



Reference: BN8544122

FOI 031/19/20 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:

- a) *the number of referrals against journalists and/or media organisations by the Department of Defence and/or the Office of the Defence Minister to law enforcement agencies including but not isolated to the Australian Federal Police regarding allegations of breaches of national security laws and/or secrecy laws, and/or;*
- b) *the number of referrals to law enforcement agencies over alleged unauthorised disclosure of information by Defence staff, and/or;*
- c) *formal correspondence and documentation regarding these referrals. The information pursued in a) and b) is purely statistical and should not be exempt under the Act. The time frame for this request is 1st of July 2017 – 15 July 2019.'*

excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents, and documents sent to and from you. Furthermore, Defence only considers 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 four documents as matching the scope of the request. These documents are the four referrals that Defence made to the Australian Federal Police during the period 1 July 2017 and 15 July 2019.

4. Defence does not make referrals against journalists and/or media organisations and as such, no documents were identified as matching part (a) of the scope of this request.

Decision

5. I have decided to partially release all four documents, on the grounds that public disclosure of the documents would, or could reasonably be expected to, cause damage to the security of the Commonwealth under subsection 33a(i) of the FOI Act. One of the documents contains personal information of individuals and this information is exempt from release under section 47F(1) of the FOI Act.

Material taken into account

6. 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 of the FOI Act;
- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the FOI Guidelines);
- e. cited case law;
- f. advice received from relevant areas across the Department of Defence; and
- g. advice received from the Australian Federal Police.

Reasons for decision

Section 33(a)(i) – [Documents affecting national security]

7. After reviewing the documents I have determined that they contain exempt material, pursuant to subsection 33(a)(i) - [Documents affecting national security] of the FOI Act. Subsection 33(a)(i) of the FOI Act stipulates that:

“A document is an exempt document if disclosure of the document under this Act:
 (a) *would, or could reasonably be expected to, cause damage to”.*

...

(i) *the security of the Commonwealth”*

8. The term ‘*security of the Commonwealth*’ is defined in subsection 4(5) of the FOI Act. Subsection 4(5) states:

Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:

- (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and*
- (b) *the security of any communications system or cryptographic system of the Commonwealth or of another country used for:*
 - (i) *the defence of the Commonwealth or of any country allied or associated with the Commonwealth; or*
 - (ii) *the conduct of the international relations of the Commonwealth.*

9. Importantly when considering the application of a section 33a(i) exemption, the exemption should be construed broadly. In the case of *Prinn and Department of Defence* [2014]¹ the Privacy Commissioner Timothy Pilgrim cited with approval the reasoning in *R v Bersinic* [2007] ACTSC 46, in which the Court said at [5]-[6]:

“[A] court should be particularly cautious when confronted with a claim for non-disclosure on grounds of national security.

... It is probably safer to err on the side of non-disclosure provided the interests of other citizens ... are able to be protected.”

¹ AICmr 84.

10. The need for both a cautious approach to the release of documents with the potential to affect the security of the Commonwealth and the need to consider the broader context that the document exists in was set out by Spender J. in the AAT case of *Aldred and Department of Foreign Affairs and Trade* [1990]².

11. The FOI Guidelines pick up on and support both of these lines of reasoning, at paragraph 5.33 stipulate:

“It is well accepted that securing classified government information forms part of the security of the Commonwealth.³ The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time. Where a request is received for classified government information, the documents must be considered both individually and collectively. The Information Commissioner believes that it might be safer for the FOI decision maker to err on the side of non-disclosure provided the interests of other citizens are able to be protected.⁴ Where there is doubt, this should be in favour of non-disclosure.”

