



Australian Government
Department of Defence

Reference: BN10869320

FOI 171/19/20 - STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by ^{name} provided under the *Freedom of Information Act 1982* (FOI Act), for access to:

1. *Any communications from the Department between 17 September 2019 and 20 September 2019 arising from my ABC enquiry and relating to contact reporting, security contact reports, soft power, foreign interference, espionage*
2. *Any communications from Department secretary Greg Moriarty in 2019 about contact reporting, security contact reports, soft power, foreign interference, espionage*
3. *The number of security contact reports filed by Department of Defence employees in 2019*
4. *Any briefings or submissions created about security contact reports since 2019*
5. *The number of security contact reports filed by Department of Defence employees in 2018*
6. *The number of security contact reports filed by Department of Defence employees in 2013*
7. *The number of Department of Defence employees who filed security contact reports in 2019, and who also held top secret security clearance.*

The Department of Defence excludes personal email addresses, signatures, personnel (PMKeyS) numbers and mobile telephone numbers contained in documents that fall within the scope of a FOI request unless you specifically request such details. Defence also excludes duplicates of documents and documents sent to or 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 17 documents as matching the description of the request.
4. The decision in relation to each document is detailed in a schedule of documents.
5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. fully release three documents from items 1, 2, and 4;
 - b. partially release 13 documents of the request from item 1 in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of

the FOI Act, on the grounds the deleted material is considered exempt under section 7 [exemption of certain persons and bodies], 47E(d) [certain operations of agency-effective and efficient operations], and section 47C [deliberative processes] of the FOI Act;

- c. refuse access to documents from item 7 under subparagraph 24A(1)(b)(ii) [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act;
- d. deny access to item 2, document 1 in accordance with section 22 of the FOI Act, on the grounds that the material is derived from an exempt agency in accordance with section 7 of the FOI Act;
- e. 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

7. 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. advice from the Secretary's office;
 - f. advice from Defence Media,
 - g. advice from Defence Security and Vetting Service; and
 - h. advice received from other relevant subject matter areas.

Reasons for decision

Section 7 – Exemption of certain persons and bodies

8. The Guidelines state:

Under s 7(1), the following bodies specified in Schedule 2, Part I, Division 1 are not agencies for the purposes of the FOI Act:

...

- *Australian Security Intelligence Organisation (ASIO)...*

9. Defence does not capture information relating to Items 3, 5, and 6. We are unable to easily identify the different levels of people reporting issues as this is not distinguished in information retained by Defence. Determination of security and employment levels would require vetting of each individual report, reports which are derived from an agency exempt from the FOI Act under section 7.

10. The Guidelines go on to state:

All Australian Government agencies are exempt from the operation of the Act in relation to 'intelligence agency documents' (for example, a document that originated with or was received from ASIO or ONA) (s 7(2A)) and 'defence intelligence documents' (for example, a document that originated with or was received from the Department of Defence and relates to the collection, reporting or analysis of operational intelligence (s 7(2C)). These exemptions also apply to documents in the possession of ministers (s 7(2B)). The exemption

extends to a part of a document that contains an extract from or a summary of an intelligence agency document or a defence intelligence document.

11. Taking the above into account, I consider that information requested under items 3, 5, and 6 is exempt under section 7 of the FOI Act.

Section 24A(l) of the FOI Act - Requests May Be Refused

12. I could not locate any documents related to Items 7. Section 24A(l) of the FOI Act states:

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

13. Paragraph 3.95 of the Information Commissioner Guidelines advises what detail this statement of reasons needs to include to refuse a request under section 24A(l):

The statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search.

14. To ensure that "all reasonable steps" have been taken in this request, every reasonable avenue of locating the documents has been exhausted.

15. Defence Security and Vetting Service personnel undertook document searches in the Defence electronic record management system (Objective) and physical files (including archived files). No documents within the scope of this request were identified related to 'The number of Department of Defence employees who filed security contact reports in 2019, and who also held top secret security clearance'.

16. I am satisfied that "all reasonable steps" have been taken to locate the documents sought by the applicant. I am satisfied that the documents cannot be found or do not exist, and refuse access to this request under section 24A(l) of the FOI Act.

Public Interest Conditional Exemptions

Section 47C [Deliberative processes]

17. Section 47C(1) of the FOI Act states:

'A document is conditionally exempt if its disclosure under the 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 process involved in the functions of...an agency....'

18. The comments protected within the documents provide an opinion or suggestion regarding the documentation and format for reporting. The information is not confirmed as fact, statistical

data or formal reporting, rather, the information relates to a departmental administrative officer making comments regarding their opinion.

