



## DEFENCE FOI 171/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] (the applicant) under the *Freedom of Information Act 1982* (FOI Act) for access to:

*The instruction entitled “Concurrent Administrative and Disciplinary / Criminal Action – Guidance for Commanders.*

2. The applicant provided further information in their request:

*The version of the document that I am seeking is the version that was filed in the “Appeal Book” in the Defence Force Discipline Appeal Tribunal (DFDAT) matter of McCleave v Chief of Navy [2019] ADFDAT 1.*

*I also note that the content of the requested document was quoted from and referred to in the Tribunal’s publicly available McCleave decision at [94]-[97].*

### FOI decision maker

3. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

### Documents identified

4. I identified one document as matching the description of the request.

### Decision

5. In accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the Act, I have decided to:

- a. grant partial access to the document in accordance with section 42 [documents subject to legal professional privilege] of the FOI Act; and
- b. remove irrelevant material under section 22 of the FOI Act.

### Material taken into account

6. 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 the Office of Director General Military Legal Service as to the nature of the document and the applicable legal professional privilege (LPP); and
- f. the decision of the Defence Force Discipline Appeals Tribunal in the matter of *McCleave v Chief of Navy* [2019] ADFDAT 1, in particular the reasons of Hiley and Garde JJ.

## Reasons for decision

### Section 22 – Access to edited copies with exempt or irrelevant matter deleted

7. Section 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 document to you with deletions, and have decided to release those portions over which privilege has not been waived by deliberate action but due to the publication of those parts of the document.

### Section 42 – Documents subject to legal professional privilege

8. Section 42(1) of the FOI Act states:

*(1) A document is an exempt 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.*

9. I have reviewed the document and am satisfied the document contains legal advice which would be privileged from production in legal proceedings on the ground of LPP.

10. The Guidelines provide that, at paragraph 5.129, in considering whether LPP exists, the following factors should be considered:

- a. whether there is a legal adviser-client relationship;
- b. whether the communication was for the purpose of giving or receiving legal advice, or use or in connection with actual or anticipated litigation;
- c. whether the advice given is independent; and
- d. whether the advice given is confidential.

11. I am satisfied that the legal adviser-client relationship has been established, as the advice was provided by lawyers, who were acting in their capacity as independent professional advisers.

12. I am further satisfied that the specific material contained in the document was created for the dominant purpose of giving or receiving legal advice and/or use in actual or anticipated litigation, and that advice was provided independently. I also note there is no evidence to suggest that privilege has been waived over the whole document by the client or the legal adviser.

13. However, I have considered that the Defence Force Discipline Appeals Tribunal (DFDAT), in giving its reasons in the matter of *McCleave v Chief of Navy* [2019] DFDAT 1, chose to publish portions of the document in the course of providing the context for its decision. This extremely high level of transparency was nonetheless limited and only selected portions of the document were released.

14. The document contains information provided by in-house lawyers and the Guidelines, at paragraph 5.131, provides that despite a lawyer working in the same agency (such as an in-house lawyer) as the client business area to which the advice is provided, a legal adviser-client relationship can still exist.

15. In the AAT case of *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728, Tamberlin DP explained that:

*communications and information between an agency and its qualified legal advisers for the purpose of giving or receiving advice will be privileged whether the legal advisers*

*are salaried officers [or not], provided that they are consulted in a professional capacity in relation to a professional matter and the communications arise from the relationship of lawyer client.*

16. Consequently, the mere fact that a lawyer works as an in-house lawyer and is employed by the same Department as the client seeking legal advice does not automatically remove the degree of independence required for LPP to apply. On the contrary, *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [10], referring to *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445 at [35] confirms that:

*An in-house lawyer has the necessary degree of independence so long as their personal loyalties, duties or interests do not influence the professional legal advice they give.*

17. I am also satisfied that the necessary degree of independence of in-house lawyers is established on the basis that there is a clear lawyer-client relationship between the client and the legal officers in which the legal officers could be said to bring a mind professionally detached from, or disinterested in, the subject matter of the advice. The document contains advice relevant to Defence Legal's practice of law for its client and specifically, information of relevance to the conduct of litigation.

18. The relevant document is marked with "SENSITIVE: LEGAL". I acknowledge that while this does not automatically attract LPP, it does clearly show the author and recipients of the correspondence understood and intended the context of the correspondence to be subject to LPP as independent lawyers were involved in providing the legal advice.

19. Further, the disseminating legal marker demonstrates the intention of the author of the correspondence was to limit the distribution of the correspondence and ensure the material was handled appropriately to preserve the privilege contained in the material and limit unintentional waiver of privilege.

20. Based on the above, I have accordingly decided that privilege has not been waived over the parts of the document not published by the DFDAT and therefore these parts of the document are exempt in accordance with section 42 of the FOI Act.

**Ingrid SINGH** Digitally signed by Ingrid SINGH  
Date: 2022.11.04 14:03:29  
+11'00'

Ingrid Singh  
Accredited Decision Maker  
Defence Legal