



Reference: Objective ID: R26974839

FOI 369/15/16 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the letter of 25 July 2016, in which [REDACTED] sought an internal review under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the decision by Ms Natalie Carpenter, Acting Director Freedom of Information, dated 22 July 2016.
2. The applicant's request was for access to the following documents under the FOI Act:

"all documents relating to: The preparation of a letter, signed by defence chiefs and published in The Australian, on 13 April. The documents should include all those relating to the proposal for the letter, planning, drafts, alterations, feedback, and monitoring of reaction to the letter. Relevant emails between advisers, defence chiefs, and others are sought along with any minutes of meetings, and clarification by defence of its objectives around subjects raised in the letter including diversity. The first and subsequent drafts of the letter are sought."
3. The applicant's request excludes personal email addresses, signatures, PMKeyS numbers, mobile telephone numbers, duplicates of documents and email trails.

Contentions

4. The applicant has sought an internal review in relation to the documents deemed partially exempt.
5. The applicant sought confirmation that no other documents '*have been created or omitted*'. Further, the applicant sought confirmation that mobile text messages had been searched for.
6. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents that are the subject of the internal review.

Reviewing officer

7. I am authorised to make this internal review decision under arrangements approved by the Secretary for Defence under section 23 of the FOI Act.

Internal review decision

8. I have decided to vary Ms Carpenter's decision by:
 - a. releasing further information in Item 1 Serial 10; and
 - b. denying access to 17 text messages under section 47C [Public interest conditional exemptions-deliberative processes], 47E(d) [Public interest

conditional exemptions-certain operations of agencies] and section 47F of the FOI Act.

9. I have decided to uphold the remainder of Ms Carpenter's decision. In essence, the section 47F redactions relate to three specific instances which are repeated in a number of the serials. I am satisfied that the redactions have no material bearing on the preparation of the letter and that their release would be unreasonable in that they contain personal information. The public interest has been served by the release of a majority of the material in scope. The section 22 redactions relate to material that is not within the scope of the applicant's request. I am satisfied that the section 22 redactions (apart from Item 1 Serial 10 which was inadvertently redacted) do not fall within the scope of the request.

10. Item 1 Serial 10 in the form approved for release is at Attachment 1. As the applicant was provided with a copy of the other pages in the form I have decided to uphold, I have not provided another copy of the pages.

Material taken into account

11. In arriving at my decision, I had regard to:
- a. the terms of the applicant's request and subsequent internal review application;
 - b. the decision and documents which are the subject of internal review;
 - 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);
 - e. the result of fresh searches conducted by the Office of Chief of Defence Force (OCDF); and
 - f. advice from the Chief of the Defence Force (CDF).

Findings and reasons for the decision

Section 22

12. Material was removed from the documents under section 22(1)(a)(ii) that was reasonably regarded as irrelevant to the request. Material removed included mobile phone numbers, emails produced after the request was received and material that was not relevant to the scope of the request.

Fresh searches

13. Upon receipt of the internal review application, my office requested fresh searches to be conducted by the OCDF in which 17 text messages were identified. The chain of messages was between CDF and the Vice Chief of the Defence Force and commenced at 6.36am on Wednesday 13 April 2016. The reasons for my decision to deny access to the messages are detailed below.

Section 47C

14. Subsection 47C(1) of the FOI Act states '*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... an agency'. The deliberative process involves the exercise of judgement in developing and making a selection from different options.

15. 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 found the text messages contained material of a deliberative nature which, if disclosed, would release matter relating to opinion and advice involving the functions of Defence in its management of public responses regarding diversity within the Australian Defence Force. The information contained in the text messages can be described as Defence's thinking process on the responses and is not the final view of the writers of the messages.

16. I have taken into account the guidelines issued by the Australian Information Commissioner detailing types of *'purely factual material'* that would not be regarded as deliberative, including:

- 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.

17. On review of the text messages, I did not consider any of the material to be purely factual. In my view, the text messages contain advice, opinions, recommendations and matters which the CDF needed to consider in understanding the issue at hand.

18. In light of the above, I consider the text messages to be exempt under section 47C of the FOI Act. My consideration of the public interest test is discussed later in this statement of reasons.

Section 47E(d)

19. 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.'

20. As described above, the text messages contain discussions which involved frank and candid communication. Disclosure of the exempt material would strongly inhibit frank and candid communication between senior leaders in Defence in the future. The inability to conduct such communication in confidence would be contrary to the efficient and effective flow of ideas and options in dealing with particular issues. Any loss in the ability of Defence to properly conduct these frank and candid discussions and develop responses could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Defence.

21. In addition, I found the communications were conducted in confidence and there was a reasonable expectation that the material in question would remain confidential between the Chief of the Defence Force and Vice Chief of the Defence Force

22. My consideration of the public interest test is discussed later in this statement of reasons.

Section 47F

23. Subsection 47F(1) of the FOI Act states: *‘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).’*

24. Upon review, I identified personal information of persons other than the applicant such as names, personal actions and personal opinions.

25. The Guidelines issued by the Australian Information Commissioner note that *‘the personal privacy exemption is designed to prevent the ‘unreasonable’ invasion of third parties’ privacy’*. In accordance with subsection 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, I had regard to:

- 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 documents;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

26. Against those criteria, I found that:

- a. the specific personal information relating to the individuals is not well known;
- b. the specific personal information is not readily available from publicly accessible sources; and
- c. the specific personal information is information that the individuals would not wish to have disclosed to a third party.

27. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest considerations are set out below.

Public interest considerations – 47C, 47E(d) and 47F

28. In considering whether disclosure of the material would be unreasonable, 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. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to the public interest. Specifically, I considered if disclosure of the document would:

- a. promote the objects of the Act;
- b. inform debate on a matter of public importance;

- c. promote effective oversight of public expenditure; and
- d. allow a person to access her or his personal information.

29. In reviewing the request, I decided that, while releasing the material in question may promote some of the objects of the FOI Act, the nature of the deleted material would not inform debate on a matter of public importance, nor would its release promote effective oversight of public expenditure. Conversely, the release of this material could reasonably be expected to prejudice the Department's position in regard to the CDF making unfettered determinations upon a particular course of action. Further, the release of this information could reasonably be expected to harm the interests of the parties involved by making publicly available frank opinions about a course of action which the Department might wish to pursue.

30. Regarding the deletions made in accordance with section 47F of the FOI Act, there is a strong public interest in protecting the privacy of individuals whose personal details appear in documents. This includes information of the nature described above. Accordingly, I decided that the section 47F deletions would not inform debate on a matter of public importance, nor would their release promote effective oversight of public expenditure or prevent the applicant access to their own personal information. Conversely, the release of this deleted information could reasonably be expected to result in a decline in confidence in Defence's ability to maintain the privacy of its members.

31. In addition to the above, I note that minimal redactions have been made to the final documents released under the scope of this request. I consider that the public interest has been served by the material that has already been released. Little or no value would be added by releasing the opinions and advice contained in the remaining material.

32. In arriving at my decision I also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. None of the irrelevant factors have been taken into account in making my decision. After assessing all these factors, I decided that the harm that could arise from disclosure of the deliberative matter, operations of the agency and personal information far outweighs any favourable public interest factors that could be gained from its release.

TonyCorcoran

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DN: c=AU, o=GOV, ou=DoD, ou=PKI,
ou=Personnel, cn=TonyCorcoran
Date: 2016.08.24 09:18:58 +10'00'

Mr Tony Corcoran
Accredited Decision Maker – Internal Review

24August 2016