



DEFENCE FOI 461/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 20 November 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

Ministerial submissions, briefings, reports and talking points provided to the Minister for Defence, the Hon Richard Marles MP, concerning the incident referred to in the Minister's media release of 18 November entitled "Unsafe and unprofessional interaction with PLA-N"

I do NOT seek access to duplicates of any document captured within the scope of the request; nor the mobile numbers or full email addresses of government officials, nor the names and contact details of government officials not in the Senior Executive Service or equivalent.

I do ask that junior official's position or titles be left unredacted, along with email domains that provide useful information as to the origin and destination of communication e.g. '[redacted]@defence.gov.au'.

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 2 documents as falling within the scope of the request.

Decision

4. I have decided to:
 - a. partially release the 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], 47C [Public interest conditional exemptions--deliberative processes] and 47F [Public interest conditional exemptions--personal privacy] of the FOI Act; and
 - b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

5. 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).

REASONS FOR DECISION

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

- 6. 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.
- 7. The documents contain exempt material and information that does not relate to the request.
- 8. 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

- 9. 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.*
- 10. In regard to the terms ‘would, or could reasonably be expected to’ and ‘damage’, the Guidelines provide:

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:

 - 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.*

11. In regard to 'security of the Commonwealth', the Guidelines provide at paragraph 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)).*

12. In regard to 'international relations', the Guidelines provide at paragraph 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.

13. I find that disclosure of the materials exempted under sections 33(a)(i) and 33(a)(iii) of the FOI Act would cause, or could reasonably be expected to cause, damage to the security and international relations of the Commonwealth.
14. I identified material in the document which, upon release, could reasonably be expected to cause damage to relations between the Australia and the People's Republic of China, resulting in a disadvantageous outcome and impacting the security of the Commonwealth by prejudicing the conduct of ongoing operations. Accordingly, I am satisfied the information in document 1 is exempt under sections 33(a)(i) and 33(a)(iii) of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

15. Section 47C(1) of the FOI Act 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.*

16. On examination of document 1, I found it contains information relating to opinions and advice prepared for deliberative processes involved in the functions of Defence. There is a risk, if the information were released it would harm the smooth operation of Defence business, including the ability for Defence to present and communicate frank preliminary advice to Government.
17. Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material. The Guidelines, at paragraph 6.73, state that:

[p]urely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

18. Accordingly, I am satisfied that the document contains matter that meets the definition of deliberative material, and that where the content is purely factual, it is embedded in, or intertwined with the deliberative content and cannot be excised. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

19. 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).

20. 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.

21. I found that all documents contain personal information relating to individuals.
22. 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; and
 - d. the effect the release of the personal information could reasonably have on the third party.
23. 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.
24. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Public interest considerations – sections 47C and 47F

25. 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.

26. 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.*
27. 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).
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:
- a. the protection of an individual's right to privacy;
 - b. the interests of an individual or a group of individuals; and
 - c. the management function of an agency.
29. 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 the material contained within the documents.
30. Defence has an obligation to protect the personal information of third parties that it holds, and I find that the public interest in protecting this information outweighs the public interest in releasing this information. Further, I consider that disclosure would constitute an unwarranted and unnecessary intrusion into, and breach of, the personal privacy of the individuals concerned – without any legitimate countervailing benefits flowing to anyone, noting the personal information does not relate to the applicant.
31. 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.
32. 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 47C and 47F of the FOI Act.

FURTHER INFORMATION

33. One of the documents matching the scope of the request was classified. I have declassified the version of the document that was approved for release.

34. One 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.

chris [REDACTED] Digitally signed by
chris [REDACTED]
[REDACTED] Date: 2024.02.21
16:02:17 +11'00'

[REDACTED] **Chris** [REDACTED]
Accredited Decision Maker
Vice Chief of Defence Force Group
Department of Defence