19. The FOI Guidelines advise that:

...no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.

20. Whilst I am not required to consider whether harm will result from releasing the information, I do make such a consideration. In my view, the release of the thinking processes, opinions, and development of the Media advice could be expected to negatively influence administrative officers from voluntarily providing opinion in future processes.

21. I found that eight documents contained the consultation or deliberation that has taken place, in the course of, or for the purpose of, a deliberative process of the government or agency or minister. It is considered to be important that the department continues to undertake these deliberations with frankness, candour and completeness. The release of this material could reasonably be expected to inhibit the department's ability to produce and provide similar responses in the future.

22. Opinions can be considered to differ from advice such that the advice is provided in a professional capacity within the confines of a public servant's duties; whereas opinions infer a more emotive and instinctive response, not necessarily complying with the professional norms and guides that exist within that particular specialty.

23. Taking into account the above factors, I consider that the release of the information would be an unreasonable disclosure of deliberative information and is conditionally exempt under section 47C of the FOI Act.

Section 47E(d) [Certain operations of agencies – effective and efficient operations]

24. In making my decision, I found material to be exempt under subsection 47E(d) of the FOI Act. Subsection 47E(d) of the FOI Act state:

'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.'

25. Defence has a responsibility for administering security complaint and investigation process issues and incidents in a timely, efficient, and effective manner.

26. I consider 'PX' and the Australian Federal Police (*Freedom of Information*) [2019] AICmr 8 in which the Information Commissioner (IC) considered the issue of releasing the contact details of the Ombudsman investigation officer. The IC determined that:

...in my view, giving the applicant access to the contact details would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations, in particular the function of the Ombudsman to investigate complaints...

27. Information removed within the documents relates to means of direct contact with personnel required to manage security policy and incidents, including research and investigation. The release of these details to the public, in particular the media, could reasonably be expected to have a substantial effect on the progress of their day to day activities if they are to be regularly approached for direct comment. Defence management of serious incidents, in particular incidents subject to media speculation, could reasonably be expected to be harmed or adversely hampered by direct interruption of the personnel managing the incident.

28. I also consider that Defence has freely available media contact details through which any enquiries, complaints, or suggestions can be submitted, and addressed rapidly.

29. I contend that disclosure of the names, positions and position identifiers would be expected to diminish the ability of Defence to develop and resolve security policy and issues in a timely and efficient manner in order to minimise potential security breaches. Noting the above, I have decided that the material is conditionally exempt under sections 47E(d) of the FOI Act.

Public interest considerations – sections 47C and 47E(d)

30. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the FOI 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.

31. The issues addressed in the documents relate to individual perceptions and opinions regarding actions in the workplace, not official public service business. In my view, disclosure would cause a detriment to future requests for information, as individuals may not provide candid information if they were aware that it could subsequently be released to the world at large. Further, there is an expectation that Defence manages personal information in a sensitive way.

32. In relation to the information, disclosure of the specific may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the information protected by these sections would not increase scrutiny or discussion of government activities. I consider the direction that the Information Commissioner made in *Seven Network (Operations) Limited and the Australian Competition and Consumer Commission (Freedom of Information) [2019] AICmr 29* that stated:

...the public interest test in s 11A(5) does not require a decision maker to consider whether disclosure of conditionally exempt material would be in the public interest. Rather, access to a conditionally exempt document must be given, unless giving access to the document, at the time of the decision, would, on balance be contrary to the public interest.

33. The information is not the applicant's own personal information. Additionally, disclosure of the information would not promote oversight of public expenditure.

34. 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:

- a. security, law enforcement, public health or public safety
- b. an agency's ability to obtain confidential information
- c. an agency's ability to obtain similar information in the future
- d. the management function of an agency
- e. the flow of information to the police or another law enforcement or regulatory agency.

35. In this case, I give greater weight to the factors against disclosure. In particular, I consider that the public interest lies with protecting the integrity and robustness of Defence's ability to manage security issues in an effective manner.

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

37. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the information that matches the scope of the request. I

therefore decided that it would be contrary to the public interest to release the information considered exempt under sections 47C, and 47E(d) of the FOI Act.

Section 22 (where documents are being denied in full)

38. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. It is my view that it would not be reasonably practicable to prepare an edited copy of the document without disclosing exempt material. Doing so would leave only a skeleton of the former document that would convey little of its content or substance.

Amanda Black

Amanda Black
Accredited Decision Maker
Defence Security and Vetting Service