



Reference: BN13925218

**FOI 339/19/20 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the application by \_\_\_\_\_ under the *Freedom of Information Act 1982* (FOI Act), for access to:

*“All advice (both internal advice, and advice externally provided to ministers) produced by the Defence Department since 1 November 2019 relating to the deployment of ADF reservists*

*Any briefings provided to relevant ministers since 1 November 2019 relating to the deployment/possible deployment of ADF resources*

*All briefings provided to relevant ministers since 1 November 2019 regarding more generally the use of Defence Force resources for bushfire assistance (including but not limited to evacuations, relief work, recovery work, and firefighting operations)”*

*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 36 documents as matching the description of the request.

4. The decision in relation to each document is detailed in the attached schedule of documents.

5. I have added an FOI reference number and document number to each of the documents, which corresponds with the schedule.

**Decision**

6. I have decided to:

- a. release 27 documents in full;
- b. partially release five documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 42 [legal professional privilege], section 47E [public interest conditional exemptions-certain operations of agencies] and section 47F [public interest conditional exemptions-personal privacy] of the FOI Act;

- c. deny access to four documents on the grounds that they are considered exempt under section 34 [Cabinet documents] of the FOI Act; and
- d. 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); and
  - e. consultation with the Department of Prime Minister and Cabinet.

### **Reasons for decision**

#### **Section 22 – Access to edited copies with exempt or irrelevant matter deleted**

8. 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. Upon examination of the documents I identified material which I consider could reasonably be regarded as irrelevant to the request. As such I have prepared an edited copy of the documents with this irrelevant material deleted.

#### **Section 34 – Cabinet documents**

9. Section 34 of the FOI Act states:

*(1) A document is an exempt document if:*

*(a) both of the following are satisfied:*

*(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*

*(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet;....*

*(b) it is an official record of the cabinet: or*

*(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*

*(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.*

10. The guidelines relating to section 34 of the FOI Act state that Agencies should refer to the Cabinet Handbook issued by the Department of Prime Minister and Cabinet (PM&C) for guidance about Cabinet processes and the underlying principles of the Cabinet System. The Handbook states that agencies must consult with PM&C on any Cabinet-related material identified as being within the scope of an FOI request.

11. I have identified four documents (documents 19, 21, 25, and 31 in the attached schedule) that fall within this category as they were prepared for the Minister for Defence and Chief of Defence Force's attendance at National Security Committee meetings. As such, PM&C were consulted on the documents.

12. Based on the above, I am satisfied that the requirements of section 34 have been met. Accordingly, I exempt the release of these documents in full.

### **Section 42 – Documents subject to legal professional privilege**

13. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the grounds of legal professional privilege.

14. A document is exempt from production on the ground of legal professional privilege if all of the following apply:

- a. there exists a solicitor-client relationship;
- b. there have been confidential communications which are recorded in the document;
- c. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
- d. the privilege has not been waived.

15. I have identified information in three documents (documents 13, 29 and 32 in the attached schedule) that incorporate material prepared within the bounds of legal professional privilege. I am satisfied that the legal adviser/client relationship has been established, as the advice was provided by a qualified lawyer, who was acting in their capacity as a professional adviser.

16. Further, I am satisfied that the specific material contained in the documents relevant to this request were created for the dominant purpose of giving legal advice, and there is no reason to doubt the legal advisers' independence in providing such advice. I note that legal professional privilege is the client's privilege to waive and I am satisfied that the waiver has not occurred. I note that while the material in question contained in the documents is being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed in paragraph 5.148 of the Guidelines, which states modern organisations often work in teams and several people may need to know about privileged communications.

17. I find that disclosure of the material identified as exempt under section 42(1) would involve disclosure of information that would be exempt from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I am satisfied that the material identified is exempt under section 42(1).

### **Section 47E – Certain operations of agencies**

18. Subsections 47E(c) and 47E(d) of the FOI Act state:

*A document is conditionally exempt if its disclosure under the Act would, or could reasonably be expected to:*

...

