



Reference: BJ4451710

FOI 433/19/20 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 report provided by Engineers Australia to the Department of Defence as part of its recent mobilisation review and any other key reports commissioned from external organisations by Defence as part of the review*
 - b. *The key documents detailing future scenarios and/or scenario modelling developed for and/or considered by the mobilisation review*
 - c. *The report of a wargame facilitated by Admiral Chris Barrie for the Department in 2012 or 2013 and attended by then UK Special Envoy on Climate Change, Rear Admiral Neil Morisetti*
 - d. *The final report of the Department’s mobilisation review”*

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 five 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 number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. fully release two documents
 - b. partially release three 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:
 - i. section 33 [national security, defence or international relations];
 - ii. section 42 [legal professional privilege];
 - iii. section 47C [public interest conditional exemptions – deliberative processes];
 - iv. section 47F [public interest conditional exemptions-personal privacy]; and
 - v. section 47J [public interest conditional exemptions-the economy].

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 officers of affected external departments and agencies; and
 - f. advice from officers within the department.

Reasons for decision

Section 33 - Documents affecting national security, defence or international relations

8. Section 33 of the FOI Act exempts a document if its disclosure under the Act would or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth, or information that would divulge information or matter communicated in confidence by or on behalf of a foreign government.

9. Subparagraph 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

10. In regards to the terms ‘could reasonably be expected to’ and ‘damage’, the Guidelines provide:

5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

5.17 The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

5.28 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency. In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.

11. Upon examination of the document, I identified material which upon release ‘could reasonably be expected to cause damage to the defence of the Commonwealth’ by making public information about current and anticipated military preparedness levels and the consequences to Defence mobilisation.

12. In light of the above, I have decided that the specified material is exempt pursuant to section 33 of the FOI Act.

Section 42 - Documents subject to legal professional privilege

13. Section 42(1) of the FOI Act exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

14. In regards to the terms ‘legal professional privilege’ the Guidelines provide:

5.129 At common law, determining whether a communication is privileged requires a consideration of:

- *whether there is a legal adviser-client relationship*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential.*

15. Upon examination of the documents, I identified information that was provided as legal advice from the Defence Legal Service, the Department’s ‘in house lawyers’. In ascertaining whether the provisions of the existence of a legal adviser-client relationship and of the independence of the in-house lawyers were met, the Guidelines provide:

5.131 A legal adviser-client relationship can exist but may not be as readily established when advice is received from a lawyer who works within the agency, whether as an ongoing staff member of the agency or as a lawyer contracted to work within the agency to provide advice. Whether a true adviser-client relationship exists will be a question of fact to be determined on the circumstances applying to the particular advice that was given. That is, there may be a privileged relationship applying to some but not all advice. The following factors are relevant to establishing whether a legal adviser-client relationship exists:

- *the legal adviser must be acting in his/her capacity as a professional legal adviser*
- *the giving of the advice must be attended by the necessary degree of independence*
- *the dominant purpose test must be satisfied*
- *the advice must be confidential*
- *the fact that the advice arose out of a statutory duty does not preclude the privilege from applying*
- *whether the lawyer is subject to professional standards can be relevant*

5.132 An in-house lawyer has the necessary degree of independence so long as their personal loyalties, duties or interests do not influence the professional legal advice they give.

16. In light of the above, I have decided that the specified material is exempt pursuant to section 42(1) of the FOI Act.

Section 47C – Deliberative processes

Conditional Exemption – Section 47C(1) – Deliberative matter

17. Section 47C(1)(a) of the FOI Act conditionally exempts a document if it is of such a nature that it 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 an agency.

18. Additionally, section 47C(3)(a) provides that this section does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts.

19. In regards to the terms ‘deliberative processes’, ‘deliberative matter’ and ‘reports, the Guidelines provide:

6.61 A deliberative process may include the recording or exchange of:

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *interim decisions or deliberations*

6.63 ‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document

6.75 As noted in [6.54] above, the s 47C conditional exemption does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, including reports expressing experts’ opinions on scientific or technical matters (s 47C(3)(a)).

20. Upon examination of the documents, I identified that they fell within the definitions of deliberative processes and contained information, such as recommendations and advice that constitutes deliberative matter. I also determined that all the documents could be considered to be reports.

21. When assessing as to whether to disclose the deliberative matter, I considered the following factors:

- a. whether the deliberative process has concluded and any advice or recommendations arising from that have been adopted or acted upon;
- b. whether the documents were reports on scientific or technical matters and prepared in whole or in part from the contribution of technical experts.

22. The release of the details of deliberative processes do not need to result in any type of harm, however, the documents do meet the conditions of being deliberative processes and containing deliberative matter. Taking into account the above factors, I consider that the release of the deliberative matter is conditionally exempt under section 47C(1)(a) of the FOI Act.

