



## **FOI 076/18/19 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), for access to:

*“The incoming briefs prepared for new minister Christopher Pyne.”*

### **FOI decision maker**

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

### **Documents identified**

3. I identified the requested document, being the “Incoming Minister Brief – Minister for Defence, August 2018”, as matching the description of the request. For the purposes of this Statement of Reasons, the document will be referred to as the Incoming Minister Brief.

### **Decision**

4. I have decided to partially release the Incoming Minister Brief 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 the following sections of the FOI Act:

- 7 – [Exemption of certain persons or bodies];
- 33 – [Documents affecting national security, defence or international relations];
- 34 – [Cabinet documents];
- 47C – [Public interest conditional exemptions – deliberative processes];
- 47E – [Public interest conditional exemptions – certain operations of agencies];
- 47G – [Public interest conditional exemptions – business ]; and
- 47J – [Public interest conditional exemptions – the economy].

### **Material taken into account**

5. 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 received from relevant subject matter experts.
6. The Incoming Minister Brief was prepared in accordance with unwritten conventions of government regarding frank advice from officials to Ministers, and the practice in government is to treat them as highly confidential documents. The Defence Incoming Minister Brief is classified SECRET AUSTEO due to the sensitive nature of some of the material it contains.

Apart from the Minister for Defence, access to the full document is confined to a small number of senior officials. The document in the form for release has been declassified and the marking struck through.

## **Reasons for decision**

### **Section 7**

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 Incoming Minister Brief pertains to an intelligence document originating from or to an agency exempt from the operations of the Act, as identified in s7(2A)(a).

### **Section 33**

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 FOI 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 could 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 Incoming Minister Brief that would affect Australia’s security and defence, I have also taken into account the intelligence technique known as ‘mosaic theory’. This theory holds that individual pieces of information, while not harmful in isolation can, 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 Incoming Minister Brief would divulge information about Defence’s capability. 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. 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 exempt under paragraph 33(a)(i) of the FOI Act.

12. I found that release of some material contained in the Incoming Minister Brief would allow those hostile to the Commonwealth’s interests to take appropriate counter measures and hinder Defence operations. This 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 exempt under paragraph 33(a)(iii) of the FOI Act.

#### **Section 34**

14. Under subsection 34(2) of the FOI Act, a document will be exempt from disclosure if it contains information that, if disclosed, would reveal Cabinet deliberations or decisions, unless the deliberations or decisions have been officially disclosed. This provision covers parts of documents which refer directly to Cabinet decisions or the fact or timing of Cabinet's active consideration of particular matters. A document may also canvass options or information in the context that they may later be put to Cabinet for consideration, or canvass views which a Minister may raise in Cabinet for consideration.

15. A strong Cabinet system is fundamental to well-informed decision making and policy development by the government. The convention of the collective responsibility of Ministers for government decisions is central to the Cabinet system of government. Cabinet is a forum in which Ministers, while working towards a collective position, are able to discuss proposals, options and views with complete freedom. This requires that Cabinet deliberations are treated confidentially.

16. Based on my review of the Incoming Minister Brief, I have established that some of the material contained in the Incoming Minister Brief would reveal Cabinet considerations, thus the material is exempted under subsection 34(3) of the FOI Act.

#### **Section 47C(1)**

17. I found that the Incoming Minister Brief contains material in respect of which a claim for exemption under subsection 47C(1) of the FOI Act is warranted.

18. Subsection 47C(1) of the FOI Act states 'A document is conditionally exempt if its disclosure under the 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 process involved in the functions of...an agency... or a Minister.' Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

19. I have taken into account the guidelines issued by the Australian Information Commissioner noting that one consideration in the exemption under section 47C is whether the document includes content of a specific type, namely deliberative matter. I have determined that some of the material contained in the Incoming Minister Brief is exempt under section 47C as it is deliberative.

20. I then turned my mind to the question of purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the guidelines issued by the Australian Information Commissioner that 'purely factual material' that would not be regarded as deliberative matter would include:

- content that is merely descriptive.
- incidental administrative content.
- procedural or day-to-day content.
- the decision or conclusion reached at the end of the deliberative process.

- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

21. While purely factual material is not considered to be deliberative matter, I have also taken into account that, where a document contains factual material that is related to the provision of policy advice and elaborates its context or likely impact, it may potentially come within the deliberative document exemption.

22. In my view, the Incoming Minister Brief contains advice, opinions, recommendations and matters the newly appointed Minister needed to consider in understanding his new responsibilities in the Defence portfolio, including considerations for implementation of plans. The Incoming Minister Brief contains material about Defence's policy-forming processes, dealing with the merit and expedience of particular issues, and proposing options for consideration closely intertwined with factual information. Information contained in the Incoming Minister Brief is still being considered and deliberated upon by the Minister. There is a risk, if the Incoming Minister Brief was released intact, that the Minister would have his options curtailed by the premature release of sensitive considerations, with the resultant detrimental impact on planning and implementation of future Defence capabilities or Government decisions.

