



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

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

*“the incoming government briefs prepared by the department, including but not limited to information uploaded to an App and/or part of the Digital First System”*

*excluding personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. Furthermore, Defence only considers final versions of documents.*

**FOI DECISION MAKER**

2. I am a relevantly authorised officer, pursuant to section 23 of the FOI Act, authorised to make a decision in regards to this FOI request.

**DOCUMENTS IDENTIFIED**

3. I have identified a single document as matching the description of the request. For the purposes of this Statement of Reasons the identified document will be referred to as the Incoming Government Brief (IGB).

4. The decision in relation to the IGB is detailed in a schedule of documents. I have added an FOI reference number and Item/Serial number to each of the sections of the IGB, these numbers correspond with the numbers set out in the schedule.

**DECISION**

5. I have decided to partially release the IGB 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 in accordance with the following sections:

7 – [Exemption of certain persons and bodies];

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

33a(ii) – [Documents affecting the defence of the Commonwealth];

33a(iii) – [Documents affecting international relations of the Commonwealth]

34 – [Cabinet documents];

47C – [Public interest conditional exemptions – deliberative process];

47D – [Public interest conditional exemptions – financial or property interests of the Commonwealth]; and

47E – [Public interest conditional exemptions – certain operations of agencies].

**MATERIAL TAKEN INTO ACCOUNT**

6. In making my decision, I had regard to:

- a. the terms of the Applicant's FOI request;
- b. the content of the IGB;
- 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. advice received from relevant Departmental officers across all Groups and Services within the Department of Defence (Defence); and
- f. relevant case law as cited.

## REASONS FOR DECISION

### Section 7 – Exemption of certain persons and bodies

7. Section 7(2A) of the FOI Act exempts from the operation of the FOI Act any documents from exempted agencies, further section 7(2A) extends that exemption over any material contained in other documents which contain either extracts from, or summaries of, either an intelligence agency's document, or a defence intelligence document. Section 7(2A) states:

*An agency is exempt from the operation of this Act in relation to the following documents:*

- (a) *a document (an **intelligence agency document**) that has originated with, or has been received from, any of the following:*
  - (i) *the Australian Secret Intelligence Service;*
  - (ii) *the Australian Security Intelligence Organisation;*
  - (iii) *the Inspector-General of Intelligence and Security;*
  - (iv) *the Office of National Intelligence;*
  - (v) *the Australian Geospatial-Intelligence Organisation;*
  - (vi) *the Defence Intelligence Organisation;*
  - (vii) *the Australian Signals Directorate*
- (b) *a document that contains a summary of, or an extract or information from, an intelligence agency document, to the extent that it contains such a summary, extract or information.*

8. After studying the material in the IGB, I am satisfied that it contains information that pertains to an intelligence document originating from or to an agency exempt from the operations of the FOI Act, as identified in section 7(2A)(a). As such I consider that the material redacted and marked as section 7(2A) is exempt material, pursuant to section 7(2A) of the FOI Act.

### Section 33 – Documents affecting National Security, Defence or International Relations – Background Information

9. IGB are briefs that give the incoming government a comprehensive overview of the state of an agency and its functions, as well as its key priorities. In the context of Defence's IGB, the document provides strategic insights into:

- a. Commonwealth security;
- b. Commonwealth defence; and
- c. Commonwealth international relations.

As the IGB is a comprehensive overview of Defence’s position and ability to achieve its core functions, the IGB will, if released, be analysed both in terms of what it includes and what it does not include, as well as the level of detail provided to each topic. In making my decision in relation to the application of section 33 exemptions, I have taken this factor into consideration.

10. In considering the applicability of each of the different section 33 exemptions, I have taken into consideration:

- a. the strategic and important nature of this document;
- b. the potential interest associated in the IGB by certain elements including foreign military analysts; and
- c. the fact that any documents released under an FOI request cannot be conditionally released, so must be considered as being released to the world at large.

### **Section 33(a)(ii) – [Documents affecting the defence of the Commonwealth]**

11. In considering the contents of the IGB, I have determined that it contains exempt material, pursuant to subsection 33(a)(ii) of the FOI Act. Subsection 33(a)(ii) 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”.*

...

