



Australian Government
Department of Defence

Reference: Objective ID R31293508

FOI 009/17/18 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:

“...documents since 1 January, 2015, specifically reports, executive/ministerial briefings and attachments, Senate Estimate Hearing reports, minutes of executive meetings and internal correspondence involving the ADF executive in relation to transgender or prospective transgender officers/recruits/personnel/staff.

In relation to narrowing down correspondence involving the ADF executive, I'm happy to limit to what I have in previous applications i.e chiefs of each division including the ADF and officers which would specifically deal with this issue.

In relation to emails, please limit to the final thread of the conversation. Please exclude duplicates, documents that have already been publicly released, media reports/articles/released and correspondence with media. ”

The above also excludes 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.

FOI decision maker

2. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

3. Following discussions with the applicant I have limited the scope of the request to final versions of documents. In relation to the internal correspondence involving the ADF executive I have limited my searches to the Groups/Services that would reasonably be expected to hold documents matching the scope, such as Air Force, Army, Defence People Group (DPG), Joint Health Command (JHC) and Navy.

4. I have also decided to consider one document that was finalised after the request was validated rather than considering the draft that was in existence at the time.

5. I identified 78 documents as matching the description of the request. While 78 documents have been identified, in some instances only a small part of the document specifically matches the scope of the request. As such, the remaining material has been removed as irrelevant. In most instances the material removed relates to other diversity groups or initiatives.

6. The decision in relation to each document is detailed in schedules of documents for Air Force, Army, DPG, JHC and Navy.

7. I have added an FOI reference number and Serial number to each of the documents, which corresponds with the schedule.

Decision

8. In relation to documents provided by Air Force, I have decided to release two documents in full.
9. In relation to documents provided by Army, I have decided to:
 - a. release four documents in full; and
 - b. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.
10. In relation to documents provided by DPG, I have decided to:
 - a. release 35 documents in full;
 - b. partially release 14 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 section 47F [public interest conditional exemptions-personal privacy], 47C [public interest conditional exemptions-deliberative] or 47E(c) [operations of the agency – management of personnel] of the FOI Act;
 - c. deny access to one document 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 section 47C [public interest conditional exemptions-deliberative] of the FOI Act; and
 - d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.
11. In relation to documents provided by JHC, I have decided to:
 - a. release five documents in full;
 - b. partially release seven 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 section 47F [public interest conditional exemptions-personal privacy] and 47E(c) [operations of the agency – management of personnel] of the FOI Act; and
 - c. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.
12. In relation to documents provided by Navy, I have decided to:
 - a. releases five documents in full;
 - b. partially release one document 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 section 47F [public interest conditional exemptions-personal privacy] of the FOI Act;
 - c. deny access to four documents in 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 section 47C [public interest conditional exemptions-deliberative] of the FOI Act; and

- d. 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

13. 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); and
 - e. Advice received from third parties and officers in DPG, JHC, Navy, Army, Air Force and the Australian Defence Force Academy.

Reasons for decision

Section 47C – Public interest conditional exemptions - deliberative processes

14. I found that some of the identified documents contain material which a claim for exemption under subsection 47C(1) of the FOI Act is warranted.

15. Subsection 47C(1) of the FOI Act states '*A document is conditionally exempt if its disclosure under the Act would disclose matter (deliberative 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 process involved in the functions of...an agency....*'. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

16. The Australian Information Commissioner has issued Guidelines to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act.

17. I have taken into account the Guidelines, noting that one consideration under section 47C is whether a document includes content of a specific type, namely deliberative matter regardless of any harm that may result from disclosure. I have determined that all of the material contained in the documents considered exempt under 47C is deliberative.

18. The documents to which 47C applies are guidance documents that are currently being developed by Defence to help provide information on the administrative arrangements for transgender members. The documents are still under consideration and are being deliberated over by the relevant areas in Defence. Premature release would limit Defence's ability to explore all options and potentially constrain Defence to a particular path.

19. Having decided that these guidance documents are exempt under deliberative processes, I then turned my mind to the question of purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines which state that, 'purely factual material' that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive;
- b. incidental administrative content;
- c. procedural or day-to-day content;
- d. the decision or conclusion reached at the end of the deliberative process; and
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

20. I have also taken into account that, while purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to the provision of policy advice or opinion and elaborates its context or likely impact, it may potentially come within the deliberative document exemption. In particular, I took note of the Guidelines which state that:

'Purely factual material does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it'.

21. There is some ancillary factual material throughout the documents such as terminology and definitions however, this is intertwined with the deliberative content.

