



## **DEFENCE FOI 1003/23/24**

### **STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982**

1. I refer to the revised request by James Smith (the applicant), dated on 02 July 2024 to the Department of Defence (Defence), for access to the following documents under the *Freedom of Information Act 1982* (Cth) (FOI Act):

*...I request copies of the Department's Senate Estimates issues briefs prepared for the Department's appearances before the Foreign Affairs, Defence and Trade Committee for the following budget estimates hearings:*

*2024–25 Estimates  
Budget—3 to 6 June 2024*

#### **Background**

2. On 19 June 2024, the applicant submitted a request under the FOI Act to Defence in the following terms:

*I request copies of the Department's Senate Estimates issues briefs prepared for the Department's appearances before the Foreign Affairs, Defence and Trade Committee for the following budget estimates hearings:*

*2024–25 Estimates  
Budget—3 to 6 June 2024*

*2023–24 Estimates*

*Budget—30-31 May 2023, 1-2 June 2023  
Supplementary—25–26 October 2023  
Additional — 14–15 February 2024*

3. On 02 July 2024, following administrative release of certain documents to the applicant, the scope of the request was revised as outlined in paragraph 1.

#### **FOI decision maker**

4. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

#### **Documents identified**

5. I have identified 55 documents as falling within the scope of the request.

## Exclusions

6. Mobile telephone numbers contained in documents that fall within the scope of the FOI request and duplicates of documents are excluded from this request. Defence has only considered final versions of documents.

## Decision

7. I have decided to:
- a. partially release the 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 sections:
    - i. 33(a) [Documents affecting national security, defence or international relations] of the FOI Act;
    - ii. 47C [Public interest conditional exemptions--deliberative processes] of the FOI Act;
    - iii. 47E [Public interest conditional exemptions--certain operations of agencies] of the FOI Act; and
    - iv. 47F [Public interest conditional exemptions – Personal Privacy] of the FOI Act; and
    - v. 47G [Public interest conditional exemptions—business] of the FOI Act.

## Material taken into account

8. In making my decision, I have had regard to:
- a. the terms of the request;
  - b. the content of the identified documents in issue;
  - 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 Guidelines); and
  - e. advice received by subject matter experts within Defence.

## REASONS FOR DECISION

### Section 22 – Access to edited copies with exempt or irrelevant matter deleted

9. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access. I have relied on this exemption to provide you with redacted copies of the documents relevant to your request.
10. Upon examination of the documents, I have identified that they contain exempt material and information (*mobile telephone or names of junior officials*) that I

consider does not relate to the terms of your request. Where applicable, I have exempted this material from disclosure.

11. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

### **Section 33 – Documents affecting national security, defence or international relations**

12. Section 33(a) of the FOI Act states:

*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;*
  - ii. *the defence of the Commonwealth; or*
  - iii. *the international relations of the Commonwealth;*

13. In regard to the terms ‘would, or could reasonably be expected to’ 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.*

14. In regard to ‘defence of the Commonwealth’, the Guidelines, at paragraph 5.36, note that the FOI Act does not define this term, and refers to previous Administrative Appeals Tribunal (AAT) decisions which have determined the term can include:

- a. meeting Australia’s international obligations;
- b. ensuring the proper conduct of international defence relations;
- c. deterring and preventing foreign incursions into Australian territory; and
- d. protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.

15. Defence's primary role is to secure and defend Australia and its national interests, promote security and stability, and support the Australian community as directed by the Government. I consider that releasing information regarding operational information of Defence could cause damage to Australia’s military diplomacy, and could cause harm through the use of disclosed information by hostile actors.

16. I have identified that disclosure of limited material within the documents would, or could reasonably be expected to, cause damage to the defence of the Commonwealth by disclosing information about the ability, availability or operational status of strategic Defence capabilities. I consider that the exempt material contains sensitive information that could potentially allow those with hostile intentions to identify and exploit the Australian Defence Force, and which would prejudice, or hinder its effectiveness.

