



**Australian Government**  
**Department of Defence**

Reference: R35420130

**FOI 001/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act), for access to:

*“I seek documents from 1 January 2017 to date of this request relating to:*

- Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) issues and sexism.*
- Any words, terms, books, movies or media that are banned in relation to LBGTIQ and sexism.*
- Changes in policy in relation to gender defined issues or LGBTIQ.”*

*Please limit searches to the Chief of the Defence Force, Secretary, Deputy Secretary People Group and Head Defence Legal. The scope of the request relates to the most recent updates and final reports/policy rather than regular updates.*

*Exclusions: Exclude duplicates, documents that have already been publicly released or made publicly available, media statements/reports/articles and correspondence with media. If emails are captured, please limit to the final thread of the conversation.”*

*Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request.*

**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 34 documents as matching the description of the request.
4. The decision in relation to each document is detailed in a schedule of documents.
5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

**Decision**

6. I have decided to:
- a. release six documents in full;
  - b. partially release three 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 sections 47E(c) &

- (d) [public interest conditional exemptions-certain operations of agencies] or 47F [public interest conditional exemptions-personal privacy] of the FOI Act;
- c. deny access to ten documents in full in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that they are considered exempt under section 47E(c) & (d) [public interest conditional exemptions-certain operations of agencies] of the FOI Act.
- d. deny access to 15 documents in full on the grounds that they are considered exempt under section 42 [absolute exemptions-Documents subject to legal professional privilege] of the FOI Act; and
- e. remove 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**

7. 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);
  - e. consultation with third parties; and
  - f. advice received from officers within the department.

### **Reasons for decision**

#### **Absolute Exemption – Section 42 – Documents subject to legal professional privilege**

8. I found that fifteen documents contain material which fall within the purview of section 42 of the FOI Act, as it contains legal advice and correspondence, which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP). I note that the FOI Act does not define LPP, however, the guidelines require that I consider each of the following:

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

9. In determining whether a legal adviser-client relationship exists, the guidelines state that the following points must be considered:

- a. legal advice given by a qualified lawyer employed by the government can be privileged
- b. the legal adviser must be acting in their capacity as a professional legal adviser
- c. the giving of the advice must be attended by the necessary degree of independence

- d. the *dominant purpose* test must be satisfied
- e. the advice must be confidential.

10. I am satisfied that the legal adviser/client relationship had been established, as the advice was provided by qualified lawyers, who were acting in their capacity as professional advisers.

11. Further, I am satisfied that the specific material contained in the documents relevant to this request was created for the dominant purpose of giving or receiving legal advice, and there is no reason to doubt the legal advisers' independence in providing such advice. I note that LPP is the client's privilege to waive and I am satisfied that waiver has not occurred. I note that while the material in question is contained in documents being disclosed to more than one person in Defence, 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.

12. I am satisfied, therefore, that the documents should be privileged from production on the basis of LPP and are therefore exempt under section 42 of the FOI Act.

#### **Conditional Exemption – Section 47E(c) and 47E(d) – certain operations of agencies**

13. Section 47E(c) and 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:*

...

*(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by and agency;*

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.”*

14. In relation to subsection 47E(c) and 47E(d) of the FOI Act, the Guidelines advise that, where the document relates to management of personnel, the decision maker must address whether:

- a. an effect would be reasonably expected following disclosure; and
- b. the expected effect would be both substantial and adverse.

15. I considered whether:

- a. prejudice could reasonably be expected to occur to the effectiveness of the procedures or methods of the agency; and
- b. the disclosure of these documents at this time would, on balance, be contrary to the public interest.

16. Upon examination of the documents, I found that they contained information which a claim for exemption under section 47E(c) of the FOI Act is warranted. The information which is conditionally exempt under section 47E(c) reveals sensitive information concerning the management and behaviour of personnel including considerations of early draft policy impacting the Department in relation to ‘gender’ which are not yet finalised.

17. The information contained within the documents included information which if released would have broad and unforeseen consequences for the management of personnel across Defence that would be both substantial and adverse.

18. Upon examination of the documents, I also found that they contained information which a claim for exemption under section 47E(d) of the FOI Act is warranted. The information which is conditionally exempt under section 47E(d) contains opinion, advice and recommendations about future Defence policy which if released, would for example, reasonably be expected to have a negative impact on the potential success of the inclusion program being implemented by Defence.

19. Release of this information would be reasonable expected to affect the way Defence performs its functions and could reasonably be expected to adversely affect the proper and efficient conduct of the operations of Defence.

20. The release of the information would have a substantial and adverse effect on both individuals, the management of personnel, and the efficient and proper conduct of the operations of Defence. I consider the material is therefore conditionally exempt under section 47E(c) and 47E(d) of the FOI Act.

21. Section 11A(5) of the FOI Act 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.

22. My public interest arguments are detailed below.

### **Section 47E(c) and 47E(d) – Public interest considerations**

23. I have found that the documents are conditionally exempt under section 47E(c) and 47E(d) of the FOI Act. 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.

24. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factor is that disclosure may promote some of the objects of the FOI Act as information held by the Government is a national resource. However, the disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

25. 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 or harm:

- a. the interests of an individual or group of individuals;
- b. an agency's ability to obtain confidential information;
- c. an agency's ability to obtain similar information in the future; and
- d. could reasonably be expected to prejudice the management function of an agency.

26. While I accept there is a public interest in the considerations being made by Defence in an important area of policy and that Defence undertakes its functions in a transparent and proper manner, on balance, it would be contrary to the public interest to disclose sensitive, careful considerations in relation to this issue.

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

### **Conditional Exemption – Section 47F – Personal privacy**

28. Upon examination of the documents, I identified information, specifically names, ranks, positions, and personal details of individuals other than the applicant.

29. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors:

- 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 document
- c. the availability of the information from publicly accessible sources
- d. the effect the release of the personal information could reasonably have on the third party.

30. I found that the:

- a. specific personal information listed is not well known
- b. individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents
- c. information is not readily available from publicly accessible sources.

31. The release of the names, ranks, positions, opinions and personal details, and personal information in the documents could reasonably be expected to cause harm to the privacy of the third parties. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act.

### **Sections 47F - Public interest considerations**

#### *Factors in favour of disclosure*

32. I have found that some of the identified documents are conditionally exempt under section 47F(1) of the FOI Act. Section 11 A (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'.

33. 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 objects of the FOI Act, as information held by the Government is a national resource.

34. However disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

35. 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.

36. Releasing details that would identify individuals including rank, position, and descriptions would be a breach of privacy and could cause significant harm to the individuals involved. 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 47F(1) of the FOI Act.

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

## Section 22

38. 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.

## Further Information

39. 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.

digitally signed  
by david.haddad  
Date: 2018.10.15  
17:12:56 +11'00'

Mr David Haddad  
Accredited Decision Maker  
Defence People Group