



Reference: BN6875076

FOI 412/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

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

“[I]nformation under the Freedom of Information Act, specifically the most recent incoming briefs prepared for Labor in the event of a change of government, including not but limited to information uploaded to an App and/or part of the Digital First System.

I advise that 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 an accredited officer, pursuant to section 23 of the FOI Act, authorised to make a decision on this FOI request.

Documents identified

3. I identified a single document as matching the description of the request.

Decision

4. I have decided to refuse release of the document in whole, as the document is exempt from the operation of the FOI Act, pursuant to subsection 47E(d) and section 47C 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);
 - e. the reasoning of Deputy President Justice J A Logan in the Administrative Appeals Tribunal case of *Thomas: Secretary, Department of Defence and*

(*Freedom of Information*) [2018]¹ (hereafter referred to as “the Thomas Hedley case”); and

- f. the reasoning of Deputy President A.N. Hall and members I. Prowse and C.A. Hughes in the case of *Re Waterford and Department of the Treasury* (No.2) [1984]² (hereafter referred to as “the Waterford case”).

Reasons for decision

6. The documents sought by the Applicant are exempt from release pursuant to sub-section 47E(d) [certain operations of agencies] and sections 47C [deliberative processes] of the FOI Act.

SUB-SECTION 47E(d) [CERTAIN OPERATIONS OF AGENCIES] EXEMPTION OF THE FOI ACT

7. I have determined that the document sought by the Applicant is exempt from release pursuant to sub-sections 47E(d) [certain operations of agencies] of the FOI Act, because the release of the document would or could have a substantial adverse effect on the proper and efficient conduct of the operations of Defence. Sub-sections 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:

...

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

8. In relation to subsection 47E(d) of the FOI Act, paragraph 6.123 of the Guidelines advises that, where a document relates to certain operations of agencies, the decision-maker must address whether the predicted effect bears on the agency’s ‘proper and efficient’ operations; that is, the predicted effect impacts on the agency in undertaking its expected activities in an expected manner.

9. To address these Guidelines requirements effectively it is necessary to consider three aspects of this case;

- a. the operational context that Defence operates in;
- b. what operations Defence is required to undertake; and
- c. whether or not the release of the document in question would bear on the proper and efficient undertaking of those operations.

¹ AATA 604.

² AATA 67.

10. To understand the context of the operations of the agency, it is instructive to revisit the reasoning of his Honour Deputy President Logan in the Thomas Hedley case, where he stated at paragraph 137:

“The exercise of the command of any military force, large, small or overall is, at its heart, very different to the management of civilian organisations. It is a mistake to assimilate the two.”

11. This point is extremely poignant in the context of in-coming government briefs, as the Department of Defence as an entity controlling the Australian Defence Force (ADF) is unlike any of the other Commonwealth departments, and has fundamentally different requirements for open, frank and candid communication with the government-of-the-day to any of the other government departments. Defence’s unique requirements are founded on the fundamentally different obligations, which Defence is required to meet, in regard to informing the government-of-the-day and maintaining the highest level of trust between the government-of-the-day and the government’s military forces.

12. Defence’s role as the defender of the democratic interests of Australia require Defence to be:

- a. both totally apolitical and also perceived by all parties as being apolitical;
- b. responsive to the needs to the government-of-the-day;
- c. trusted to fully, candidly and frankly inform and advised the government-of-day on all Defence and military matters;
- d. trusted to advise the government-of-the-day of the strategic impacts of both external influences on the Australian strategic environment as well as the impacts of any policy or proposed policy decisions of the government-of-the-day;
- e. trusted, by all branches of government and the people of Australia to defend Australia’s interests, sovereignty and democracy.

13. Each of these requirements are fundamental to the effective functioning of Defence, both at the present time and into the future. The release of this document would or could impact on the effective operations of Defence in the future by allowing scrutiny of Defence’s advice on hypothetical government policies, which would or could lead to unfair commentary about one or the other of the political parties. This would or could lead to the perception of the politicisation of Defence and substantially erode the trust between Defence and the government-of-the-day, or a future government-of-the-day, and/or the trust of the Australian people in Defence as an apolitical defender of Australian democracy.

14. Not only would this type of effect, if it crystallised, have an immediate and substantial impact on the proper and efficient operations of Defence, it would or could impact on Defence’s present or future ability to fully and frankly advise either present or future governments in a timely fashion and/or the willingness of present or future governments to heed the advice given by Defence.

15. In the Thomas Hedley case, Deputy President Logan considered it an essential part of understanding an agency's operating environment to also consider external contextual influences, at paragraphs 114-117 he stated:

"These are increasingly complex times in which we in Australia live and in which Australia interacts with the rest of the world.