*(ii) the defence of the Commonwealth”*

12. The operative terms in subsection 33(a)(ii) of the FOI Act are – ‘reasonably expected’, ‘damage’ and ‘defence of the Commonwealth’. Therefore, to understand the proper operation of subsection 33(a)(ii), these three terms need to be defined.

13. The term “reasonably expected” or “reasonable expectation of” has been the focus of much judicial consideration. The widely accepted interpretation for the meaning of the term is the definition set out in the Federal Court in *Attorney-General’s Department v Cockcroft* (1986)<sup>1</sup> (here after known as “the Cockcroft case”). The Cockcroft case set out that “reasonable expectation” requires judgement as to what is reasonable, ‘as distinct from something that is irrational, absurd, or ridiculous.’ Further the Court stated that it was “undesirable to attempt any paraphrase of these words or to consider the operation of the provision in terms of probabilities or possibilities or the like”. However, this test is balanced by the reasoning in the Federal Court case of *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992)<sup>2</sup> where the Court stressed that the words “reasonably expected” needed to receive their ordinary meaning and that the test in *Cockcroft* could not be interpreted to mean that an outcome which is not “irrational, absurd, or ridiculous” must automatically be regarded as reasonable.

14. In defining the term damage, it should firstly be noted that section 33 of the FOI Act uses the term “damage” rather than the more onerous term “substantial adverse effect”. The term damage is not defined in the FOI Act so should be given its normal meaning in

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<sup>1</sup> 64 ALR 97.

<sup>2</sup> 108 ALR 163.

accordance with the rules of statutory interpretation. The Australian Oxford Dictionary defines ‘damage’ to mean: “loss of what is desirable”; “injury impairing value or usefulness”; “injure so as to diminish value”; or “detract from reputation”. The Macquarie Dictionary defines the word ‘damage’ to mean: “injury or harm that impairs value or usefulness”.

15. At paragraph 5.31 of the FOI Guidelines, the term ‘damage’ is further defined. The FOI Guidelines state:

*The meaning of ‘damage’ has three aspects:*

- i. *that of safety, protection or defence from something that is regarded as a danger. The AAT has given **financial difficulty, attack, theft and political or military take over as examples.***
- ii. *the means that may be employed either to bring about or to protect against danger of that sort. **Examples of those means are espionage, theft, infiltration and sabotage.***
- iii. *The organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect. [Emphasis added].*

16. The term ‘defence of the Commonwealth’ is also a term that is not defined by the FOI Act. However the term was somewhat defined in the Administrative Appeals Tribunal (AAT) case of *Dunn and Department of Defence*<sup>3</sup> to encompass all of the relevant Defence areas envisaged by the Australian constitution. Deputy President S A Forgie in *Dunn*, whilst citing with approval *Re Hocking and Department of Defence*<sup>4</sup>, set down that:

*“Section 51(vi) of The Constitution makes it clear that the defence power extends not only to external defence but also to the maintenance and control of forces to execute and maintain laws of the Commonwealth, while section 119 of The Constitution requires the Commonwealth, on the application of the government of the State, to protect the State against domestic violence.”*

17. The FOI Guidelines at paragraph 5.34 further define the term “defence of the Commonwealth” in the following terms:

*Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:*

- *meeting Australia’s international obligations*
- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursions into Australian territory*
- ***protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.** [Emphasis added]*

18. In determining the extent to which the section 33(a)(ii) exemption applies, the FOI Guidelines at 5.39 stipulate:

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<sup>3</sup> [2004] AATA 1040.

<sup>4</sup> (1987) 12 ALD 554 (in part) and AAT 3483

*“When evaluating the potential harmful effects of disclosing documents that affect Australia’s national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the ‘mosaic theory’. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia’s national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption”.*

19. In all cases, determining the potential for damage that would or could be caused by the release of the material in this document, the potential for damage needs to be considered in light of the context of:

- a. what the IGB is and what information it contains or does not contain;
- b. what the IGB would or could reveal about the capabilities of the Australian Defence Force (ADF) in combination with other available information;
- c. the context of why and how the IGB was formed; and
- d. the context in which the IGB has been maintained.<sup>5</sup>

20. Given the above considerations, I consider that the release of the IGB would or could damage the defence of the Commonwealth by:

- a. Providing valuable information on the current and future strategic capabilities of the ADF and the placement of those capabilities, which could or would undermine Defence’s ability to undertake its functions in the face of adversaries that might seek to inhibit Defence’s proper functions in protecting the sovereignty of Australia and Australia’s interests; and
- b. Providing valuable information on the current and future strategic objectives of Defence necessary for ensuring the future defence of Australia and its interests.

