



DEFENCE FOI 048/22/23 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:

*“Briefings to the Minister about Nancy Pelosi’s visit to Taiwan;
Between 1 July 2022 – current [3 August 2022].”*

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 eight 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 a document number to each of the documents, which corresponds with the schedule.

Exclusions

6. 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

7. I have decided to:
 - a. partially release six 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 47E [public interest conditional exemptions-certain operations of agencies] of the FOI Act.
 - b. deny access to two documents of the FOI Act, on the grounds the material is exempt under section 33 [Documents affecting national security, defence or international relations], and section 34 [Cabinet documents] of the FOI Act; and
 - c. remove irrelevant material under section 22 of the FOI Act.

Material taken into account

8. 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. consultation with the Department of the Prime Minister and Cabinet (PM&C); and
- f. advice from Defence officers with responsibility for matters relating to the documents to which access was sought.

Reasons for decision

Section 22 – Material irrelevant to the request

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 – Documents affecting national security, defence or international relations of the Commonwealth

10. Section 33 of the FOI Act states:

A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

- i. the security of the Commonwealth;*
- ii. the defence of the Commonwealth; or*
- iii. the international relations of the Commonwealth....*

11. In regards to the terms 'would or could reasonably be expected to' and 'damage', the Guidelines state:

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.

5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

5.28 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

12. I have considered document eight exempt under section 33(a)(iii) as disclosure of the document would, or could reasonably be expected to cause damage to the international relations of the Commonwealth. The Guidelines describe international relations at 5.36 as

“... the ability of the Australian Government to maintain good working relations with other governments and international organisations.”

13. The information matching the description of this request could prejudice the Australian relationship with the various other Governments and its officials. Release of this information could reasonably be expected to cause a loss of trust and confidence in the Australian Government, and as a result, foreign officials may be less willing to engage with Australian Government officials in the future.

14. Accordingly, I am satisfied that the document is exempt under section 33(a)(iii) of the FOI Act.

Section 34 – Cabinet documents

15. 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;*

.....

(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies.

16. I have found document seven in the attached schedule of documents was brought into existence for the dominant purpose of briefing a Minister and is exempt under section 34(1)(c) to a document to which section 34(1)(a) applies. PM&C were consulted on the document and support the use of exempting the document under section 34 of the FOI Act.

17. Accordingly I am satisfied the document is exempt under section 34 of the FOI Act.

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

18. Section 47E(c) of the FOI Act states that:

“A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to....

c. have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;”

19. Paragraphs 6.113 and 6.114 of the Guidelines provide that where the document relates to the agency’s policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemptions in section 47E(c), namely, that:

- an effect would reasonably be expected following disclosure;*
- the expected effect would be both substantial and adverse.*

20. Further, for this exemption to apply, the documents must relate to:

- *the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*

21. I consider that the management of staff and discharge of the Australian Government's legal responsibility to ensure the health and safety of its workforce may be substantially and adversely affected if the public servants' names and contact details in these documents are disclosed in response to this FOI request.

22. I have reviewed the documents and consider that due to the subject matter contained in the documents, I consider that release of staff names, in this instance, could see those individuals targeted for abuse as their roles in Defence are not known and could attract attention through publication.

23. Accordingly, I am satisfied that the material is exempt under section 47E of the FOI Act.

Section 47E – Public interest considerations

24. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the material would, on balance, be contrary to the public interest. The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

25. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the range of relevant factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

- 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.

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

- a. an agency's ability to obtain confidential information;
- b. an agency's ability to obtain similar information in the future; and
- c. the interests of an individual or group of individuals.

27. While I consider that release of the material removed under section 47E(c) may be of some interest to the applicant, disclosure of the conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way.

Furthermore, the public interest is better served in protecting the privacy of the individuals whose personal details are contained within these documents from release to the public at large.

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

29. After weighing all of the above, I consider, that on balance, the public interest factors against disclosure outweigh the factors for disclosure. I have therefore decided that it would be contrary to the public interest to release the information considered exempt under section 47E(c) of the FOI Act.



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