To take one example and as we observed in the course of the hearing, none of us grew up in an Australia in which there were barriers preventing or inhibiting the vehicular traverse of the major public squares, malls and footpaths in our major cities. No need for these was once apprehended. It is a matter of notoriety that these have been erected because of a threat to public safety presented by those who would kill or maim using vehicles as a weapon and who perversely invoke the authority of the Islamic faith for so doing, one of the world's great religions, to which a significant minority of those who now live in these same cities are adherents. It is readily possible to bring to mind other ways in which violent acts invoking such authority have been committed in Australia and throughout the Western world on and from 11 September 2001, if not earlier in the modern era. Yet ordinary experience also tells one that the commission or encouragement of such violence is not the daily stuff of this same significant minority.

...
Religious-inspired terrorism aside, other notorious facts include rapidly-increased military spending in certain foreign countries, continuing territorial disputes – including in the South China Sea, and North Korea's testing of intercontinental ballistic missiles. It is possible but presently unnecessary to cite many other threats to our peaceful existence. These were the times in which the text exchange occurred and the present times are hardly more benign (for example, the likely extent of North Korea's nuclear capabilities has been more explicitly evidenced). The point is that, though we do not live in a period of general hostilities as in the First or Second World Wars, the need in a period short of general hostilities for an efficient ADF has never been greater."
 [Emphasis added].

16. In-line with the reasoning of Deputy President Logan in the Thomas Hedley case, I consider it is an essential element of Defence's functions to maintain open, responsive and trusted lines of communication between Defence and the government-of-the-day. This requirement is ever more amplified by the on-going strategic challenges which Defence now faces and that were outlined by Deputy President Logan in his reasoning.

17. Both the ability of Defence to act as an apolitical entity and to provide full, frank and candid advice to the government-of-the-day are fundamental necessities for the successful operation of Defence; the release of the documents would or could substantially impact on both of these fundamental and necessary operations of the department at the highest level of the interchange of military and civilian power, where trust is integral to both the ongoing operations of Defence and day to day governance of the Commonwealth.

18. For the reasons outlined above, I have determined that the document in question is conditionally exempt pursuant to s47E(d) of the FOI Act.

SECTION 47C [DELIBERATIVE PROCESSES] EXEMPTIONS OF THE FOI ACT

19. 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.*

20. In the Waterford case the AAT 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.**"*

21. The document in question was created to address a hypothetical event that did not and now can never eventuate. The document provided advice and recommendations about that hypothetical event and is deliberative in nature. In the words of the AAT in the Waterford case, the document is the "*processes of reflection, for example, upon the wisdom and expediency of a proposal*". The document was never provided to the potential intended hypothetical recipient and so has never left the thinking space of government and never should leave the thinking space of government, given that it is not Defence's role to provide advice to any entity except to the government-of-the-day or to another entity at the behest of the government-of-the-day. It is certainly not Defence's role to provide advice relating to the potential policies of different political parties to the public.

22. In the Thomas Hedley case, Deputy President Justice J. A. Logan set out the reasoning for the limited, but important role of considering frankness and candour. Deputy President Logan said:

"It is noteworthy that the catalogue of irrelevant considerations found in s11B(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”.”

23. Deputy President Logan continued at paragraph 71:

*“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.” [Emphasis added].***

24. It is clear from Deputy President Logan’s reasoning that it is essential to fully consider and understand the circumstances of the operational requirements of Defence and Defence’s communications when considering the release of deliberations under the FOI Act, especially those deliberations of a sensitive and advisory nature that are in or are potentially in the interchange area of military and political powers. Though currently judicially untested, it is reasonable to presume that Deputy President Logan’s cautionary note for the need for careful consideration of deliberative material of a sensitive advisory nature would extend to Defence leadership where the deliberative advice in question included advice and recommendations from military leaders given to what hypothetically could be the government-of-the-day (i.e. those who would have ultimately been decision-makers of many military decisions, which would have potentially impacted the defence of the Commonwealth for decades to come).

25. When considering FOI requests relevant to Defence’s communication systems with the government-of-the-day that relate to sensitive deliberations or include ADF matters, it is obvious from Deputy President Logan’s reasoning that consideration must be given to the far greater consequence for military personnel where it is perceived, or could be misconstrued by political powers, that those in the military are not aligned to the views of the political forces in power. Deputy President Logan in the Thomas Hedley case heavily predicated his reasoning on the “chilling effects” and subsequent loss of morale in making public sensitive deliberations for certain positions/professions. Deputy President Logan emphasised the fraught nature of the tenure of ADF Officers when expressing even essential and correct

military recommendations or advice. At paragraphs 124-126 of his judgment Deputy President Logan recited the tragic story of Colonel John Lavarack CMG, saying:

“Of the professions, only in respect of two in Australia, the profession of arms and the Law, as represented by the judicial branch of the latter profession, is appointment to the highest echelons the result of a Vice Regal decision made on the advice of political officers.