21. The release of this information could or would undermine Defence’s current and future ability to undertake its functions in the face of adversaries that might seek to inhibit Defence in those functions by providing information useful for:

- a. thwarting Defence’s current and/or future strategic initiatives;
- b. creating counter strategies to overcome strategic protective measures; or
- c. gaining prior knowledge of Defence’s intentions, which could be used to inhibit Defence from achieving its goals.

22. In understanding the Defence context through the scope of the mosaic theory, it is essential to take into consideration Defence’s capability and security requirements and the wide breadth of information otherwise available to external parties, to which it is not within

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<sup>5</sup> 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”.**

Defence's ability to control or restrict access. The IGB contains key strategic information about the ADF which, if released, would or could make up key pieces of the mosaic that along with other pieces of information already available would provide information that could or would damage Defence's abilities to undertake its core functions.

23. The importance of the mosaic theory, or the cumulative prejudice theory as it is also known, was set out by the AAT in *Re Millisse and National Archives of Australia* [2000]<sup>6</sup> at paragraphs [21] and [22]:

*“[I]n seeking to obtain access to material, a searcher may seek or be enabled to with the smallest particle of intelligence, even though such particle may be innocuous standing alone, when used in conjunction with other pieces of intelligence build up a picture, the like of which the searcher was seeking to construct.*

*Thus information on its face or in conjunction with other material might, depending on the evidence, enable a person to ascertain by process of inference, induction or deduction, the identity of a source in question.”*

24. The importance of maintaining Australia's strategic interests, including in securing strategically important information, was highlighted by the reasoning of Deputy president Logan in the Thomas Hedley case in which he emphasised the need to understand the current context in which Defence must operate, he stated:

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

...

*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].*

25. After examining the IGB and taking account of the above considerations, I find that the release of the material in the IGB would or could damage Defence's ability to undertake its core functions. I am satisfied that the release of the redacted material in the IGB, which is marked as exempt pursuant to section 33a(ii) of the FOI Act, would or could damage the Defence of Commonwealth. As such, I consider the release of that redacted material exempt from the operation of the FOI Act.

### **Section 33(i) – Documents affecting national security**

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<sup>6</sup> AATA 565 at paragraphs 21 and 22.

26. After reviewing the IGB, I have determined that it contains 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:  
(b) would, or could reasonably be expected to, cause damage to”.*

...  
(i) *the security of the Commonwealth”*

27. The term “reasonably expected” as it applies to the operation of section 33a(i) is defined at paragraph 11 above, whilst 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.*

28. The FOI Guidelines at paragraphs 5.30-5.32 set out that in order for a subsection 33(a)(i) [security of the Commonwealth] exemption to be applied.

*“A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.*

*The meaning of ‘damage’ has three aspects:*

- i. *that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. *the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. *The organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.”*

29. 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]<sup>7</sup> 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]:

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<sup>7</sup> AICmr 84.

*“[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.”*

30. 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 in which the document exists was set out by Spender J. in the AAT case of *Aldred and Department of Foreign Affairs and Trade* [1990]<sup>8</sup>, where Spender J. stated:

*I have had reservations in respect of documents 52 and 54, having regard to their nature and contents, but in the end have concluded that there are reasonable grounds for the claimed exemptions having regard to the nature of the document and the useful role documents of that kind play in a much broader context, the value of which might be endangered if disclosure were permitted.*

31. The FOI Guidelines support both of these lines of reasoning. Paragraph 5.33 stipulates:

*“It is well accepted that securing classified government information forms part of the security of the Commonwealth.<sup>9</sup> 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.<sup>10</sup> Where there is doubt, this should be in favour of non-disclosure.”*

32. I found that release of the redacted information in the IGB, which is marked as being exempt pursuant to section 33a(i) of the FOI Act, would or could allow internal and/or external adversaries with the intention of inhibiting the Commonwealth from achieving or maintaining its interest to:

- a. inhibit or thwart the Commonwealth in its lawful pursuit of properly securing the interests of Australia through obtaining information on current or future security measures/arrangements either in place or being proposed; and/or
- b. inhibit or thwart the Commonwealth in its lawful pursuit of properly securing the interests of Australia by using the information (or by deduction of the lack of certain information) to counter measure and hinder Defence operations. Release of information that could reasonably be expected to cause damage to the defence of the Commonwealth is exempt under section 33(a)(ii) of the FOI Act.

