



DEFENCE FOI 245/22/23 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:

...copies of Media talking points provided for the Minister for Defence and/or his office in relation to, or including mention of, the topic 'nuclear deterrence' from 1 January 2020 to date.

FOI decision maker

2. I am the authorised officer, pursuant to section 23 of the FOI ACT, approved to make a decision on this FOI request.

Documents identified

3. I identified four documents as matching the description of the request.
4. The decision in relation to each document is detailed in a schedule of documents.

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 these four documents 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 sections 33 [documents affecting national security, defence or international relations] and 47E [public interest conditional exemptions –certain operations of agencies] of the FOI Act; and
 - b. remove irrelevant material under section 22 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; and
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

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

8. Where giving access to a document would disclose exempt or irrelevant material, section 22 of the FOI Act provides for access to a copy (an edited copy) of that document, modified by deletions, in accordance with section 11A (access to documents on request) and

such that it would not disclose any irrelevant material. Accordingly, I have decided to grant access to edited copies of documents with exempt or irrelevant matter deleted.

Section 33 - Documents affecting national security, defence or international relations

9. 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.*

10. In regards to the terms ‘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.

...

Security of the Commonwealth: [Damages]

5.31 The meaning of ‘damage’ has three aspects:

- i. that of safety, protection or defence from something that is regarded as a danger. The Administrative Appeals Tribunal has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

Defence of the Commonwealth: [Damages]

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.

International Relations: [Damages]

5.37 ... The expectation of damage to international relations 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. Additionally, the Guidelines provide:

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*
- (b) *the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations (see definition in s 4(5))*

Defence of the Commonwealth:

5.34 *The FOI Act does not define 'defence of the Commonwealth'. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the terms includes:*

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

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. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

12. I have identified material in the documents which, if released, could reasonably be expected to damage the security, defence and international relations of the Commonwealth. Any damage to the Commonwealth requires the strict assessment of whether there will be any undue harm or risk on the ability to conduct, manage and perform its functions in the future.

13. Release of this sensitive information could reasonably be expected to cause damage by potentially causing an unmanaged public distrust and loss of confidence. The documents requested are avenues of communication between Ministers and their officials to provide sensitive assessments and frank advice.

14. If these communication channels are compromised this could be reasonably be expected to seriously affect Defence's ability to deliver on its obligations to protect Australia's interests. Additionally, any release of the information, which is communication in confidence among Ministers and their staff, would cause a loss of trust and confidence in the Australian government and foreign officials may be less willing to engage with Australian Government in the future.

15. To add, it would likely cause damage to the Commonwealth insofar as it could reduce trust in Australia, reduce opportunity for open conversations in open Government and undermine key development between foreign officials which support Australian Defence Force activities. Candid relationships are critical to Defence's ability to deliver on its obligations to protect national interests and, importantly, broaden opportunity for effective partnerships.

16. Ultimately, I found the information, if disclosed in full, will not add factually to what is already largely available in the public domain. By releasing this information, which contains

advice and information to support negotiations and decision-making, it could significantly undermine confidentiality of those discussions and foreign officials may be less willing to engage with the Australian Government.

17. In light of the above, I have determined the relevant information in the documents would cause, or could reasonably be expected to cause, damage to the national security, defence and international relations of the Commonwealth and that the national interest in not disclosing this information outweighs the disclosure and is, therefore, exempt under section 33(a) of the FOI Act.

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

18. Section 47E 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 an agency.

19. Paragraph 6.123 of the Guidelines states:

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...

20. Upon examination of the documents, I have identified information of Defence individuals' details including their names and direct email address contact details. I consider that the material could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Defence.

21. It is submitted that the release of this information, which is not publicly available, would create an opportunity for third parties to ascertain information through an improper communication channel. Defence has dedicated avenues of communication for interacting with the public, which are best supported for contact in these instances.

22. In addition to the above, the release of this information could reasonably be expected to affect the ability of the individual to undertake their role or cause undue harm and distress. The release of names could see individuals targeted as their roles in Defence, are not widely known and could attract attention through publication.

23. In conclusion, I am satisfied that parts of the documents are conditionally exempt under section 47E(d) of the FOI Act.

Public interest considerations – Section 47E

24. I have found that some of the identified material in the document is conditionally exempt under section 47E 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*'.

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

- (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. I note that disclosure of the requested documents may promote some of the objects of the FOI Act, such as information held by the Government is a national resource. However, disclosure of the specific conditionally exempt material would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

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

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

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

29. In coming to the above decision, none of the irrelevant factors outlined in section 11B(4) [irrelevant factors] of the FOI Act were taken into account in making my decision.

Terence

[Redacted]

Mr Terence [Redacted]
Accredited Decision Maker
Strategy, Policy and Industry Group

 Digitally signed by Terence [Redacted]
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