Reference: R25688968

FOI 286/15/16 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:

"All correspondence and analysis that mentions a proposed class action by serving and former ADF members who took part in the trial of the anti-malarial drugs mefloquine and/or tafenoquine,
The scope of this request is limited to the years 2004 and 2005."

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

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 14 documents matching the description of the request. The decision in relation to each document is detailed in a schedule of documents at Annex A. I have added an FOI reference and item number to each of the documents, which corresponds with the schedule.

Decision

4. I have decided to partially release 14 documents, on the grounds that deleted material is considered exempt under section 33(a)(iii) (could reasonably be expected to cause damage to the international relations of the Commonwealth), section 42 (documents subject to legal professional privilege), section 47F (public interest conditional exemption - personal privacy), and section 47G (public interest conditional exemption - could reasonably be expected to adversely affect business) of the FOI Act.

5. I also removed irrelevant material from 9 documents in accordance with section 22(a)(ii) of the FOI Act.

Material taken into account

6. In arriving at 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; and

d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Findings

7. In making my decision I carefully considered the application of the exemptions and public interest conditional exemptions. As required by the FOI Act, I also considered the objectives of that Act, together with the public interest factors both in favour and against disclosure of parts of the documents. Based on my considerations, I found that the 14 documents could be released to you with deletions.

8. Where I have denied access to sections of the 14 documents I have done so for the following reasons.

Reasons for decision

Section 22 – Edited copies with exempt or irrelevant matter deleted

9. Section 22 of the FOI Act provides that if an agency or Minister decides to:

   (i) refuse access to an exempt document; or

   (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access;

and it is reasonably practicable to prepare a copy of the document modified by deletions, the agency or Minister must give the applicant access to the edited copy.

10. Considering all of the above, I decided that it was reasonably practicable to remove the irrelevant material, as stated in the scope of your request and release the document in that form. Some irrelevant material was material outside the scope of your request. Other irrelevant material was deleted as it was duplicating documents that had already been provided to you. Annex A details the nature of the deletions in each document.

Exemption under the FOI Act.

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

11. Material was deleted from document 2 as the material is an unsubstantiated statement relating to a foreign military. Release of the statement without the explicit agreement of that party could jeopardise ongoing relationships with that party.

Section 42 – Documents subject to legal professional privilege
12. Section 42 of the FOI Act exempts from disclosure material that would be privileged from production in legal proceedings on the grounds of legal professional privilege (LPP). There are no documents provided to you that are privileged in their entirety, however I have redacted paragraph in document 3 as that paragraph contained material that would be subject to LPP.

13. I have reviewed the guidelines which set out a number of factors to be considered in relation to claiming an LPP exemption. I consider those factors as follows:

   a. The circumstances giving rise to the production of the material clearly amounts to a legal adviser-client relationship and the provider of the advice was independent.

   b. The material contained confidential communication between parties for the dominant purpose of seeking or giving legal advice. I also consider that the material relates to activities generally regarded as falling within the legal adviser’s professional functions and that the legal adviser was acting in their capacity as a professional legal adviser.

14. I am not aware of any circumstances which would indicate the right to claim legal professional privilege has been waived. While the advice has been disclosed to more than one person in Defence, this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed in paragraph 5.132 of the guidelines, which states that modern organisations often work in teams and several people may need to know about privileged communications.

15. I have also taken into account the guidelines, in particular paragraph 5.138, which states that if only part of a document contains material which is privileged under section 42, section 22 requires disclosure of the parts of the document which are not privileged. In this case only the specific part of the document that is subject to LPP has been removed under section 42 of the FOI Act.

**Conditional Exemptions under FOI Act**

**Section 47F - Personal privacy**

16. I identified information that is regarded as personal information under section 4 of the FOI Act. Common examples of personal information are an individual’s name, signature, address, telephone number, date of birth, medical records, bank account details, employment details and commentary or opinion about a person.

17. Section 47F of the FOI Act provides that:

   (1) 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).

18. As described above, I have not released mobile telephone numbers of Defence officials. However, names, email addresses and official contact details have been released to you as documents containing that information were generated by those persons in the course of performing their duties.
In considering whether or not to release other personal information to you I considered the objects of the Act and that release of any information to you would inform debate on a matter of public importance, being the ADF’s conduct of anti malarial drug trials in 2004 and 2005. Where I have redacted information identified as personal information I consider that release of that information could reasonably be expected to prejudice the protection of an individual’s right to privacy and therefore constitute an unreasonable disclosure of personal information.

Section 47F – Public interest considerations

In determining public interest considerations I must determine whether or not benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding that information.

Section 47F(1) provides conditional exemptions for a document if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Section 47F(2) says that in determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or minister must have regard to the following matters:

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;

d. any other matters that the agency or Minister considers relevant.

In addition, the general test contained in section 11A(5) states that:

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.

Factors in favour of disclosure

I consider factors in favour of disclosure are:

a. promoting the objects of the FOI Act (s. 11B(3)(a)), and

b. informing debate on a matter of public importance (s.11B(3)(b)).

Factors determining whether the disclosure of the documents would involve the unreasonable disclosure of personal information

I consider factors against disclosure to be:
a. persons to whom the information relates are known to be (or to have been) associated with the matters dealt with in the document (s. 47F(2)(b)). The personal information of officials has been released in accordance with this principle, however personal information of third parties has not been released as described in paragraph 16; and

b. the test in section 11A(5) is temporal in nature, and there would be many instances where once a particular time or certain events occurred, documents could be released. An example of this would be to release an inquiry report once an inquiry had been completed. However, personal information always remains personal information and where it is contained in the documents I have not released it as I consider it to be unreasonable release of personal information in this circumstance.

Section 47G – Public interest conditional exemptions – business

26. I identified information contained in the documents relating to business information. Section 47G provides that:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking in a case in which the disclosure of the information:

(a) would or could reasonably be expected to, unreasonably affect that person in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

27. In considering whether or not to release business information to you I considered the objects of the Act and that release of any information to you would inform debate on a matter of public importance, being the ADF’s conduct of anti malarial drug trials in 2004 and 2005. Where I have redacted information identified as business information I consider release of that information could reasonably be expected to unreasonably affect the person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

Sections 47G – Public interest considerations

28. In determining public interest considerations I must determine whether or not benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding that information.

29. Section 47G(1) provides conditional exemptions for a document if its disclosure under the FOI Act would be unreasonably be expected to have an adverse affect on business or professional affairs as described above.

Factors in favour of disclosure

30. I consider factors in favour of disclosure are:
a. promoting the objects of the FOI Act (s. 11B(3)(a)), and

b. informing debate on a matter of public importance (s.11B(3)(b)).

Factors determining whether the disclosure of the documents would involve the unreasonable disclosure of personal information

31. I consider factors against disclosure to be:

a. could reasonably be expected to impede the administration of justice generally, including procedural fairness; and

b. could reasonably be expected to harm the interests of an individual or group of individuals.

c. the test in section 11A(5) is temporal in nature, and there would be many instances where once a particular time or certain events occurred, documents could be released.

32. Taking these three factors into consideration, certain professions need to be able to conduct their matters in a way that preserves the confidentiality of their clients and does not breach any fiduciary duty to their clients. Defence needs to ensure that does not occur inadvertently when releasing information under the FOI Act as this could result in clients losing confidence and trust in Defence.

Yours sincerely

CM Rice
Commander RAN
Accredited Decision Maker
Defence Legal Division
Associate Secretary Group

27 April 2016

Annex
A. Schedule of Documents