



DEFENCE FOI 386/22/23 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:

...reports related to all research undertaken between 1 January 2020 and 17 January 2023 by the ADF or commissioned by the ADF into performance enhancing drugs such as stimulants or steroids for military use. This could be research into potential harms or performance enhancing effects.

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 12 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 are excluded from this request. Defence has only considered final versions of documents.

Decision

6. I have decided to:

- a. release 8 documents in full; and
- b. partially release 4 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 33 [documents affecting national security, defence or international relations], 47 [documents disclosing trade secrets or commercially valuable information] and 47E [Public interest conditional exemptions – certain operations of agencies] 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 Defence Science and Technology Group; and
- f. advice received as part of a third-party consultation process.

Reasons for decision

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

8. Section 33(a) of the FOI Act states:

A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

(i) the security of the Commonwealth

...

(ii) the international relations of the Commonwealth.

9. In regards to the terms 'would, or could reasonably be expected to' and 'damage', the Guidelines provide:

Would or could reasonably be expected to:

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 AAT 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.*

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.

10. Additionally, the Guidelines state:

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.*

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.*

11. I identified material in Document 3 which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth by making public, research that is classified. The exempt material contains sensitive information about research that could potentially allow bad actors with hostile intentions to exploit the Australian Defence Force as well as other international forces that rely on the same information.

12. Document 4 also contains information which, if released, could reasonably be expected to damage the international relations of the Commonwealth. The document contains information communicated to Australia by foreign governments and their officials under the expectation that it would not be disclosed. The release of such information could harm Australia’s international standing and reputation. It could reasonably be expected to limit the Commonwealth’s ability to deal with those countries in relation to similar matters in the future. If divulged, I find that the relevant information would cause a loss of trust and confidence such that foreign officials would be less willing to engage with the Australian Government. Accordingly, the disclosure of such information could impact Australia’s good working relations with those foreign governments as well as inhibit the flow of confidential information.

13. In applying the section 33 exemption, I have also taken into account the intelligence technique known as the “mosaic theory”, whereby information in a document may not, itself, cause harm, but in combination with other known information, it may contribute to a complete picture which results in harm (the ‘mosaic theory’).

14. The Guidelines provide further, at paragraph 5.39:

The mosaic theory

5.39 *When evaluating the potential harmful effects of disclosing documents that affect Australia’s national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the ‘mosaic theory’. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia’s national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.*

15. Accordingly, I assert further that the release of the identified material, when combined with information already in the public domain, could allow adversaries to undermine Defence's capability and effectiveness.

16. Based on the above considerations, I find that the identified material is exempt pursuant to section 33 of the FOI Act.

Section 47 – Documents disclosing trade secrets or commercially valuable information

17. Where access has been denied to information under section 47 of the FOI Act, I considered that the commercial value of the material could reasonably be expected to be destroyed or diminished if the information were disclosed.

18. Section 47 of the FOI Act states:

(1) A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

19. Upon examination of Document 1, I identified commercially valuable information about research undertaken by the University of Adelaide.

20. The Guidelines at paragraph 5.205 lists factors that may assist in deciding whether information has commercial value:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors*
- *whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- *whether the information is still current or out of date (out of date information may no longer have any value)*
- *whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price*

21. In the context of the information I identified, I have determined that release of this information would be unreasonable due to its currency and the insight it provides in relation to ongoing research projects conducted by the University of Adelaide. I formally consulted with the University of Adelaide, and I am satisfied that their arguments successfully demonstrated that disclosure of the identified material could reasonably be expected to destroy or diminish its commercial value.

22. In light of the above, I have decided that the relevant material in Document 1 is exempt pursuant to section 47 of the FOI Act.

Section 47E(d) – Public interest conditional exemptions – certain operations of agencies

19. Section 47E(d) 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 the 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. In the case of *ABK and Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner (IC) found that where the direct email contact details of staff are not publicly known, they should be conditionally exempt under 47E(d). The IC made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

22. I am satisfied that were the contact details of Defence personnel made publicly available, it would have substantial adverse effects on the proper and efficient operation of extant public communication channels. Furthermore, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of direct contact details could, therefore, reasonably be expected to prejudice the operations of Defence.

23. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the document, 'could reasonably be expected to lead a change in the agency's processes that would enable those processes to be more efficient.' Given that the direct contact details within the documents are not publicly available and that more appropriate communication channels are already available, I am satisfied that release of the information could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.

24. Accordingly, I am satisfied that all direct staff names and contact information contained within the documents is exempt under section 47E(d) of the FOI Act.

Public interest considerations – section 47E(d)

25. Section 11A(5) 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.

26. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being:

(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.

27. However, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

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:

- The protection of an individual's right to privacy;
- The interests of an individual or a group of individuals; and
- The management function of an agency.

29. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the direct contact details of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs public interest in their release.

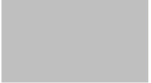

30. Furthermore, I do not consider that the inclusion of names of persons other than the applicant promote the spirit of the public interest requirement set out in the FOI Act. While disclosure of the requested information may promote some of the objects of the FOI Act, such as transparency and accountability, disclosure of the specific conditionally exempt material would not increase public participation in the Defence process, nor would it increase discussion of Defence activities.


31. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure and, on balance, it is against the public interest to release the information to you. Accordingly, I have decided that the relevant information is exempt under section 47E(d) of the FOI Act.

32. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making this decision.

Further Information

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

 Digitally signed
by  Stephen
Stephen Date: 2023.04.05
13:34:50 +09'30'

Stephen 
Accredited Decision Maker
Defence Science and Technology Group