



**Australian Government**  
**Department of Defence**

OAIC Ref: MR 18/00203

Defence Ref: Defence FOI 299/17/18

**NOTICE OF IC REVIEW AND REQUESTS FOR DOCUMENTS**

Dear [REDACTED]

1. On 23 March 2019, [REDACTED] (the applicant) requested that the Office of the Australian Information Commissioner (OAIC) review Defence's statement of reasons dated 21 March 2018. Since that time the OAIC has contacted Defence in regards to this matter.

2. As a result of this contact from the OAIC, I have had the opportunity to review the documents and have determined that material originally considered irrelevant to the scope of the applicant's request is relevant to the request and some information can be released. However, some of the material is exempt for the purposes of the FOI Act. As such, a revised decision under section 55G [revocation or variation of access refusal decision] of the FOI Act should be provided to the applicant in this instance.

**Defence Accredited Decision-Maker**

3. I am authorised to make this decision under the FOI Act under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

**Material subject to the revised decision**

4. The purpose of this statement of reasons is to provide the applicant with a revised decision in relation to the material originally considered irrelevant to the FOI request under paragraph 55G(1)(a) [Procedure in IC review – revocation or variation of access refusal decision] of the FOI Act.

**Revised decision**

5. In undertaking the revised decision, I have decided to release further information and I have decided that material is exempt pursuant to sections 47C and 47E(d) of the FOI Act.

6. Additionally, I consider the employees' mobile phone numbers do not fall within the terms of the applicant's FOI request.

## Material taken into account

7. In arriving at my decision, I had regard to:
- a. the scope of the applicant's FOI request;
  - b. the content of the contended document identified as being within the scope of the applicant's FOI request;
  - 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); and
  - f. the reasoning of the Administrative Appeals Tribunal in *Thomas: Secretary, Department of Defence and (Freedom of Information)* [2018]<sup>1</sup> (hereafter referred to as the "Hedley Thomas case").

## Findings and reasons

8. The documents sought by the applicant is exempt from release pursuant to sections 47C [deliberative processes] and sub-section 47E(d) [certain operations of agencies] of the FOI Act. Therefore this material has been redacted pursuant to section 22(1)(a)(i) of the FOI Act.

9. Where section 47C(1) [deliberative processes] 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.

10. In *Re Waterford and Department of the Treasury (No.2)* [1984],<sup>2</sup> the Tribunal said:

*"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. 'Deliberation' means 'The action of deliberating: careful consideration with a view to decision': see The Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description."*

11. The redacted material in the document is material that is deliberative in nature and also goes to the normal and essential operations of providing recommendations to inform decision-makers

<sup>1</sup> AATA 604.

<sup>2</sup> AATA 67; (1984) 5 ALD 588

and policy-makers making decisions or policies related to or affecting the Australian Defence Force Service (ADF) Tribunals, which are an essential part of the ADF's disciplinary system.

12. The document is a deliberative document, which is in the thinking space of government. In this instance the document actually goes beyond that and it shows aspects of a document in the thinking space of the author. The author sets out their thought processes and considerations directly relating to both consideration for an FOI decision and sensitive policy consideration, which were being considered at the time of the author writing the document. Given that the material is deliberative advice/recommendations on internal decisions as well as policy, it is considered to be deliberative material for the purpose of the section 47C exemption of the FOI and therefore conditionally exempt from release.

#### **Public interest considerations – section 47C**

13. In assessing whether disclosure of the conditionally exempt material is, on balance, Contrary to the public interest, I considered the range of relevant factors that favour access to a document set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. While disclosure may promote some of the objects of the FOI Act, such as ensuring that information held by the Government is a national resource, I do not consider these deliberation would inform public debate.<sup>3</sup> Further, the release of the information would not increase public participation in government processes, nor would it increase scrutiny or discussion of government activities.

14. On the other hand, there is a strong public interest in Defence maintaining frank and candid communications (especially from key positions such as the Registrar of Military Justice) and continuing to have effective and efficient operations including deliberative operations for the formulation of both well-informed decisions and policies.

