



## DEFENCE FOI 398/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

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

*The 8th quarterly report of the Afghanistan inquiry implementation oversight panel, the one that would have been provided to Minister Marles in early November 2022 or thereabouts. For clarity, this is the report of the panel led by Dr Vivienne Thom AM covering the period 1 August 2022 to 31 October 2022 including any enclosures/appendices to that substantive report.*

### FOI decision maker

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

### Documents identified

3. I identified one document as matching the description of the request.

### Exclusions

4. Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

### Decision

5. I have decided to partially release this 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 irrelevant or exempt under section 33 [documents affecting national security, defence or international relations], section 45 [documents containing material obtained in confidence], section 47C [public interest conditional exemptions – deliberative processes], section 47E(d) [public interest conditional exemptions – certain operations of agencies] and section 47F [Public interest conditional exemptions – personal privacy] of the FOI Act.

### Material taken into account

6. 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 from the Afghanistan Inquiry Response Task Force - Inquiry Implementation Branch, in respect of Defence's current Reform Plan; and

- f. Terms of Reference for the Afghanistan Inquiry Implementation Oversight Panel regarding the confidentiality section within.

### Reasons for decision

#### Section 22 – ‘Access to edited copies with exempt or irrelevant matter deleted’

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

8. The document contains information, being a signature that does not relate to the scope of the request. As such, I have considered this information as falling outside the scope of the request.

9. I am satisfied that it is reasonably practicable to remove the irrelevant and exempt material and release the document in an edited form.

#### Section 33 – Documents affecting national security, defence or international relations

10. Section 33 of the FOI Act states:

*A document is an exempt document if disclosure of the document under this Act:*

*(a) would, or could reasonably be expected to, cause damage to:*

*...*

*ii. the defence of the Commonwealth; or*

*iii. the international relations of the Commonwealth*

11. In regards to the terms 'would or could reasonably be expected to' and 'damage', the Guidelines provide:

*5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.*

*5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.*

*Defence of the Commonwealth: [Damages]*

*5.35 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage ... However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.*

*International Relations: [Damages]*

*5.37 ... The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.*

12. Additionally, the Guidelines state:

*Defence of the Commonwealth*

5.34 *The FOI Act does not define ‘defence of the Commonwealth’. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:*

- *meeting Australia’s international obligations*
- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

*International relations*

5.36 *The phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

13. Upon examination of the documentation, I have identified material which, upon release, could reasonably be expected to cause damage to the defence of the Commonwealth and the international relations of the Commonwealth.

14. I have determined that the document contains information about core military capabilities, the exposure of which could prejudice the effectiveness of the Australian Defence Force. The release of this information could also expose vulnerabilities which external entities could then utilise to hinder capability, resulting in damage to the defence of the Commonwealth.

15. In addition, I have determined that the material contains information which, upon release, would likely cause damage to the international relations of the Commonwealth, limiting or hindering any possible future interactions between the Commonwealth and its international partners.

16. Accordingly, I find that this material is exempt under sections 33(a)(ii) and 33(a)(iii) of the FOI Act.

**Sections 45 – Documents containing material obtained in confidence**

17. Section 45 of the FOI Act states:

- (1) *A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency of the Commonwealth), for breach of confidence.*

18. In relation to a breach of confidence, the Guidelines further explain:

*Breach of Confidence*

5.158 *A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.*

5.159 *To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:*

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual understanding of confidence*
- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

19. Upon examination of the material, I have formed the view that disclosure of the information would be a basis for an action to be brought against the Commonwealth for breach of confidence and for compensation to be sought for loss or damages arising from the disclosure. The redacted information was obtained on the basis of a mutual understanding of confidence to ensure frank and open conversations with both current and ex-service members as well as non-serving personnel. Outside formal reporting obligations, I believe disclosure of this information would have a substantial adverse effect on the future supply of information in similar situations.

20. In view of the above, I find that the relevant material is exempt pursuant to section 45 of the FOI Act.

#### **Section 47C – Public interest conditional exemptions – deliberative processes**

21. Section 47C of the FOI Act conditionally exempts from disclosure, documents that would disclose deliberative matter.

22. Section 47C of the FOI Act specifically states:

##### *General Rule*

*(1) A document is conditionally exempt if its disclosure under this 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 processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

##### *Exceptions*

*(2) Deliberative matter does not include either of the following:*

- (a) operational information ...;*
- (b) purely factual material.*

23. Relevantly, the Guidelines, at paragraph 6.52, 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.*

24. Paragraph 6.91 of the Guidelines provides that the conditional exemption must only apply where the potential effect following disclosure is expected to, ‘be both substantial and adverse.’

