



Reference: R32704096

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

1. I refer to the application by [REDACTED], on behalf of [REDACTED] under the *Freedom of Information Act 1982* (FOI Act), for access to:

"This is a request for access to documents made pursuant to section 15 of the Freedom of Information Act 1982 (Cth) (FOI Act). This request is an application for the purposes of the FOI Act.

We act for [REDACTED], in relation to a draft manuscript of a proposed book authored by [REDACTED] about Australia's involvement in the war in Afghanistan (the Book). The publisher is Allen & Unwin Pty Ltd (Allen & Unwin). It is understood, and in fact openly admitted by Allen & Unwin, that [REDACTED] was granted access to various documents by the Department of Defence (Defence Documents) for the purpose of researching and writing the Book. It is this background which forms the basis of this FOI request.

Documents requested under this application

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] or his 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, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of document.

FOI decision maker

2. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on Item 5(v) of this FOI request.

Documents identified

3. I identified two documents as matching the description of the request.

Decision

4. I have decided to refuse access to both documents on the grounds that public disclosure of the documents:

- 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.

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;
- a. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
- b. information from the Inspector-General of the Australian Defence Force (IGADF) concerning a current inquiry and a direction given by a duly authorised Assistant IGADF under section 21 of the *Inspector-General of the Australian Defence Force Regulation 2016* (the IGADF Regulation) in connection with that inquiry.

Reasons for decision

Section 37 – Documents affecting enforcement of law and protection of public safety

6. Subsection 37(1)(a) of the FOI Act relevantly provides:

“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.”

7. Paragraph 5.79 of the Guidelines state that the exemption under subsection 37(1)(a) (and also subsection 37(1)(b)) applies to documents which, if released, would or could reasonably be expected to affect law enforcement or public safety in any of the following ways:

- prejudice the conduct of an investigation of a breach, or possible breach, of the law
- prejudice the conduct of an investigation of a failure, or possible failure, to comply with a taxation law
- prejudice the enforcement, or the proper administration, of the law in a particular instance
- reveal the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law
- endanger the life or physical safety of any person
- prejudice the fair trial of a person, or the impartial adjudication of a particular case
- disclose lawful methods or procedures for investigating, preventing, detecting or dealing with breaches of the law where disclosure of those methods would be reasonably likely to reduce their effectiveness
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety (see subsections 37(1)-(2)).

8. I am aware that the IGADF is conducting an inquiry the scope of which is publicly available at: <http://www.defence.gov.au/mjs/igadf-afghanistan-inquiry.asp>.

9. I have identified documents that contain information concerning this investigation which is continuing.

10. I consider that the release of this information could impact on the direction of the investigation and would or could reasonably be expected to have one or more of the consequences set out in the categories listed in paragraph 5.79 of the Guidelines.

11. In particular, I consider that the pre-emptive release of this information could reasonably be expected to prejudice the conduct of the investigation by revealing lines of inquiry and/or the existence or non-existence of confidential sources of information.

12. I have therefore exempted these documents under subsection 37(1)(a).

Sections 46 – Documents disclosure of which would be contempt of Parliament or contempt of court

13. Subsection 46(b) 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.

14. I am aware of a direction given by a duly authorised Assistant IGADF under section 21 of the IGADF Regulation in relation to the aforementioned investigation pertaining to the non-disclosure of certain evidence. The direction was made on the dual basis that it was necessary to restrict disclosure in the interests of the defence of the Commonwealth, or fairness to person(s) who the IGADF considers may be affected by the investigation.

15. I have identified that the IGADF (and an Assistant IGADF) has power under subsections 23(5) and 23(6) to examine witnesses on oath or affirmation.

16. I therefore consider that a direction under section 21 of the IGADF Regulation that evidence or documents not be disclosed falls within subsection 46(b) of the FOI Act.

17. I have therefore also exempted both documents under section 46(b).

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Bronwyn Worswick
Brigadier
Accredited Decision Maker
Office of the Inspector-General ADF