



DEFENCE FOI 920/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 19 May 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

A copy of correspondence in relation to the matters raised in the attached emails including the “extensive feedback from Legal”, consultation with Directorate of Super (DSUPER), consultation with Attorney General’s department (including the “suggested approach” and phone or written confirmation as mentioned in email 18/2/11) and the “Guidance document” and clearance from Super mentioned in email 18/2/11 i.e. “We presume that Super have already cleared your Guidance document and provided input.”

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.
5. The decision in relation to each document is detailed below.

Decision

6. I have decided to partially release two 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 42 [documents subject to legal professional privilege] and s47F [public interest considerations – personal privacy] 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; and

- 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 42 – Documents subject to legal professional privilege

8. Section 42(1) of the FOI Act states:

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

9. I find that the documents contain legal advice which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).
10. The Guidelines provide, at paragraph 5.129, that in considering whether LPP exists, the following factors should be considered:
 - *whether there is a legal adviser-client relationship*
 - *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
 - *whether the advice given is independent*
 - *whether the advice given is confidential*
11. I am satisfied that the legal adviser-client relationship had been established, as the advice was provided by Department of Defence lawyers, who were acting in their capacity as independent professional advisers.
12. I am satisfied that the specific material contained in the documents was created for the dominant purpose of giving or receiving legal advice and that advice was provided independently. I also note there is no evidence to suggest that privilege has been waived by the client or the legal adviser.
13. Finally, I am satisfied the advice was provided in confidence given the disseminating legal marker attached to one of the documents. Further, I note that while the material in question is contained in documents being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed at paragraph 5.148 of the Guidelines, which provides that '[m]odern organisations often work in teams and several people may need to know about privileged communications...'.
14. Accordingly, I am satisfied that the documents are exempt under section 42 of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

15. 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).

16. 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.*
17. I found that the documents contain personal information of other persons. This includes their names and contact details which would reasonably identify a third party.
18. 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.
19. Against the criteria I found:
- a. that the specific personal information is not well known;
 - b. the individuals whose personal information is contained in the document is not known to be associated with the matters dealt with in the documents; and
 - c. the information is not readily available from publicly accessible sources.
20. Taking into account the above factors, I consider that the release of the material would be an unreasonable disclosure of individual’s personal information other than the applicant and could reasonably be expected to cause harm to their privacy. I am satisfied that the documents are conditionally exempt under section 47F of the FOI Act.

Public interest considerations – section 47F

21. 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.*
22. I have considered the factors supporting 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;

(d) allow a person to access his or her own personal information.

23. 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).
24. 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;
 - an agency's ability to obtain similar information in the future; and
 - the management function of an agency.
25. 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.
26. 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 section 47F of the FOI Act.

Digitally signed
by
george. [REDACTED]
Date: 2024.06.17
15:27:08 +10'00'

George [REDACTED]
Accredited Decision Maker
Associate Secretary Group
Department of Defence