



DEFENCE FOI 687/22/23

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 26 April 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

...all such response letters from the leadership of both Combined Team Uruzgan and Joint Task Force 633 to the AIHRC between 2009 and 2014.

Background:

Between 2009 and 2014, via its office in Tarin Kowt, the Afghan Independent Human Rights Commission (AIHRC) made numerous inquiries into incidents involving Australian military forces in Uruzgan and neighbouring provinces that it claimed resulted in civilian casualties. The inquiries were fielded by ADF legal officers based in Tarin Kowt, who then passed them up the chain of command.

Most AIHRC inquiries received written responses signed by senior leaders from either Combined Team Uruzgan or Joint Task Force 633.

FOI decision maker

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

Documents identified

5. I have identified seven (7) documents as falling within the scope of the request.
6. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

7. Signatures contained within 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

8. I have decided to:
 - a. partially release seven (7) 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 redacted material is considered exempt under sections 33 [documents affecting national security, defence or international relations], section 47E [public interest conditional exemptions - operations of agency] and section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.
 - b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

9. In making my decision, I have had regard to:
 - a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. relevant provisions of 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 Chief of the Defence Force, Vice Chief of the Defence Force, the Afghanistan Implementation Reform Task Force and Strategic, Policy, and Industry Group.

REASONS FOR DECISION

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

10. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.
11. I have identified exempt information within the documents that is considered irrelevant to the request such as signatures.
12. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

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

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

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

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

(i) the security of the Commonwealth

...

(iii) the international relations of the Commonwealth

14. Upon examination of the documents, I formed the view that disclosure of the information would, or could reasonably be expected to damage the security and international relations of the Commonwealth.
15. In relation to subsection 33(a)(i), 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.

5.30 A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.
16. Subsection 33(a)(iii) of the Guidelines provide:

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...

5.37 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. 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.
17. Paragraph 5.16 of the Guidelines provide that the term 'reasonably expected' requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27, the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur, which can be supported by evidence or reasoning. A mere allegation or possibility of damage will be insufficient for the purposes of the exemption.
18. Having considered the above in relation to the identified documents, I have formed the view that disclosure of the relevant information in the documents would, or could reasonably be expected to, cause damage.
19. I identified material in the documents which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth by making public, information relating to defence operations that are classified. The exempt material contains sensitive information about operational activity that could potentially allow bad actors with hostile intentions to exploit the Australian Defence Force (ADF) in future scenarios as well as cause damage to, or risk to international forces involved.

20. In addition, if the information contained within the documents was to be disclosed and then combined with other pieces of information available to the public generally such as Defence techniques, tactics and procedures put in place to serve Australia's Defence personnel deployment activities, then the amalgamation of such intel would have the potential to prejudice the effectiveness of those activities or future activities.
21. Furthermore, the documents contain information relating to Australia's relationship with foreign governments. Release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interests and government and foreign officials may be less willing to engage with Australian government officials in the future.
22. Based on my consideration of the above, I am of the view that release of the relevant information in the documents could reasonably be expected to cause damage to the national security and international relations of the Commonwealth.
23. It is for these reasons I have decided that the relevant information in the documents is exempt under sections 33(a)(i) and 33(a)(iii) of the FOI Act.

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

24. 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.

25. Paragraph 6.123 of the FOI Guidelines 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.

26. In the case of *'ABK' and Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner (IC) found that where the direct names, email addresses and phone numbers of agency staff are not publicly known, they should be conditionally exempt under section 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.
27. If the contact details of Defence personnel were to be made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels. Further, 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 names, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of Defence.

28. Accordingly, I am satisfied that the relevant information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

29. Section 47F(1) of the FOI Act states:

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).

30. The FOI Act shares the same definition of ‘personal information’ as the *Privacy Act 1988* (Cth). The Guidelines provide that:

6.128 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.*

31. I have found that the documents contain highly sensitive personal information. The documents include the names, ages, familial relationships and locations of multiple individuals, which if disclosed, could reasonably be expected to identify the third parties.
32. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors in accordance with section 47F(2):
- 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;
 - c. the availability of the information from publicly accessible sources;
 - d. the effect the release of the personal information could reasonably have on the third party.
33. I found that the personal information relating to the third parties is not readily available from publicly accessible sources and could reasonably identify or cause harm to the individuals or their close relations.
34. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Public interest considerations - sections 47E and 47F

35. Section 11A(5) of the FOI Act states:

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.

36. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document 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) promote effective oversight of public expenditure.

37. In my view, 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).
38. 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;
 - an agency's ability to obtain confidential information;
 - the management function of an agency; and
 - the personnel management function of an agency.
39. While I accept that there is a public interest to ensure that Defence maintains the Commonwealth's good internal working relationships with its stakeholders, I consider that the release of this information would harm the effectiveness in obtaining similar information or have a substantial adverse effect on the proper and efficient conduct of the operations of Defence and the management of its personnel. In my view, this would not be in the public interest.
40. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to you.
41. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.
42. Accordingly, I find that the information is exempt under the sections 47E and 47F of the FOI Act.

chris

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Chris
Colonel
Accredited Decision Maker
Headquarters Joint Operation Command
Department of Defence