



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

Reference: BN6470749

**FOI 342/18/19 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:

*“...copies of documents, discussion/briefing papers, submissions, correspondence dated or created between 1 June 2017 and 30 November 2018 relating to Defence call out powers in the case of civil disobedience/unrest.”*

**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 have identified 37 documents that match the terms of this FOI request.
4. The decision in relation to each document is detailed in the Schedule of Documents. Each document is cross-referenced by serial number to the schedule.

**Decision**

5. I have decided to:
- a. release three documents in full; and
  - b. partially release 34 documents in accordance with section 22 [access to deleted copies with exempt or irrelevant matter deleted] of the FOI Act; and, on the grounds that the deleted material is considered exempt under sections 33(a)(ii) and (iii) [documents affecting national security, defence or international relations], 42 [legal professional privilege], 47B [public interest conditional exemptions – Commonwealth-State relations], 47C [public interest conditional exemptions – deliberative process], and 47F [public interest conditional exemptions – personal privacy] 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. the relevant provisions of 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 Strategic Policy Division, Department of Defence.

## Reasons for decision

### Section 22 – Edited copies with exempt or irrelevant material deleted

7. Upon examination of the documents I found that they contained material that did not relate to the terms of the request. I considered that the material would disclose information that would reasonably be regarded as irrelevant to the terms of the FOI request. Accordingly, I decided to redact this material in accordance with section 22(1)(a)(ii) of the FOI Act and partially release the documents.

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

8. Subparagraphs 33(a)(i)(ii) and (iii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth; cause damage to the defence of the Commonwealth; or the international relations of the Commonwealth.

9. With regard to the terms ‘could reasonably be expected to’ and ‘damage; the Guidelines provide:

*5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.*

*5.17 The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.*

*5.28 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.*

10. In accordance with the Guidelines, I examined the content of each document that was relevant to the terms of the FOI request.

11. I have identified material in the documents that would, or could reasonably be expected to cause damage to national security, defence or international relations if it were to be released in full. Material in the documents concerns information about Defence capability that is not otherwise readily available, as well as information relating to Australia’s relationships with foreign governments that is also not readily available. Release of this material would seriously affect Defence’s ability to deliver its obligations to protect Australia’s interests.

12. This material is therefore exempt under section 33(a)(ii) and (iii) of the FOI Act and has been redacted from the documents released under this FOI request.

### **Section 42 – Documents subject to legal professional privilege**

13. Section 42 of the FOI Act exempts documents that are subject to legal professional privilege (LPP). In accordance with the Guidelines, paragraphs 5.142 and 5.143 state:

*“LPP does not apply to a communication that is not confidential – that is, known only to the client or to a select class of persons with a common interest in the matter.”*

and

*“LPP can extend to documents containing information that is on the public record if disclosure would reveal confidential communications made for the dominant purpose of giving or receiving legal advice on the various issues covered by those documents.”*

14. I have identified material in the documents that I consider was provided directly for the purpose of giving or receiving legal advice, and that it was independently given and was confidential. Release of this material is therefore exempt under section 42(1) of the FOI Act, and I decided to exempt and redact this material from the documents partially released under this FOI request.

### **Section 47B - Public interest conditional exemptions – Documents affecting Commonwealth-State relations**

15. Section 47B of the FOI Act conditionally exempts a document where disclosure would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a state. In accordance with the Guidelines, I examined the content of each document that was relevant to the terms of the FOI request.

16. I have identified material in the documents that I consider, given the nature of the material, would damage Commonwealth-State relationships if disclosed as the material relates to capability and operational information not otherwise readily available. I have decided to exempt and redact this material from the documents partially released under this FOI request.

17. The subject of this FOI request concerns potentially very sensitive issues relating to how the Commonwealth and States and Territories prepare for, and respond to, terrorist incidents. The documents include material that was produced at an early stage in the development of proposals for adjustments to the national counter-terrorism arrangements and prior to discussions with the States and Territories regarding specific legislative amendments and other actions to enact these changes.

18. I have found that a number of documents contain material which, if disclosed, could reasonably be expected to create difficulty in negotiations or discussions that are underway regarding changes to enhance Defence contribution to national counter-terrorism arrangements. As such, I have decided to exempt this material under section 47B of the FOI Act.

### **Section 47C - Public interest conditional exemptions – Documents subject to deliberative processes**

19. Section 47C(1)(a) of the FOI Act conditionally exempts documents containing:

*... “deliberative matter that is in the nature of an opinion, advice or recommendation that has been obtained, prepared or recorded; or, a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or a minister.”*

20. I examined the content of each document that was relevant to the terms of the FOI request. With regard to assessing deliberative matter, the Guidelines state:

*'Deliberative matter' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document. There is no reason generally to limit the ordinary meaning given to the words 'opinion, advice or recommendation, consultation or deliberation'.*

21. I have identified material in the documents that I consider, given the nature and substance of the material, represent opinion, advice or recommendation, or consultation as part of a deliberative process. I have decided to exempt and redact this material from the documents partially released under this FOI request.

### **Section 47F - Public interest conditional exemptions – Documents affecting personal privacy**

22. Section 47F of the FOI Act conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of a person. In accordance with the Guidelines, I examined the content of each document that was relevant to the terms of the FOI request.

23. I have identified material in the documents that I consider, if released, could reasonably be expected to cause harm to their personal privacy or cause an adverse effect on individuals within the agency. I have decided to exempt and redact this material from the documents partially released under this FOI request. I have limited this to redacting the disclosure of mobile telephone numbers and the names of certain individuals whose identities must be protected.

### **Further information**

24. Some of the documents matching the terms of this FOI request contained security classifications and/or handling and dissemination limiting markers. As these documents are approved for release, these classifications and markers have been struck-through.

**JohnAnderson4**

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JohnAnderson4

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Accredited Decision Maker  
Strategic Policy and Intelligence Group

6 June 2019