



FOI 060/17/18 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:

“...copies of documents from 1 June 2017 to 1 August 2017 between the Department of Prime Minister and Cabinet and the Department of Defence [Item 1] and the Department of Immigration and Border Protection and the Department of Defence [Item 2] relating to the proposed plans for the Australian Defence Force to act against domestic terrorist threats when called in to do so by State & territory governments.”

Excluding personal email addresses, signatures, PMKeys numbers, mobile telephone numbers and names and phone numbers of non-SES personnel 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. I identified 153 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.
6. No documents were identified matching the criteria for Item 2.

Decision

7. I have decided to:
 - a. release documents in full;
 - b. partially release 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 7 [Exemption of certain persons and bodies], 33(a)(i) and 33(b), [Documents affecting national security] section 34 [Cabinet documents], section 47B [public interest conditional exemption – Commonwealth-State relations], and/or section 47C [public interest conditional exemption – Deliberative processes] of the FOI Act;

- c. deny access to 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 33(a)(i) and 33(b), [Documents affecting national security] section 34 [Cabinet documents], section 47B [public interest conditional exemption – Commonwealth-State relations], and/or section 47C [public interest conditional exemption – Deliberative processes] of the FOI Act;
- d. refuse access to documents of the request under subparagraph 24A(1)(b)(ii)[Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and
- e. remove documents that were duplicates and material that was irrelevant to the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

- 8. 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. advice provided by States/Territories, the Department of Prime Minister and Cabinet, the Attorney-General's Department, and the Australian Federal Police.
 - f. advice provided by Defence Legal, Special Operations Command and ADF Headquarters.

Reasons for decision

Section 7– Exemption of certain persons or bodies

- 9. Subsection 7(1) of the FOI Act states:

(1) The bodies specified in Division 1 of Part 1 of Schedule 2 [of the FOI Act], and a person holding and performing the duties of an office specified in that Division, are to be deemed not to be prescribed authorities for the purposes of this Act.
- 10. A number of documents were identified containing information regarding persons holding and performing the duties of an office in a body specified in Division 1 of Part 1 of Schedule 2 of the FOI Act. This information has been exempted in accordance with Section 7 of the FOI Act.

Section 22

- 11. 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 24(a) – Request may be refused if documents cannot be found, do not exist or have not been received

12. Section 24A(1) of the FOI Act states:

(1) an agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

13. No documents matching the description of Item 2 of the request were identified from searches of electronic data management systems using appropriate key words. Searches were undertaken within Strategic Policy and Intelligence Group, Defence Legal and Vice.

14. Based on the above, I am satisfied that no documents could be located that meet the description of Item 2 of the request. I am satisfied that all reasonable steps have been taken to locate the requested documents and have decided to refuse access under section 24A of the FOI Act.

Subsection 33(a)(i) – Documents affecting the security of the Commonwealth

15. Section 33 of the FOI Act exempts documents that would, or could reasonably be expected to cause damage to the security of the Commonwealth.

16. I have identified information within the documents that, if released, could jeopardise the capability of the ADF. This particular information relates to the names and contact details of Defence personnel who have been granted Protected Identity Status. I am of the view that the release of this information could expose personnel associated with sensitive defence capabilities to threats from foreign intelligence services, terrorist groups and other hostile or subversive groups or organisations. Other material refers to Defence capabilities that may be deployed in response to a domestic terrorist incident.

17. I have therefore determined that this material is exempt under section 33(a)(i) of the FOI Act.

Subsection 33(b) – Documents communicated in confidence to the Commonwealth

18. Subsection 33(b) of the FOI Act exempts information communicated in confidence to the Australian Government or agency by another government or one of its authorities.

19. I have identified documents and information communicated in confidence to the Australian Government by another government pursuant to a treaty between the Government of the Commonwealth and this government regarding the reciprocal protection of classified information. This information was communicated in response to a formal request from an Australian Government representative and is marked to indicate its confidential nature.

20. Subsection 4(10) of the FOI Act states that information communicated pursuant to a treaty between the Commonwealth and a foreign government on the reciprocal protection of classified information is information communicated in the way mentioned in subsection 33(b)

of the FOI Act. I have therefore decided to exempt this information under subsection 33(b) of the FOI Act.

