



Reference: Objective ID: [R33690341]

FOI 160/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the email of 12 March 2018, in which [REDACTED] sought an internal review on behalf of [REDACTED] under section 54 of the *Freedom of Information Act 1982* (FOI Act), of the Authorised Decision Makers' decisions dated 15 and 19 December 2017.

2. The applicant's request was for access to the following documents under the FOI Act:

"In this application, a reference to 'document' has the same meaning as set out in section 4 of the FOI Act.

We request one copy of the following documents from 1 January 2014 to 20 Oct 2017:

Item 1 - Any commercial agreement between the Department of Defence and [REDACTED] Allen & Unwin, regarding access to Defence Documents.

Item 2 - All documents evidencing and relating to requests made by [REDACTED] for access to Defence Documents.

Item 3 - All documents evidencing and relating to permissions granted by the Department of Defence to [REDACTED] for access to Defence Documents.

Item 4 - All documents provided to [REDACTED] by the Department of Defence.

Item 5 - Diary entries for the following individuals evidencing dealings between the Department of Defence and [REDACTED] in relation to the Book:

i) Chief of the Defence Force, Air Chief Marshal Mark Donald Binskin AC, (or his delegate);

ii) Former Chief of the Defence Force, Air Chief Marshal Sir Allan Grant "Angus" Houston, AK, AC (Mil), AFC;

iii) Chief of Army, Lieutenant General Angus Campbell (or his delegate);

iv) Former Chief of Army, Lieutenant General David Lindsay Morrison AO;

v) and Inspector General Australian Defence Force, Mr James Gaynor CSC (or his delegate).

Excluding personal email addresses, signatures, personnel (PMKeyS) numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents.”

Army decision – Items 1, 2, 3, 4, 5(i), 5(ii), 5(iii) 5(iv)

3. The decision maker, Colonel Ashley Collingburn identified three documents matching the scope of the FOI request.
4. On 15 December 2017, Colonel Collingburn decided to:
 - a. release two documents (Item 4 Serial 1 and Item 5 Serial 1) intact;
 - b. partially release one document (Item 1 Serial 1) in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the material is considered exempt under section 47F [public interest conditional exemptions – personal privacy] and 47G [public interest conditional exemptions – business] of the FOI Act; and
 - c. refuse access to documents of the request under subparagraph 24A(1)(b)(ii) [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act.
5. Irrelevant material, as referred to in the scope of the FOI request, was removed in accordance with section 22(1)(b)(ii) of the FOI Act.

Inspector General Australian Defence Force (IGADF) decision – Item 5(v)

6. The decision maker, Brigadier Bronwyn Worswick, identified two documents matching the scope of the FOI request.
7. On 19 December 2017, Brigadier Worswick decided to refuse access to both documents on the grounds that public disclosure:
 - a. would, or could reasonably be expected to, prejudice the conduct of an investigation or a breach, or possible breach of the law pursuant to subsection 37(1)(a) [Documents affecting enforcement of law and protection of public safety] of the FOI Act; and
 - b. would be contrary to a direction given by a tribunal or other person or body having power to take evidence on oath pursuant to section 46(b) of the FOI Act.
8. On 14 February 2018, three documents were released to the applicant as the third party review rights had been exhausted.

Contentions

9. In summary, the applicant has applied for an internal review on the basis that he is not satisfied with the original decision to:
 - a. exempt material under section 47G(1)(a) [Public interest conditional exemptions – business] of the FOI Act **[Item 1]**;
 - b. refuse access to material under section 24A(1)(b)(ii) [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act **[Items 2, 3, 5(i), 5(ii) and 5(iv)]**;

- c. deny access to documents on the grounds that public disclosure of the documents:
 - i. would, or could reasonably be expected to, prejudice the conduct of an investigation or a breach, or possible breach of the law pursuant to subsection 37(1)(a) [Documents affecting enforcement of law and protection of public safety] of the FOI Act [**Item 5(v)**]; and
 - ii. would be contrary to a direction given by a tribunal or other person or body having power to take evidence on oath pursuant to section 46(b) [Documents disclosure of which would be contempt of Parliament or contempt of court] of the FOI Act [**Item 5(v)**].