22. Where I have denied access in full to a document I considered that all the material in the document to be conditionally exempt under section 47C of the FOI Act.

23. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

24. My public interest considerations are detailed below.

Section 47E(c) – Management or assessment of personnel

25. Section 47E(c) of the FOI Act states:

47E Public interest conditional exemption- certain operations of agencies

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 Australian Information Commissioner has issued Guidelines to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. In relation to section 47E(c), the Guidelines explain 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 exemptions in 47E(c) namely, that:

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

27. For this exemption to apply, the documents must relate to either:

- a. the management of personnel - including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety; or
- b. the assessment of personnel - including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment or bonus or eligibility for progression.

28. After examination of the identified documents, I am satisfied that the documents contain information falling within the paragraphs above as the documents detail the number of transgender

personnel within Defence. Noting the numbers reported are broken down below 10, or can be deduced from the remaining numbers, there is a significant risk that specific individuals could be identified. Noting the identification/reporting process is conducted through a voluntary system, there is a risk that individuals would not identify themselves for statistical purposes if they thought their privacy would be breached through reporting. Lack of an indication of numbers of transgender personnel would have a substantial and adverse effect of Defence's ability to manage transgender personnel in the Department.

29. I am satisfied that it is reasonable to expect that disclosing the information, such as that contained within the identified documents would make staff reluctant to report this information in the future.

30. Based on the above reasons, I considered that some material in the identified documents is conditionally exempt under section 47E(c) of the FOI Act.

31. My public interest considerations are detailed below.

Section 47F - Personal privacy

32. On examination of the documents I considered whether:

- a. the documents contained personal information;
- b. the disclosure of the personal information would be unreasonable; and
- c. whether the disclosure of this information would, at this time, be contrary to the public interest.

33. In my examination of the documents I identified information that would reveal the identity of certain individuals.

34. As a person's identity could be apparent or reasonably ascertainable from the identified information, I have decided that it constitutes personal information.

35. In determining whether release of the above personal information is unreasonable, I took into account:

- 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 within the document; and
- c. the availability of the information from publicly accessible sources.

36. Against these criteria, I found:

- d. the context in which the identified personal information is not well known;
- e. the persons to whom the information relates is not widely known to be (or to have been) associated with the matters dealt with in the documents; and
- f. the context of the identified personal information is not available from publicly accessible sources.

37. After considering all of the above, I am satisfied that the specific identified information is conditionally exempt under section 47F of the FOI Act.

Sections 47C 47E(c) and 47F - Public interest considerations

38. In determining whether to release the documents conditionally exempt under sections 47C, 47E(c) and 47F, I considered the Guidelines together with a range of factors that favour access to a document set out in sub-section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. I had regard to whether giving access to the applicant at this

time would, on balance, be contrary to the public interest. Specifically, I considered if disclosure of the documents would:

- a. promote the objects of the FOI Act;
- b. inform debate on a matter of public importance;
- c. promote effective oversight of public expenditure; and
- d. allow a person to access her or his personal information.

39. I consider that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. I consider, however, the disclosure of the deliberative guidance material, the transgender numbers below 10 and personal information would not increase public participation in Government processes. Further, I consider that disclosure of the numbers and personal information would also not increase scrutiny or discussion of Government activities or provide the applicant access to their information.

40. While I considered that disclosure of the guidance material may increase scrutiny or discussion of Defence activities, it would also constrain Defence's ability to duly consider all options. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a public interest in maintaining the confidentiality of some material contained in the documents while they are still in the deliberative stages. Disclosure of some of the material contained in the documents would potentially have a significant impact on the Commonwealth's ability to effectively manage its employees and hamper Defence's ability to develop a comprehensive document that is not constrained down a certain path.

41. Further, the Guidelines specify a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to disclosing the transgender numbers below 10 and personal information in relation to this request is that release of this information could reasonably be expected to prejudice:

- a. an agency's ability to obtain confidential information;
- b. an agency's ability to obtain similar information in future
- c. the management function of an agency; and
- d. the protection of an individual's right to privacy.

42. 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 47C, 47E(c) and 47F of the FOI Act.

43. I have considered the irrelevant factors in sub-section 11B(4) [irrelevant factors] and did not take these in to account when making my decision.

Section 22 (where documents are being denied in full)

44. 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 the applicant 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

45. 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.

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by
melissa.davidson
Date: 2017.09.20
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A stylized red signature graphic that overlaps the text "melissa.davidson" and "Date: 2017.09.20".

Melissa Davidson
Accredited Decision Maker
Associate Secretary Group