



DEFENCE FOI 514/21/22 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:

We seek copies of both the Red and Blue incoming government briefs prepared for the May 2022 election.

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 scope of this request.

Exclusions

4. Personal email addresses, signatures and PMKeyS numbers contained in document 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.

Decision

5. I have decided to partially release the document in accordance with sections 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 33(a)(i) [Documents affecting national security]; 33(a)(ii) [Documents affecting the defence of the Commonwealth]; 33(a)(iii) [Documents affecting international relations of the Commonwealth]; 47C [Public interest conditional exemptions – deliberative process]; 47E [Public interest conditional exemptions – certain operations of agencies]; and 47F [Public interest conditional exemptions – personal privacy].

Material taken into account

6. In making my decision, I had regard to:
- the terms of the request;
 - the content of the identified document at issue;
 - relevant provisions in the FOI Act; and

- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Reasons for decision

Section 33(a)(i) – Documents affecting national security

7. 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.

8. The Guidelines, at paragraph 5.29, provides that:

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'.

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

10. 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.

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

12. The material that I have decided to exempt under this section relates to sensitive Defence capabilities 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 to damage the Commonwealth of Australia's interests.

13. 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) – Documents affecting the defence of the Commonwealth

14. 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.

15. In regards to the terms, 'could reasonably be expected to', the Guidelines specify at 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.

16. The Guidelines, at paragraph 5.34, 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*
- *deterring and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

17. 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 a tactical advantage to foreign governments and diminish the capability of the Australian Defence Force to defend the Commonwealth.

18. 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.

19. 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) – Documents affecting international relations of the Commonwealth

20. 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.

21. The document contains 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 the disclosure.

22. 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 47C– Public interest conditional exemptions – deliberative process

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

24. 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.

25. 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, at paragraph 6.66, 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.*

26. 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.

27. The document contains 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 document also contains 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 document is still being considered and deliberated upon by Ministers.

28. There is a risk, if the document was 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.

29. Release of the deliberative matter contained in the document 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.

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

31. 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.

32. My public interest arguments are detailed below.

Section 47E(d) - Public interest conditional exemptions – certain operations of agencies

33. I found that parts of the Incoming Minister Brief contains material in respect of which a claim for exemption under subsection 47E(d) of the FOI Act is warranted. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

34. Subsection 47E(d) of the FOI Act states:

‘A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following: ...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.’

35. Those parts of the Incoming Minister Brief considered to be conditionally exempt under subsection 47E(d) of the FOI Act contain specific and frank details of sensitive issues affecting the Defence organisation. The exempt material provides information on the way Defence performs its functions, some of which are not publicly known and information about which is limited to certain people on a strict need-to-know basis. Release of information on the way Defence performs its functions could reasonably be expected to adversely affect the proper and efficient conduct of Defence’s operations.

36. There is also a considerable risk that, if the Minister is not afforded the appropriate time to consider and discuss aspects of the Incoming Minister Brief with Defence, the viability of some of the advice could be jeopardised. This would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence by denying the best use of limited resources and damaging good relations with key stakeholders.

37. I have taken into account paragraph 6.112 of the Guidelines, noting that the predicted effect must bear on the agency’s ‘proper and efficient’ operations; that is, the agency is undertaking its expected activities in an expected manner. Defence has in place best practices and procedures to ensure appropriate consultations are undertaken with the Minister to ensure that the best outcomes are achieved for the Government and, hence, the Australian community. I am satisfied that release of the material would have a substantial adverse effect on Defence’s proper and efficient conduct of its operations if parts of the Incoming Minister Brief were released before appropriate consultation between Defence and the Ministers could be conducted.

38. My public interest arguments are detailed below.

Section 47F - Public interest conditional exemptions – personal privacy

39. Section 47F of the FOI Act provides that:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

40. The FOI Act has the same definition of ‘personal information’ as the *Privacy Act 1988* (Cth).

41. Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- a. whether the information or opinion is true or not; and
- b. whether the information or opinion is recorded in a material form or not.

42. Upon examination of the document, I identified information, specifically mobile phone numbers of individuals other than the applicant.

43. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors, as provided for at paragraph 6.140 of the Guidelines:

- a. the extent to which the information is well known;
- b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- c. the availability of the information from publicly accessible sources; and
- d. the effect the release of the personal information could reasonably have on the third party.

44. I found that the:

- a. specific personal information listed is not well known;
- b. individuals whose personal information is contained in the document are not widely known to be associated with the matters dealt with in the document; and
- c. information is not readily available from publicly accessible sources.

45. Taking into account the above factors, I consider that the release of mobile phone numbers of individuals identified in the document could reasonably be expected to cause harm to their privacy. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations – sections 47C, 47E and 47F

46. I have found that some of the identified material in the document is conditionally exempt under sections 47C, 47E(d) and 47F of the FOI Act. 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’.

47. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource and inform debate on a matter of public importance.

48. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request are that release of this information could reasonably be expected to prejudice:

- a. the protection of an individual's right to privacy;
- b. the interests of an individual or a group of individuals;
- c. an agency's ability to obtain confidential information;
- d. an agency's ability to obtain similar information in the future;
- e. the management function of an agency; and
- f. the personnel management function of an agency.

49. However, disclosure in the form in which this information is presented to the Minister would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act). The document was prepared for use by the new Minister for the purpose of understanding the issues affecting the Department and the portfolio, and to identify strategies for meeting election commitments.

50. In *Crowe and the Department of the Treasury* [2013], the Australian Information Commissioner, Professor John McMillan noted the confidentiality of the briefing provided to the new Minister is "essential at...(the) early stage in developing a relationship that accords with the conventions of responsible parliamentary government."


51. The document provides detailed advice to the new Minister and if the confidentiality of the document cannot be assured and an Incoming Government Brief is tailored to an audience other than the new Minister, the document loses its utility.

52. 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 47C, 47E(d) and 47F of the FOI Act.

53. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

Further Information

54. The document matching the scope of this request contained a dissemination limiting marker (DLM). This DLM has been struck through when material has been approved for public release.



Bree James
Accredited Decision Maker
Associate Secretary Group