



DEFENCE FOI 332/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 5 October 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

Briefing and talking points provided to the Minister for Defence, the Hon Richard Marles MP, for his participation in the Australia-Papua New Guinea Defence Ministers' Meeting held in Geelong on October 5th, 2023.

Background

FOI decision maker

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

Documents identified

4. I have identified two (2) documents as falling within the scope of the request.

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 one document 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], 45 [Documents containing material obtained in confidence], 47E(d) [Public interest conditional exemptions – certain operations of agencies] and 47F [Public interest conditional exemptions - personal privacy] of the FOI Act;
 - b. refuse access to one document on the grounds that the it is considered exempt under section 33(a)(ii) and 33(a)(iii) of the FOI Act;
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

7. 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 from a consultation with the Department of Foreign Affairs and Trade.

REASONS FOR DECISION

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

8. 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.
9. One document contains exempt material and information that does not relate to the request. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the document to you in an edited form.
10. In relation to the other document, I considered disclosing it to you with deletions, but have decided to refuse access to the document as it would be meaningless and of little or no value once the exempt material is removed.

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

11. 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 defence of the Commonwealth; or

(iii) the international relations of the Commonwealth.

12. 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.*

5.31 *The meaning of 'damage' has three aspects:*

- *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.*
- *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.*
- *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.*

13. Additionally, the Guidelines state:

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.

14. I have formed the view that the relevant material contained in the documents is exempt under section 33(a)(i) of the FOI Act because its release would, or could reasonably be expected to, disclose patterns of life, including accommodation, dining, and meeting venues of ministerial events. Further, the release of this information could reasonably be expected to allow anticipation of future patterns of meetings, thereby placing at risk the personal safety of ministers, foreign delegations and Defence personnel. It is reasonable to expect that these individuals may be targets for adverse actions and, therefore, disclosing their meeting venues would increase any potential threat to these individuals. Additionally, threat actors may seek to identify and target locations frequented by ministers, foreign delegations, and Defence personnel in a way that poses a safety and security risk to other persons (including members of the public), property, and operations and activities being conducted at those locations. This would adversely impact and cause damage to the security of the Commonwealth.
15. Accordingly, I am satisfied the relevant information in the documents is exempt under section 33(a)(i) of the FOI Act.
16. Section 33(b) of the FOI Act states:

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

 - (a) *would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.*
17. I have identified material in the documents which, upon release, would cause, or could reasonably be expected to cause, damage to the defence of the Commonwealth. The documents identify sensitive advice relating to Australia's defence and foreign policy, including means by which we aim to defend the Commonwealth through our international defence cooperation and relations. Release would reasonably be expected to hinder Defence and international cooperation activities that contribute to the Defence of the Commonwealth.
18. I find that disclosure of the information and documents exempted under section 33(a)(iii) of the FOI Act would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth. The documents identify sensitive advice relating to Australia's defence relations and cooperation with Papua New Guinea and other countries, including details of our current cooperation as well as future possible cooperation. Most of this information is premised on confidential flow of information between Australia, Papua New Guinea, and other countries. Disclosure of this information could reasonably be expected to damage good working

relations with our partners, as well as hindering elements of our current and future cooperation.

19. I find that disclosure of parts of the documents exempted under section 33(b) of the FOI Act would divulge information or matter communicated in confidence by or on behalf of a foreign government to the Government of the Commonwealth. In making this decision I have relied on evidence of communications between the governments of Papua New Guinea and Australia, the organisation of the Defence Ministers' Meeting with our bilateral counterparts, the way in which that information was communicated, and normal practice in international relations between governments. The information was communicated through official channels which impose an obligation of confidence on the Commonwealth. Disclosure would breach that obligation and would be perceived as such by our international counterparts, which would likely impact our relationships in the future.
20. In applying section 33 exemptions, 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').
21. 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.

22. 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 effectiveness.
23. Based on the above considerations, I find that the identified material contained within the scope of the request is exempt pursuant to sections 33(a)(ii), 33(a)(iii) and 33(b) of the FOI Act.

Sections 45 – Documents containing material obtained in confidence

24. Section 45(1) of the FOI Act states:

(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency of the Commonwealth), for breach of confidence.

25. In relation to a breach of confidence, the Guidelines further explain:

Breach of Confidence

5.158 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

5.159 To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified*
- it must have the necessary quality of confidentiality*
- it must have been communicated and received on the basis of a mutual understanding of confidence*
- it must have been disclosed or threatened to be disclosed, without authority*
- unauthorised disclosure of the information has or will cause detriment.*

26. Upon examination of the material, I have formed the view that disclosure of some redacted information would be a basis for an action to be brought against the Commonwealth for breach of confidence. The redacted information was obtained on the basis of a mutual understanding of confidence to ensure frank and open conversations between the defence ministers of Australia and Papua New Guinea. It reflects standard diplomatic and bilateral practice for our official relations.
27. In making this decision I have relied on evidence of communications between the governments of Papua New Guinea and Australia, the organisation of the Defence Ministers' Meeting with our bilateral counterparts, the way in which that information was communicated, and normal practice in international relations between governments. The information was communicated through official channels which impose an obligation of confidence on the Commonwealth. Outside formal reporting obligations, I believe disclosure of this information could have a substantial adverse effect on the future supply of information in similar situations.
28. I have also considered the elapse of time from the date of the original request outlined in paragraph two and have formed the view that there is no change in the circumstances for which the information was received and/or could be disclosed. Seeking the originator's consent to disclose the information would have a substantial adverse effect on the future supply of information in similar situations.
29. In view of the above, I hold that the relevant material is exempt pursuant to section 45 of the FOI Act.

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

30. 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:

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

31. 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.

32. In the case of 'ABK' and Commonwealth Ombudsman [2022] AICmr 44, the Information Commissioner (IC) found that where the direct 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.
33. 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 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.
34. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to 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.
35. Accordingly, I am satisfied that all staff information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

36. 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).

37. 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.*

38. I found that the document contain personal information of other persons. This includes their names, titles, and a range of travel details, which would reasonably identify third parties.

39. 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; and
 - e. [add any other evidence you relied on in making the decision to apply this exemption].
40. I found that the specific personal information listed is not well known, individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the document and the information is not readily available from publicly accessible sources. While some information is known individually, in aggregate it could disclose a significant collection of personal details which could have a substantial impact on the individuals concerned.
41. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Public interest considerations - sections 47E(d) and 47F

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) 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. In my view, disclosure of this information would not significantly increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it significantly increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act). This is based on the substantial information already in the public domain regarding the relevant activities, as well as the status of the information that is the subject of the conditional exemption.
45. 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;

- an agency's ability to obtain confidential information;
 - an agency's ability to obtain similar information in the future.
46. I have not taken any of the factors listed in section 11B(4) of the FOI Act into account when making this decision.
47. 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. Accordingly, I find that the information is exempt under sections 47E(d) and 47F of the FOI Act.

FURTHER INFORMATION

48. Some parts of the released document matching the scope of this request contained a dissemination limiting marker (DLM). Where parts of the document have been approved for public release, the DLM has been struck through.

Jeremy



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Jeremy [redacted]
Date: 2023.12.01
13:58:23 +11'00'

Jeremy [redacted]

Accredited Decision Maker

Strategy, Policy & Industry Group

Department of Defence