



Defence Reference: FOI 009/17/18
OAIC Reference: MR 17/00565

SECTION 55G [PROCEDURE IN IC REVIEW – REVOCATION OR VARIATION OF ACCESS REFUSAL DECISION] REVISED DECISION



1. In your external review application, you requested that the Information Commissioner review the Department of Defence's FOI decision made on 2 September 2017 ('the original decision'). On 10 May 2019, the Office of the Australian Information Commissioner invited the Department to review certain aspects of the matter.
2. Following review of this matter, Defence has decided to revise its original decision under section 55G of the *Freedom of Information Act 1982* (FOI Act). The revised decision and reasons for that decision are outlined below.

Background

3. On 22 June 2017, you made a request to Defence for access to:

"...documents since 1 January 2015, specifically reports, executive/ministerial briefings and attachments, Senate Estimate Hearing reports, minutes of executive meetings and internal correspondence involving the ADF executive in relation to transgender or prospective transgender officers/recruits/personnel/staff.

In relation to narrowing down correspondence involving the ADF executive, I'm happy to limit to what I have in previous applications, ie. Chiefs of each division including the ADF and officers which would specifically deal with this issue. In relation to emails, please limit to final thread of conversation.

Please exclude duplicates, documents that have already been publicly released, media reports/articles/releases and correspondence with media ..."

4. On 3 July 2018, you clarified the scope of the request, stating:

"... what I'm asking for ... executive briefings and attachments are documents that exist (including hot issues briefings) which would also capture any policy reviews, along with reports and internal correspondence involving the areas that deal specifically with transgender (LGBTQI) issues, this might include bullying, or treatment/medication, logistics (ie. Whether officers are placed in female or male quarters) and overall analysis ..."

5. On 5 July 2018, you further clarified the scope of the request, stating:

“... I’d expect searches of minutes to be undertaken to find out. I’m being very specific here about the documents I’m seeking, I can’t understand the confusion. It’s just a matter of undertaking key word searches using the terms “transgender”, LGBTQI (Lesbian, Gay, Bi, Trans, queer/questioning, intersex).*

I know hot issues briefs exist, and if there was any bullying or other kinds of incidents involving transgender officers/personnel, that would go up the chain which is why I suggested reports and executive/hot issues briefings and attachments.

And lastly, requests for special needs like medication/treatment for transgender officers would also have to be facilitated by a particular faculty/officer/unit (presumably health) so it’s just a matter of doing searches there.”

6. On 17 July 2019, the Office of the Australian Information Commissioner confirmed that you had agreed to add a disclaimer to the scope as follows:

“Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers contained in the documents that fall within the scope of the FOI request.”

Decision

7. I am authorised to make this section 55G revised decision under arrangements approved by the Secretary of Defence pursuant to section 23 of the FOI Act.

8. In reviewing the original decision and the further clarification of the scope of your request as set out above, I have determined that some of the material previously considered exempt under section 47C [public interest conditional exemptions - deliberative processes] of the FOI Act can be released.

9. I have also added a further exemption to material not to be released. Essentially, material which was initially regarded exempt under only section 47C is now also exempt from release under subsection 47E(c) [public interest conditional exemptions - management and assessment of personnel] of the FOI Act.

10. I have also identified information that can be released which was originally removed under section 22 [irrelevant material] of the FOI Act, as it was inadvertently identified as irrelevant to the scope of the request.

11. I have decided to vary the original decision by partially releasing further information previously removed under section 22 and/or section 47C of the FOI Act. The attached combined schedule of documents provides detail on documents where further information has been released.

12. In arriving at my decision, I had regard to:

- a. the scope of your request and subsequent external review application;
- b. the original decision;
- c. the content of the documents subject to external review;
- d. relevant provisions in the FOI Act;

- e. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines);
- g. consultation with Navy, Army, Air Force and Defence People Group; and
- h. the *Work Health and Safety Act 2011* (the WHS Act).

Reasons for decision

Section 47C of the FOI Act

13. I have determined documents and information are exempt under section 47C of the FOI Act.

14. Subsection 47C(1) of the FOI Act stipulates:

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.

15. In my view, the material in the documents is deliberative in nature and relates to the ordinary and essential operations of developing and consulting on Defence's culture and policy direction.