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<sup>8</sup> AATA 833

<sup>9</sup> *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

<sup>10</sup> *As per Prinn and Department of Defence* [2014] AICmr 84 at paragraphs 23 to 24].

33. Some of the international relations material considered exempt under section 33(a)(iii) of the FOI Act relates to Australia maintaining good working relations with other governments and their officials. Release of information about Defence's relationships with other governments and officials would cause damage to those relationships and is exempt under section 33(a)(iii) of the FOI Act.

**Section 33(a)(iii) [Documents affecting international relations of the Commonwealth]**

34. In reading the IGB, I have determined that it contains exempt material, pursuant to subsection 33(a)(iii) of the FOI Act. Subsection 33(a)(iii) of the FOI Act states:

**Documents affecting national security, defence or international relations**

*"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:*

*...*

*(iii) the international relations of the Commonwealth".*

35. The term "reasonably expected" as it applies to the operation of section 33 is defined at paragraph 11, whilst the term "damage" is defined at paragraph 13. Additionally, the FOI Guidelines [5.36] state that:

*"The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. <sup>11</sup>The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries."<sup>12</sup>*

36. I have analysed the content of the IGB and I have determined that it contains sensitive information relating to foreign countries, and that information is of the nature that those countries would not want the information released.

37. The release of the information in the IGB could or would impact on the Commonwealth's ability to obtain critical information from other countries through its network or international relationships, by a deterioration of trust in those relationships precipitated by the release of the redacted information marked as exempt pursuant to section 33(a)(iii). The loss of such information would have a substantial impact on Defence's ability to undertake its core defence and security functions.

38. In *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988]<sup>13</sup> cited with approval the reasoning of both Davies J in *Re Throssell*. and Neaves J in *In Re Throssell* (No.2) stating at paragraphs 40-41:

<sup>11</sup> *Re McKnight and Australian Archives* [1992] AATA 225.

<sup>12</sup> Also see *Re Haneef and Australian Federal Police* [2009] AATA 51.

<sup>13</sup> AATA 110.

*“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].*

39. The IGB includes information about both Australia’s international strategic interests and requirements and the strategic interests and requirements of other countries. The IGB also contains other sensitive information that could or would cause damage to the international relations of the Commonwealth if it were released. The information is written from a Defence strategic perspective and is articulated in a tone and manner fitting an in confidence Defence incoming briefing on strategic matters. It is not written from, or meant to be written from, the perspective of the diplomatic corps. To release the information redacted and marked as exempt pursuant to section 33a(iii) could or would damage both the Commonwealth’s international relationships and the Government’s ability to build international relationships related to other diplomatic channels that the Commonwealth might wish to explore. This damage would or could be caused not only by what is said, or how it is said, but potentially what is not said in the IGB.

40. Australia invests heavily in maintaining its international relationships with many foreign countries, the release of this information could or would damage Australia’s ability to maintain those international relationships, and build those relationships into the future, by deteriorating the good working relationships and trust that has been built on many levels with those countries.

41. It is noted that maintaining numerous international relationships is often contingent on not making public comment on those international relations, especially where those comments could impact on those other countries’ ability to maintain good working relationships with third countries or might impact on their internal political issues. In making my decision I have considered these factors as important and have determined that the material redacted and marked as s33a(iii) is exempt from the operation of the FOI Act.

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

42. Section 34 of the FOI Act states that:

- (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; or
  - (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.
- (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
- (3) **A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.**

*Exceptions*

- (4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

*Note:* However, the attachment itself may be an exempt document.

- (5) A document by which a decision of the Cabinet is officially published is not an exempt document.
- (6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:
- (a) the disclosure of the information would reveal a Cabinet deliberation or decision; and
  - (b) the existence of the deliberation or decision has not been officially disclosed.” [Emphasis added].

