



**Australian Government**  
**Department of Defence**

Defence Reference: FOI 017/20/21

**FOI 017/20/21 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:

*“A copy of the ministerial advice provided to the Minister of Defence authorising the definitions for Nature of Service Classification dated 27 February 2018.”*

*Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of 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 as matching the description of the request.
4. I have added an FOI reference number to the document.

**Decision**

5. I have decided to partially release one 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 47C [public interest conditional exemptions–deliberative process] and section 42 [legal professional privilege] 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 received from relevant stakeholders within the department.

**Reasons for decision**

**Section 47C – Deliberative process**

7. Upon examination of the documents, I found that they contained information relating to opinions, advice and recommendations relating to proposed amendments to Australian Defence Force nature of service definitions. I found the material to be conditionally exempt under subsection 47C(1) of the FOI Act which 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.*

8. I considered the question of whether the information is purely factual. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines which clarifies ‘purely factual material’ that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive;
- b. incidental administrative content;
- c. procedural or day to day content;
- d. the decision of conclusion reached at the end of the deliberative process
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposed of, a deliberative process.

9. I have also taken into account further detail in the Guidelines (6.73) that advise “‘*purely factual material*” does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it’.

10. Taking the above into consideration, I am satisfied that this information contained in these documents is conditionally exempt under section 47C of the FOI Act

11. Section 11A(5) of the FOI Act 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. My public interest considerations are detailed below.

**Public interest considerations – section 47C**

12. In assessing whether disclosure is on balance, contrary to the public interest, I considered the Guidelines together with a range of factors set out in section 11B(3) of the FOI Act, which favours access to a document:

- a. *promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- b. *inform debate on a matter of public importance;*
- c. *promote effective oversight of public expenditure;*
- d. *allow a person to access his or her own personal information*

13. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the specific conditionally exempt material would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

14. 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 documents while they are still in the

deliberative stages. Additionally, I do not consider that disclosure of the material would promote oversight of public expenditure.

15. I consider that there is a strong public interest in preventing an adverse effect on the ability of Defence to both receive and prepare frank advice, the premature release of which could impede the effective completion of the matters under deliberation.

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

17. After weighing all of the above, I consider that on balance the public interest factors against disclosure outweigh the factors for disclosure of the conditionally exempt material in the document. Accordingly, I have decided that the specific material is exempt under section 47C of the FOI Act.

### **Sections 42 – Legal professional privilege**

18. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the grounds of legal professional privilege.

19. A document is exempt from production on the ground of legal professional privilege if all of the following apply:

- a. there exists a solicitor-client relationship;
- b. there have been confidential communications which are recorded in the document;
- c. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
- d. the privilege has not been waived.

20. I am satisfied that the legal adviser/client relationship has been established, as the advice was provided by a qualified lawyer, who was acting in their capacity as a professional adviser.

21. Further, I am satisfied that the specific material contained in the documents relevant to this request were created for the dominant purpose of giving legal advice, and there is no reason to doubt the legal advisers' independence in providing such advice. I note that legal professional privilege is the client's privilege to waive and I am satisfied that the waiver has not occurred. I note that while the material in question contained in the documents is being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed in paragraph 5.148 of the Guidelines, which states modern organisations often work in teams and several people may need to know about privileged communications.

22. I find that disclosure of the documents exempt under section 42(1) would involve disclosure of documents that would be exempt from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I am satisfied that the documents are exempt under section 42(1).

**Beth.Cook1** Digitally signed by  
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Date: 2020.08.20  
13:00:45 +10'00'

Beth Cook  
Accredited Decision Maker  
Associate Secretary Group