



**Australian Government**  
**Department of Defence**

**DEFENCE FOI 511/21/22 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:

*A list of (or documents containing requested information) briefs, submissions, advice and talking points listing document title, document classification, area that generated each product and date given to each office) provided to Defence Portfolio Ministers since the prorogation of the 46th Parliament (11 April 2022 to 21 May 2022 (inclusive). Limit scope to items the First Assistant Secretary Ministerial and Executive Communication and Coordination Division and/or any other senior executive service officer(s) who reports to them knew were provided to the respective Ministerial offices.*

**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. Two documents were 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; and
  - b. Producing the documents did not substantially and unreasonably divert resources of the agency from its other operations.

**Decision**

4. I have decided to partially release the documents in part in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] on the grounds that the deleted material is considered exempt under section 33 [document affecting national security, defence or international relations], section 45 [documents containing material obtained in confidence]; section 47E [public interest conditional exemptions – certain operations of agencies]; section 47F [public interest conditional exemptions – personal privacy]; and section 47G [public interest conditional exemptions – business affairs] 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;
  - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and

- e. advice from Ministerial and Parliamentary Branch in relation to submissions for other agencies that were submitted to Ministerial offices through Defence information systems and not subject to Ministerial and Executive Coordination and Communication oversight.

## Reasons for decision

### Section 33 – Documents affecting national security, defence or international relations

6. Section 33 of the FOI Act exempts a document if its disclosure under the Act 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.*

7. Upon examination of the document, I formed the view that disclosure of the information could damage the security of the Commonwealth, defence of the Commonwealth and international relations of the Commonwealth.

8. In relation to subsection 33(a)(i) the Guidelines state:

#### *Security of the Commonwealth*

5.29 *The term ‘security of the Commonwealth’ broadly refers to:*

- (a) *the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests.*

5.30 *A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.*

9. In relation to subsection 33(a)(ii) the Guidelines state:

#### *Defence of the Commonwealth*

5.34 *The FOI Act does not define ‘defence of the Commonwealth’. Previous Administrative Appeals Tribunal (AAT) decision indicate that the term includes:*

- *meeting Australia’s international obligations*
- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursion into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

5.35 *Damage to the defence of the Commonwealth is not necessarily confined to monetary damage. However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.*

10. In relation to subsection 33(a)(iii) the Guidelines state:

#### *International relations*

5.36. *The phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them...*

*5.37 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relation must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.*

11. The Guidelines provide that the term ‘reasonably expected’ 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 possibility of damage will be insufficient for the purposes of the exemption.

12. Having considered the Guidelines in relation to the identified document, I have formed the view that, disclosure of the material, would, or could reasonably be expected to, cause damage. The material contains information relating to Australia’s relationship with foreign governments. 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 interest. 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.

13. Based on my consideration of the above, I am of the view that release of the material could reasonably be expected to cause damage to national security, defence and international relations of the Commonwealth.

14. Noting all of the above, I have decided that material is exempt under sections 33(a)(i), 33(a)(ii) and 33(a)(iii) of the FOI Act.

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

15. 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.

16. Section 45(1) of the FOI Act states “A document is an exempt document if it is 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 at 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.*

17. Having examined 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.

18. In light of the above, I have decided that the specific material identified is exempt pursuant to section 45 of the FOI Act.

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

19. Section 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 the agency.*

20. The Guidelines, at paragraph 6.123, provide 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.*

21. I have found the material, specifically the document title could reasonably be expected to effect the agency's 'proper and efficient' operations. The document title reveals the topics Defence provided to Defence Portfolio Ministers to continue the business of government to undertake ordinary matters of administration during the Caretaker. The release of this material could reasonably expect to jeopardise the ability for Defence to freely communicate with Defence Portfolio Ministers.

22. Additionally, the disclosure of the document title would substantially adversely affect the conduct of operations of the agency. The release of the material will prevent Defence to gather this kind of information in the future and reveal topics passed to Defence Portfolio Ministers.

23. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information "could reasonably be expected to lead a change in the agency's processes that would enable those processes to be more efficient". Given the nature of the material I believe the release of this information could lead to a change in communicating with Defence Portfolio Ministers.

24. I am satisfied that release of the documents/information could reasonably be expected to lead to a change in Defence's processes. Accordingly, I am satisfied that the material is exempt under section 47E(d) of the FOI Act.

#### **Section 47F - Public interest conditional exemptions – personal privacy**

25. Where access has been denied under section 47F of the FOI Act, I considered that the material would involve the unreasonable disclosure of personal information about a person (including a deceased person). This material satisfies the definition of personal information in section 4 of the FOI Act.

26. 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.

27. Against those criteria I have found:

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

28. 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.

#### **Section 47G – Public interest conditional exemptions – business affairs**

29. Access has been denied, in part, to some information under section 47G of the FOI Act, which states that:

*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.*

30. 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.

31. 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.

32. 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.

33. 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.

#### **Section 47E, 47F and 47G - Public interest considerations**

34. I have found that material contained in the documents is conditionally exempt under section 47E, 47F and 47G 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’.

35. 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.

36. 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:

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

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

38. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure and the information is exempt under sections 47E, 47F and 47G of the FOI Act.

#### **Section 22 – out of scope information**

39. Some information has been redacted as outside the scope of the request as the submissions for other agencies were submitted to Ministerial offices through Defence information systems but were not subject to Ministerial and Executive Coordination and Communication oversight.

#### **Further Information**

40. The documents generated under this FOI were classified. In applying the exemptions to relevant information, I have removed the classified information from the versions of the documents that are approved for partial release.

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Associate Secretary Group