



Defence Reference: FOI 090/20/21

E&IG Reference: BS14602656

FOI 090/20/21 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act) for access to:

“...Former Air Defence Headquarters (Bankstown Bunker), Condell Park In the early 1970s the Department of Defence handed over the 4-hectare (9-acre) site to the Commonwealth Department of Housing All documents held by Department of Defence regarding the transfer of the site to the Commonwealth Department of Housing...”

Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

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 identified 12 documents as matching the description of the request.
4. The decision in relation to each document is detailed in a schedule of documents.
5. I have added an FOI item number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. release 8 documents in full;
 - b. partially release 4 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 section 42 [documents subject to legal professional privilege] and section 47F [public interest conditional exemptions – personal privacy] of the FOI Act; and
 - c. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

7. In making my decision, I had regard to:
 - a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. relevant provisions in 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

Exemption Claim – Section 42 – Documents subject to legal professional privilege

8. I found one document (document 7) contains material which falls within the purview of section 42 of the FOI Act, as it contains legal advice, which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP). I note that the FOI Act does not define LPP, however, the guidelines require that I consider each of the following:

- a. whether there is a legal adviser-client relationship;
- b. whether the communication was for the purpose of giving or receiving advice or for the use or in connection with actual or anticipated litigation;
- c. whether the advice given is independent; and
- d. whether the advice given is confidential.

9. In determining whether a legal adviser-client relationship exists, the guidelines state that the following points must be considered:

- a. legal advice given by a qualified lawyer employed by the government can be privileged;
- b. the legal adviser must be acting in their capacity as a professional legal adviser;
- c. the giving of the advice must be attended by the necessary degree of independence;
- d. the dominant purpose test must be satisfied; and
- e. the advice must be confidential.

10. I am satisfied that the legal adviser/client relationship had been established, as the advice was provided by qualified lawyers, who were acting in their capacity as professional advisers.

11. Further, I am satisfied that the specific material contained in the documents relevant to this request was created for the dominant purpose of giving legal advice, and there is no reason to doubt the legal advisers' independence in providing such advice. I note that LPP is the client's privilege to waive and I am satisfied that waiver has not occurred. 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 in paragraph 5.148 of the guidelines, which states *modern organisations often work in teams and several people may need to know about privileged communications*.

12. I am satisfied, therefore, that a part of the document should be privileged from production on the basis of LPP and that part is therefore exempt under section 42 of the FOI Act.

Exemption Claim – Section 47F – Personal privacy

13. Upon examination of the documents, I identified information, specifically names of individuals other than the applicant.

14. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors:

- 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.

15. I found that the:

- a. specific personal information listed is not well known
- b. individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents
- c. information is not readily available from publicly accessible sources.

16. The release of the names of individuals identified in the documents could reasonably be expected to cause harm to their privacy. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F of the FOI Act.

Public interest considerations – Section 47F

17. I have found that some of the information in the identified documents to be conditionally exempt under section 47F of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

18. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource and it would allow the applicant access to their own personal information.

19. However, 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).

20. 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
- c. an agency’s ability to obtain confidential information

21. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47F of the FOI Act.

22. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

BruceBennett2 Digitally signed by BruceBennett2
Date: 2020.10.22 14:19:32 +11'00'

Bruce William BENNETT
Accredited Decision Maker
Estate & Infrastructure Group
Encl.