*(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*

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

19. In relation to subsection 47E(c) of the FOI Act, the Guidelines advise that, where the document relates to management of personnel, the decision maker must address whether:

- a. an effect would be reasonably expected following disclosure; and

- b. the expected effect would be both substantial and adverse.
20. I considered whether:
- a. prejudice could reasonably be expected to occur to the effectiveness of the procedures or methods of the agency; and
  - b. the disclosure of these documents at this time would, on balance, be contrary to the public interest.
21. Upon examination of the documents, I found that information that warrants a claim for exemption under subsection 47E(c) of the FOI Act as they reveal the personal details of reservists supporting Operation Bushfire Assist. It would be unreasonable in the circumstances to fully identify them without specific approval from each individual named.
22. The release of these documents may prejudice the Department's ability to attract and retain reservist personnel, particularly its ability to provide short-notice Defence Aid to the Civil Community under 'Call For' (volunteer) arrangements in the future. Assurances that the personal privacy of individuals is effectively protected unless they agree to public release is core to the conduct of Defence business.
23. 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 an expected manner.*
24. Upon examination of the documents, I found some information concerning the proper and efficient conduct of the operations of Defence, specifically points of contact related to Defence's operational activities (documents 13, 14, 15 and 29 of the schedule).
25. Releasing information identifying points of contact could adversely affect Defence's ability to efficiently conduct similar future operations as this information is managed closely to ensure that only relevant material and contact is made during high-tempo periods.
26. Taking the above into consideration, I am of the view that release of the information would have a substantial adverse effect on Defence's management of personnel and the proper and efficient conduct of the operations of Defence. The information is therefore conditionally exempt under section 47E of the FOI Act.

### **Section 47F - Personal privacy**

27. Upon examination of the documents, I identified information, specifically names and personal information of third parties other than the applicant (document 15 of the schedule).
28. In making my decision, I considered whether:
- a. the document contained personal information;
  - b. the disclosure of the personal information would be unreasonable; and
  - c. the disclosure of this information would, at this time, be contrary to public interest.
29. As a person's identity is apparent or reasonably ascertainable from the identified information, I have decided that it constitutes personal information.
30. In determining whether release of the above personal information is unreasonable, I took into account, inter alia:
- a. the extent to which the information is well known;

- b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt within the document; and
- c. the availability of the information from publicly accessible sources.

31. Against these criteria, I found:

- a. the specific identified information is not well known;
- b. the persons to whom the information relates is not widely known to be (or to have been) associated with the matters dealt with in the documents; and
- c. the specific identified information is not available from publicly accessible sources.

32. With reference to the assessment above, I consider the release of personal identifying information of third parties, other than the applicant, would be an unreasonable disclosure of personal information and therefore find part of document eight conditionally exempt under subsection 47F(1) of the FOI Act.

**Public interest considerations – Sections 47E and 47F**

33. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the documents at the time would, on balance, be contrary to the public interest’.

34. I considered that disclosure will promote some of the objects of the FOI Act, as information held by the Government is a national resource. However disclosure of the information identified as exempt in this document would not increase participation in debate on a matter of public importance, nor would it increase scrutiny or discussion of Defence activities. In fact release of the information could reasonably be expected to cause harm to the privacy of the individuals identified within the document and have an adverse impact on Defence’s proper conduct of operations in the public interest.

35. 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. the protection on 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; and
- e. the efficient and effective management of an agency.

36. 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 and 47F of the FOI Act.

37. In coming to the above decision I considered factors outlined in section 11B(4) [irrelevant factors] of the FOI Act. None of these factors were taken into account in making my decision.

**Further Information**

38. A number of the documents matching the scope of this request were classified while others contained a dissemination limiting marker. I have declassified the versions of the documents that are approved for release and where relevant, the marker has been struck through.

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COL Jason Logue  
Accredited Decision Maker  
Vice Chief of the Defence Force Executive