12. In examining both the scope of the FOI request and the identified documents it is clear that the request is directed at obtaining information about national security or documents connected with national security, therefore I consider that the documents are exempt pursuant to section 33(a)(i) of the FOI Act. In coming to this conclusion I took into consideration:

- a. the circumstances surrounding the document and the environment in which the documents were created, which in this case was the environment of referral for investigation of actions that adversely impact on national security;
- b. the sensitive nature of the referral and the fact that the referrals were created with an expectation of confidence, I also took into consideration that the documents have been maintained close hold and in confidence;
- c. the need for Defence to protect the processes, procedures and steps it takes when dealing with incidents affecting national security, including any referrals to law enforcement agencies;
- d. that the documents provide information about the securing of secret information, which could or would, if released, provide information on potential weaknesses in the current security measures for controlling secret information; and
- e. that a loss of trust in Defences’ ability to maintain its secret information, could or would led to third parties (including foreign intelligence agencies) refusing to share sensitive information, essential for maintaining the national interests, with Defence. In *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988]⁵ cited with approval the reasoning of both Davies J in the case of *Re Ric Throssell and Australian*

² AATA 833

³ *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

⁴ *As per Prinn and Department of Defence* [2014] AICmr 84 at paragraphs 23 to 24].

⁵ AATA 110.

Archives [1986]⁶ and Neaves J in the case of *Re Ric Prichard Throssell and Australian Archives* [1987]⁷ [Re Throssell (No.2)], stating at paragraphs 40-41:

“Security is a particularly sensitive area and particularly dependent for its effectiveness upon an adequate flow of information. See the comments of Davies J. in Re Throssell.

In Re Throssell (No.2) Neaves J. also referred to the inhibition in the flow of information at pages 10-11:

The material before the Tribunal tends to support the conclusion that the disclosure to the public of the records identified in the certificate could have the result of impairing the degree of trust and confidence which foreign governments place in the Government of the Commonwealth and, in consequence, of inhibiting the flow of information relating to security which might otherwise come to Australia from the overseas governmental agencies concerned and, possibly, similar agencies in other overseas countries. If such a result ensued, damage would be caused to the security and international relations of the Commonwealth. Whether such action on the part of the foreign governments and agencies would be a rational or otherwise proper reaction to the disclosure of these particular records is not to the point. The question is whether such action could reasonably be expected in the event of access being granted.” [Emphasis added].

13. The information in the documents could or would, if released, adversely affect the security of the Commonwealth, therefore I consider that it is exempt from the operation of the FOI Act, pursuant to section 33(a)(i) of the FOI Act.

Section 47F – [Personal privacy]

1. One of the documents contains the personal information of individuals. It is appropriate to consider whether this information is exempt from release under section 47F(1) of the FOI Act.

2. Personal information such as names and employment information that would identify individuals are contained within one document. This information could be used to reasonably ascertain the identity of an individual and therefore satisfies the definition of personal information in section 4 of the FOI Act. To determine whether the disclosure of the identified personal information was unreasonable, I had regard to the criteria specified in section 47F(2) of the FOI Act.

3. Section 47F(2) states:

General Rule

(2) *In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*

(a) *the extent to which the information is well known;*

⁶ AATA 229.

⁷ AATA 453.

- (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;*
- (d) *any other matters that the agency or Minister considers relevant.*

4. 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 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.

5. With reference to the assessment above, I consider that the release of personal information that would identify individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act.

6. Section 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless access to the document would be contrary to the public interest.

Public interest considerations – Section 47F

7. When assessing whether the disclosure of the personal information is contrary to the public interest, I considered the factors that favour access to a document set out in section 11B(3) of the FOI Act [Public interest exemptions – factors]. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

8. In relation to section 11B(3)(a) of the FOI Act [Promote the objects of this Act (including all the matters set out in sections 3 and 3A)], information held by the Government is a national resource and release of the personal information would promote the object of the FOI Act specified in section 3(1)(b) of the FOI Act.

9. 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).

10. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factor I find particularly relevant to this request are that disclosure of the documents:

- a. could reasonably be expected to prejudice the protection of an individual's right to privacy (Paragraph 6.22(a))

11. I find that the public interest factors against disclosure outweigh the factors for disclosure of the identified personal information and I deem the information exempt under section 47F(1) of the FOI Act.

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Joanne Groves
Accredited Decision Maker
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