



Australian Government
Department of Defence

R33585594

**FOI 247/17/18 AND FOI 284/17/18 - 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:

"The statement of facts tendered by defence prosecutors in each of the matters disclosed in response to FOI 112/17/18"

2. In FOI 112/17/18 access was sought to *"Findings and punishment Report from September 2014 - CM/DFM Matters, excluding PMKeys numbers"*.

3. The Department excludes personal email addresses, signatures, personnel (PMKeyS) numbers and mobile telephone numbers, contained in documents that fall within the scope of a FOI request. Duplicates of documents are also excluded

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 identified 161 documents being charge sheets, totalling 548 pages, as matching the description of the request.

6. I have been advised that court martial (CM) and Defence Force magistrate (DFM) proceedings do not use a document titled or considered a statement of facts. I have interpreted the scope of the requests to mean the charge sheets that contain the Director of Military Prosecution's particularisation of the alleged offences. I have made this interpretation in order to provide consistent information across each of the matters disclosed in FOI 112/17/18.

7. Further, the documents captured by FOI 284/17/18 (*"The statement of facts tendered by defence prosecutors in each of the matters disclosed dating January -December 2016 listed in response to FOI 112/17/18"*) are included in the documents identified for FOI 247/17/18. As such, this decision covers both requests for the period September 2014 – October 2017.

8. The decision in relation to each document is detailed in a schedule of documents.

9. I have added an FOI reference number and item/serial number to each of the documents, which corresponds with the schedule.

Decision

10. I have decided to:

- a. partially release all the identified documents with deletions made 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 exempt under section 33(a)(i) [documents affecting the security of the Commonwealth]; and/or section 47D [public interest conditional exemptions –

financial interests]; and/or section 47E(c) [public interest conditional exemptions – operations of agencies – management or assessment of personnel; and/or section 47E(d) [public interest conditional exemptions – operations of agencies]; and/or section 47F [public conditional exemptions – personal privacy] of the FOI Act; and

- b. 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

11. 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;
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines);
 - e. the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* and the *Defence Force Discipline Act 1982 (Commonwealth)*; and
 - f. advice from Strategic Policy and Intelligence Group; Chief Information Officer Group, and Registrar of Military Justice.

Reasons for decision

Section 33(a)(i) of the FOI Act – Documents affecting national security, defence or international relations

12. Section 33 of the FOI Act exempts a document if its disclosure under the Act would or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth. As well as information that would divulge information or matter communicated in confidence by or on behalf of a foreign government.

13. In regards to the security of the Commonwealth the guidelines state:

5.26 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)).

14. Upon examination of the documents, I found that some of them contained sensitive information relating to Defence communication devices, domain and server names, and security procedures. The communication devices are also compatible to those used by allied defence forces.

15. If this material was to be released, it could be used by an adversary to infiltrate the systems and attempt to compromise that capability.

16. Taking the above into account, I consider that disclosure of the material would, or could reasonably be expected to, cause damage to the security of the Commonwealth. Accordingly, I consider the material to be exempt under section 33(a)(i) of the FOI Act.

Section 47D - public interest conditional exemptions – financial interests

17. Upon examination of the documents, I found that they contained the numbers of Defence Travel Cards, Defence Purchasing Cards, and Defence Fuel Cards. A document is conditionally exempt under the FOI Act if have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency.

18. Release of these card numbers would have a substantial adverse effect on the financial interest of the Commonwealth as it would provide third parties with sufficient information to fraudulently use Commonwealth funds. I consider the material is therefore conditionally exempt under section 47D of the FOI Act.

19. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

20. My public interest considerations are detailed below.

Section 47E(c) and 47E(d) - public interest conditional exemptions – certain operations of agencies

21. Section 47E(c) and 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:

...

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

22. In relation to subsection 47E(c) and 47E(d) of the FOI Act, the Guidelines advise that, where the document relates to management of personnel, the decision maker must address whether:

- a. an effect would be reasonably expected following disclosure; and
- b. the expected effect would be both substantial and adverse.

23. I considered whether:

- a. prejudice could reasonably be expected to occur to the conduct of the agency and the management of personnel; and
- b. the disclosure of these documents at this time would, on balance, be contrary to the public interest.

24. Upon examination of the documents I found that they contained information which a claim for exemption under section 47E(c) of the FOI Act is warranted. The information which is conditionally exempt under section 47E(c) reveals sensitive personal information concerning the management and behaviour of personnel including names and addresses of those being charged, and information where a complainant could be identified. Release of the

information at this time, to retrospectively publish, several years after the event, the names of those charged or involved in the case can reasonably be expected to have a lasting negative impact on the individuals. This puts the rehabilitative effect, such as fines paid or time served, at risk and undermines the efforts made by the individuals concerned thereby negatively affecting their performance and consequently the effectiveness of Defence.

25. The information contained within the documents included information that identified people who were subject to sexual offences. Where there are proceedings for sexual offences under the *Crimes Act 1900 (ACT)*, subsections 40(1) and (4) of the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* are applicable. These provisions prohibit the publication of, and make it an offence to publish, the complainant's name or information concerning the complainant's identity.