25. Upon examination of the documentation, I have identified deliberative matter – that is in the nature of, or relating to either 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 purpose of a deliberative process of Defence.

26. The redacted information contains opinions, advice, recommendations and supporting material that was gathered through consultation. Defence is still in the process of considering this information, and is yet to make a decision on the recommendations. Consequently, I find the document contains deliberative matters which is conditionally exempt under section 47C(1) of the FOI Act.

#### **Section 47E(d) – Public interest conditional exemptions – certain operations of agencies**

27. Section 47E 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:*

...

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

28. The Guidelines, at paragraph 6.123, provide that:

*The predicted effect must bear on the agency’s ‘proper and efficient’ operations, that is, the agency is undertaking its expected activities in an expected manner.*

29. I have identified that the document contains the names of Defence staff that are not reasonably known to you, nor are they available from publicly available sources.

30. In the case of ‘*ABK and Commonwealth Ombudsman [2022]*’ AICmr 44, the Information Commissioner (IC) found that where the direct email addresses and phone numbers of agency staff are not publicly known, they should be conditionally exempt under section 47E(d). The IC made this determination due to reasonable expectation that the release of staffs’ direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

31. I am satisfied that were the names of Defence personnel made publicly available, it would have substantial adverse effects on the proper and efficient operation of extant public communication channels through the risk of improper contact by members of the public. Further, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of names could, therefore, reasonably be expected to prejudice the operations of Defence.

32. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information ‘would, or could reasonably be expected to lead to a change in the agency’s processes that would enable those processes to be more efficient.’ Given that the names within the document are not publicly available and that more appropriate communication

channels are already available, I am satisfied that release of the information could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.

33. Accordingly, I am satisfied that the staff names contained within the document are conditionally exempt under section 47E(d) of the FOI Act.

### **Section 47F – 'Public interest conditional exemptions - personal privacy'**

34. Section 47F of the FOI Act states:

#### *General Rule*

- (1) *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).*
- (2) *In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*
  - (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) *any other matters that the agency or Minister considers relevant.*

35. The FOI Act shares the same definition of 'personal information' as the Privacy Act 1988 (Cth). The Guidelines provide that:

- 6.128 Personal information 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. I found that the document contains personal information of third parties that is not reasonably known to you. This includes names which would reasonably identify a third party.

37. In my assessment of whether the disclosure of personal information is unreasonable, in accordance with section 47F(2), 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; and
- d. The effect the release of the personal information could reasonably have on the third party.

38. I found that the specific personal information listed is not well known and the information is not readily available from publicly accessible sources. The release of this information could also reasonably be expected to cause harm to their privacy.

39. Accordingly, I am satisfied that the information is exempt under section 47F(1) of the FOI Act.

## Public interest considerations – Sections 47C, 47E and 47F

40. Section 11A of the FOI Act states:

...

- (5) *The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

41. I have considered the factors favouring disclosure set out in section 11B(3) of the FOI Act with the relevant factors being:

- (a) *promote the objects of this Act (including all the matters set out in sections 3 and 3A);*  
 (b) *inform debate on a matter of public importance;*  
 (c) *promote effective oversight of public expenditure.*

42. I consider that the release of the material removed under sections 47C, 47E and 47F may promote some of the objects of the FOI Act, as information held by Government is a national resource.

43. However, while the information may be of particular interest to the applicant, disclosure of this specific conditionally exempt material would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it beneficially increase scrutiny or discussion of Defence activities and expenditure in any meaningful way (section 3(2)(b) of the FOI Act).

44. 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 strong public interest in maintaining the confidentiality of the material contained within the document, particularly those still under consideration by Defence.

45. Additionally, it is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the names of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Extant communication channels and processes enable efficient and appropriate liaison with the public.

46. 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 this information could reasonably be expected to prejudice:

- (a) *the protection of an individual's right to privacy;*  
 (b) *an agency's ability to obtain confidential information;*  
 (c) *an agency's ability to obtain similar information in the future;*  
 (d) *could reasonably be expected to harm the interests of an individual or group of individuals; and*  
 (e) *the management function of an agency.*

47. I am satisfied that, based on the above particulars, the public interest factors against disclosure outweigh the factors in favour of disclosure and that, on balance, it is against the


public interest to release this information. Accordingly, I have decided that the relevant information is exempt under sections 47C, 47E and 47F of the FOI Act.

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

**Further Information**

49. The document matching the scope of this request contained a dissemination limiting marker (DLM). Where the document has been approved for public release, the DLM has been struck through.

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Sharon   
Accredited Decision Maker  
Associate Secretary Group