualified lawyers acting independently in their capacity as legal advisers.

The information contained in the documents reveal communications between the relevant business area and Commonwealth agencies and qualified lawyers within Defence and other Commonwealth agencies acting in their capacity as independent professional legal advisers.

21. I am satisfied that the specific material relevant to this request was created for the dominant purpose of a client area seeking legal advice from Defence Legal. The documents concerned contain requests for legal advice, correspondence to inform legal advice, and legal reasoning and opinion. In my view, the advice was provided on a confidential basis.

22. I note that legal professional privilege is the client's privilege to waive and I am satisfied that waiver has not occurred.

23. I find that the disclosure of legal advice among legal advisors and various client areas within Defence and other agencies with a shared purpose does not waive legal professional privilege. 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 provides that modern organisations often work in teams and several people may need to know about privileged communications. The Guidelines also make clear that disclosure within the Commonwealth as required by the *Legal Services Directions 2017* also does not waive privilege.

24. Accordingly, I am satisfied that the material identified is exempt under section 42 of the FOI Act.

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

25. Section 47E(c) 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”

26. The Guidelines provide, at paragraph 6.113, that:

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.*

27. Upon assessment of the documents, I found that they contain information concerning the management of personnel, and actions that could be taken by management in relation to disciplinary activities.

28. The information contained in the document includes names and direct contact details of personnel within Defence.

29. The draft updated Guidelines state, at paragraphs 6.104 - 6.105, that subject to the factors stipulated in paragraph 6.106:

“In some circumstances it may be appropriate to address concerns about the work health and safety impacts of disclosing public servants’ personal information (such as names and contact details) under s 47E(c).”

30. An assessment conducted on a case-by-case basis, based on objective evidence, is required when considering whether it is appropriate to apply section 47E(c) of the FOI Act.

31. As release of information under the FOI Act is considered release to the world at large, I am satisfied that the applicant or other members of the public may be inclined to use this information to directly contact Commonwealth representatives and disregard appropriate channels of communication. Consequently, in the current matter, it can be reasonably expected that disclosure of the exempted material would cause harm or distress to the personnel whose details would be disclosed. Defence has an obligation under the *Work, Health and Safety Act 2011* (Cth) to have regard for the welfare of its personnel.

32. Based on my consideration of the above, I am of the view that release of the relevant material would, or could reasonably be expected to, have a substantial adverse effect on the management and assessment of personnel by Defence and on personnel vulnerable to inappropriate direct contact and harassment by aggrieved members of the public.

33. Accordingly, I am satisfied that the information is conditionally exempt under section 47E(c) of the FOI Act.

Section 47F - public interest conditional information- Personal Privacy

34. 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)’.

35. ‘Personal information’ has the same meaning as in the *Privacy Act 1988* (Cth) which means 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.

36. Upon examination of the documents, I identified personal information of a number of individuals, being names and mobile phone numbers, and email addresses.

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

38. The Guidelines note that ‘the personal privacy exemption is designed to prevent the ‘unreasonable’ invasion of third parties’ privacy’. In accordance with section 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.

39. Against those criteria, I found that:

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

40. Accordingly, I am satisfied the identified information is conditionally exempt under section 47F of the FOI Act.

Sections 47E(c) and 47F – public interest considerations

41. Having found that the identified documents are conditionally exempt under sections 47E(c) and 47F of the FOI Act, I am required to consider public interest considerations in release of the information.

Factors in favour of disclosure

42. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. On review, I found that disclosure of the information would promote the objects of the FOI Act.

43. However, while I note that the release of the information being withheld may be of some interest to the applicant, it would not inform public debate on a matter of public importance, nor would it promote effective oversight of public expenditure in any meaningful way.

Factors against disclosure

44. 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 the release of this information could reasonably be expected to prejudice:

- a. the protection of an individual's right to privacy; and
- b. an agency's ability to manage its personnel.

45. I consider that the above factors weigh heavily against disclosure at this time.

46. Furthermore, I am satisfied that disclosure of the direct contact details of employees would not increase public participation in government processes, nor increase scrutiny or discussion of government activities.

47. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I find the relevant information exempt under sections 47E(c) and 47F of the FOI Act.

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

Further information

49. The applicant has also submitted contentions regarding the validity of searches, given advice to them earlier that Defence had located 300 documents constituting a total of 1000 pages. Following the applicant's revision of scope, a closer review and assessment was undertaken of the documents located. I am satisfied on review of the searches that a thorough and comprehensive assessment of documents potentially falling within scope took place and identified only 20 documents as falling within the remit of the applicant's revised scope.

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