10. The applicant notes he was provided with full access to a document under **Item 4** of the request, but has repeated his “*request for disclosure of all documents*”.

11. The applicant has believes that release of the information “*is unlikely to unreasonably affect [REDACTED] adversely in respect of his or her lawful business or professional affairs*”.

12. The applicant also believes that [REDACTED] would have been provided with documents by the Commonwealth during the period of the deed (5 December 2014 and 5 December 2016), to obtain material as the basis for his book. Therefore the applicant has asserted view that “that not all reasonable steps have been taken” to identify documents matching Items 2, 3, 4, 5(i), (ii) and (iv).

13. The applicant is of the view that insufficient search terms were used to search for documents and that it would have been reasonable to broaden the search parameters. Further, the applicant stated it is unclear to him what combination of search terms were used as insufficient details were provided.

14. Furthermore, the applicant contended that “*diary entries should have no, or no significant, connection to the Inquiry or the reasons relied on*” by the Inspector-General Australian Defence Force”.

Items subject to the internal review

15. Taking into account the applicant’s contentions, all Items of the request are the subject of this internal review. The documents released intact (Item 4 Serial 1 and Item 5 Serial 1) are not considered subject to this internal review.

16. The purpose of this statement of reasons is to provide the applicant with a fresh decision relating to the documents.

Reviewing officer

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

Internal review decision

18. After careful consideration, I have decided to uphold the original decision to :
 - a. partially release Item 1 Serial 1 in accordance with section 22 of the FOI Act, on the grounds that the material is considered exempt under section 47F and section 47G of the FOI Act; and
 - b. refuse access to documents of the request under subparagraph 24A(1)(b)(ii) of the FOI Act.
19. Further to the above, irrelevant material, as referred to in the scope of the FOI request, was removed in accordance with section 22(1)(b)(ii) of the FOI Act.
20. I have also decided to uphold the original decision to refuse access to two documents under Item 5(v) on the grounds that public disclosure:
 - a. would, or could reasonably be expected to, prejudice the conduct of an investigation or a breach, or possible breach of the law pursuant to subsection 37(1)(a) of the FOI Act; and
 - b. would be contrary to a direction given by a tribunal or other person or body having power to take evidence on oath pursuant to section 46(b) of the FOI Act.
21. As I have upheld the original decision relating to Item 1 Serial 1 I have not provided another copy of this document.
 - a.

Material taken into account

22. In arriving at my decision, I had regard to:
 - a. the scope of the applicant's request and subsequent internal review application;
 - b. the original decision;
 - c. the content of the documents subject to the internal review;
 - d. relevant provisions in the FOI Act;
 - e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines);
 - f. the outcome of fresh searches;
 - g. the outcome of further third party consultation;
 - h. advice from the office of the IGDAF; and
 - i. advice provided by Army Headquarters (AHQ).

Findings and reasons

Section 24A

23. Section 24A of the FOI Act allows agencies to refuse FOI requests if the documents cannot be found, do not exist or have not been received. Specifically, subsection 24A(1) states that:

'An agency or Minister may refuse a request for access to a document if:
(a) all reasonable steps have been taken to find the documents; and
(b) the agency or Minister is satisfied that the document:
 (i) is in the agency's or Minister's possession but cannot be found; or
 (ii) does not exist.'

24. My office requested fresh searches to be conducted to identify any documents falling within the scope of Item 2, Item 3, Item 4 and Items 5 i, ii and iv.

