



DEFENCE FOI 887/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant) for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):
 - 1) *Ministerial Submission dated 5 October 2012 entitled "Possible apprehension and prosecution of OBJECTIVE JUNGLE EFFECT".*
 - 2) *Ministerial submission dated 12 October 2012 entitled "Update on the apprehension and deportation of OBJECTIVE JUNGLE EFFECT".*
 - 3) *The Noting Brief for CDF in relation to Op Slipper signed on the date 13 March 2013.*

Background

2.

3.

4.

5.



FOI decision maker

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

Documents identified

7. I have identified three (3) documents falling within the scope of the request:
- a. MA12-702076 Update on the apprehension and deportation of Objective JUNGLE EFFECT, dated 12 October 2012.
 - b. MA12-702037 Possible Apprehension and Prosecution of Objective JUNGLE EFFECT, dated 05 October 2012.
 - c. MA12-702037 Possible Apprehension and Prosecution of Objective JUNGLE EFFECT, dated 05 October 2012.

Please note that (b) and (c) are the same document. While both versions are signed and considered final, the versions contain different handwritten notations, and one version includes an attachment.

8. No documents were found matching item (3) of the request.

Decision

9. I have decided to:
- a. refuse access to one (1) document (document (a)) on the grounds that the material is considered exempt under section 34 [Cabinet documents] of the FOI Act; and
 - b. partially release two (2) documents (documents (b) and (c)) 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 sections 33(a) [Documents affecting national security, defence or international relations], 42 [Documents subject to legal professional privilege], 47E(d) [Public interest conditional exemptions - certain operations of agencies], and 47F [Public interest conditional exemptions - personal privacy] of the FOI Act.

Material taken into account

10. In making my decision, I have had regard to the:
- a. terms of the request;
 - b. content of the identified documents in issue;
 - c. relevant provisions of the FOI Act; and
 - d. Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

REASONS FOR DECISION

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

11. 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.
12. Documents (b) and (c) contain exempt material. I am satisfied that it is reasonably practicable to remove the exempt material and release the documents to you in an edited form.

Section 33(a)(ii) – Documents affecting defence of the Commonwealth

13. 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...*

14. 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.

...

5.32 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.*

15. In regard to ‘defence of the Commonwealth’, the Guidelines, at paragraph 5.36, 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.
16. I have determined that the documents contain information that the disclosure of could prejudice the effectiveness of the Australian Defence Force. This is because the information pertains to specific military capabilities that are not publically known. The release could expose information that external entities could utilise to hinder capability. Such action could result in damage to the defence of the Commonwealth.
17. Accordingly, I find that this material is would, or could reasonably be expected to, cause damage to the defence of the Commonwealth and is exempt under section 33(a)(ii) of the FOI Act.

Section 33(a)(iii) – Documents affecting international relations of the Commonwealth

18. Section 33(a)(iii) 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:*
- (iii) the international relations of the Commonwealth*
19. The meaning of the terms ‘would, or could reasonably be expected to’ and ‘damage’, are discussed at paragraph 14 above.
20. In regard to ‘international relations’, the Guidelines provide at paragraph 5.39:
- 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.*
21. I find that disclosure of the material exempted under section 33(a)(iii) of the FOI Act would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. The material identifies specific communications with governmental officials of other countries that were intended to remain confidential. The release could damage the trust and confidence between Australia and those countries and reduce Australia’s ability to maintain a good working relationship.
22. Accordingly, I am satisfied that this material is exempt under section 33(a)(iii) of the FOI Act.

Section 34 – Cabinet documents

23. Section 34(1) of the FOI Act states:

A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or it was proposed to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet

24. Document (a) is a Cabinet document created for the dominant purpose of consideration by Cabinet. The Department of the Prime Minister and Cabinet were consulted on the use of this exemption. I am satisfied that the document is exempt under section 34(1) of the FOI Act.

Section 42 – Documents subject to legal professional privilege

25. Section 42(1) of the FOI Act states:

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

26. I find that some material in documents (b) and (c) is legal advice which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

27. The Guidelines provide, at paragraph 5.149, that in considering whether LPP exists, the following factors should be considered:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential

28. I am satisfied that the legal adviser-client relationship had been established, as the advice was provided by lawyers, who were acting in their capacity as independent professional advisers.

29. I am satisfied that the specific material contained in the documents was created for the dominant purpose of giving or receiving legal advice, and that advice was provided independently. I also note there is no evidence to suggest that privilege has been waived by the client or the legal adviser.

30. I note that while the material in question is contained in documents being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is

discussed at paragraph 5.174 of the Guidelines, which provides that ‘[m]odern organisations often work in teams and several people may need to know about privileged communications...’.

31. Accordingly, I am satisfied that the material is exempt under section 42 of the FOI Act.

Section 47E – Public interest conditional exemptions – certain operations of agencies

32. Section 47E(d) 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.*

33. The Guidelines, at paragraph 6.115, 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.

34. In the case of ‘*ABK*’ and *Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner found that where the direct contact details of agency staff are not publicly known, they should be conditionally exempt under section 47E(d). The Information Commissioner made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the Information Commissioner 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.

35. I am satisfied that were the names of non-Senior Executive Service Defence personnel made publicly available, it would have a substantial adverse effect on the proper and efficient operation of existing public communication channels. 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.

36. Accordingly, I am satisfied that the names of non-Senior Executive Service Defence personnel contained within the document is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

37. 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).

38. 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.*

39. I find that the documents contain personal information of a person other than the applicant.
40. In my assessment of whether the disclosure of 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.
41. I find that the specific personal information listed is not well known, individuals whose personal information is contained in the document are not widely known to be associated with the matters dealt with in the documents and the information is not readily available from publicly accessible sources.
42. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Public interest considerations – section 47E and 47F

43. 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.

44. 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;

...

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

45. 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).
46. Paragraph 6.222 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:
- the management function of an agency; and
 - the personnel management function of an agency.
47. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. In addition, material within the definition of personal information. 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. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.
48. 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.
49. 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 47E(d) and 47F of the FOI Act.

catherine. [redacted]

Digitally signed by

catherine. [redacted]

Date: 2024.06.28 10:55:56 +10'00'

Catherine [redacted]

Air Commodore

Accredited Decision Maker

Associate Secretary Group

Department of Defence