



DEFENCE FOI 544/22/23 STATEMENT OF REASONS UNDER SECTION 55G OF THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

ANY AND ALL documents (within the meaning of Section 4 of the Freedom of Information Act 1982] in relation to General CAMPBELL's nomination for the Distinguished Service Cross, particularly what was it about his command and leadership of Joint Task Force 633 that was "distinguished";

AND

ANY AND ALL documents considered by the Honours and Awards Board (or the person or persons) who considered the nomination;

AND

ANY AND ALL documents relating to any recommendation the Honours and Awards Board (or the person or persons) who considered the nomination made to the Minister for Defence in relation to the nomination.

NB. 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 to or from the applicant are excluded from this request.

Request timeframe: from date

01/01/2011 - 12:00am

Request timeframe: to date

31/12/2011 - 12:00am

Background

2. On 22 March 2023, with the applicant's written agreement, The Department of Defence (Defence) extended the period for processing the request until 28 April 2023 in accordance with section 15AA [extension of time with agreement] of the FOI Act.

3. On 20 April 2023, Defence submitted a request to the Office of the Australian Information Commissioner (OAIC), seeking a 29-day extension of time in accordance with section 15AB [extension of time for complex or voluminous requests] of the FOI Act. On 03 May 2023, the Information Commissioner agreed to extend the period for Defence to process the request from 28 April 2023 until 27 May 2023 under section 15AB [extension of time for complex or voluminous requests] of the FOI Act.

4. On 21 July 2023, the OAIC advised Defence that the applicant had sought an external review.

5. On 28 July 2023, Defence responded to the OAIC stating that the decision is in progress, and should be provided to the applicant soon.

6. On 10 August 2023, the OAIC issued a directive to Defence to produce documents, in accordance with section 55(2)(e)(ii) of the FOI Act.

Scope of external review

7. In their application for an Information Commissioner review, the applicant raised the following contentions:

To receive all documents covered by the original request to the Department of Defence on the 27/02/2023.

8. The purpose of this correspondence is to provide the applicant with a decision under section 55G [Procedure in IC review – revocation or variation of access refusal decision] of the FOI Act.

FOI decision maker

9. I am authorised to make this decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

Documents identified

10. I have identified eight (8) documents as matching the description of the request.

11. The decision in relation to each document is detailed in the schedule of documents.

12. I have added an FOI reference number and document number which corresponds with the schedule.

Exclusions

13. 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

14. I have decided to:

- a. partially release eight 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 section 33 [documents affecting national security, defence or international relations] and section 47E [public interest conditional exemptions - operations of agency] of the FOI Act; and
- b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

15. 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. advice received by subject matter experts within Headquarters Joint Operations Command (HQJOC), Defence People Group, Joint Health Command (JHC), Afghanistan Inquiry Response Task Force (AIRTF), the Office of the Chief of Defence Force (OCDF) and the Strategic Policy and Industry Group (SP&I).

Reasons for decision

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

16. 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.

17. 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

18. Section 33(a) 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;*

...

(iii) *the international relations of the Commonwealth.*

19. 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.

20. 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.

21. In relation to subsection 33(a)(iii), the Guidelines state:

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.

22. The Guidelines, at paragraph 5.16, 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.

23. Having considered the Guidelines 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.

24. 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 deployments that could potentially allow bad actors with hostile intentions to exploit the Australian Defence Force (ADF) as well as other international forces involved.

25. In addition to the above, by divulging the identified information, if combined with other pieces of information available to the public generally, including capabilities, techniques, tactics and procedures put in place to serve Australia’s Defence personnel deployment activities, could generate a composite that would prejudice the effectiveness of those activities.

26. The documents also 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 and Australian businesses in the future.

27. 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, defence and international relations of the Commonwealth.

28. 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(c) – Public interest conditional exemptions – certain operations of agencies

29. Section 47E(c) 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:

...

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency...

30. The Guidelines provide, at paragraph 6.113, that:

Where the document relates to the agency’s policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- *an effect would reasonably be expected following disclosure*
- *the expected effect would be both substantial and adverse.*

31. I find that the information contained in the documents relates to the management of personnel including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety.

32. Releasing the information involved in the decision making process for recognition, and information that relates to how the decision was conducted and who conducted the decision could reasonably be expected to have a substantial adverse effect on Defence's management. Maintaining the integrity of the Honours and Awards nomination process is paramount. Releasing details about the considerations of individuals and what is taken into account could adversely affect Defence's ability and integrity with respect to protecting the confidentiality of these processes, thus affecting the proper and efficient conduct of the operations of Defence and its Honours and Awards process.

33. Additionally, the documents contain information related to frank and candid comments from Defence staff regarding the actions of personnel with an expectation of it being provided in confidence. If released, it could reasonably be expected to prejudice the participation of personnel to provide such frank and candid comments which could reasonably impact the decision making processes in future.

34. It is vital that Defence has the ability to manage its personnel and values. This ability plays an important part in operational requirements whereby Defence manages personnel issues and undertakes appropriate disciplinary action. The inability of Defence to handle these matters would unfairly affect those personnel subject to allegations and deny them procedural fairness.

35. The disclosure of this information would result in the reluctance of employees or agencies to provide honest information and a loss of trust. The level and quality of information gathered in the future would be significantly diminished.

36. Accordingly, I am satisfied that the relevant information is conditionally exempt under section 47E(c) of the FOI Act.

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

37. 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.

38. 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.

39. 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.

40. 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.

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

Public interest considerations – sections 47E(c) and 47E(d)

42. 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.

43. 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.

44. 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 interests of an individual or a group of individuals;
- an agency's ability to obtain confidential information;
- an agency's ability to obtain similar information in the future;
- the management function of an agency; and
- the personnel management function of an agency.

45. While I accept there is a public interest in ensuring that Defence undertakes operations within the agency in a fair and proper manner, it would, on balance, be contrary to the public interest to breach the confidentiality of those involved in processes within Defence, as future requests for information may be impeded.

46. There is also a strong public interest in Defence maintaining the Commonwealth's good internal working relationships with its stakeholders, and not releasing information that would harm the effectiveness in obtaining that information. Disclosure of this information would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence and the management of its personnel and would not, in my view, be in the public interest.

47. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the relevant information within the documents. I have, therefore, decided that it would be contrary to the public interest to release the information considered exempt, under sections 47E(c) and 47E(d) of the FOI Act.

48. In coming to the above decision, I have not taken the factors outlined in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.

Further Information

49. 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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[redacted] Date: 2023.08.17
16:37:35 +10'00'

Steven [redacted]
Director FOI Operations
Associate Secretary Group