



DEFENCE FOI 021-24-25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 5 July 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

...copies of any cables, memoranda, emails, directives, advice, talking points relating to the recent announcement defence foreign recruitment see - <https://www.sbs.com.au/news/article/government-clarifies-defence-plans-after-foreign-recruitment-confusion/835wh7gxi> and requirements for non-citizens to renounce foreign allegiance/citizenship before being eligible to join the Australian Defence Force.

2. On 23 July 2024 the applicant further clarified the date range relevant to the request:

...date range to be from 1 May 2024 to 5 July 2024

FOI decision maker

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

Exclusions

4. Personal email addresses, signatures, 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 identified eight documents as falling within the scope of the request. In summary, I have decided to:
 - a. partially release eight documents 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 [national security, defence or international relations], 42 [legal privilege], 47(C) [deliberative processes] and 47(E) [operations of an agency] of the FOI Act; and
 - b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

6. 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; and
- d. the 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

- 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 documents contain exempt material and information that does not relate to the request. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

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

- 9. 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*
 - (ii) the defence of the Commonwealth*
 - (iii) the international relations of the Commonwealth*

- 10. 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.*

- 11. In regard to ‘defence of the Commonwealth’, the Guidelines provide at paragraph 5.36:

The FOI Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term includes:

...enduring the proper conduct of international defence relations

...protecting the Defence Force from hindrance or activities that would prejudice its effectiveness.

12. The documents relevant to the request relate to the government's decision to expand eligibility criteria to allow non-citizens from partner countries to join the Australian Defence Force.
13. In April 2024 the Albanese Government released the National Defence Strategy; the blueprint for delivery of an ambitious transformation to ensure the Australian Defence Force is positioned to safeguard Australia's security, and contribute to regional peace and prosperity. This includes a requirement to recruit, retain and grow a highly specialised and skilled Defence workforce.
14. I am satisfied that the information exempted under section 33(a)(ii) of the FOI Act directly relates to the ability of the Defence Force to achieve its objectives and capabilities, which as noted above relies on sustainable and effective recruitment and retention strategies.
15. 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.
16. I find that disclosure of the information exempted under section 33(a)(iii) of the FOI Act would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth given the deliberative nature of the information contained within the documents; and that the release of this information could reasonably and adversely impede the good working relations between Australia and the Governments of other nations, or the flow of confidential information between them.
17. Accordingly, I am satisfied that the information is exempt under section 33(a)(ii) and 33(a)(iii) of the FOI Act.

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

18. Section 33(b) of the FOI Act states:

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

- (b) *would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.*

19. In regard to determining whether information is communicated in confidence, the Guidelines provide at paragraph 5.46:

...Information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential.

20. I find that disclosure of the information exempted under section 33(b) of the FOI Act would divulge information or matter communicated in confidence by or on behalf of a foreign military to the Department of Defence. In arriving at this decision, I have taken into account that the information was communicated in confidence for the purposes of informing Defence's deliberative processes.
21. Accordingly, I am satisfied that the information is exempt under section 33(b) of the FOI Act.

Section 42 – Documents subject to legal professional privilege

22. 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.

23. I find that one document contains legal advice, which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).
24. 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*
25. 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.
26. 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.
27. Finally, I am satisfied the advice was provided in confidence given the disseminating legal marker attached to the documents. Further, 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...'.

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

Section 47C – Public interest conditional exemptions - deliberative processes

29. 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.*

30. In regards to ‘deliberative processes’, the Guidelines provide at paragraph 6.54:

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of the agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

31. In making my assessment, I have also considered paragraph 6.59 of the Guidelines, which state:

There is no reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.

32. I am satisfied that the identified material relates to opinion, advice or recommendation prepared to support deliberations on, and a course of action regarding Defence Force recruitment policy design, announcement and implementation. Further, I consider that disclosure of the identified material would, or could reasonably be expected harm future deliberative processes of the agency by exposing opinion, advice, or recommendations subject to future consideration.

33. In regards to ‘functions of an agency’, the Guidelines provide at paragraph 6.56:

The functions of an agency are usually found in the Administrative Arrangements Order or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy.

34. The Administrative Arrangements Orders provide broadly that the matters dealt with by the Department are Defence of the Commonwealth, including international defence relations, and defence co-operation. Further, the *Defence Act 1903* provides that the Secretary [of the Department of Defence] and the Chief of the Defence Force have joint administration of the Defence force. I am therefore satisfied that deliberative matter is directly linked to the functions of the agency.

35. 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.

36. Accordingly, I am satisfied that the information 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 47E(d) – Public interest conditional exemptions – certain operations of agencies

37. 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:

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

38. 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.

39. As previously described, the identified documents relate to the implementation of a core function of the Department; specifically through policy development and operational considerations regarding the recruitment and retention of Defence Force personnel.
40. The provision of advice, or briefing to Government regarding Defence matters is a core function of the Department. The Department's mission and purpose is to defend Australia and its national interests in order to advance Australia's security and prosperity.
41. To effectively and efficiently conduct its operations, the Department must remain agile, adaptable and consider a variety of methods by which to achieve its goals. I am satisfied that disclosure of the identified material would, or could reasonably be expected to have a substantial adverse impact on the Department's proper and efficient conduct, being to consider and deliberate on options available to ensure necessary workforce capability requirements.
42. In '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 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.
43. I am satisfied that were the contact details of Defence personnel made publicly available, it would have substantial adverse effects 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, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of Defence.

44. The documents contain names and contact details of Defence personnel and other information used for the purposes of internal Defence business and are not publicly facing. Defence has established procedures to direct correspondence from members of the public through specific channels to ensure that workflows can be controlled and managed. Releasing these contact details would interfere with the procedures that are in place and would have a substantial adverse effect on the operations of the area, and Defence as a whole.
45. 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.' I am satisfied that disclosure of the identified material would not be expected to lead to any efficiencies
46. I am satisfied that if the identified material were to be made publicly available, it would have substantial adverse effects on the proper and efficient operation of Defence by: reducing the effectiveness of existing public communication channels; limiting Defence's ability to continue to deliberate on matters contained within the documents; or by exposing information that would harm international relations, or the defence of the Commonwealth.
47. Accordingly, I am satisfied that the identified material contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Public interest considerations - sections 47C and 47E(d)

48. 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.

49. 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.*

50. 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). In forming this view, I have considered the publicly available material detailing the decision taken by Government regarding recruitment of non-citizens.

51. 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 defence of the Commonwealth or international relations,
- could reasonably be expected to adversely impact the Department's proper and efficient conduct, including recruitment strategies;
- could be reasonably expected to harm Defence interests, including the ability to recruit and retain necessary personnel;
- could adversely impact the ability of the Department to provide deliberative advice to Government on Defence matters;
- could adversely impact future, or further deliberations on Defence recruitment strategies;
- could adversely impact the health and wellbeing of its personnel, through exposure of their personal information;
- could adversely impact the proper and efficient conduct of the agency, through diversion of public communications away from recognised channels;
- protection of an individual, or group of individual's right to privacy (including junior personnel); and
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

52. 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.

53. 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 identified material is exempt under sections 47C and 47E(d) of the FOI Act.

FURTHER INFORMATION

54. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

Digitally signed by [REDACTED]

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Accredited Decision Maker
Defence People Group
Department of Defence