17. Additionally, with regards to the definition of ‘international relations’, the Guidelines state:

*5.36 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. 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.*

*5.37 The expectation of damages to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.*

18. I have identified that limited material within the documents contains information which, if disclosed, would, or could reasonably be expected to damage the international relations of the Commonwealth. I consider that if the information were to be publicly released, the Commonwealth’s ability to engage meaningfully with international organisations and counterparts would be diminished.
19. I have determined that disclosure of the identified information could diminish the confidence that other countries have in Australia as a reliable recipient of its confidence, and that it is reasonable to consider other countries would be less willing to cooperate with Australian agencies in the future, impacting on the proper conduct of defence international relations, and broader engagement.
20. I have also taken into account, and placed weight on the intelligence technique known as the ‘mosaic theory’ when making my assessment of the damage that would, or could reasonably be expected to occur on disclosure of the limited material identified.
21. In this regard, the Guidelines, at paragraph 5.43 provide:

*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 of information, 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.*

22. In modern society, significant volumes of information exist in the public domain, accessible to the world at large. I am satisfied that release of the identified material, when combined with information already in the public domain, could allow adversaries to piece together information that would undermine Defence’s capability and effectiveness, causing damage to the security, defence or international relations of the Commonwealth.

23. Based on the above considerations, I am satisfied that the specified information is exempt under section 33(a)(ii) and 33(a)(iii) of the FOI Act.

**Section 47C – Public interest conditional exemptions - deliberative processes**

24. Section 47C of the FOI Act states:

*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 an agency.*

25. Upon examination of the documents, I found that identified material within the documents contains information relating to opinion, advice or recommendation prepared for the purposes of the deliberative processes involved in the functions of the agency.
26. In making my decision I have considered section 47C(2), and paragraph 66 of the Guidelines. I am satisfied that the identified material is not purely factual in nature, nor it is operational information of the kind defined at section 8A of the FOI Act.
27. I am satisfied that release of the limited material identified as deliberative matter would, or could reasonably be expected to harm, or otherwise impede a deliberation still being considered by government.
28. Accordingly, I am satisfied that the document contains matter that meets the definition of deliberative material, and I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

**Section 47E – Public interest conditional exemptions – certain operations of agencies**

29. Section 47E(c) 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 management or assessment of personnel by the Commonwealth or by an agency*

30. The Guidelines provide, at paragraph 6.102, that:

*Where the document relates to the agency's policies and practices in relation to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:*

- *an effect would reasonably be expected following disclosure*
- *the expected effect would be both substantial and adverse.*

31. The Guidelines, at paragraph 6.109, provide that:

*In some circumstances it may be appropriate to address concerns about the work health and safety impacts of disclosing public servants' personal information*

32. Additionally, I considered paragraphs 6.110-111 of the Guidelines, which provide that an assessment conducted on a case-by-case basis, based on objective evidence, is required when considering whether it is appropriate to apply s 47E(c). The type of objective evidence needed to found a decision that disclosure of a public servant's personal information may pose a work health and safety risk will depend on all the circumstances.'
33. In considering the documents, I have identified two documents comprising information regarding workplace incidents impacting named ADF members. I consider that the Department owes a duty of care to current and former ADF members, and their families, to protect their wellbeing and privacy.
34. While it is necessary for senior officials, in the context of Senate Estimates, to have relevant information before them in case questions are raised, it is also necessary for me to consider the substantial adverse impacts that disclosure would, or could reasonably be expected to cause, noting that release under the FOI Act amounts to release to the world at large.
35. I am satisfied that the identified material is unsuitable for disclosure under section 47E(c) of the FOI Act, as disclosure could reasonably be expected to have a substantial adverse impact on the workplace health and safety obligations the Department, and particularly the Australian Defence Force, owes to its members.
36. Section 47E(d) 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:*
- (e) have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.*
37. The Guidelines, at paragraph 6.123, provide that:
- The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner.*
38. I have identified that each document contains the names and direct contact details of Defence personnel, including mobile phone numbers, and the contact information and names of junior officials who supported early preparation of the documents.
39. I consider that disclosure of the identified material, would, or could reasonably be expected to have a substantial adverse impact on the proper and efficient conduct of the Department, as the contact information could be used inappropriately to divert communications with the Department away from established channels, or could be used to harass, intimidate or subject staff to unsolicited communications.
40. In addition, I have identified limited material within the documents regarding deliberative, or operationally sensitive policy matters, relating to Defence's primary role of defending Australia and its national interests, promoting security and stability, and supporting the Australian community. I consider that disclosure of the limited material identified would, or could reasonably be expected to have a substantial adverse impact on the proper and efficient conduct of the Department, by disclosing

information regarding its thinking processes, methods or conduct that is not otherwise well-known, and which would impede the delivery of the Department's functions.