43. Paragraphs 5.59 – 5.61 of the FOI Guidelines stipulate that:

*“The Cabinet exemption applies to the following classes of documents:*

- a. *Cabinet submissions that:*
  - i. *have been submitted to Cabinet; or*
  - ii. *are proposed for submission to Cabinet; or*
  - iii. *were proposed to be submitted but were in fact never submitted and were brought into existence for the dominant purpose of submission for the consideration of Cabinet (s 34(1)(a))*
- b. *official records of the Cabinet (s 34(1)(b))*
- c. ***documents prepared for the dominant purpose of briefing a minister on a Cabinet submission (s 34(1)(c))***
- d. *drafts of a Cabinet submission, official records of the Cabinet or a briefing prepared for a minister on a Cabinet submission (s 34(1)(d)).*

*The exemption also applies to full or partial copies of the categories of documents listed at [5.59] above as well as a document that contains an extract from those categories (s 34(2)).*

*Any document containing information which, if disclosed, would reveal Cabinet deliberations or a decision is exempt unless the deliberation or decision has been officially disclosed (s 34(3)).*” [Emphasis added].

44. Based on my review of the IGB, I have determined that the material redacted and marked as “section 34” are extracts from documents prepared for the dominant purpose of briefing a minister on a Cabinet submission and that the IGB contains material that would reveal Cabinet deliberation. As such, I have determined that the material is exempt under subsection 34(3) of the FOI Act.

### **Sections 47C, 47D and 47E(d) – Background material**

45. In the AAT case of *Dreyfus and Secretary Attorney-General’s Department (Freedom of information)* [2015]<sup>14</sup> (the Dreyfus case) Bennett J accepted the following background information on both the importance of IGB and the function of IGB. This background information is the context in which I have considered the application of section 47C, 47D and 47E(d) exemptions

46. Commonwealth agency’s IGB play an essential role in the Westminster system of government. Once the result of an election is known, the Minister takes almost immediate responsibility for his or her portfolios. Therefore, it is critical that each Department contributes to the continuity in the Australian system of responsible parliamentary government at these critical junctures.

47. Trust and confidence by the Minister in the agency, right from the outset is essential. An IGB is critical in developing that necessary relationship and must be comprehensive and considered in providing analysis and understanding of the newly elected government’s objectives, and advice on how these objectives might best be implemented.

48. An IGB performs an essential and time critical task of comprehensively informing the incoming government, through the Minister, of the issues facing the portfolio and the key questions of the day, as well as providing a foundation for forming views about the strategic direction of the agency’s responsibilities. In this way, agencies assist Ministers to transition quickly into their role and ensure that public administration continues smoothly after a change in government or Minister.

49. In the early days of a ministry, incoming Ministers need to rely on the advice in an IGB, so the advice needs to be absolutely frank about any relevant issues faced by the agency. The understanding that the content of an IGB is confidential is important in developing the ongoing relationship of trust between the Minister and the agency.

### **Section 47C– Public interest conditional exemptions – deliberative process**

50. I have determined that the document contains information that is exempt material pursuant to section 47C [deliberative processes] of the FOI Act. Where section 47C(1) [deliberative processes] of the FOI Act stipulates:

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<sup>14</sup> AATA 962 [18].

*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.*

*Exceptions*

- (2) *Deliberative matter does not include either of the following:*
  - (a) *operational information (see section 8A);*
  - (b) *purely factual material.*

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

52. For the purpose of section 47C of the FOI Act, operational information is defined at section 8 of the Act, but that definition is not relevant to my decision, as the IGB does not contain any operational information as defined for the purpose of the FOI Act.

53. The term "purely factual information is not defined by the FOI Act, but Bennett J in the AAT case of *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015]<sup>15</sup> (the Dreyfus case) provided, at paragraph 49, guidance as to when factual material is no longer considered 'purely factual material' for the purpose of section 47C of the FOI Act, but instead is considered to comprise part of the deliberative matrix forming the deliberative material. His Honour said:

*In Harris v Australian Broadcasting Corporation and Others [1984] FCA 8; (1984) 1 FCR 150, the Full Court considered what constitutes 'purely factual material'. Their Honours discussed the difference between deliberative material and a deliberative process and the fact that in the latter case, a factual summary prepared*

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<sup>15</sup> AATA 962 [18].

