



## **DEFENCE FOI 550/21/22 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:

*I request under the FOI Act access to documents detailing Defence's approach to engaging with the Media.*

*I also request a list of all parliamentarians, journalists and other individuals or organisations Defence monitors (and may receive monitoring from a third party) on social media, through media monitoring reports or whatever processes Defence uses. Noting there may be a large volume of pages (200 +), I seek pages chronologically up to the threshold of a practical refusal but for which does not invoke a practical refusal'*

*Further, I request copies of documents that detail the decision points and rationale for authorising the monitoring or otherwise of parliamentarians, journalists or other individuals or organisations.*

### **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 four documents as matching the description of the request.

4. One additional document was generated under section 17 of the FOI Act matching the description of the request:

- a. The documents were produced by using a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information s17(1)(i); and
- b. Producing the documents did not substantially and unreasonably divert resources of the agency from its other operations.

5. The decision in relation to each document is detailed in a schedule of documents.

6. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

### **Exclusions**

7. Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents 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

8. I have decided to:
- a. release the document created under section 17 of the FOI Act in full; and
  - b. partially release four 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 45 [*documents containing material obtained in confidence*]; section 47F [*public interest conditional exemptions – personal privacy*]; and section 47G [*public interest conditional exemptions – business affairs*].

## Material taken into account

9. 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 from staff in the Media and Information Disclosure Branch in relation to mainstream media and social media monitoring arrangements;
  - f. Defence's contracted media monitoring service and associated contractual arrangements, under which responsibility for curating reports relevant to the Defence portfolio lies with the contracted service provider; and
  - g. Current procurement activity for Defence's media monitoring services.

## Reasons for decision

### Section 45 – Documents containing material obtained in confidence

10. Where access has been denied under section 45 of the FOI Act, I consider that the material contained in the documents provided to Defence was communicated in confidence and its disclosure of source information would bring action for the breach of confidence.

11. Section 45(1) of the FOI Act states "A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth, for breach of confidence." In relation to a breach of confidence, the guidelines paragraphs 5.158 & 5.159 provide that:

*5.158 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to the obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.*

*5.159 To found an action for breach of confidence (which means that s45 would apply, the following five criteria must be satisfied in relation to the information:*

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual*
- *understanding of confidence*

- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

12. Through examining the material matching the request, I have formed the view that disclosure of the information would be a basis for an action to be brought against the Commonwealth for breaches of confidence, and for compensation to be sought for loss or damages arising from the disclosure. The information relating to organisations/companies in the documents and the nature of the goods exported/information supplied and the country that received the goods/information is confidential business information that has been provided to Defence in confidence.

13. The courts in Australia have generally accepted that business information which an entity generates about its activities as being inherently confidential. This can include pricing, sales statistics, order details, customer and supplier lists, negotiation information and customer requirements.

14. In light of the above, I have decided that the specific material beyond the first two pages of document four is exempt pursuant to section 45 of the FOI Act.

#### **Section 47F - Personal privacy**

15. Upon examination of the documents, I identified information, belonging to other people other than the applicant. This material satisfies the definition of personal information in section 4 of the FOI Act.

16. In accordance with subsection 47F(2) of the FOI Act, in determining whether disclosure of this information would involve the unreasonable disclosure of personal information, I had regard to:

- a. the extent to which the information is well known;
- b. whether the person to who the information relates is known to be (or to have been) associated with matters dealt with in the documents: and
- c. the availability of the information from publically accessible sources.

17. Against those criteria I have found:

- a. this specific personal information is not well known to the general community; and
- b. this specific information is not readily available from publically accessible sources.

18. Accordingly, I have decided that the disclosure of this information would be an unreasonable disclosure of personal information belonging to another person and is therefore conditionally exempt under section 47F of the FOI Act. My public interest considerations are set out below.

#### **Sections 47F - Public interest considerations**

19. I have found that some of the identified documents are conditionally exempt under section 47F of the FOI Act. Section 11A (5) 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'.

20. 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. However, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of

the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act) in a meaningful way.

21. 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. prejudice the protection of an individual's right to privacy; and
- b. harm the interests of an individual or group of individuals.

22. Accordingly, I considered that the public interest factors against disclosure outweigh the factors for disclosure of the identified material. Therefore I decided it would be contrary to the public interest to release the specific information and consider it exempt under section 47F of the FOI Act.

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

### **Section 47G – Business affairs**

24. Where access has been denied under section 47G of the FOI Act relevantly states:

*1) A document is conditionally exempt if its disclosure under this 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, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.*

25. I note the use of the word 'could' in this provision requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause the consequences specified.

26. In accordance with the section 27(3) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of business information, I had regard to:

- 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 information;
- c. the availability of the information from publicly available sources; and
- d. any other matters that the agency considers relevant.

27. Against those criteria, I found that:

- a. the information is not well known to the broader community;
- b. the information is not readily available from publicly accessible sources; and
- c. the third party would likely object to the release.

28. 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 section 47G of the FOI Act.

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

**Public interest considerations – section 47G**

30. In making my decision I had regard to the Guidelines, specifically 6.184 which notes,

*‘The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself’. It adds at 6.185, ‘...it is intended to protect the interest of third parties dealing with the government.’*


31. I also considered paragraph 6.197 of Guidelines where it notes *‘A document that discloses the kind of information ... will be conditionally exempt if the disclosure could reasonably be expected to prejudice future supply of information to the Commonwealth...’*

32. Further, at 6.198 of the Guidelines it notes ‘This limb of the conditional exemption comprises two parts:

- *a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government*
- *the reduction will prejudice the operations of an agency’*

33. The information in the voluntary disclosures relate to the business affairs of a Defence contractor.

34. In light of the above, I have decided that the specific material identified is exempt pursuant to section 47G of the FOI Act.



**Bronwyn Graham**  
Accredited Decision Maker  
Defence People Group