



FOI 288/17/18 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:

"... to documents containing information about sexual assaults.

Specifically, I am seeking information about:

- *Documents produced in the last six months containing information including statistics about the incidence of (a) sexual assaults and ((b) sexual harassment including details of any summary of any such incidents.*

I advise I am not interested in duplicate copies of documents or documents that have already been publicly released or media releases, media articles or media statements."

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.

Document identified

3. One document, recording 134 incidents that match the description of the request was generated under section 17 of the FOI Act:
- a. A written document was produced containing the information using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (section 17(1)(c) refers).
 - b. Producing the written document did not substantially and unreasonably divert resources of the agency from its other operations (section 17(2) refers).

Decision

4. I have decided to partially release the document with deletions made under 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 sections 37(1)(a) [documents affecting enforcement of law and protection of public safety], and / or 47E(d) [public interest conditional exemptions – certain operations of agencies] of the FOI Act

Material taken into account

5. 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); and

Reasons for decision

Section 37 - Documents affecting enforcement of law and protection of public safety

6. Section 37(1)(a) of the FOI Act states:

"A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating prejudice the enforcement or proper administration of the law in a particular instance."

7. Section 5.91 of the Guidelines states:

Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase 'in a particular instance', it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand.[60] In other words, the exemption does not apply if the prejudice is about investigations in general.

8. I consider that the release of identifying material is considered exempt under section 37(1)(a) of the FOI Act, as it could reasonably be expected to prejudice the conduct of investigations of breaches, or possible breaches of the law, or failures, or possible failures, to comply with a law relating prejudice the enforcement or proper administration of the law.

9. In order for the exemption to apply, it must be shown that disclosure 'would, or could reasonably be expected to' cause damage.

10. The Guidelines provide that the term 'reasonably expected' in the context of section 37(1)(a) of the FOI Act, requires consideration of the likelihood of the predicted or forecast damage. In particular, at 5.27 the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning. A mere allegation or a mere possibility of damage will be insufficient for the purposes of the exemption.

11. 'Damage' is not confined to loss or damage in monetary terms and the relevant damage may be of an intangible nature.

12. The material that I have decided to exempt relates to the names and other identifying factors of Defence members. I am of the view that if the names of these members were disclosed, it could expose them to unnecessary attention and duress.

13. Taking the above into account I am therefore satisfied that the deleted material is exempt under section 37(1)(a) of the FOI Act.

Section 47E – Certain operations of agencies

14. Subsection 47E(d) of the FOI Act provides as follows:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected, to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

15. In relation to subsection 47E(d) of the FOI Act, paragraph 6.123 of the Guidelines advise that, where the document relates to certain operations of agencies, the decision maker must address whether the predicted effect must bear on the agency's 'proper and efficient' operations; that is, the agency is undertaking its expected activities in the expected manner.

16. The release of information that could identify, or potentially identify a complainant, or other individuals identified during the course of Defence's investigation of a complaint, could reasonably be expected to affect the willingness of individuals to provide information to Defence for the purpose of investigating complaints. This could reasonably result in a perception that Defence lacks integrity with respect to protecting the confidentiality of investigation records; thus affecting the proper and efficient conduct of the operations of Defence.

Consequently, I have decided that the material is conditionally exempt under section 47E(d) of the FOI Act.

Public interest considerations – section 47E(d)

17. I have found that the identified documents are conditionally exempt under section 47E 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 objectives of the FOI Act, as information held by the government is a national resource.

19. While I note that the release of the information being withheld may be of interest to the applicant, it would not inform public debate on any matter of public importance in any meaningful way.

20. Paragraph 6.29 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;
- d. an agency's ability to obtain similar information in the future;
- e. the management function of an agency; and
- f. the protection of a (public interest) discloser.

21. It is reasonable to consider that individuals named in investigation records maintained by Defence expect protection of their privacy and identity. Such individuals would therefore expect Defence to maintain a high level of confidentiality in respect to documents that may

lead to their identity being disclosed. This is particularly relevant where the allegations were not substantiated.

22. Releasing information about a complainant, or others involved in the allegations or its investigation, could reasonably be expected to adversely impact on the agency's ability to gain the confidence of the complainant, or other current or future complainants, and the provision of relevant information in the future. This could significantly undermine any investigative process and undermine the ability of the department to handle complaints without undue external influence.

23. 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 47E(d) of the FOI Act.

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

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WGCdr T. Lewis
Accredited Decision Maker
Associate Secretary Group