*to aid the resolution of a difficult complex question would be within an exemption for a deliberative process. Their Honours concluded that a summary may be classed as purely factual material but may also be of a character as to disclose a process of selection involving opinion, advice or recommendation. Their Honours said that ‘a conclusion which involves opinion, advice or recommendation for the purposes of the deliberative process may well prevent material from being purely factual and render it exempt’ (at 155). In that regard, as is pointed out in Re Chapman (at 151), the issue may not be able to be determined by reference only to the content of the document but by reference also to the context which formed part of the deliberative or consultative process.*

54. In looking at the material in the IGB, I have determined that material redacted and marked as exempt pursuant to section 47C is deliberative material of a confidential nature. To the extent that factual material is present in the material, that factual material forms an integral part of the matrix forming the deliberative material, i.e. as accepted by Bennett J in the Dreyfus case *‘the factual material is integral to the deliberative content and purpose of the Brief. The analysis and views expressed in the Strategic Brief and the factual matters are so integrated that it is not only not practical to separate them but also the separate disclosure of the factual matters would be likely to effectuate a disclosure of the deliberative matters to which they relate. In that sense, they cannot be described as “purely factual matters”.’*<sup>16</sup> Therefore, I consider that the material redacted and marked as exempt under section 47C is conditionally exempt from disclosure pursuant to section 47C of the FOI Act.

55. Section 11A(5) of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the material in the IGB would, on balance, be contrary to the public interest. My public interest considerations are set out below.

#### **Section 47D – Public interest conditional exemptions – financial or property interests of the Commonwealth**

56. Upon examination, I found that the IGB contained information that relates to sensitive financial considerations and I have determined that the material redacted and marked as exempt under section 47D is exempt pursuant to section 47D of the FOI Act. Section 47D states that:

*“A document is conditionally exempt if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.”*

57. The FOI Guidelines at paragraph 6.92 state that:

*“A substantial adverse effect may be indirect. For example, where disclosure of documents would provide the criteria by which an agency is to assess tenders, the agency’s financial interest in seeking to obtain best value for money through a competitive tendering process may be compromised.”*

58. In considering the information redacted and marked as exempt pursuant to section 47D of the FOI Act, I found that the material is information that would or could jeopardise

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<sup>16</sup> As per paragraph 52.

Defence's position in negotiating particular commercial agreements and result in the Commonwealth not being able to achieve the best value for money in its commercial dealings. Therefore, I consider the material to be conditionally exempt under section 47D of the FOI Act, as release would cause a substantial adverse effect on the financial interests of the Commonwealth.

59. 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.

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

60. Sub-section 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.*

61. 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 an agency, the decision-maker must address whether the predicted effect would bear on the agency's 'proper and efficient' operations; that is, the agency is undertaking its expected activities in an expected manner.

62. In considering the substantial adverse effects that could or would be expected from the release of the document, I have considered both the quintessential confidential nature of IGB and the essential role that IGB played in the Westminster system of government, as was accepted by Bennett J in the Dreyfus case.

63. I am satisfied that the expected effect of disclosing to the applicant the material identified exempt under section 47E(d) would or could have a substantial adverse effect on the proper operations of Defence, resulting in future IGB that would be less comprehensive in the level and detail of advice of an IGB that is/was created on the premise of confidentiality between Defence and the Minister. This would affect the proper transfer of responsibility to the Minister, resulting in the Minister not obtaining the critically needed early and full briefing.

64. Further, the disclosure of highly sensitive material could adversely impact on the operations of the Government policy and program areas relating to Defence, and its:

- a. relationships with foreign governments;
- b. abilities to undertake its core functions and/or
- c. capacity to respond to threats to national security.

65. Disclosure would also impact on the future processes for the preparation of and the content of IGB. Disclosure would likely mean that, in the future, a conservative and cautious approach would be taken to the preparation of material for inclusion in future IGB. This would frustrate the achievement of the objective of providing the Minister with the greatest, most immediate assistance to commence administering his or her responsibilities as efficiently

as possible. This would be to the detriment of the capacity of an IGB to fulfil its intended function.

66. For these reasons I have decided that the specified material identified and redacted in the document and marked as exempt pursuant to section 47E(d) is conditionally exempt, pursuant to subsection 47E(d) of the FOI Act.

