



Objective Reference: AHQ/OUT/2022/BQ42307474

DEFENCE FOI 021/22/23 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:

Item 1. *Any patrol reports regarding operations in or around Watabe, near Suai (East Timor), on 19 October 1999, involving the Special Air Service Regiment (SASR).*

Item 2. *Any subsequent investigation reports and/or assessments relating to the above operation and the alleged shooting of two people on a motorcycle during this operation.*

Item 3. *Any correspondence and/or reports on the deliberation of possible charges arising out of this operation and/or allegations of the falsification of a patrol report from this operation.*

Timeframe: 1 January 2002 to 1 January 2004.

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 totalling 32 pages as matching the description of the request.

4. I have added an FOI reference number and Item/Serial number to those documents being released.

Exclusions

5. 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

6. I have decided to:

- a. 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 sections 42 [Documents subject to

legal professional privilege] and 47E(d) [Public interest conditional exemptions-certain operations of agencies] of the FOI Act

- b. refuse access to part of the request in accordance with section 24A [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act.

Material taken into account

7. 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 received from Joint Military Police Unit and Special Operations Command.

Reasons for decision

Section 24A – Requests may be refused if documents cannot be found, do not exist or have not been received

8. Section 24A(1) of the FOI Act states:

Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

9. Paragraph 3.85 of the Guidelines reinforces that:

... There are two elements that must be established before an agency or minister can refuse a request for access to a document under s 24A:

- *the agency or minister must have taken all reasonable steps to find the document, and*
- *the agency or minister is satisfied that the document cannot be found or does not exist.*

10. In addition, paragraph 3.89 of the Guidelines states:

... At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.*

11. Searches in relation to this FOI request located a minute from Special Operations Headquarters (partially released) that referred to an Investigating Officer's Report (IOR) which included matters relating to the patrol report requested at Item 1.

12. Comprehensive steps were taken to search for the IOR and patrol report. Electronic searches were conducted on the Defence Protected Network and the Defence Secret Network through Objective, the record management system on which Defence stores all of its digital information. Physical searches were also conducted in numerous locations given that the documents are expected to be around 20 years old. Over and above that, enquiries were made of those who may be able to help locate the IOR and patrol reports, and a series of searches were also undertaken.

13. I am satisfied that Defence has taken comprehensive steps to try and find the relevant documents in accordance with the normal business practices in Defence's operating environment. Given the subject matter of the documents and that no record of destruction could be located, Defence carried out an extensive and lengthy search for the IOR and patrol report.

14. Accordingly, I am satisfied that 'all reasonable steps' have been taken to locate the IOR and patrol report and I am satisfied that neither the IOR nor patrol report can be found, and refuse the request under section 24A(1) of the FOI Act.

Section 42 - Documents subject to legal professional privilege

15. Section 42 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.*

16. The Guidelines at paragraph 5.129 state that:

... determining whether a communication is privileged requires a consideration of:

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

17. I am satisfied that the legal adviser-client relationship has been established, with the advice being provided by a qualified lawyer who was acting in their legal capacity. I am also satisfied that the specified material was created for the dominant purpose of giving legal advice and the legal adviser's independence in providing such advice is established. Further, I note that while the material in question was disclosed to more than one person in Defence, I consider this to be expected due to the nature of the work undertaken and, as such, legal professional privilege was maintained. In support of this finding, paragraph 5.148 of the Guidelines states that *...Modern organisations often work in teams and several people may need to know about privileged communications, both in the requesting client organisation and in the firm of legal advisers.* Last, I note that legal professional privilege is the client's privilege to waive and I am satisfied that there has been no waiver.

18. Accordingly, I find the specified material to be exempt under section 42 of the FOI Act on the grounds of legal professional privilege.

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

19. Section 47E(d) of the FOI Act provides as follows:

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

...

- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an 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. Unauthorised disclosure of information potentially identifying investigative processes, procedures, the management of witnesses and their information, could reasonably be expected to have a substantial adverse effect on Defence's management of complaints in the future.

22. Based on my considerations of the above, I am of the view that the release of this information would have a substantial adverse effect on the proper and efficient conduct of the agency and is therefore conditionally exempt under section 47E(d) of the FOI Act.

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 set out below.

Public interest conditional exemptions – Section 47E

24. I find the identified material to be conditionally exempt under section 47E of the FOI Act.

25. In assessing whether disclosure is, on balance, contrary to the public interest, I considered a range of factors set out in section 11B(3) of the FOI Act which favour access to a document that would:

- 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. allow a person to access his or her own personal information.

26. I considered that all of the above factors weighed heavily against disclosure at this time. Disclosure of this information would not increase public participation in government processes nor would it, in my view, increase scrutiny or discussion of government activities.

27. While I consider that release of the material removed under section 47E(d) may be of interest to the applicant, disclosure of the conditionally exempt material would not inform public debate. Additionally, the public interest is better served in protecting the information directly related to witnesses from release to the public at large.

28. 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. the protection of an individual's right to privacy
- b. the interests of an individual or group of individuals
- c. the personnel management function of an agency
- d. could reasonably be expected to prejudice an agency's ability to obtain confidential information.

29. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure in many instances and I deem the information exempt under section 47E of the FOI Act.

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

Further Information

31. 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.

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Colonel
Accredited Decision Maker
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