One effect of this is that the public expression of views which do not accord with those of the government of the day by those who aspire to these highest echelons can be fraught.

In relation to the profession of arms, the best Australian example of this, in our view, is offered by the experience of the then-Colonel John Lavarack CMG, DSO after his authorship of a scholarly article, published in 1933. In that article, with relentless logic, carefully and politely expressed, Lavarack sought to expose the strategic flaw in the “Singapore strategy”, given the reduced strength of the Royal Navy in both an absolute and relative sense, in the event of the involvement of the United Kingdom in a major European war at the same time as there occurred aggression or war in the Far East. Under the “Singapore strategy”, principal fleet units of the Royal Navy would deploy to a major base at Singapore so as either to deter aggression or to prevent the invasion of the then British Dominions and colonies in the Far East, which included Australia. Lavarack argued that this deployment would be difficult if not impossible, in the event of a simultaneous European war and that this carried with it a need for greater expenditure in respect of the field army in Australia. Australian governments in the 1930’s favoured the “Singapore strategy”. One reason for the attraction to the strategy was that it justified, especially at a time of financial stringency imposed by the Great Depression and its aftermath, minimal expenditure on the field army. The soundness of Lavarack’s thesis would be emphatically but tragically vindicated in February 1942 by the Fall of Singapore, the surrender of Malaya Command (including the 8th Division of the 2nd AIF) to the Japanese and a related “invasion scare” in Australia. By then, Lavarack had also demonstrated his sound abilities in higher formation command in the Middle Eastern theatre of operations, especially in the campaign in Syria and the Lebanon in June/July 1941. Though he was restored to the rank of Lieutenant General in the latter campaign, Lavarack never again commanded troops in the field. In respect of both his pre-war and Second World War career, it is now accepted that his advancement in the profession of arms was stultified as a result of the article which he wrote in 1933”.

26. Through the use of this tragic but poignant story, Deputy President Logan emphasised both the fundamental need for military personnel to give full, frank and candid advice without fear nor favour, and also the fraught position that military officers may find themselves in, when providing that exact same frank and candid advice. Deputy President Logan reasoned that, on sensitive matters involving the provision of sensitive advice or recommendations (especially those with potential to be politically perceived or misconstrued as having political aspects, such as the correct, timely and strategically significant advice of then-Colonel John Lavarack CMG in 1933), the publication of this advice can have a “chilling effect” both on the careers of military officers and the willingness of those in the military to supply that vital advice. In-line with the reasoning of Deputy President Logan, the impact of those “chilling

effects” and subsequent loss of morale in making public sensitive deliberative communications needs to be seriously considered when determining whether or not to release documents of a deliberative nature under the FOI Act. As the formation of in-coming government briefs rely heavily on the provision of frank and candid advice given by senior military personnel and given without fear or favour, there is strong public interest factors favouring refusing access to the document.

27. 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 case the circumstances surrounding the creation of the document is the provision of sensitive information to an in-coming government-of-the-day relating to current and future capabilities of Defence in relation to Defence’s ability to Defend Australia’s national interests in the light of the proposed hypothetical government’s policies. Once created, this document has been maintained in confidence and has not been released to the hypothetical intended recipient nor made publicly available.

28. The document in question was created as part of the normal and essential operations of providing recommendations to inform a hypothetical in-coming Labor government relating to proposed policies related to and/or affecting Defence as a whole, including the ADF. The document is an in-coming government brief that, by its nature, is an advisory document addressing hypothetical considerations and providing full, frank and candid advice. In essence, the document is a hypothetical deliberative document in the thinking space of government that relates to the wisdom and expediency of policy proposals of a hypothetical Labor government. Given that the material is deliberative advice/recommendations on potential government policies, the document is considered to be deliberative material for the purpose of the section 47C exemption of the FOI and therefore conditionally exempt from release.

29. 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. Defence’s public interest considerations in relation to these documents are set out below.

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

30. As part of my consideration on the relevant factors affecting the balance of public interest, I gave consideration to the objects of the FOI Act, the Guidelines provided by the Information Commissioner, and the factors favouring access to documents set out at subsection 11B 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.

31. In this case, I have determined that the documents have little ability to increase scrutiny of government expenditure, as the document relates to recommendations for proposals proposed by a hypothetical Labor government.

