



**DEFENCE FOI 956/23/24**

**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) *Emails between [members of the Australian Defence Force that are mentioned in the report described in this news article (<https://www.abc.net.au/news/2017-07-11/afghan-files-shed-light-on-notorious-severed-hands-case/8496654>)] in relation to forensic training, sensitive site exploitation training or any other training on the topic of the acquisition and preservation of evidence in a deployed setting. (Date range: 1 July 2012 - 1 May 2014).*
- 2) *Any PowerPoint slide decks associated with such training.*

**Background**

2.

3.

4.

5.



6.



**FOI decision maker**

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

**Documents identified**

8. I have identified four (4) documents falling within the scope of the request:

- a. Powerpoint slide deck.
- b. Powerpoint slide deck.
- c. Correspondence requesting Sensitive Site Exploitation training for SOTG elements, 1 page PDF.
- d. Correspondence.

**Decision**

9. I have decided to:

- (a) refuse access to Items (a) and (b) above in accordance with section 47 [Documents disclosing trade secrets or commercially valuable information] of the FOI Act.
- (b) partially release Item (c) above, 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 [Documents affecting national security, defence or international relations] and 47E [Documents concerning certain operations of agencies] of the FOI Act; and
- (c) refuse access to Item (d) above on the grounds that the deleted material is considered exempt under sections 33 [Documents affecting national security, defence or international relations] and 47E [Documents concerning certain operations of agencies] of the FOI Act.

**Material taken into account**

10. In making my decision, I have had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions of 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. formal consultations with external stakeholders; and
- f. consultations with internal Defence stakeholders.

## 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 exempt material.
- 12. I have considered releasing the three documents refused in full as an edited copy, however, I have decided to refuse access to the documents as they would be meaningless, and of little or no value once the exempt material is removed.
- 13. One (1) document contains exempt material however, I am satisfied that it is reasonably practicable to remove the exempt material and release the document to you in an edited form.

### Section 47 – Documents disclosing trade secrets or commercially valuable information

- 14. Section 47 of the FOI Act states:
  - (1) *A document is an exempt document if its disclosure under this Act would disclose:*
    - ...
    - (b) *any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*
- 15. The Guidelines state that:

*Information having a commercial value*

*5.234 To be exempt under s47(1)(b) a document must satisfy 2 criteria:*

- *the document must contain information that has a commercial value either to an agency or to another person or body, and*
- *the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.*

*5.235 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. ... The following factors may assist in deciding whether information has commercial value:*

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its*

*intrinsic commercial value*

- *whether the information confers a competitive advantage on the agency or person to whom it relates ...*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether the information is still current ...*
- *whether disclosing the information would reduce the value of a business operation or commercial activity ...*

...

*5.237 The second requirement of s47(1)(b) ... must be established separately by satisfactory evidence. ... It must be established that the disclosure would destroy or diminish the commercial value of the information.*

16. Upon examination of the documents, I identified information that has a commercial value which would be, or could reasonably be expected to be, diminished if it were disclosed. I identified the Powerpoint slide decks to contain valuable commercial information of the Commonwealth and third parties. This information is not in the public domain and could impact the Commonwealth's ability to effectively manage existing contracts and engage in future contract negotiations. Release of this information could also reasonably be expected to provide competitors of third parties with sensitive information that would otherwise only be known to limited parties, thus conferring an unfair competitive advantage.
17. Accordingly, I consider that the release of the information would, or could reasonably be expected to, diminish commercial value, and is exempt under section 47(1)(b) of the FOI Act.

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

18. Section 33(a) 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:*
- (i) the security of the Commonwealth;*
  - (ii) the defence of the Commonwealth; or*
  - (iii) the international relations of the Commonwealth.*

19. 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 Administrative Appeals Tribunal (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.*

20. In regard to ‘security of the Commonwealth’, the Guidelines provide at paragraph 5.30:

*The term ‘security of the Commonwealth’ broadly refers to:*

- (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests*
- (b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth’s international relations (see definition in s 4(5)).*

21. In regard to ‘defence’, the Guidelines provide at paragraph 5.36:

*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.*

22. 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.*

23. Upon examination of the documents, I identified material, which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth by making public information relating to defence operations that are classified. The exempt material contains sensitive information related to deployments that could potentially allow individuals to exploit the Australian Defence Force (ADF) and other international forces.
24. Furthermore, I have identified material in the documents, which, upon release, would cause, or could reasonably be expected to cause, damage to the defence of the Commonwealth. After consideration, I have determined that by divulging the identified material, with concern for the potential to combine the information with publically available information and doctrine related to ADF capabilities, techniques, tactics and procedures, it could prejudice the effectiveness of those activities.
25. I find that disclosure of the material exempted under section 33(a) of the FOI Act would, or could reasonably be expected to, cause damage to the security, defence and international relations of the Commonwealth. The material identifies specific communications with or concerning 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.
26. Accordingly, I am satisfied that this material is exempt under section 33(a) of the FOI Act.

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

27. 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.*

28. 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 operations in an expected manner.*

29. 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.

30. I am satisfied that were the contact details of 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, and phone numbers would, or could, therefore, reasonably be expected to have a substantial adverse effect on the proper and efficient conduct on the operations of Defence.
31. Accordingly, I am satisfied that staff information contained within the document is conditionally exempt under section 47E(d) of the FOI Act.

**Public interest considerations - section 47E(d)**

32. 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.*

33. 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.*

34. 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).

35. Paragraph 6.233 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.

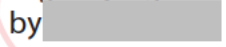
36. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the

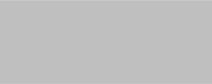
release of the names and phone numbers of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.

37. 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.
38. 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 section 47E(d) of the FOI Act.

#### **FURTHER INFORMATION**

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

Digitally signed  
by   
Date: 2024.08.26  
15:53:48 +10'00'

  
Accredited Decision Maker  
Associate Secretary Group