



DEFENCE FOI 025/22/23 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:

“1. All briefings or submissions provided to the Minister for Defence in relation to the IGADF Afghanistan Inquiry (the Brereton inquiry), or in relation to Defence's Afghanistan Inquiry Reform Plan, or in relation to any actions, reforms, progress or recommendations arising from the above.

2. To the extent this is not covered in point 1, all correspondence between Defence leadership and the Minister for Defence (in both directions) in relation to the topics mentioned above including any decisions taken by the Minister for Defence.

In all of the above cases, the search is limited to documents generated or transmitted between 21 May 2022 and 8 July 2022 inclusive.”

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 4 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 an FOI reference number and item/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 3 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 37(1)(a) [law enforcement and public safety – investigation of a breach of law], section 42 [legal professional privilege], and section 47C [public interest conditional exemptions – deliberative processes] of the FOI Act

- b. deny access to 1 document under section 42 [legal professional privilege] of the FOI Act
- 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); and
 - e. advice received from Defence Legal.

Reasons for decision

Section 37 – Law enforcement and public safety

9. Section 37(1)(a) of the FOI Act states:

- (1) *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...*

10. Further, paragraph 5.82 of the Guidelines states:

To be exempt under section 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence.

11. I note the material refers to current investigations being conducted under the Australian criminal justice system, and consider that the release of any material prior to the conclusion of investigations could impact the course of those activities.

12. Taking the above into consideration, I am satisfied that the information contained in the document and marked 's37' is conditionally exempt under section 37(1)(a) of the FOI Act.

Section 42 – Legal professional privilege

13. Section 42 exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP). The FOI Act does not define LPP, however, the guidelines require that I consider each of the following:

- (a) *whether there is a legal adviser-client relationship*
- (b) *whether the communication was for the purpose of giving or receiving advice, or use in connection with actual or anticipated litigation*
- (c) *whether the advice given is independent*

(d) whether the advice given is confidential.

14. In determining whether a legal adviser-client relationship exists, the guidelines state that the following points must be considered:

- (a) the legal adviser must be acting in his/her capacity as a professional legal adviser*
- (b) the giving of the advice must be attended by the necessary degree of independence*
- (c) the dominant purpose test must be satisfied*
- (d) the advice must be confidential*
- (e) the fact that the advice arose out of a statutory duty does not preclude the privilege from applying*
- (f) whether the lawyer is subject to professional standards can be relevant.*

15. I am satisfied that the legal adviser/client relationship has been established. The advice was provided by qualified lawyers who were acting in their capacity as professional advisers.

16. Further, I am satisfied that the specific material contained in the identified documents was created for the purpose of giving legal advice, and there is no reason to doubt the legal advisers' independence in providing that advice.

17. I note that it is the client's privilege to waive LPP, and I am satisfied that waiver has not occurred.

18. The LPP material has been disclosed to only officials with a legitimate need to know in the context of the matters subject to advice. Paragraph 5.148 of the guidelines supports this disclosure stating modern organisations often work in teams and several people may need to know about privileged communications.

19. I am satisfied, therefore, that the parts of the documents marked 's42' should be privileged from production and are exempt under section 42 of the FOI Act.

Section 47C – Deliberative processes

20. Section 47C of the FOI Act conditionally exempts documents containing deliberative matter, with the Guidelines stating, at paragraph 6.52:

Deliberative matter is content that is in the nature of, or relating to either:

- (a) an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- (b) a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister*

21. The document is a Ministerial submission to the Deputy Prime Minister (DPM) and Minister for Defence. I am satisfied the document was created for the dominant purpose of providing advice to inform the DPM and Minister for Defence on the Department's response to the IGADF Afghanistan Inquiry and its recommendations.

22. These recommendations are still under consideration. Consequently, I find the documents contain deliberative matter and are conditionally exempt under section 47C of the FOI Act. Further, I am satisfied that the material is not purely factual in nature nor operational information.

23. 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. My public interest considerations are detailed below.

Public interest considerations

24. In assessing whether disclosure is, on balance, contrary to the public interest, I considered the Guidelines together with factors favouring disclosure set out in section 11B(3) of the FOI Act, which favours access to a document:

- (a) promote the objects of the 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 information.*

25. I consider the release of the material exempted under section 47C of the FOI Act may promote some of the objects of the FOI Act, as information held by the Government is a national resource.

26. The disclosure of this information may also increase public participation in Government processes (section 3(2)(a) of the FOI Act), or increase scrutiny or discussion of Government activities (section 3(2)(b) of the FOI Act).

27. However, while the information may be of particular interest to the applicant, Defence already publishes a substantial amount of information allowing for public scrutiny of decision making processes. Disclosing the exempt information within the documents in scope of this request would not further inform public debate or increase discussion of Defence activities in any meaningful way.

28. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of material contained within the documents, particularly that which is still under consideration. Disclosure of the information would prejudice the Department's ability to provide its Minister with confidential information and advice for the purpose of developing and exploring options as part of an overall deliberative process.

29. Further, I consider that disclosure of the information could reasonably be expected to compromise the quality, clarity and frankness of the information, views, opinions or recommendations provided by the Department to its Minister.

30. I consider that, in this circumstance, considering the subject matter of the documents, disclosure of the exempt information could adversely impact the deliberative process which requires reflection and consideration of issues, weighing up of options and the development of a final position for consideration and implementation.

31. 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 or harm:


- (a) the management function of an agency;*
- (b) the interests of an individual or group of individuals; and*
- (c) the proper and efficient conduct of the operations of an agency.*

32. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47C of the FOI Act.

Further Information

33. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

JasonWoods
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Mr Jason Woods
Accredited Decision Maker
VCDF Group