



DEFENCE FOI 456/24/25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to the request by [REDACTED] (the applicant), dated and received on 9 December 2024 by the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

“1.) Documents 5 and 9 (entitled “Brief”) referred to in Item 1 of the Schedule of Documents for FOI 176/24/25.

2.) Document 6 (entitled “Plan”) referred to in Item 1 of the Schedule of Documents for FOI 176/24/25 [sic].

3.) Document 19 (entitled “Presentation”) referred to in Item 1 of the Schedule of Documents for FOI 176/24/25.

4.) Documents 1 and 2 (entitled “Email”) referred to in Item 3 of the Schedule of Document for FOI 176/24/25.”

Background

2. The documents sought within this FOI request are in reference to FOI 176/24/25 in which the applicant sought access to:

“1.) Progress reports and operational summaries sent to and from Omni Executive and members of Special Operations Command Headquarters (SOHQ) related to the provision of the services described in Schedule 1 of the contract signed by [REDACTED] on 22 March 2016. (Date range: 23 March 2016 - 1 Sept 2024).

2.) Paragraphs 1 - 4 of the SOHQ Development Branch document entitled "Section 23 Commitment Approval for the Procurement of ISTAR EW Mission Systems" (ref #: AM2251877) dated for commitment approval on 21 March 2016.

3.) Emails sent to and from members of SOHQ related to the planned or actualized engagement of a private company for the purposes of filling capability gaps for domestic ISTAR EW operations. (Date range: 1 January 2010 - 1 January 2017).

4.) Air Force Minor Project 1037 (AFM1037) documents related to domestic ISTAR EW operations. (Date range: 1 January 2010 - 1 January 2017).”

3. The current request relates to Item 1 and 3 of the scope of FOI 176/24/25.

4. [REDACTED]

5.

FOI decision maker

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

Documents identified

7. I have identified six (6) documents as falling within the scope of the request.
8. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

9. Signatures and mobile telephone numbers contained in documents that fall within the scope of the FOI request are excluded from this request.

Decision

10. I have decided to:
- a. partially release four 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(a) [Documents affecting national security, defence or international relations], 42 [Documents subject to legal professional privilege], 47E(d) [Public interest conditional exemptions – certain operations of agencies], 47F [Public interest conditional exemptions – personal privacy], and 47G [Public interest conditional exemptions – business] of the FOI Act;
 - b. refuse access to two documents on the grounds that the documents are considered exempt under section 47E(d) [Public interest conditional exemptions – certain operations of agencies] of the FOI Act; and
 - c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

11. 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);
 - e. third party consultation advice received under section 27A of the FOI Act; and
 - f. advice received from Subject Matter Experts (SMEs) within the Royal Australian Air Force (RAAF), and Capability Acquisition and Sustainment Group.

REASONS FOR DECISION

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

12. 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.
13. The documents being released in part contain exempt and irrelevant material such as a mobile telephone number and signature that do not relate to the request.
14. Where whole pages are considered to be exempt in full or irrelevant to the scope of the request, these pages have been removed from the released document pack.
15. 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.
16. In the case of documents being refused in full, I have decided to refuse access to the documents as they would be meaningless and of little or no value once the exempt material is removed.

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

17. Section 33(a) of the FOI Act relevantly 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*

18. 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.

...

5.32 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.*

19. In regard to ‘security of the Commonwealth’, the Guidelines provide at paragraph 5.30:

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)).*

20. I have identified material in the documents which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth. This consideration is based on SMEs advice provided by RAAF and the consideration of the mosaic theory. The release of the material could expose information that unfriendly external entities could utilise to hinder Australian defence operations. I consider that release of this information could result in damage to the security of the Commonwealth.
21. In regard to ‘defence of the Commonwealth’, the Guidelines, at paragraph 5.36, refer to previous Administrative Appeals Tribunal (AAT) decisions which provide that the term includes:
- a. meeting Australia’s international obligations;
 - b. ensuring the proper conduct of international defence relations;
 - c. deterring and preventing foreign incursions into Australian territory; and
 - d. protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.
22. I have identified material which upon release, would, or could reasonably be expected to, cause damage to the defence of the Commonwealth. The documents contain information detailing strengths and capabilities of Army Special Operations Command. The release of this information could provide adversaries with intelligence divulging operational capabilities and formations. In addition, the specific details of capability would or could cause damage to the defence of the Commonwealth, this option has been supported by SMEs within RAAF.
23. Accordingly, I am satisfied that the information is exempt under section 33(a) of the FOI Act.

Section 42 – Documents subject to legal professional privilege

24. 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.

25. I find that document two contains legal advice which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).
26. The Guidelines provide, at paragraph 5.149, 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*
27. I am satisfied that the legal adviser-client relationship had been established, as the advice was provided by lawyers, who were acting in their capacity as independent professional advisers.
28. 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.
29. Finally, I am satisfied the advice was provided in confidence given the disseminating legal marker attached to 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 5.174 of the Guidelines, which provides that '[m]odern organisations often work in teams and several people may need to know about privileged communications...'
30. Accordingly, I am satisfied that the information is exempt under section 42 of the FOI Act.

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

31. 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.*

32. The Guidelines, at paragraph 6.115, provide that:

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner.

33. 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.
34. 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.
35. In addition, in assessing whether disclosure could be expected to adversely affect the operations of Defence, I consider that the material identified in the schedule of documents as a Plan and Presentation were obtained and prepared on the Defence use of equipment and its effectiveness. The routine release of these kinds of documents could have a detrimental impact on the proper and efficient conduct of Defence by releasing specific information on the capability.
36. The Guidelines provide, at paragraph 6.112, 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.
37. 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

38. 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).

39. The FOI Act shares the same definition of ‘personal information’ as the *Privacy Act 1988* (Cth). The Guidelines provide that:

6.123 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.*

40. I found that the documents contain personal information of other persons. This includes their names which would reasonably identify third parties.
41. 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.
42. I found that the specific personal information 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 documents and the information is not readily available from publicly accessible sources.
43. Accordingly, I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

Section 47G – Public interest conditional exemptions – business

44. Section 47G(1)(a) of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

45. I note that the use of the word ‘could’ in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.
46. The Guidelines explain, at paragraph 6.185:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest - preserving the profitability of a business. However, at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

47. The Guidelines also state, at paragraph 6.181:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

48. The Guidelines go on to provide, at paragraph 6.191, '[t]he term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.
49. The documents contain information, which, if released, could provide an advantage to competitors, who could use the information to capture the market, hence affecting the organisations 'money making affairs.'
50. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

Public interest considerations - sections 47E, 47F and 47G

51. 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.

52. 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;*
- (d) allow a person to access his or her own personal information.*

53. 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).
54. Paragraph 6.233 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; and

- an agency's ability to obtain similar information in the future.

55. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the names, email addresses and phone numbers of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.
56. 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.
57. 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, 47F and 47G of the FOI Act.

Digitally signed by [REDACTED]
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Accredited Decision Maker
Army Headquarters
Department of Defence