32. Whilst I accept that the release of the document sought by the Applicant would likely allow for an increase in discussion and comment amongst some sections of the community, this same discussion would or could unreasonably politicise Defence and result in substantial damage to Defence's ability to undertake its fundamental functions, by:

- a. impacting on Defence's ability to communicate sensitive information to the government-of-the-day (especially at election times) in a full, frank and candid manner;
- b. impacting on the thinking space of government; and
- c. unreasonably politicising Defence in a way that could or would impact on Defence's ability to maintain the essential trust needed with either the current government-of-the-day or future governments of the day.

33. For most government agencies, the need to both communicate with the government-of-the-day and to maintain an apolitical status is extremely important. However, for Defence as the military organisation charged with the defence of the nation, these requirements are crucial. It is crucial that Defence maintains the ability to:

- a. immediately communicate to the government-of-the-day, as the ultimate decision making body for the commitment of military forces;
- b. maintain the ability to advise the government-of-the-day in confidence and provide full, frank and candid recommendations;
- a. maintain both being an apolitical entity as well as being perceived as being a completely apolitical entity; and
- b. maintain the trust of both the current government-of-the-day and also future governments-of-the-day.

34. At points 85-86 of his, Judgment Professor John McMillan in the Information Commissioner's case of *Crowe and Department of the Treasury* [2013]³ (the Crowe case) set out the public interest considerations in not releasing the in-coming government brief for the unsuccessful party, stating:

***“Incoming government briefs play an important role in the Australian system of responsible parliamentary government. Their purpose is to enable and facilitate a smooth transition from one government to another following a general election.*”**

³ AICmr 69.

A new government may be formed and commence governing immediately after the election result is known. The new government will place strong reliance on receiving a helpful incoming government brief.

The incoming government brief will be prepared prior to the date of the general election, when both the election outcome and the identity of the new Minister are unknown. Immediately a government is formed a department must establish a working and trusting relationship with a new Minister. The confidentiality of the discussions and briefing provided to the new Minister are essential at that early stage in developing a relationship that accords with the conventions of responsible parliamentary government.

Part of the value of an incoming government brief is that it provides a department's frank and honest advice on the policy priorities and challenges facing a new government. A department may perceive the need to raise difficult questions for the Minister about implementing the policy agenda of the incoming government. The advice is prepared before the identity of the new Minister is known, and in that sense differs from other advice that may be prepared at the Minister's request or as part of the department's normal support and advising function. The context is unique and requires that confidential advice can be prepared by the department for the incoming Minister, without endangering the impending development of a proper working relationship with the Minister.

Another special feature of an incoming government brief is that it is prepared essentially as a communication limited to an audience that may comprise only one person – the new Minister. If it is known that the brief will be disclosed publicly under the FOI Act, there is a risk that it will be tailored to a different audience or with different interests in mind. This could compromise the quality and value of the brief and make it less relevant to its specific circumstance.

It is important, in the early days of a new government, that the public service is not drawn into political controversy, or required publicly to defend the advice provided to a new government. An incoming brief that is not confidential may include only bland material that will not raise concern, and possibly be of less value to a new government. An associated risk is that the brief will not be comprehensive and will be replaced by oral briefings to the new Minister.

Four additional points in Treasury's submission apply specifically to the portions of the blue book to which this IC review relates:

Special treatment is given to the brief prepared for a party that does not form government. The brief is never provided to that party, nor does it have the opportunity to consider and respond to it. Circulation of the brief is limited, even within the department, and the practice followed by some departments prior to 2010 was to destroy all copies of the brief once the outcome of the election was known. Public release of any portion of the brief would compromise the department's role in managing the transition from one government to another.

Public release of the confidential advice prepared for a party that did not form government could complicate the relationship between the public service and the Ministers who have formed government.

It is a convention of Cabinet government that the Cabinet papers of one government are not available to the Ministers of another. By extension, the high level advice that was prepared for a party in the expectation that it may (but did not) form government should not be released publicly under the FOI Act.

It is unfair to the party that did not form government to make public the assessment of its policies by a department, when the party has not had an opportunity to adjust or implement those policies.” [Emphasis added].

35. I am satisfied that the expected effect of disclosing the document to the Applicant, as set out above and by Professor John McMillan in the Crowe case, could or would reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Defence by impacting on the above functions. Therefore, 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 find that, on balance, the public interest is best served by not disclosing the document and by deeming the information exempt under section 47C and sub-section 47E(d) of the FOI Act.

36. I am aware of factors outlined in section 11B(4) [irrelevant factors] of the FOI Act and in coming to my decision I have ensured that none of these irrelevant factors were considered.

Yours sincerely,

Justine.
Nordin

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Justine Nordin
Accredited Decision Maker
Associate Secretary Group