



Reference: BJ4608969

FOI 541/19/20 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:

“...the so called ‘mobilisation review’ conducted by the Directorate of Preparedness and Mobilisation through 2019, including:

- a. The final report prepared by the Directorate of Preparedness and Mobilisation based on the review.*
- b. Correspondence containing advice or recommendations from the Directorate of Preparedness and Mobilisation to the Secretary for Defence, the CDF, and/or the Minister.”*

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 three documents as matching the description of the request.

Decision

4. In regard to part (a) of the request, the final report of the ‘mobilisation review’ was released on 7 May 2020 under a separate request as FOI 433/19/20. It is available through the Disclosure Log on the Department of Defence public website.

5. In regard to part (b), I have decided to:

- a. partially release two 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]; and
 - iii. section 47C [public interest conditional exemptions – deliberative processes].

Material taken into account

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

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in the FOI Act;
- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and

- e. advice from officers within the department.

Reasons for decision

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

7. 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.

8. 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.

9. In regard 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.

10. 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.

11. 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

12. 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.

13. In regard 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.*

14. 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.

15. 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

16. 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.

17. In regards to the terms 'deliberative processes' and 'deliberative matter', 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*

18. 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.

19. When assessing as to whether to disclose the deliberative matter, I considered whether the deliberative process has concluded and any advice or recommendations arising from that have been adopted or acted upon.

20. 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. The documents are a collection of the opinions of employees fulfilling their usual duties or responsibilities. 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 47C - Public interest considerations

21. 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.

22. 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.

23. 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.

24. 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.

Further Information

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

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by
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Date: 2020.06.09
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Stephen Hledik
Colonel
Accredited Decision Maker
VCDF Executive