



## DEFENCE FOI 278/22/23 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:

*All documents between 1 June until 29 November 2022 in relation to consideration of administrative action in relation to personnel who held command positions in the period within the scope of the Afghanistan Inquiry (2005 to 2016).*

*To be clear this relates to the following report by The Daily Telegraph on 26 November 2022: Defence Force chief calls on top officers to hand back honours and medals*

*For the avoidance of doubt, this includes but is not limited to:*

- A copy any correspondence to the Chief of the Defence Force and/or the Department of Defence by the Minister for Defence regarding the consideration of administrative action.*
- Any internal departmental documents and correspondence related to the decision to recommence administrative action.*
- All relevant briefs to Ministers sworn into the Defence Portfolio.*
- Question Time Briefs on the matter.*

### 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 have identified 12 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 a document number to each of the documents, which corresponds with the schedule.

### Exclusions

6. Consistent with the application, excluded from consideration of the request were:
- Names and contact details of members of the public (who are not public servants or defence members)
  - Direct contact details of public servants and defence members
  - Duplicates of documents (for example, please only provide a single email thread if it contains all of the relevant commentary)
7. Additionally, I have only considered the final versions of documents and removed the personal signatures of Defence officials.

## Decision

8. I have decided to:
- a. partially release 12 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 [documents affecting enforcement of law and protection of public safety], section 47C [public interest conditional exemption – deliberative processes], section 47E [public interest conditional exemptions – certain operations of agencies] and section 47F [public interest conditional exemptions - personal privacy] of the FOI Act; and
  - b. remove irrelevant material under section 22 of the FOI Act.

## Material taken into account

9. 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. consultation with the Office of the Governor-General and the Office of the Special Investigator.

## Reasons for decision

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

10. Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to provide an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

11. I have decided that parts of documents marked 's22' would disclose information that could reasonably be regarded as irrelevant to the request, and have, therefore, prepared an edited copy of the documents with the irrelevant material deleted, pursuant to section 22(3) of the FOI Act.

12. The remainder of the document has been considered for release as it is relevant to your request.

### Section 37 – Documents affecting enforcement of law and protection of public safety

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

*(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.*

14. Paragraph 5.86 of the Guidelines states:

*Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in a particular instance’, it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.*

15. Upon examination of the documents, I identified information that is considered relevant to investigations being conducted under the Australian criminal justice system. Pertaining to this consideration, I am aware that relevant investigations are continuing and that the release of material prior to the conclusion of these investigations could have an impact on the course of those activities.

16. Accordingly, I consider this information to be exempt under section 37 of the FOI Act.

#### **Section 47C – Public interest conditional exemptions – deliberative processes**

17. Section 47C of the FOI Act conditionally exempts from disclosure, documents that would disclose deliberative matter.

18. Section 47C of the FOI Act specifically states:

*(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

#### *Exceptions*

*(2) Deliberative matter does not include either of the following:*

- (a) operational information...; and*
- (b) purely factual material.*

19. Relevantly, the Guidelines at paragraph 6.52 state:

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

- *an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- *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.*

20. Upon review of the documents, I have identified deliberative matter – that is in the nature of, or relating to either opinion, advice or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the purpose of a deliberative process of Defence.

21. The redacted information contains opinions, advice, recommendations and supporting material that was gathered through consultation. Defence is still in the process of considering this information, and decisions are yet to be finalised. Consequently, I find the documents contain deliberative matter which is conditionally exempt under section 47C(1) of the FOI Act.

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

22. Section 47E 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 do any of the following:*

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

23. The Guidelines explain, at paragraph 6.122, that for this exemption to apply, 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.

24. The documents contain names, positions/ranks and contact details of junior Department employees. Defence receives a large volume of external correspondence and communications, and has defined procedures and designated points of contact (including public facing inquiries teams) in place to manage contact with members of the public and answer queries.

25. Disclosure of names, positions and direct contact details would have a substantial adverse effect on the proper and efficient conduct of the Department's operations by enabling members of the public to go around established communication channels. This, in turn, would result in the diversion of resources away from the performance of normal duties of employees in order to deal with the redirection of communications to the appropriate person or area, and also adversely impact on the Department's ability to effectively and efficiently manage and respond to enquiries.

26. I am satisfied that the disclosure of this material would have a substantial and adverse effect on the proper and efficient conduct of the Department's operations. I, therefore, find that the relevant material is conditionally exempt under section 47E(d) of the FOI Act.

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

27. Section 47F of the FOI Act states:

*(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

28. The Guidelines, at 6.128, provide that:

*Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- a. whether the information or opinion is true or not; and*
- b. whether the information or opinion is recorded in a material form or not.*

29. The Guidelines also state, at paragraph 6.140, when assessing whether the disclosure of personal information is unreasonable, the following factors must be considered:

- 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 document; and*
- c. the availability of the information from publicly accessible sources.*

30. Upon examination of the documents, I identified information, which, if disclosed, would involve the unreasonable disclosure of personal information.

31. In other instances, information associated with personnel management action relating to a discrete workforce element is considered identifying information which is not well known, would identify persons as being associated with such action and the information is not available from publicly accessible sources.

32. I consider that the release of this information could result in an unreasonable disclosure of personal information under section 47F(1) of the FOI Act, and, as such, is conditionally exempt under section 47F of the FOI Act.

## **Public interest considerations – Sections 47C, 47E and 47F**

33. Section 11A of the FOI Act states:

*(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

34. 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....*

35. 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 protection of an individual's right to privacy;*
- (b) the management function of an agency;*
- (c) the interests of an individual or group of individuals;*
- (d) the proper and efficient conduct of the operations of an agency; and*
- (e) could reasonably be expected to impede the administration of justice generally, including procedural fairness*

36. Whilst the information may be of interest to the applicant, the disclosure of this information does not increase public participation in the Defence processes (section 3(2)(a) of the FOI Act), or increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

37. In relation to the specific subject matter, Defence 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.

38. 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 those still under consideration. Noting this, disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence.

39. It is for these reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and consider the material exempt under sections 47C, 47E and 47F of the FOI Act.

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

### **Further Information**

41. 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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Jason 

Accredited Decision Maker  
Afghanistan Inquiry Response Task Force