



BP36281059

DEFENCE FOI 257/23/24

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] the applicant], dated and received on 14 September 2023 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

... copies of Australian Department of Defence produced emails, briefing documents, written correspondence and reports pertaining to the "classified summary of relevant Air Force capabilities" referenced in the Australian Department of Defence's response to Senator Whish-Wilson's Question on Notice (Question Number 76 / Portfolio Question Number 91). I also kindly request that personal details be limited to the full names of individuals involved in any applicable FOI response.

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 three (3) documents as falling within the scope of the request.

Exclusions

6. 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

7. I have decided to partially release three (3) 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], 47E [Public interest conditional exemptions - certain operations of agencies] and 47F [Public interest conditional exemptions - personal privacy] of the FOI Act.

Material taken into account

8. In making my decision, I have had regard for:

- 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

9. 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.

10. I am satisfied that the documents contain exempt material and that it is reasonably practicable to remove it and release the documents to you in an edited form.

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.

12. 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.

...

Security of the Commonwealth: [Damages]

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.*

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.

13. Additionally, the Guidelines provide:

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*
- (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*
- deterring and preventing foreign incursions into Australian territory*
- protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

14. I have identified material in the documents, which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth by making public a Defence capability that is highly classified. The exempt material contains sensitive information about a capability that could potentially allow bad actors with hostile intentions to exploit Australian Defence Force capabilities.

15. Further, I have identified material in the documents, which, upon release, could reasonably be expected to cause damage to the defence of the Commonwealth. In making the Defence capability publically known, Nation States not allied with Australia could take steps or devote resources to counter the capability and exploit weaknesses causing damage to the defence of the Commonwealth.

16. 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.

17. Therefore, having particular regard for the nature of the specified information, I also assert further that the release of the identified material, when combined with information that is already available in the public domain, could allow adversaries to undermine Defence's capability and effectiveness.

18. Accordingly, I am satisfied that the specified information is exempt under section 33(a) of the FOI Act.

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

19. 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.

20. 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.

21. 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.

22. 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 that adversely affects the health, wellbeing and work of Defence personnel. Therefore, disclosure of direct contact details could reasonably be expected to prejudice the operations of Defence.

23. 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.

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

Section 47F – Public interest conditional exemptions - personal privacy

25. 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).

26. 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*
- (b) whether the information or opinion is recorded in a material form or not.*

27. I found that the documents contain personal information of persons who are not the applicant. This includes their names, email addresses and phone numbers, which would reasonably identify them as a third party.

28. In my assessment of whether the disclosure of the 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. any other matters that the agency or Minister considers relevant.

29. In view of the above, I note that the identified personal information is not widely known to be associated with the matters dealt with in the documents nor readily available from publicly accessible sources. The release of this information could also be reasonably expected to cause harm to their privacy.

30. Accordingly, I am satisfied that the relevant information is conditionally exempt under section 47F of the FOI Act.

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

31. 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.

32. 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.*

33. In my view, disclosure of this information would not increase public participation in Defence processes (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).

34. 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*
- *the management function of an agency.*

35. It is also in the clear public interest that Defence efficiently and productively operate with regard for the health and wellbeing of its personnel. As I have established above, the release of the direct contact details of Defence personnel can reasonably be expected to prejudice the management functions of Defence. There are existing communication channels and processes to enable the efficient and appropriate liaisons with the public. Accordingly, the direct contact details of Defence personnel should not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.

36. Additionally, Defence has an obligation to protect any personal information of third parties that it holds, for which I find the public interest in protecting this information far outweighs the public interest in its release. As a result, I have formed the view that the public have a reasonable expectation that personal information of third parties would not be released, as it would adversely affect the personal privacy of those individuals.

37. 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.

38. 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

39. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

40. 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.

Digitally signed by

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Group Captain
Accredited Decision Maker
Royal Australian Air Force