23. The documents are a collection of the opinions of scientific and technical experts as well as those of employees fulfilling their usual duties or responsibilities. With respect to the provisions of section 47C(3)(a), I consider that certain of the documents are technical reports that have been prepared in whole or in part by technical experts and contain opinions on technical matters in which the participants are qualified to comment. Subject to other exemptions or conditional exemptions, I have determined to release those documents in full.

Section 47C - Public interest considerations

24. I have found that the identified documents are conditionally exempt under section 47C(1)(a) of the FOI Act. Section 11A(5) provides that if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to public interest.

25. I considered the factors favouring disclosure set out in 11B(3) of the FOI Act. The relevant factors are that disclosure may promote some of the objects of the FOI Act, as information held by the government is a national resource and it would inform debate on a matter of public importance.

26. However, the disclosure of this information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

27. Taking into account the above factors, I consider that the release of the deliberative matter is conditionally exempt under section 47C(1)(a) of the FOI Act.

Section 47F - Personal privacy

Conditional Exemption – Section 47F(1) – Personal privacy

28. Upon examination of the documents, I identified information, such as names and other types of personal information belonging to individuals other than the applicant.

29. When assessing whether the disclosure of personal information is unreasonable, I considered the following factors:

- 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 with in the documents;
- c. the availability of the information from publicly available sources; and
- d. the effect the release of the personal information could reasonably have on the third party.

30. I found that the:

- a. 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
- b. information is not readily available from publicly available sources.

31. The release of the details of individuals identified in the documents could reasonably be expected to cause harm to their privacy. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act.

Section 47F - Public interest considerations

32. I have found that the identified documents are conditionally exempt under section 47F(1) of the FOI Act. Section 11A(5) provides that if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to public interest.

33. I considered the factors favouring disclosure set out in 11B(3) of the FOI Act. The relevant factors are that disclosure may promote some of the objects of the FOI Act, as information held by the government is a national resource and it would allow the applicant access to their own personal information.

34. However, the disclosure of this information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

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 or harm:

- a. the protection of an individual's right to privacy; and
- b. the interests of an individual or group of individuals.

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 47F(1) of the FOI Act.

Section 47J – The economy

Conditional Exemption – Section 47J(3)(f) – Foreign investment

37. Section 47J(1)(a) of the FOI Act conditionally exempts a document if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on Australia's economy by influencing a decision or action of a person or entity. Section 47J(3)(f) identifies foreign investment in Australia as relevant.

38. In regards to the term 'the economy', the Guidelines provide:

6.217 The economy exemption reflects the need for the government to be able to maintain the confidentiality of certain information if it is to carry out its economic policy responsibilities, including the development and implementation of economic policy in a timely and effective manner.

39. Treatment of the terms 'substantial adverse effect' and 'reasonably be expected' is as *per* my consideration regarding section 33(a)(ii) material, with the additional explanation provided in the Guidelines:

6.222 A decision maker must focus on the expected effect on Australia's economy if a document is disclosed. The types of circumstances that would, or could reasonably be expected to, lead to a substantial adverse effect could include:

- *premature disclosure of information could compromise the Government's ability to obtain access to information*
- *disclosure of information could undermine confidence in markets, financial frameworks or institutions*

- *disclosure of information could distort the Australian economy by influencing investment decisions or giving particular individuals or businesses a competitive advantage*

40. The release of information in the documents could reasonably be expected to cause harm to the economy on account of how foreign investment in Australia may pertain to Defence mobilisation. Taking into account the above factors, I consider that the release of the information would be an unreasonable disclosure and conditionally exempt under section 47J(3)(f) of the FOI Act.

Section 47J - Public interest considerations

41. I have found that the identified documents are conditionally exempt under section 47J(3)(f) of the FOI Act. Section 11A(5) provides that if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to public interest.

42. I considered the factors favouring disclosure set out in 11B(3) of the FOI Act. The relevant factors are that disclosure may promote some of the objects of the FOI Act, as information held by the government is a national resource and it would inform debate on a matter of public importance.

43. Upon examination of the document, I identified material which upon release 'could reasonably be expected to cause damage to the economy' by making public information about current and anticipated foreign investment and the consequences to Defence mobilisation.

44. In light of the above, I have determined that the specified material is exempt pursuant to section 47J(3)(f) of the FOI Act.

Further Information

45. Some of the documents matching the scope of this request contained a dissemination limiting marker. As the documents are approved for public release the marker has been struck through.

stephen
.hledik2

Digitally signed
by
stephen.hledik2
Date: 2020.04.29
11:45:03 +10'00'

Stephen Hledik
Colonel
Accredited Decision Maker
VCDF Executive