



Australian Government
Department of Defence

Reference: R28593780

FOI 049/16/17 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act):

“I'd like to request under the Freedom of Information Act for the following document: a previously unpublished review by Albert Palazzo of the Australian Defence Force's involvement in Iraq.”

Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request.

FOI decision maker

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

Documents identified

3. I identified one document as matching the description of the request, being a document titled *‘The Australian Army and the War in Iraq 2002 – 2010’*.

4. The identified document is an *unofficial* history drafted at the working level. The views expressed are the author's and are not those of the Australian Army or the Department of Defence. In releasing the document, Defence makes no claims as to the academic rigour or the factual or technical correctness for the document or for the validity of any of the conclusions drawn by the author. Furthermore, it should be noted that the document was never finalised, it contains sections that are incomplete and does not attach lists or other documents referred to.

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 exempt under section 7 [exemption of certain persons and bodies], section 33 [documents affecting national security, defence or international relations], section 34 [cabinet documents], section 42 [documents subject to legal professional privilege] and/or section 47E [public interest conditional exemptions – certain operations of agencies] 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); and
- e. advice from subject matter experts including but not limited to:
 - Air Force
 - Army
 - Defence Legal
 - Headquarters Joint Operations Command
 - International Policy Division
 - Joint Health Command
 - Military Strategic Commitments
 - Office of the Chief of the Defence Force
 - Office of the Secretary of Defence
 - Department of Agriculture and Water Resources
 - Department of Foreign Arrairs and Trade
 - Department of Prime Minister & Cabinet

Reasons for decision

Section 7 – exemption of certain persons or bodies

7. Section 7(2A) of the FOI ACT (supplemented by Schedule 2, Part II) lists agencies that are exempt from the operation of the Act in relation to particular types of documents. The exemption extends to a part of a document that contains an extract from or a summary of an intelligence agency document, or a defence intelligence document.

8. I am satisfied that material contained in the identified document pertains to intelligence documents originating from or to an agency exempt from the operations of the Act, as identified in section 7(2A)(a) of the FOI Act.

Section 33 – documents affecting national security, defence or international relations

9. The term ‘security of the Commonwealth’, as defined in section 4 of the FOI Act, broadly refers to the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests. While the Act does not define ‘defence of the Commonwealth’, the Information Commissioner’s guidelines refer to previous Administrative Appeals Tribunal decisions which interpret it as ‘protecting the Defence Force from hindrance or activities which would prejudice its effectiveness’. 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.

10. In evaluating potential harmful effects of disclosing information in the identified document that would affect the defence of Australia, I have also taken into account the intelligence technique known as the ‘mosaic theory’. This theory holds that individual pieces of information; while not harmful in isolation, when combined with other pieces of information can generate a composite - a mosaic - that can damage Australia’s national security and defence.

11. Release of some details contained in the identified document would divulge information about Defence's capability as well as our tactics, techniques and procedures. Release of such information could reasonably be expected to damage the security of the Commonwealth by disclosing information about Defence's capability assets, plans and vulnerabilities, which could be used to attack its infrastructure and personnel. Such a release could create a security risk to Defence personnel and cause damage to the security of the Commonwealth. Access to the material that would, or could be expected to, cause damage to the Commonwealth's security is exempted under paragraph 33(a)(i) of the FOI Act.

12. I found that release of some material contained in the identified document would allow those hostile to the Commonwealth's interests to take appropriate counter measures and hinder Defence operations. Hindrance of these activities would prejudice Defence in its effectiveness to undertake military operations required by the Government, and to be ready for future tasks as part of the Government's overall national security strategy. Release of information that could reasonably be expected to cause damage to the defence of the Commonwealth is exempted under paragraph 33(a)(ii) of the FOI Act.

13. Some of the international relations information considered exempt, under paragraph 33(a)(iii) of the FOI Act, relates to Australia maintaining good working relations with other governments and their officials. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interests. Release of information about Defence's relationships with other governments and officials would cause damage to those relationships, and is therefore exempted under paragraph 33(a)(iii) of the FOI Act.