41. I have also considered that disclosure of limited material identified within the documents could reasonably be expected to adversely impact the Department's ability to negotiate effectively to obtain value-for-money outcomes on behalf of the Commonwealth.
42. The Guidelines provide, at paragraph 6.120, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient'. I am satisfied that release of the information would not lead to any efficiencies.
43. Accordingly, I am satisfied that the information contained within the documents is conditionally exempt under sections 47E(c) and 47E(d) of the FOI Act.

#### **Section 47F – Public interest conditional exemptions - personal privacy**

44. Section 47F(1) of the FOI Act states:

*A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

45. The FOI Act shares the same definition of 'personal information' as the *Privacy Act 1988* (Cth). The Guidelines provide that:

*6.123 Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*  
*(a) whether the information or opinion is true or not; and*  
*(b) whether the information or opinion is recorded in a material form or not.*

46. I found that the material contained in two documents contains the personal information of ADF personnel involved in workplace incidents. In my assessment of whether the disclosure of personal information is unreasonable, I considered relevant factors in accordance with section 47F(2), and further considered the Department's obligations and intentions to provide trauma-informed engagement when supporting current or former ADF members, and their families and loved ones, when impacted by workplace incidents.
47. In considering whether to release the limited information identified, I have also had significant regard to the likely harm that could be expected to be caused by seeking permission from relevant individuals, to disclose their personal information, or that of their loved ones. I am satisfied that the information is conditionally exempt under section 47F of the FOI Act.

#### **Section 47G – Public interest conditional exemptions – business**

48. Section 47G(1)(a) of the FOI Act states:

*(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her*

*business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*

*(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.*

49. I note that the use of the word ‘could’ in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.
50. The Guidelines provide, at paragraph 6.191 that the term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.
51. I have identified limited information within the documents that would disclose the business information of a third party. Outside formal reporting obligations, I believe that the disclosure of the identified information would, or could reasonably be expected to unreasonably affect the third party in respect of their lawful business, commercial or financial affairs.
52. I am satisfied that disclosure of the identified material within the documents would, or could reasonably be expected to prejudice the future supply of information to the Commonwealth, which could reasonably be expected to have a flow-on substantial adverse impact on the operations of the Department.
53. I consider that third party businesses engaging with the Department would, or could reasonably be expected to be unreasonably affected by the disclosure of their business information by the Department through a freedom of information release.
54. I consider that disclosure of this information could also have a substantial adverse effect on the future supply of information to Defence and unreasonably affect Defence’s significant commercial commitments, and the administration and fulfilment of its purpose to defend Australia and its national interests, in order to advance Australia’s security and prosperity.
55. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

**Public interest considerations - sections 47C, 47E, 47F and 47G**

56. Section 11A(5) of the FOI Act states:

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

57. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. I consider relevant factors favouring disclosure to be that disclosure would, in some instances:



*(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*

*(b) inform debate on a matter of public importance;*

*(c) promote effective oversight of public expenditure.*

58. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.
59. Paragraph 6.233 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:
- the security and defence of the Commonwealth;
  - the protection of Australia and its national interest;
  - the financial and property interests of the Commonwealth, including the value for money able to be obtained in future negotiations or commercial commitments;
  - an agency's proper and efficient conduct of its operations;
  - the interests of an individual, group of individuals or third party businesses;
  - an agency's ability to obtain similar information in the future; and
  - the personnel management function of an agency.
60. I acknowledge that it is in the public interest that Defence efficiently and productively operates, and undertakes its functions in a transparent and proper manner. I consider there is also public interest in ensuring that senior officials attending a public hearing are provided a suite of information – some of which may not be suitable for disclosure – to ensure they are properly supported to provide fulsome responses across a significantly wide remit of issues.
61. I have placed weight on the variety of publicly available material related to the topic of the applicant's request, including video footage, and transcripts of all dialogue exchanged during Senate Committee hearings. I have also had regard to the significant volume of material within the documents which I have determined to be appropriate for public disclosure.

62. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the identified information to the applicant. Accordingly, I find that certain, limited information across the documents is exempt under sections 47C, 47E, 47F and 47G of the FOI Act.

A handwritten signature in black ink, appearing to read 'Mark Bazzacco', with a long horizontal flourish extending to the right.

04 November 2024

**Dr Mark Bazzacco**

First Assistant Secretary

Ministerial and Executive Coordination and Communication Division

Department of Defence