



Australian Government
Department of Defence

Defence Reference: FOI 454/18/19

FOI 454/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] (the Applicant) on 20 June 2019 under the *Freedom of Information Act 1982* (FOI Act), for access to:

“1. Emails, correspondence and advice to the minister regarding the publication of documents by Dan Oakes and others of the ABC under the title the Afghan files in July 2017 and the subsequent referral to the AFP.

2. emails, correspondence and advice to the minister regarding the raid on the ABC offices in June this year.

Please confine the search of documents to between 1 July 2017 to the date of this email.”

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.

DECISION

4. I have decided to deny access to the document in its entirety, as the document is exempt from the operation of the FOI Act pursuant to both sections 33a(i) and subsection 47E(d) of the FOI Act.

MATERIAL TAKEN INTO ACCOUNT

5. In making my decision, I had regard to:
- the terms of the Applicant’s FOI request;
 - the content of the document;
 - relevant provisions of the FOI Act;
 - the Guidelines published by the Office of the Australian Information;
 - Commissioner under section 93A of the FOI Act (“the FOI Guidelines”); and
 - relevant case law as cited.

REASONS FOR DECISION

6. The Applicant is seeking documents relating to a purported leak of classified information from the Department of Defence (Defence).

Section 33(i) – Documents affecting national security

7. After reviewing the document, 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:
 (a) *would, or could reasonably be expected to, cause damage to”.*

...

(i) *the security of the Commonwealth”*

8. 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.*

9. 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.”*

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

1 *Prinn and Department of Defence [2014] 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.”

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

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

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

13. In examining the document I considered that the entirety of the document is exempt pursuant to section 33(a)(i) of the FOI Act. In coming to this conclusion I considered:

- a. The circumstances surrounding the document and the environment in which the document was created, which in this case was the environment of Defence managing the leak of a classified document, and the subsequent steps that Defence was undertaking to investigate the situation;
- b. I took into consideration the sensitive nature of the issue and the fact that the document was created with an expectation of confidence. I also took into consideration that the document has been maintained close hold and in confidence.
- c. I took into consideration the need for Defence to protect the processes, procedures and steps it takes when dealing with purported breaches of information security

2 *Aldred and Department of Foreign Affairs and Trade* [1990]

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

4 *Prinn and Department of Defence* [2014] AICmr 84

affecting national security (the leaking of any such document can lead to criminal charges);

- d. I took into consideration that the document provides information about the securing of secret information, which could or would provide information on the current security measures for controlling classified information. The information on current security measures I considered could potentially be conveyed both by what is said in the briefing and what is not said. The release of the document could or would lead others, who might harbour an intention to leak classified national security information, to attempt to undertake similar activities to those that were purportedly undertaken in this instance, and provide those with that intent with information as to how such security issues would be investigated and/or approached.
- e. I took into consideration that disclosure of the document to the public 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 overseas governmental agencies’⁵. In *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988]⁶ 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:

“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].

5 *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988]

6 *Re G R Slater and Brian Field Cox, Director-General, Australian Archives* [1988]

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

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

15. After analysing the document, I have determined that the entirety of the document is also exempt pursuant to subsection 47E(d) of the FOI Act. Subsection 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.

16. In relation to subsection 47E(d) of the FOI Act, paragraph 6.123 of the FOI Guidelines states 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.

17. I have examined the document and I consider that release of the document would or could substantially adversely affect the efficient conduct of Defence, by:

- a. Compromising the provision of frank and candid advice to the Minister of Defence in future briefs relating to sensitive and pressing matters in relation to national security.
- b. Impact on the relationship of mutual trust and confidence built between Defence and the Minister of Defence.
- c. Reveal discussions on security measures taken in the context of a purported high level leak of classified information, which may provide an opportunity for parties with intentions adverse to those of the Commonwealth, to seek to exploit potential vulnerabilities in the existing security framework.

18. Given the above I consider that the release of the document could or would substantially effect the efficient operations of Defence. I therefore have decided that the document is conditionally exempt pursuant to subsection 47E(d) of the FOI Act.

19. 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 – subsection 47E(d)

20. As part of my consideration on the relevant factors affecting the balance of public interest, I gave consideration to the objectives of the FOI Act, the 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.

21. I accept that there is a public interest in disclosure of the document, 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 document would be "interesting" to the public. Rather, the test is whether disclosure is in, or contrary to, the public interest⁷ and to a large extent whilst the information in the document would be interesting, its public interest value is limited. However, there are substantial factors favoring not releasing the document. These include:

- a. Disclosure of the document is reasonably likely to compromise the provision of frank and candid advice to the Minister. It is reasonably likely that, if the contents in the document were publicly disclosed, officers of Defence would prepare briefings with a public audience in mind. Accordingly, the briefing would be of less utility to the Minister. This may compromise the efficient functions of Defence in being responsive to government. Given the essential role that Defence undertakes in maintaining Australia's interest, there is strong public interest in maintaining the effective operations in its dealings with the Minister.
- b. Disclosure of certain material in the document 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.
- c. Disclosure of the document could or would reveal discussions on security measures taken in the context of a purported leak of classified information, which may provide an opportunity for parties, with intentions adverse to those of the Commonwealth, to exploit potential vulnerabilities in the existing security framework.

22. In the AAT case of *Thomas: Secretary, Department of Defence and (Freedom of Information)* [2018]⁸ Deputy President Logan considered it essential to understanding an agency's contextual operating environment to also consider other relevant external contextual influences affecting the operations of an Agency; at paragraphs 114-117, he stated:

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

To take one example and as we observed in the course of the hearing, none of us grew up in an Australia in which there were barriers preventing or inhibiting the vehicular traverse of the major public squares, malls and footpaths in our major cities. No need for these was once apprehended. It is a matter of notoriety that these have been erected because of a threat to public safety presented by those who would kill or maim using vehicles as a weapon and who perversely invoke the authority of the Islamic faith for so doing, one of the world's great religions, to which a significant minority of those who now live in these same cities are

⁷ *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

⁸ *Thomas: Secretary, Department of Defence and (Freedom of Information)* [2018]

adherents. It is readily possible to bring to mind other ways in which violent acts invoking such authority have been committed in Australia and throughout the Western world on and from 11 September 2001, if not earlier in the modern era. Yet ordinary experience also tells one that the commission or encouragement of such violence is not the daily stuff of this same significant minority.

...

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.”

23. In considering these external influences impacting on the operations and functions of Defence detailed by Deputy President Logan, I consider the public interest is more than served by ensuring that Defence is able to maintain its security procedure information without hindrance.

24. I have considered all relevant considerations, and I am satisfied that the expected effect of disclosing to the applicant the document 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 sub-section 47E(d) of the FOI Act.

25. 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.

Justine
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Justine Nordin
Defence Accredited
Decision Maker