67. 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 – section 47C, section 47D and subsection 47E(d)**

68. 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 FOI 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.

69. I accept that there is public interest in disclosure of the IGB, in that disclosure would advance the objects of the Act by increasing public participation in government processes and increasing scrutiny, discussion, comment and review of the Government's activities. However, the test for access is not that the information in the IGB would be "interesting" to the public. Rather, the test is whether disclosure is in, or contrary to, the public interest<sup>17</sup> and, to a large extent, whilst the information in the IGB would be interesting, its public interest value is limited. However as outlined by the Secretary in the Dreyfus case, there are substantial factors favoring not releasing IGB, these include:

- a. Disclosure of certain material in the IGB is reasonably likely to compromise the provision of frank and candid advice to the Minister in future IGB. It is reasonably likely that if the contents in the IGB were publicly disclosed, officers of Defence would prepare IGB with a public audience in mind. Accordingly, the IGB would be of less utility to a new Minister. This may compromise efficient policy implementation and the capacity of the Minister to make decisions on a fully informed basis early in the life of a newly elected government.
- b. As new Ministers become immediately responsible for Ministerial roles, there is a public interest in a new Minister being able to access material and be able to immediately and comprehensively deal with matters. The disclosure of material in the IGB would or could reasonably be expected to prejudice the capacity of an

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<sup>17</sup> *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

incoming Minister to assume immediate responsibility and may adversely impact the continuity of a government.

- c. Disclosure of certain material in the IGB may compromise the future capacity of Defence to build a relationship of mutual trust and confidence with a new Minister. The relationship of trust and confidence between Defence and the Minister will be affected if advice is not able to be provided on a confidential basis.
- d. Disclosure would provide information that would or could jeopardise Defence's position in negotiating particular commercial agreements and result in the Commonwealth not being able to achieve the best value for money in its commercial dealings.
- e. Disclosure would reveal deliberations on national Defence and security measures, which may provide an opportunity for parties, with intentions adverse to those of the Commonwealth, to exploit potential vulnerabilities in the existing Defence and security framework.

70. Bennet J in the Dreyfus case accepted substantially the same public interest factors favouring not releasing conditionally exempt material. In accepting these same public interest factors his Honour stated at paragraphs 106-108:

*“[T]he IGB is unique in nature.*

*In this case, the combination of factors against release in the public interest include the nature of an IGB to a new Minister in a newly elected incoming Government, the evidence of Mr Sheehan explaining the importance of the maintenance of confidentiality on not only the content of this IGB but also on the preparation of future IGBs, the need for continuity of frankness, candour and completeness in the advice and commentary contained in IGBs, the extent of deliberative matter contained in such a document and the impact on the preparation of future IGBs if access were granted. While none of these factors standing alone may be sufficient to outweigh the public interest in access, the factors against release are cumulative and it is that accumulation that tips the balance against access being granted. This is not a document of a nature that is prepared just once. Further, it is an IGB prepared for a new Minister in a new Government. The factors raised by Mr Sheehan and the Secretary, on balance, outweigh the public interest factors that favour access. As the Commissioner said, the IGB was prepared in a specific context, as summarised at [73] above. Such a context requires preparation of the document unhindered by apprehension that the IGB, prepared as a confidential brief to an incoming new Attorney-General, will be released. These factors were relevant when the IGB was being prepared and remain relevant today.*

*That is not to say that access to the purely factual material should be denied. However, in this case, on balance, the benefit to the public resulting from disclosure of the conditionally exempt information is outweighed by the benefit to the public of withholding access.”*

71. I have considered all relevant considerations, including the reasoning of Bennett J in the Dreyfus case, and I am satisfied that the expected effect of disclosing to the applicant the material redacted and marked as exempt could or would reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Defence. 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, section 47D and sub-section 47E(d) of the FOI Act.

72. 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.

### **Further information**

73. The IGB is a classified document and contains a dissemination limiting marker, as the document is approved for public release the marker has been struck through.

Yours sincerely,

**Justine**  
**.Nordin**

Digitally signed  
by  
Justine.Nordin  
Date: 2019.07.15  
21:19:28 +10'00'

Justine Nordin  
Defence Accredited  
Decision Maker