



Reference: BN6744101

FOI 409/18/19 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:

"I seek access to the following:

- *The Incoming Government Brief as prepared for the Liberal national Coalition insofar as the brief relates to the naval shipbuilding program or naval sustainment program.*
- *The Incoming Government Brief as prepared for the Labor Party insofar as the brief relates to the naval shipbuilding program or naval sustainment program."*

Excluding private email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents, and documents sent to and from you. Furthermore, Defence only considers 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 six documents as matching the description of the request.
4. The decision in relation to each document is detailed in a schedule of documents.
5. I have added an FOI reference number and serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. release one document in full;
 - b. partially release two documents 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 33 [Documents affecting national security, defence or international relations], section 34 [Cabinet documents] and/or section 47C [public interest conditional exemptions-deliberative processes] of the FOI Act;
 - c. deny access to three documents under section 33 [Documents affecting national security, defence or international relations] and/or section 34 [Cabinet documents] of the FOI Act; and
 - d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

7. 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);
 - e. advice received from officers within the department from Capability and Sustainment Group, Defence People Group and the Royal Australian Navy; and
 - f. advice received from the Department of the Prime Minister and Cabinet on Cabinet-related material.

Reasons for decision

Section 22

9. Subsection 22(1) of the FOI Act requires that, where a decision maker denies access to a document, they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

Section 33(a)(i) – the security of the Commonwealth

8. Section 33(a)(i) of the FOI Act exempts a document if its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

9. The term 'security of the Commonwealth' broadly refers to 'the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests'.

10. In order for the exemption to apply, it must be shown that disclosure 'would, or could reasonably be expected to' cause damage.

11. The Guidelines provide that the term 'reasonably expected' in the context of section 33(a)(i) requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27 the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning. A mere allegation or mere possibility of damage will be insufficient for the purposes of the exemption.

12. The term 'Damage' is not confined to loss or damage in monetary terms and the relevant damage may be of an intangible nature.

13. The material that I have decided to exempt relates to sensitive Defence capability and forward planning and I have formed the view that release of this information would pose security implications as it would provide sensitive information to foreign nationals which could be used against the Commonwealth of Australia.

14. Accordingly, I consider the release of the information so marked would, or could reasonably be expected to, cause damage to the security of the Commonwealth and exempt the release of this information under section 33(a)(i) of the FOI Act.

Section 33(a)(ii) – the defence of the Commonwealth

15. Section 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

16. In regards to the terms, ‘could reasonably be expected to’, the Guidelines specify:

Paragraph 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

17. The Guidelines explain that ‘The FOI Act does not define ‘defence of the Commonwealth’. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:

- *meeting Australia’s international obligations*
- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

18. The information, if released, would give an insight into Defence capabilities and forward planning. This could allow nations hostile to the Commonwealth’s interests to use counter measures to hinder Defence activities and operations. It could also reasonably provide an adversary with a tactical advantage and diminish the capability of the Australian Defence Force to defend the Commonwealth.

19. Particular consideration has been made regarding the mosaic effect of releasing the information that may on its own appear to be insignificant. However, when combined with other publicly available information, and material in the document that is being released, the information would divulge specific Defence capabilities, prejudicing Defence’s ability to undertake effective military operations required by Government.

20. Accordingly, I consider the release of the information so marked would, or could reasonably be expected to, cause damage to the defence of the Commonwealth and exempt the release of this information under section 33(a)(ii) of the FOI Act.

Section 33(a)(iii) – the international relations of the Commonwealth

21. I have identified information that, if released, would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. Paragraph 5.36 of the Guidelines describes international relations as the ability of the Australian Government to maintain good working relations with other governments and international organisations.

22. The documents contain information relating to Australia's relationships with foreign governments and their officials. Release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interests. Further, this information is not readily available to the public. As such any release of the information would cause a loss of trust and confidence in the Australian government and foreign officials may be less willing to engage with Australian Government officials and Australian businesses in the future. The national interest in not disclosing this information outweighs interest in disclosure.

23. Accordingly, I consider the release of the information so marked would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth and exempt the release of this information under section 33(a)(iii) of the FOI Act.

Section 34 – Cabinet documents

24. Section 34 of the FOI Act states:

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet;....

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

25. The guidelines relating to section 34 of the FOI Act state that *Agencies should refer to the Cabinet Handbook issued by the Department of Prime Minister and Cabinet (PM&C) for guidance about Cabinet processes and the underlying principles of the Cabinet System.* The Handbook states that agencies must consult with PM&C on any Cabinet-related material identified as being within the scope of an FOI request.

26. Upon examination of the document I found that it satisfied the requirements of subsection 34(1)(a) of the FOI Act. As such PM&C were consulted on the document and subsequently recommended exemption in full under section 34(3) of the FOI Act.

27. Based on the above, I am satisfied that the requirements of section 34 have been met. Accordingly, I exempt the release of this information under section 34 of the FOI Act.

Sections 47C – deliberative processes

28. Upon examination of the documents, I found that they contained information relating to opinions, advice and recommendations for the purpose of informing the incoming government and aiding decision making. 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.

29. 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 or 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.

30. 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.*

31. The documents contain material which was produced for the purpose of providing opinion and advice for consideration by the incoming government, including considerations for the implementation of plans. The documents also contain material about Defence’s policy forming processes, dealing with the merit and expedience of particular issues, and proposing options for consideration closely intertwined with factual information. Information provided within the documents are still being considered and deliberated upon by Ministers.

32. There is a risk, if the documents were released intact, that Defence would have options curtailed by the premature release of sensitive considerations, with a resultant detrimental impact on planning and implementation of future Defence capabilities.

33. Release of the deliberative matter contained in the documents would harm the smooth operation of Defence business including the ability for Defence to present and communicate frank preliminary advice at the highest levels of Government.

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

35. 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.

36. My public interest arguments are detailed below.

Public interest considerations – section 47C

37. 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 favour 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.*

38. 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.

39. 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.

40. 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.

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

42. 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 documents. Accordingly, I have decided that the specific material is exempt under section 47C of the FOI Act.

Further Information

43. Some of the documents matching the scope of this request contained a dissemination limiting marker, as the documents are approved for public release the marker has been struck through.

Context Statement

44. The Incoming Government Brief was prepared in accordance with unwritten conventions of government regarding frank advice from officials to Ministers, and the practice in government is to treat them as highly confidential documents. Apart from the Ministers, access to the document is confined to a small number of senior officials.

Yours sincerely,

Justine
.Nordin

Digitally signed
by
Justine.Nordin
Date: 2019.06.21
16:16:36 +10'00'

Mrs Justine Nordin
Accredited Decision Maker
Associate Secretary Group