26. Specifically, I considered section 40 that states:

Sexual offence proceeding—prohibition of publication of complainant's identity

(1) *A person commits an offence if the person publishes, in relation to a sexual offence proceeding—*

- (a) *the complainant's name; or*
- (b) *protected identity information about the complainant; or*
- (c) *a reference or allusion that discloses the complainant's identity; or*
- (d) *a reference or allusion from which the complainant's identity might reasonably be worked out.*

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(2) *It is a defence to a prosecution for an offence against this section if the person establishes that the complainant consented to the publication before the publication happened.*

(3) *An offence against this section is a strict liability offence.*

(4) *In this section:*

"protected identity information" means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.

27. In considering the above I noted that in many instances the same offences under the *Crimes Act 1900 (ACT)* have been made as a charge in the alternative under different legislation. I considered the effect of releasing the names of the offender and / or victim in these circumstances. I am of the view that regardless of the specific legislation the charge is made under, release of the information could reasonably be expected to allow for the identification of those people and would be contrary to the requirements of the Crimes Act applying to the 'primary' charge.

28. The *Defence Force Discipline Act 1982 (Commonwealth)* (DFDA) creates tribunals concerned with the discipline of Australian Defence Force members. Many of the offences

have no criminal equivalent and are purely disciplinary in nature, for example, insubordination. While the proceedings are generally open to the public (subject to specific exemptions) this requirement favours preventing secrecy rather than an ongoing obligation to provide information, particularly those accused, in the public domain forever. I considered the effect of releasing the names of personnel and the names of members of the public that are contained in the documents, and formed the view that release of the information could reasonably be expected to impact on the operations of the Department and reduce the likelihood of individuals participating in and providing information to disciplinary matters in future.

29. Further, retrospective publishing of names could impact negatively on the disciplinary process. It is important that Defence is able to manage its personnel, including its culture and undertake disciplinary steps where appropriate. Failure to do so would unfairly affect those personnel subject to allegations and deny them procedural fairness. Any loss of trust or reluctance in employees providing honest information and feedback could reasonably be expected to have a substantial adverse effect on the overall management of personnel.

30. Upon examination of the documents, I also found that they contained information which a claim for further exemption under section 47E(d) of the FOI Act is warranted. The information which is conditionally exempt under section 47E(d) reveals details of a communication server operated by the Royal Australian Navy. Release of the information could reasonably be expected to comprise the integrity of Defence communication systems.

31. This would therefore effect the way Defence performs its functions and could reasonably be expected to adversely affect the proper and efficient conduct of Defence's operations.

32. Based on my consideration of the above I am of the view that the release of the names, ranks, contact details and other personal information belonging to persons other than the applicant, would be an unreasonable disclosure of personal information. The release of the information would have a substantial and adverse effect on both individuals, the management of personnel, and the efficient and proper conduct of the operations of Defence and is therefore conditionally exempt under section 47E(c) and 47E(d) of the FOI Act.

33. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

34. My public interest considerations are detailed below.

Section 47F - public interest conditional exemptions - Personal privacy

35. Upon examination of the documents, I identified information, specifically names, ranks, contact details and other personal information belonging to persons other than the applicant.

36. When assessing whether the disclosure of personal information is unreasonable, I considered the follow 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; and
- c. the availability of the information from publically accessible sources.

37. Against these criteria, I found:

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

38. I consider that the release of the names, ranks, contact details and other personal information belonging to persons other than the applicant, would be an unreasonable disclosure of personal information, except where it has previously been released, and is therefore conditionally exempt under section 47F of the FOI Act.

39. Section 11A(5) of the FOI Act 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.

Public interest considerations - Sections 47D, 47E(c), 47E(d) and 47F

40. I have found that the documents are conditionally exempt 47D, 47E(c), 47E(d) and/or 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.

41. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factor is that disclosure may promote some of the objects of the FOI Act as information held by the Government is a national resource. However, the 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).

42. While I consider that release of the material may be of some interest to the applicant, disclosure of the specific conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way. Additionally, I do not consider that disclosure of the material would promote oversight of public expenditure.

43. 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 or harm:

- a. the protection of an individual's right to privacy;
- b. the interests of an individual or group of individuals;
- c. an agency's ability to obtain confidential information;
- d. an agency's ability to obtain similar information in the future.

44. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, on balance, it would be contrary to the public interest to disclose sensitive personal information of Defence members, particularly retrospectively. I consider the public interest is served with the release of the detail of the charges where permissible by law.

45. It is for the reasons detailed above that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under sections 47D, 47E(c), 47E(d) and 47F of the FOI Act.

46. None of the factors listed in section 11B(4) of the FOI Act were taken into account when making my decision.

Further information

Exemptions 47E(c), 47E(d) and 47F

47. In numerous instances the exemptions applied to personal information such as names in many documents should be read as sections 47E(c), 47E(d) and 47F all applying. However, due to lack of available space, on many occasions, only the section 47F exemption is recorded.

48. Some of the documents matching the scope of this request contained a dissemination limiting marker, as the documents are approved for public release the marker has been struck through.

nicola.viney Digitally signed by
nicola.viney
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Ms Nicola Viney
Accredited Decision Maker
Associate Secretary Group