16. In the Administrative Appeals Tribunal (AAT) case of *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015]¹, Deputy President Forgie, in considering what constituted a deliberative process, cited with approval a number of judicial sources:

The expression "deliberative processes" has been considered in Re James and Others and Australian National University in which Deputy President Hall repeated the view he had expressed as a member of the Tribunal in Re Waterford and Department of the Treasury (No.2) i.e. that the "deliberative processes" of an agency are its "thinking processes". Sheppard J stated in Kavvadias v Commonwealth Ombudsman that the expression is not to be confined to policy making. Several authorities were reviewed by Davies J in Re Howard and Treasurer of the Commonwealth of Australia.

17. The documents clearly pertain to consultation, deliberation, preliminary recommendation and advice on policy matters, and therefore fall within the definition of deliberative material accepted by the AAT. Having regard to the wording used in the documents, I consider the material is deliberative for the purpose of section 47C so is therefore conditionally exempt from release.

¹ AATA 361.

Subsection 47E(c) of the FOI Act

18. In conjunction with section 47C conditional exemption outlined above, I have determined that information and documents are also exempt under subsection 47E(c) of the FOI Act.

19. Subsection 47E(c) of the FOI Act provides that:

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 management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency...

20. At paragraphs 6.113-6.114, the Guidelines stipulate that:

“Where the document relates to the agency’s policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- an effect would reasonably be expected following disclosure*
- the expected effect would be both substantial and adverse.*

For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.”*

21. The documents in question are draft internal policy that address sensitive health issues relating to Defence personnel management, which are highly sensitive in nature as well as being complex and contentious.

22. Given the complexities of the issues involved, the premature release of the draft policies could have a substantial adverse effect on Defence’s ability to develop sound and comprehensive policy for managing its workforce. It is critical that Defence be given adequate time and opportunity to develop its internal policy before is finalised and released to the public.

23. Further, it is clear that the draft policies relate to a sensitive subject matter with potential to cause distress to Defence personnel. Under section 19 of the *Work Health and Safety Act 2011* (the WHS Act), Defence has a duty of care to ensure the welfare of its workers. It is important that sensitive policies relating to personnel health be properly developed and consulted with all relevant stakeholders including medical professionals, before they are finalised and released to the public. Failure to do so would cause unnecessary stress and anxiety to Defence workers, leading to potentially catastrophic consequences.

24. In conclusion, the documents in question are policy documents affecting the management of personnel by Defence, and the release of the deliberative draft policies would or could have a substantial adverse effect on the management of Defence personnel, particularly in relation to their health and wellbeing. Therefore, pursuant to subsection 47E(c) of the FOI Act, I consider the documents conditionally exempt from release.

25. Subsection 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

Public interest considerations – section 47C and subsection 47E(c)

26. As part of my consideration of the relevant factors affecting the balance of public interest, I gave consideration to the objectives of the FOI Act, the Guidelines and the factors favouring access to documents set out at subsection 11B(3) of the FOI Act, including that the provision of government information:

- a. increases scrutiny, discussion, comment and review of government activities;
- b. increases public participation in government processes, which helps to promote better informed decision making;
- c. should take place where possible to allow government held information to be used as a national resource;
- d. may inform debate on a matter of public importance;
- e. may promote effective oversight of public expenditure; and
- f. may allow a person to access their own personal information.

27. In my view, the draft policy, in its current state, is of very limited value in relation to the above. In fact, the release of the draft policy would have the effect of misleading public debate as the draft policy remains subject to continued consultation and substantial change. It is expected that the final official policy document would be used to inform public debate on these issues and demonstrate the clear future cultural direction of Defence.

28. Further, there is a strong public interest in Defence maintaining the proper deliberative processes of government so as to formulate appropriate policy and ensuring that policy deliberations are robust, candid and uninhibited. The purpose of section 47C exemption is to protect the integrity of these essential deliberative processes that inform good decision making and to ensure that consultation processes and the provision of advice and recommendations can be undertaken with candour.

29. Finally, to the extent that information is still capable of being linked to individuals, it is not in the public interest to release that information, given the sensitivities involved.

30. In conclusion, I am of the opinion that the factors favouring denying access to the documents outweigh any of the factors supporting disclosure of the documents. Accordingly, I have decided that, on balance, the public interest is best served by not disclosing the documents and by deeming the information exempt under section 47C and subsection 47E(c) of the FOI Act.

31. None of the factors in subsection 11B(4) [irrelevant factors] were taken into consideration when making my decision.

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Ms Sophia Blix
Assistant Secretary Enterprise Reform