



DEFENCE FOI 549/22/23 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 9th quarterly report of the Afghanistan inquiry implementation oversight panel, the one that would have been provided to Minister Marles in early February 2023 or thereabouts. For clarity, this is the report of the panel led by Dr Vivienne Thom AM covering the period 1 November 2022 to 31 January 2023 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 45 [documents containing material obtained in confidence] and section 47C [public interest conditional exemptions – deliberative processes] 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 an internal tool reference number 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. The document also contains information that is exempt from release under the FOI Act.

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

Sections 45 – Documents containing material obtained in confidence

11. 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.

12. 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.*

13. Upon examination of the document, I have formed the view that disclosure of the redacted 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 relevant 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.

14. Accordingly, I find that the relevant material is exempt pursuant to section 45 of the FOI Act.

Section 47C – Public interest conditional exemptions – deliberative processes

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

16. 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.*

17. 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.*

18. 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.’

19. Upon examination of the document, 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.

20. 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 material which is conditionally exempt under section 47C(1) of the FOI Act. My considerations of the public interest test are set out below.

Public interest considerations – Sections 47C

21. 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.

22. 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.*

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

24. 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).

25. 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.

26. 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:

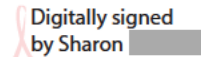
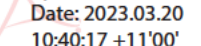
- (a) an agency's ability to obtain confidential information;*
- (b) an agency's ability to obtain similar information in the future; and*
- (c) the management function of an agency.*


27. 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 section 47C of the FOI Act.

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

Further Information

29. 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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by Sharon 
Date: 2023.03.20
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Sharon 
Accredited Decision Maker
Associate Secretary Group