



Reference: R34253418

FOI 376/17/18 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 documents marked irrelevant in 299/17/18

I request the names of all staff members listed in the 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 one document, totalling 59 pages, as matching the scope of this request. Forty four pages have not been considered as they are currently under review by the Office of the Australian Information Commissioner – Review number MR17/00699. Therefore I have made a decision on the remaining 15 pages of the document.

Decision

4. I have decided to partially release one document, on the grounds that the deleted material is considered exempt under section 47C [public interest conditional exemptions – deliberative processes], section 47E [public interest conditional exemptions – certain operations of agencies], and section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

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; 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 47C Public interest conditional exemptions – deliberative processes

6. Subsection 47C(1)(a) of the FOI Act states:

“A document is conditionally exempt if 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 ...”.

7. I found that the identified document contains material in respect of which a claim for exemption under subsection 47C of the FOI Act is warranted. On examination of the document, I identified emails expressing opinions and deliberations regarding the publication of court martial and Defence Force magistrate outcomes in the form that they were first recorded. The content of the emails is deliberative in nature and does not reflect a finalised policy position within Defence.

8. In examining the document I also found that it contains factual matter on which opinions are being given. The Guidelines advise that intertwined information should be separated where possible, without diminishing or impairing the quality or completeness of the information. I have considered this advice and in this instance it is not possible to separate the factual information from the deliberative matter.

9. Taking the above into consideration, I have decided that documents are conditionally exempt under section 47C of the FOI Act.

Section 47E Public interest conditional exemptions - certain operations of agencies

10. In relation to section 47E(d) of the FOI Act, the Guidelines explain that for this exemption to apply, 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.

11. The scope of FOI 299/17/18 was:

“...Under the FOI Act I request: [Item 1]- The terms of reference for the review of the publication standards for military tribunals [Item 2]- Any correspondence that mentions or relates to the review between the judge advocate general and the registrar for military justice.

For your assistance this review was referred to in the following statement from defence:

"The issue of publication of court martial and Defence Force magistrate lists and outcomes is currently under review. As part of this review, a number of legal and policy considerations are being taken into account. These include an analysis of other jurisdictions and the extent to which they are applicable to service tribunals..."

12. Item 1 of the scope above concerns the Terms of Reference for the review. The material regarded as out of scope in FOI 299/17/18 related to the publication of court martial and Defence Force magistrate outcomes rather than the Terms of Reference for a review into that topic. This issue of publication is currently being considered by Defence including broader conversations in areas of Defence that have responsibility for Military Justice.

13. Disclosing the information relating to potential publication would have a substantial adverse effect on the proper and efficient management of Military Justice by Defence. Retrospective publication (including through FOI release) could reasonably be expected to impact negatively on both discipline and individuals. This puts the rehabilitative effect, such as fines paid or time served, at risk and undermines the efforts made by the individuals concerned thereby negatively affecting their performance and consequently the effectiveness of Defence.

14. Taking into account the above factors, I consider that the release of the information would be an unreasonable disclosure of agency operational information and is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F Public interest conditional exemptions - personal privacy

15. Upon examination of the document, I identified information, specifically names, ranks and the opinions of individuals other than the applicant that would allow the individuals to be reasonably identifiable. The Guidelines state:

6.131 What constitutes personal information will vary, depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. For particular information to be personal information, an individual must be identified or reasonably identifiable.

6.132 Where it may be possible to identify an individual using available resources, the practicability, including the time and cost involved, will be relevant to deciding whether an individual is 'reasonably identifiable'.... An agency or minister should not, however, seek information from the applicant about what other information they have or could obtain.

16. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors:

- 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; and
- d. the effect the release of the personal information could reasonably have on the third party.

17. I found that the:

- a. specific personal information listed is not well known;
- b. individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents; and
- c. information is not readily available from publicly accessible sources.

18. Taking into account the above factors, I consider that the release of the personal identifying information of individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F of the FOI Act.

Public interest considerations – 47C, 47E and 47F

19. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

20. I considered that disclosure will promote the objects of the FOI Act, as information held by the Government is a national resource. However disclosure of information in this document would not increase participation in debate on a matter of public importance, in fact release of the information could reasonably be expected to prejudice the fair treatment of the individuals identified within the document, nor would it increase scrutiny or discussion of Defence activities.

21. Paragraph 6.22 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:

- a. the protection of an individual’s right to privacy;
- b. the interests of an individual or a group of individuals;
- c. the efficient and effective management of an agency;
- d. the information is deliberative in nature and does not reflect a formal Defence policy position; and
- e. the ongoing review by the Office of the Australian Information Commissioner.

22. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47C, 47E and 47F of the FOI Act.

23. In coming to the above decision I considered factors outlined in section 11B(4) [irrelevant factors] of the FOI Act. None of these factors were taken into account in making my decision.

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Nicola Viney
 Accredited Decision Maker
 Associate Secretary Group