15. In the Hedley Thomas case at paragraph 70, Deputy President Logan set out the reasons for the limited, but important role of considering frankness and candour. He said:

*“It is noteworthy that the catalogue of irrelevant considerations found in s 11B(4) of the FOI Act does not include inhibition of frankness and candour. Neither does s 3 of the FOI Act expressly state that the Parliament considers that the promotion of frankness and candour in intra-governmental communications is antithetical to the objects of the Act stated in that section. Given this and the otherwise breadth of the expression “public interest”, we respectfully agree with the opinion voiced by the Information Commissioner in the Guidelines (para 6.81) in relation to the Tribunal’s decision in Rovere and Secretary, Department of Education and Training [2015] AATA 462 (Rovere), that it should be regarded as standing for the proposition that a claim of inhibition of frankness and candour “carries no weight by itself but must be related to some particular practice, process, policy or program in government”. To treat such a claim otherwise would be an impermissible diminution of the remaining width of the expression “public interest”.*

16. Deputy President Logan continued at paragraph 71 saying:

<sup>3</sup> It is likely that the final policy document on this matter will inform public debate. The final policy document on this matter has already been supplied to the Applicant and is also publically available at: <http://www.defence.gov.au/JAG/Documents/Practice-Note-1-Publication.pdf>.



*As we have already observed, s 11A(5) is not to be assimilated with the determination of a common law public interest immunity claim. To approach the significance of frankness and candour in the way promoted by the Information Commissioner in the Guidelines is to recognise that, in the abstract, it is a factor of little, if any, weight. The weight to afford it as a factor is not just inherently context specific but also specific to the documents in question and to the time when the access decision falls to be made. This approach is consistent with a more general observation, with which we respectfully agree, of Deputy President Forgie in Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information) [2015] AATA 945 at [69] in noting the absence in s 11B of the FOI Act of a list of factors telling against the affording of access (in contrast with the listing of factors favouring access) in particular: “Those factors are very dependent on the particular circumstances attending the way in which a document came into being and attending it subsequently.*

17. Importantly, one of the considerations that the Deputy President Logan emphasised in his reasoning in the Hedley Thomas case was the consideration of the “chilling effects” and subsequent loss of morale in making public deliberative communications that need to be made in an environment of candour and frankness. The content of the document and the context in which the document is communicated in any given case is one of the essential factors determining the weight to be afforded to “frank and candid” considerations. In this instance, the document sought by the Applicant is a document that was clearly in the thinking space of government, it was the thought processes of the author as well as a tentative recommendation that simultaneously was seeking legal advice to ensure that it was correct. Given the nature of the document there is little public interest in providing the document, yet there are strong public interest reasons not to release the document.

18. The release of these types of deliberative documents will have future impacts on Defence’s ability to have thinking space; to put forward recommendations; and to give advice or opinions so as to make well-informed and considered decisions and policy. The release of the documents will impact on the effectiveness of Defence’s communications during deliberative processes where the requirement to have free and uninhibited communications is essential. Even where the chilling effect, discussed by Deputy President Logan in the Hedley Thomas case, does not go so far as preventing the provision of advice and recommendation, it will in all likelihood substantially impact on the effectiveness and efficiency of the provision of advice and/or recommendations during deliberative processes, as personnel (including those in key advisor roles) begin to use more and more guarded language and less direct language. This will result in the communication process becoming:

- a. Less efficient (as employees labour to sanitise their communications to the n-degree);
- b. More prone to misunderstanding as the focus of the communication moves from effectively conveying a message to ensuring that the message is guarded and sanitised (i.e. the message in many instances will in all likelihood simply be lost);
- c. Weakened; whereby employees conveying any messages, which might be sensitive in nature, will shun written forms of communication (with all the efficiencies associated with written communication), instead opting for oral communications.

19. The types of decision and policy deliberations contained in the redacted document are a part of the proper processes by which Defence develops well informed policies. Those processes need to be protected from external interference; this is why the legislator has

legislated the section 47C exemption for deliberative material. It is not possible for agencies to innovate new policies, explore new ideas or to think outside of the box, where those agencies' every thought is open to review and publication. If this type of invasive intrusion was allowed into the thinking space of government, it would punish those public servants that were innovative and effectively lock government processes, policies and decisions into the excepted positions of the past, even as society's expectations evolved and changed. This is what the operation of section 47C of the FOI is intended to prevent from happening.