21. I have decided to exempt not only the information communicated in confidence by the other government but all information that could, in its entirety, reveal the identity of the other government under paragraphs 5.33 and 5.34 of the Guidelines.

Section 34 – Cabinet documents

22. The Guidelines relating to section 34 of the FOI Act state that agencies should consult with the Department of Prime Minister and Cabinet (DPMC) on any Cabinet-related material identified as being within the scope of an FOI request (Guidelines 5.57).

23. I have identified drafts of a Cabinet submission and documents that contain information extracted from those drafts that I considered would be exempt under Section 34 of the FOI Act. DPMC were consulted on this material and my decision is based on their advice.

24. I have therefore exempted this information under s 34(1)(d) and s 34(2) of the FOI Act.

Section 47B – Commonwealth-State relations

25. Section 47B of the FOI Act states a document is conditionally exempt if disclosure of the document under this Act:

- a. *would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State*

26. According to the Guidelines (6.33): *Disclosure of the document may cause damage by, for example:*

- *interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy*
- *adversely affecting the administration of a continuing Commonwealth-State project*
- *substantially impairing (but not merely modifying) Commonwealth-State programs*
- *adversely affecting the continued level of trust or co-operation in existing inter-office relationships*
- *impairing or prejudicing the flow of information to and from the Commonwealth.*

27. The subject of this FOI request concerns potentially very sensitive issues relating to how the Commonwealth and States and Territories prepare for, and respond to, terrorist incidents. The documents include material that was produced at an early stage in the development of proposals for adjustments to the national counter-terrorism arrangements and prior to discussions with the States and Territories regarding specific legislative amendments and other actions to enact these changes.

28. I have found that a number of documents contain material which, if disclosed, could reasonably be expected to create difficulty in negotiations or discussions that are underway regarding changes to enhance Defence contribution to national counter-terrorism

arrangements. As such, I have decided to exempt this material under section 47B of the FOI Act.

Section 47C – Deliberative processes

29. I found that the documents contain proposed correspondence specifically related to the request. I considered whether this information may be exempt under subsection 47C(1) of the FOI Act.

30. 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...or a Minister.’* Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

31. I have taken into account the Guidelines noting that one consideration in the exemption under section 47C is whether the document includes content of a deliberative matter. Upon examination of the documents I identified material that contained advice, recommendations and proposals which, if released, would disclose information in the nature of opinion and advice that has taken place in the course of the functions of an agency and a Minister, the disclosure of which would be contrary to the public interest.

32. I then considered the question of whether the information is purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines that ‘purely factual material’ that would not be regarded as deliberative matter would include:

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

33. 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 and elaborates its context or likely impact, it may potentially come within the deliberative document exemption.

34. Taking the above into consideration, I am satisfied that parts of the documents contain deliberative matter that is conditionally exempt under subsection 47C(1) of the FOI Act.

Sections 47B, 47C - Public interest considerations

35. 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, such as to promote Australia’s representative democracy by increasing scrutiny, discussions, comment and review of government activities.

36. Although I consider release of this information may increase scrutiny or discussion of government activities, I found that disclosure of this material, at a time when Commonwealth-

State discussions are ongoing regarding the final form of new national counter-terrorism arrangements, could reasonably be expected to damage the working relations of the Commonwealth and the States and Territories.

37. 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 develop, with the States and Territories, enhancements to Australia's national counter-terrorism arrangements that are not constrained down a certain path.

38. I consider that there is a strong public interest in preventing an adverse effect on these discussions and Commonwealth-State cooperation on counter-terrorism that could impact on the development of effective national counter-terrorism responses.

Further Information

39. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

40. 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.

41. Some of the documents include information regarding other issues of Commonwealth-State counter-terrorism cooperation or information provided between agencies outside the scope of the request. Information relating to these other issues or between agencies not referred to in the request have been considered irrelevant and have not been released.

Context Statement

42. On 17 July 2017, the Commonwealth Government announced a plan to enhance its support to States and Territories in preparing for, and responding to, terrorist incidents.

43. The final details of this expanded support are yet to be finalised and agreed between the Commonwealth and States and Territories. Australia's legal framework and arrangements mean that the Commonwealth Government recognises that State and Territory governments have primary operational responsibility for responding to terrorist incidents in their jurisdictions.

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