23. The Incoming Minister Brief does not represent the Government's position on matters contained in the document; rather, it contains options for future Government considerations. In my view, release of the deliberative matter contained in the Incoming Minister Brief would harm the smooth transition of the new Government and the way in which frank preliminary advice at the highest levels is communicated between the Government and Defence. Taking the above into consideration, I have decided to exempt parts of the Incoming Minister Brief under subsection 47C(1) of the FOI Act.

#### **Section 47E(D)**

24. 27. I found that parts of the Incoming Minister Brief contain material in respect of which a claim for exemption under subsection 47E(d) of the FOI Act is 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 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 an agency.'*

25. Those parts of the Incoming Minister Brief considered to be conditionally exempt under subsection 47E(d) of the FOI Act contain specific and frank details of sensitive issues affecting the Defence organisation. The exempt material provides information on the way Defence performs its functions, some of which are not publicly known and information about which is limited to certain people on a strict need-to-know basis. Release of information on the way Defence performs its functions could reasonably be expected to adversely affect the proper and efficient conduct of Defence's operations.

26. There is also a considerable risk that, if the Minister is not afforded the appropriate time to consider and discuss aspects of the Incoming Minister Brief with Defence, the viability of some of the advice could be jeopardised. This would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence by denying the best use of limited resources and damaging good relations with key stakeholders.

27. I have taken into account the guidelines (refer to 6.112) issued by the Australian Information Commissioner, 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. Defence has in place best practices and procedures to ensure appropriate consultations are undertaken with the Minister to ensure that the best outcomes are achieved for the Government and, hence, the Australian community. I am satisfied that release of the material would have a substantial adverse effect on Defence's proper and efficient conduct of its operations if elements of the Incoming Minister Brief were released before appropriate consultation between Defence and the Ministers could be conducted.

#### **Section 47F - Personal privacy**

28. Upon examination of the documents, I identified personal information about some senior members of the Department of Defence, such as details about their personal lives or close relatives.

29. While senior officers of the Department should expect that aspects of their personal details will be in the public domain, on balance I consider that some of these details would not reasonably be expected to be released, nor readily publicly available. I have decided to exempt this information under section 47F of the FOI Act.

#### **Section 47G(1)**

30. I found that parts of the Incoming Minister Brief contained information which relates to information concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of information would, or could be reasonably expected to, unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

31. Taking this into account, I consider the material to be conditionally exempt under section 47G of the FOI Act.

#### **Section 47J(1)**

32. In considering the Incoming Minister Brief, I found that a part of it related to foreign investment in Australia, the release of which would have a substantial adverse effect on Australia's economy by distorting the Australian economy by influencing investment decisions or giving particular individuals of businesses an undue benefit or detriment.

33. I am satisfied that some of the material contained in the Incoming Minister Brief contains information that would, or could reasonably be expected to, lead to such an outcome and consider this material to be conditionally exempt under section 47J of the FOI Act.

#### **Public interest conditional exemption considerations**

34. In paragraphs 34 to 36 below, I have addressed the public interest considerations required under section 11A of the FOI Act.

35. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the guidelines provided by the Australian Information Commissioner, together with a range of factors that favour access to a document set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. Disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of the advice, opinions, recommendations and matters the newly appointed Ministers need to consider in understanding the Defence portfolio, including considerations for implementation of plans, would not increase public participation in Government processes nor would it, in my view, increase scrutiny or discussion of Government activities. In relation to the oversight of public expenditure, this is covered adequately in information provided to the Parliament and its subsequent scrutiny.

36. Disclosure of some information in the document would reveal sensitive considerations associated with Defence activities under consideration in relation to Defence's capabilities and future direction. 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 public interest in maintaining the confidentiality of some material contained in the Incoming Minister Brief. Disclosure of some of the material contained in the Incoming Minister Brief would potentially have a significant impact on the Commonwealth's ability to effectively manage its financial and property interests. While I considered that disclosure may increase scrutiny or discussion of Defence activities, I found that the public interest in protecting the financial interests of the Commonwealth would far outweigh the public interest in premature release of the identified material.

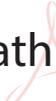
37. There is also a strong public interest in Defence maintaining the Commonwealth's security, good international relationships, and not releasing information that would harm the security and defence of the Commonwealth. Disclosure of Defence's current and future capability considerations would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence and this would not, in my view, be in the public interest. Also, release of the Incoming Minister Brief at this time would not allow the Ministers or the Government the appropriate time to consider and comment on specific options, including considerations for implementation of recommendations in the Incoming Minister Brief and, therefore, would limit options available to the Government.

### **Further Information**

38. As noted above, the Incoming Minister Brief is classified and contains a national security marking. The document in the form for release has been declassified and the marking struck through.

### **Clarification/Context Statement**

39. On page 57 of the Incoming Minister Brief, there is a reference to the Defence Cooperation Program spending in 2018-19 of \$130 million. This figure should have read \$163 million.

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Cameron Heath  
Accredited Decision Maker  
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