20. As determined by Deputy President Logan in *Hedley Thomas*, the position of the author (in the context of how the author's job functions) and the context of the communication in any given case are two of the essential factors determining the weight to be afforded to "frank and candid" considerations. In this instance the document, sought by the applicant, is a document where the public interest is strongly weighted towards ensuring on-going uninhibited frank and candid communications. This is both because of the unique nature of the position as a pivot role for the provision of advice on the administrative requirements of the Service Tribunals (i.e. the role of Registrar of Military Justice is a role that is directly appointed by the Minister and is essential for the proper functioning of the Service Tribunals), and because of the sensitive considerations required to balance the needs of the Service Tribunals to ensure Defence is able to maintain efficient and effective communications regarding:

- a. the on-going maintenance of the disciplinary system;
- b. the proper protections afforded to the accused are maintained, and
- c. that Defence's privacy obligations, as an Australian Privacy Principle Entity under the Privacy Act, are upheld.

21. I am of the opinion that the factors favouring denying access to the document outweighs any of the factors supporting disclosure of the document. Accordingly, I consider that, on balance, the public interest is best served by not disclosing the document and deem the information exempt under section 47C [deliberative processes] of the FOI Act.

22. None of the factors in section 11B(4) [irrelevant factors] were taken into consideration when making my decision. It is noted that although the position of Registrar of Military Justice is an important and unique position that plays a pivot role in the operation of the Service Tribunals, the position is not one of great seniority (i.e. the position is held at the level of Group Captain), thus it is the uniqueness of the position and its importance in maintaining the functions of the Service Tribunal and not the seniority of the position that is the important contextual factor that I have considered in my determination.

#### **Section 47E(d) [certain operations of agencies]**

23. Sub-sections 47E(d) [certain operations of agencies] 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 an agency.*

24. In relation to subsection 47E(d) of the FOI Act, paragraph 6.123 of the FOI Guidelines advise that, where a 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 an expected manner.



25. I am satisfied that the expected effect of disclosing to the applicant the material identified exempt under section 47E(c) would or could have a substantial adverse effect on the proper operations of the disciplinary system of the ADF by impacting on the provision of proper effective and efficient advice and communication. The operation of the ADF's disciplinary system is recognised as an essential operational part of the ADF and maintaining the integrity of its functions through obtaining advice from the Registrar of Military Justice is absolutely necessary. For these reasons I have decided that the specified material identified and redacted in the documents is conditionally exempt pursuant to subsection 47E(d) of the FOI Act.

26. Section 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. My public interest considerations are set out below.

**Public interest considerations – subsections 47E(d)**

27. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines provided by the Information Commissioner, together with a range of factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

28. There is also a strong public interest in Defence maintaining the Commonwealth's good internal working relationships with its stakeholders, and not releasing information that would inhibit Defence's ability to obtain that information effectively and efficiently. Disclosure of this information could have a substantial adverse effect on the effective and efficient conduct of Defence disciplinary processes within the Service Tribunals and subsequently this could substantially impact the management of Defence personnel and would not, in my view, be in the public interest.

29. Deputy President Logan's reasoning in the Hedley Thomas case sets out that to understand the operations of a military organisation is it important to consider the military management system and how the management of military organisations is governed by the disciplinary system. The need for this understanding is especially important when considering FOI requests relevant to the military disciplinary system or documents that might impact on the proper efficient and effective operation of the disciplinary system, including the effective and efficient flow of frank candid and prompt advice, from key positions, such as that held by the Registrar of Military Justice.

30. In-line with the reasoning in the Hedley Thomas case I found that, if the details and deliberative processes used in the formation of complex decisions and/or sensitive policy was released, it could reasonably be expected to have a substantial adverse effect on future requests for information and would likely substantial impact on the effectiveness and efficiency of how communications necessary for operations with any sensitives were conducted or communicated. One of likely consequences of interfering with communications of this nature is that future communications are likely to become more and more legalistic, taking the ability to grasp the true meaning outside of the grasp of much of the target audience who are not legally trained. This would destroy much of the value of the advice from important positions like this as the target audience is not in effect able to access the meaning of the advice.

31. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, and I consider that as set out above the disclosure of this document is of little or no public interest, however there are substantial factors favouring denying access to the document. Therefore I am of the opinion that the factors favouring denying access to the document outweighs any of the factors supporting disclosure of the document. Accordingly, I consider that, on balance, the public interest is best served by not disclosing the document and deem the information exempt under sub-sections 47E(d) of the FOI Act.

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

**Further information**

33. This revised decision does not cover the material considered exempt under section 47F [public interest conditional exemptions – personal privacy] of the FOI Act. This decision to deny access to this material is currently pending a decision by the Information Commissioner in the applicant's FOI request 112/17/18.

Yours sincerely,



Mrs Justine Nordin  
Accredited Decision Maker

07 May 2019