



DEFENCE FOI 784/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the request by [REDACTED] (the applicant) dated and received on 5 June 2023 by the Department of Defence (Defence) for access to the following document under the *Freedom of Information Act 1982* (FOI Act):

The 10th quarterly report of the Afghanistan inquiry implementation oversight panel, the one that would have been provided to Minister Marles in early May 2023 or thereabouts. For clarity, this is the report of the panel led by Dr Vivienne Thom AM covering the period 1 February 2023 to 30 April 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 (1) document as matching the description of the request.

Exclusions

4. The signature contained in the document that falls 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 the document.

Decision

5. I have decided to partially release the 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 sections 33 [documents affecting national security, defence or international relations], 45 [documents containing material obtained in confidence], 47C [public interest conditional exemptions – deliberative processes] and 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 - Implementation and Reform 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. Upon examination of the document, I identified a single signature that does not relate to the scope of the request, in accordance with paragraph four (4), as well as information that is exempt from disclosure under the FOI Act.

9. 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.

Section 33(a)(ii) – Documents affecting national security, defence or international relations

10. Section 33(a)(ii) 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...*

11. In regard 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.

...

5.31 The meaning of ‘damage’ has three aspects:

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

12. In regard to ‘defence of the Commonwealth’, the Guidelines, at paragraph 5.34, refer to previous Administrative Appeals Tribunal (AAT) decisions which provide that the term includes:

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

13. 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 that external entities could then utilise to hinder capability, resulting in damage to the defence of the Commonwealth.

14. Accordingly, I find that this material is exempt under section 33(a)(ii) of the FOI Act.

Sections 45 – Documents containing material obtained in confidence

15. 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.

16. 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.*

17. 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. 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.

18. 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

19. Section 47C(1) of the FOI Act states:

*(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.*

20. 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.

21. 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.

22. Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material. The Guidelines, at paragraph 6.73, state that:

[p]urely 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.

23. Accordingly, I am satisfied that the document contains matter that meets the definition of deliberative material, and that where the content is purely factual, it is embedded in, or intertwined with the deliberative content and cannot be excised. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

24. Section 47F(1) of the FOI Act states:

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).

25. 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.*

26. I found that the document contains personal information, being the name of a third party that is not reasonably known to you.

27. In my assessment of whether the disclosure of this personal information is unreasonable, I considered the following factors in accordance with section 47F(2):

- 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.

28. I found that knowledge of the specific person representing their organisation in discussions with the Afghanistan Inquiry Implementation Oversight Panel is not well known or readily available from publicly accessible sources.

29. Accordingly, I am satisfied that the material is conditionally exempt under section 47F of the FOI Act.

Public interest considerations - sections 47C and 47F

30. Section 11A(5) of the FOI Act states:

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.

31. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

- (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;*
- (d) allow a person to access his or her own personal information.*

32. In my view, 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).

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

34. 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 and to safeguard the privacy of individuals.

35. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to you. Accordingly, I find that the information is exempt under sections 47C and 47F of the FOI Act.

36. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.

Further Information

37. 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.

Sharon Digitally signed by Sharon [redacted]
[redacted] Date: 2023.06.26
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Sharon
Accredited Decision Maker
Associate Secretary Group