25. AHQ advised that searches were carried out in Defence's document record management system known as "Objective", using the following search criteria:

- a) "AHQ – date range 31/12/2013 – 21/10/2017 – [REDACTED]";
- b) "AHQ – date range 01/01/2014 – 20/10/2017 – book, Afghanistan and war";
- c) "AHQ – date range 01/01/2014 – 20/10/2017 – book and war (also refined to name does not contain – warn, ward, ware, wart, wara, warr, RWAR, warf, nwar, warw";
- d) "AHQ – date range 01/01/2014 – 20/10/2017 – book and war";
- e) "AHQ – date range 01/01/2014 – 20/10/2017 – book";
- f) "AHQ – date range 01/01/2014 – 20/10/2017 – war and award"; and
- g) "AHQ – date range 01/01/2014 – 20/10/2017 – war".

26. Despite the searches conducted, no documents falling within the scope were identified.

Section 37(1)(a)

27. Section 37(1)(a) of the FOI Act provides:

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance...

28. I have taken into account advice provided by the office of the IGADF and note that the IGADF is still conducting an inquiry.

29. I turned my mind to the Guidelines, specifically paragraph 5.79. I also considered paragraph 5.82 of the Guidelines which states:

To be exempt under ss 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence.

30. I consider the release of any material prior to the finalisation and conclusion of the investigation could impact the course of the investigation. Further, I consider the release of any material relating to the investigation, which may be used as evidence by the investigation body, could also jeopardise the outcome of the investigation.

31. Taking into account the above, I am satisfied the documents are exempt under section 37(1)(a) of the FOI Act.

Section 46

32. Subsection 46(b) of the FOI Act provides that a document is an exempt document if public disclosure of the document would be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath.

33. I have taken into account advice provided by the office of the IGADF and am satisfied that the disclosure of material would be contrary to a direction given by a body having the power to take evidence on oath. The IGADF inquiry is such a body and a direction was given under section 21 of the IGADF Regulation 2016 by a duly authorised person pertaining to non-disclosure of evidence related to this matter.

34. Noting the above, I am satisfied the documents are exempt under section 46 of the FOI Act.

Section 47G

35. Subsection 47G conditionally exempts a document if its disclosure under the FOI Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- a) would or could reasonably be expected to adversely affect the business or commercial or financial affairs; or
- b) could reasonably be expected to prejudice the future supply to the Commonwealth.

36. I note that the use of the word ‘could’ in this provision requires no more than a degree of reasonableness to be applied in deciding whether disclosure would cause the consequences specified. The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself.

37. Upon examination of the material, I identified information unique to the Deed between a third party and the Department of Defence. I found that this information is related to the business affairs of a lawful business of a third party.

38. I determined that this information is not publicly available and consider should the material be released, it could reasonably be expected to have an adverse effect on commercial and financial business affairs of a third party. I also consider that if this material is released against future authors’ wishes it could decreased their cooperation with Defence.

39. Consequently, I have decided that the material is conditionally exempt under section 47G of the FOI Act.

Public interest considerations – section 47G

40. In determining whether to release the information conditionally exempt under section 47G, I considered the Guidelines together with a range of factors that favour access to a document set out in sub-section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

41. 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 documents would:

- a. promote the objects of the FOI 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.

42. I consider that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. I consider, however, the disclosure of the material would not increase public participation in Government processes. Further, I consider that disclosure of the information would also not increase scrutiny or discussion of Government activities.

43. 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 the material. In addition, it could reasonably be expected that disclosure of the material could harm the interests of an individual or group of individuals. It could also reasonably be expected to prejudice and agency's ability to obtain similar information in the future.

44. Furthermore, I consider that release of the information could harm the commercial and financial affairs of a third party and that the harm to the third party's activities and interests outweighs any benefits that may be gained by public scrutiny.

45. 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 47G of the FOI Act.

Section 22

46. Section 22 of the FOI Act requires a decision maker to give an applicant access to an edited copy of a document with the exempt material deleted, if it is reasonably practicable to do so and retain a copy of a meaningful non-exempt edited copy of the document.

47. Based on my findings and reasons set out above, I found that it is not practicable to make an edited copy of the documents subject to Item 5(v) without them becoming meaningless.

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jarrod.howard1
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Mr Jarrod Howard
Authorised Decision Maker – Internal Review