14. I am also mindful that disclosure of some material contained in the identified document would divulge information that was communicated in confidence by our foreign partners and agreed between those parties to be treated and held as confidential information. If the material was to be released without the express agreement of the foreign governments it could harm the positive working relationship that Australia has with them.

15. Paragraphs 5.36 – 5.39 of the guidelines discuss 'information communicated in confidence'. Of particular relevance to this request is paragraph 5.36 which states *the test is whether information is communicated in confidence between the communicator and the agency to which the communication is made — it is not a matter of determining whether the information is of itself confidential in nature.*

16. I am satisfied that the information was received and communicated with an express understanding that the communication would be kept confidential and I therefore consider the material to be exempt under section 33(b) of the FOI Act.

Section 34 - cabinet documents

17. The guidelines relating to section 34 of the FOI Act state that *Agencies should refer to the Cabinet Handbook issued by the Department of Prime Minister and Cabinet (PM&C) for guidance about Cabinet processes and the underlying principles of the Cabinet System.* The Handbook states that agencies must consult with PM&C on any Cabinet-related material identified as being within the scope of an FOI request.

18. Parts of the identified document contain material that would likely be considered exempt under section 34 of the FOI Act.

19. I found that the identified document contained material that satisfied the requirements of subsections 34(1)(a) and 34(1)(b) of the FOI Act.

Section 42 – documents subject to legal professional privilege

20. I found that the identified document contained legal advice to inform decision makers, which could be privileged from production in legal proceedings, on the grounds of legal professional privilege (LPP).

21. Paragraphs 5.117 to 5.118 of the Guidelines state:

...The underlying policy basis for Legal Professional Privilege (LPP) is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

At common law, determining whether a communication is privileged requires a consideration of: 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; and whether the advice given is confidential.

22. I found that the legal advice provided in the documents was provided by legal professionals to their clients and was for the dominant purpose of providing legal advice in relation to a specific matter. The privilege created by that relationship for the provision of the legal advice has not been waived.

23. I find that the release of that information would involve the disclosure of information that would be exempt from production in legal proceedings on the grounds of LPP. Accordingly, I am satisfied that the information is exempt under section 42 of the FOI Act.

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

24. I found that parts of the identified document contain material in respect of which a claim for exemption under section 47E(d) of the FOI Act may be warranted. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest. Subsection 47E(d) of the FOI Act states:

‘A document is conditionally exempt if its disclosure under this Act would, or could reasonable be expected to, do any of the following:...

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

25. Those parts of the identified document I consider to be conditionally exempt under subsection 47E(d) of the FOI Act contain specific details affecting the Defence organisation. The identified material provides information on Defence’s and other agencies’ approaches to operational security and factors affecting the conduct of operations, most of which is not publicly known and is also limited to a strict need-to-know basis. Release of information regarding this matter could reasonable be expected to adversely affect the proper and efficient conduct of Defence’s operations.

26. I have taken into account the guidelines, noting 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.

27. Taking the above into account, I consider that the identified document contains information which is conditionally exempt under section 47E(d) of the FOI Act.

28. Section 11A(5) of the FOI Act requires Defence to allow access to conditionally exempt material unless access to the material would be contrary to the public interest.

Section 47E – Public interest considerations

29. In assessing whether disclosure of the conditionally exempt material is, on balance contrary to the public interest, I considered the guidelines together with a range of factors that favour access to the material, as set out on section 11B(3) of the FOI Act.

30. While disclosure may promote some of the objects of the FOI Act, in that consideration has been given to release I do not consider it would increase public participation in government processes, nor would it increase scrutiny or discussion of government activities.

31. I have taken into account that disclosure of the specific information could be used to undermine certain processes, which in turn could affect the operations of Defence and lead to our capabilities and personnel being in harms way.

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

33. On balance, I have found that it would be contrary to the public interest to release this information and have decided to exempt the material under section 47E of the FOI Act.

Further Information

9. The identified document is classified and contains a national security marking. The document in the form for release has been declassified and the marking struck through.

Tony.Brown
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Dr Tony Brown
Accredited Decision Maker
Associate Secretary Group

January 2017