



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

Reference: [R34768327]

**FOI 465/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

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

- “• *All diaries, appointment schedules or appointment calendars created by or for, and/or used by, the Chief of Navy for the period 6-27 November 2017.*
- *All diaries, appointment schedules or appointment calendars created by or for, and/or used by, the head of CASG for the period 6-27 November 2017.*

*I am happy to restrict the request to weekly 'Outlook' calendar views (or a similar approach if another electronic diary approach is used).*

*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 me. Furthermore, only final versions of documents are required.”*

**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 two documents as matching the description of the request.

**Decision**

4. I have decided to deny access to two documents on the grounds that they are exempt under subsection 34(2) [cabinet documents] and 47C [public interest conditional exemptions-deliberative processes] of the FOI Act.

**Material taken into account**

5. 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. the Cabinet Handbook issued by the Department of Prime Minister and Cabinet (PM&C); and
  - f. advice provided by PM&C.

## Reasons for decision

### Section 34 - Cabinet documents

6. 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;....

(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.

7. I have identified material in the two documents that has been extracted from a document which was brought into existence for the dominant purpose of consideration by the Cabinet.

8. The Guidelines state at 5.57 that agencies should refer to the *Cabinet Handbook* issued by PM&C with regard to any documents they consider may be exempt under section 34 of the FOI Act. The Guidelines also state that agencies should consult with PM&C on any Cabinet-related material. Accordingly, the FOI Directorate undertook consultation with PM&C which advised that material in the documents were exempt under section 34(2) of the FOI Act.

9. In considering the documents, I have also had regard to the Guidelines which state:

*5.71: a document is exempt from disclosure to the extent that it contains a copy or part of or an extract from a document that is, itself, exempt from disclosure for one of the reasons specified in s 34(1) (see s 34(2)). In practice, this means a document that comprises or contains a copy of, part of, or an extract from a Cabinet submission, a Cabinet briefing or an official record of the Cabinet. A copy or extract should be a quotation from, or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.*

***5.72 A document that refers to a Cabinet meeting date or Cabinet document reference number contains an extract from a Cabinet document for the purposes for s 34(2). It may therefore be deleted from an edited copy of the document where this is reasonably practicable (s 22). Although such information is generally not sensitive, s 34 does not require that the decision maker be satisfied that disclosure would cause damage. It is enough that the document in question quotes any information from a document described in s 34(1). [my emphasis is in bold]***

10. In addition to the above, I note that the Cabinet Handbook states:

*125. Cabinet documents are any material that:*

*(a) is prepared for the purpose of informing the Cabinet (for example pre-Exposure Drafts, Exposure Drafts, Drafts for coordination comments and final Submissions, Memoranda or Papers and their attachments or supporting documents; coordination*

*comments; and any other documents which are both identical in all relevant respects to those considered by the Cabinet and precursors of documents submitted to the Cabinet)*

*(b) reveal the decision and/or deliberations of the Cabinet (including business lists, Cabinet minutes, notes taken by Cabinet note takers **or Cabinet and Cabinet committee meeting dates**) [my emphasis is in bold]*

11. Taking into account the above and the advice received from PM&C, I have deemed this information be exempt under subsection 34(2) of the FOI Act.

### **Section 47C – Deliberative processes**

12. On review, I found that the documents contained material which a claim for exemption under subsection 47C(1) of the FOI Act is warranted.

13. Subsection 47C(1) of the FOI Act states ‘A document is conditionally exempt if its disclosure under the Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative process involved in the functions of...an agency...’. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

14. The Australian Information Commissioner has issued Guidelines to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act.

15. I have taken into account the Guidelines, noting that one consideration under section 47C is whether a document includes content of a specific type, namely deliberative matter regardless of any harm that may result from disclosure. I have determined that the material in the documents is in fact deliberative.

16. The material to which 47C applies includes advice that is proposed to be provided to the Cabinet for the purposes of deliberation by a Minister or the Government of the Commonwealth. Release of the material would impair the confidentiality of the Cabinet processes.

17. Having decided that the above material is exempt under deliberative processes, I then turned my mind to the question of purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines which state that, ‘purely factual material’ that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive;
- b. incidental administrative content;
- c. procedural or day-to-day content;
- d. the decision or conclusion reached at the end of the deliberative process;  
and
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

18. I have also taken into account that, while purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to the provision of policy advice or opinion and elaborates its context or likely impact, it may potentially come within the deliberative document exemption. In particular, I took note of the Guidelines which state that:

*'Purely factual material does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it'.*

19. I note there is some ancillary factual material; however, this is intertwined with the deliberative content.

20. Based on the above, I considered the material to be conditionally exempt under section 47C of the FOI Act.

21. Section 11A(5) of the FOI Act allows access to a conditionally exempt document unless, in the circumstances, access to the document would be contrary to the public interest.

### **Sections 47C - Public interest considerations**

22. In determining whether to release the material conditionally exempt under section 47C, I considered the Guidelines together with a range of factors that favour access to a document set out in sub-section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. I had regard to whether giving access to the applicant at this time would, on balance, be contrary to the public interest. Specifically, I considered if disclosure of the documents would:

- a. promote the objects of the FOI Act;
- b. inform debate on a matter of public importance;
- c. promote effective oversight of public expenditure; and
- d. allow a person to access her or his personal information.

23. I consider that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. I also consider that release of the material would increase public participation in Government processes and increase scrutiny or discussion of Government activities. However, release of the material would impair the confidentiality of Cabinet processes, inhibit the full canvassing of issues in the development of Cabinet material and inhibit frankness and candour.

24. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a public interest in maintaining the confidentiality of the Cabinet process.

25. It is for the reasons detailed above that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47C of the FOI Act.

26. I have considered the irrelevant factors in sub-section 11B(4) [irrelevant factors] and did not take these in to account when making my decision.

**Section 22**

27. 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. I have considered disclosing the documents to the applicant with deletions, but have decided against this course of action, as it would not be possible to redact parts of the document without disclosing the exempt material.

Mrs Melissa Davidson  
Accredited Decision Maker  
Associate Secretary Group