



# CDPP

Australia's Federal Prosecution Service

**Commonwealth Director  
of Public Prosecutions**

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Your Reference:

Our Reference: 2024FI00015

16 August 2024

Mr James Smith

By email: [foi+request-11651-bc01efcc@righttoknow.org.au](mailto:foi+request-11651-bc01efcc@righttoknow.org.au)

Dear Mr Smith

## **NOTICE OF DECISION UNDER SECTION 26 OF THE FREEDOM OF INFORMATION ACT 1982 (CTH)**

1. I refer to your email dated 8 July 2024 to the Office of the Director of Public Prosecutions (Cth) (CDPP) requesting access to documents under the *Freedom of Information Act 1982 (Cth)* (**FOI Act**) in the following terms (**your request**).
  - 1.1. *Please provide:*
    1. Any protocols, procedures, standards, policies, guidelines, frameworks or similar materials relating to the review, handling, access, management, sharing or use of IGADF Afghanistan Inquiry information ("Information Arrangements").
    2. Documents recording, relating to, or commenting on any breaches or contraventions of any above Information Arrangements.
    3. A copy of the CDPP's Prosecution Policy, including the "two stage test".
    4. Materials recording the assessment of briefs referred to the CDPP in relation to war crimes.
2. For ease of reference I will refer to your requests in the paragraphs above as items 1 to 4 respectively.

### **Extension of time by agreement to 16 August 2024**

3. On 5 August 2024 the CDPP sent you an email requesting that you agree to an extension of time under section 15AA of the FOI Act, for the CDPP to process your request.
4. On 7 August 2024 you sent the CDPP an email agreeing to an extension of time to 15 August 2024. On 7 August 2024 the CDPP notified the OAI of this agreement.

5. On 15 August 2024 the CDPP sent you an email requesting that you agree to a further extension of time for the CDPP to process your request, to 16 August 2024. You agreed to further extend time to "COB 16 August 2024".
6. On 16 August 2024 the CDPP notified the OAIC of our agreement of 15 August 2024 to extend the time for processing your request to 16 August 2024.

#### **AUTHORISATION**

7. I am a person authorised by the Director of Public Prosecutions to make decisions on requests to access to documents under the FOI Act. My name and position are:

David Bahlen  
Deputy Director  
Melbourne

8. In making my decision in response to your application, I have taken the following into account:
  - 8.1. The terms of your request.
  - 8.2. The documents relevant to your request.
  - 8.3. The FOI Act.
  - 8.4. The Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**the Guidelines**, available at [www.oaic.gov.au](http://www.oaic.gov.au)).
  - 8.5. The views of relevant Commonwealth agencies who were consulted.

#### **DECISION**

9. I have identified ten documents that fall within the scope of your request. The ten documents were identified following comprehensive searches undertaken by CDPP staff of the CDPP's records and discussions I had with CDPP staff with knowledge of relevant matters.
10. A list of the ten documents, my decision with respect to each of the 10 documents and the reasons for my decision, are listed in the **attached** schedule (**the schedule**).
11. In summary, I have decided to:

##### **Item 1**

- 11.1. Refuse access to documents numbered 1, 2 and 3 in the schedule in their entirety as I am satisfied that section 47E(d) of the FOI Act applies to documents 1 and 3 and that sections 47E(d), 37(1)(a), 37(2)(b) and 42(1) apply to document 2.

##### **Item 2**

- 11.2. Refuse access to your request at item 2 pursuant to section 24A(1) of the FOI Act as I am satisfied that the document(s) you have requested under item 2 do not exist in the records of the CDPP.

##### **Item 3**

- 11.3. Grant access to the Prosecution Policy of the Commonwealth (document 4 in the schedule), which is also available on the CDPP website at [www.cdpp.gov.au](http://www.cdpp.gov.au).

#### Item 4

- 11.4. Refuse access to documents 5 to 10 (inclusive) in the schedule as I am satisfied that legal professional privilege (LPP) applies to each of those documents in their entirety and they are exempt under section 42(1) of the FOI Act.

### REASONS FOR DECISION

#### Item 2

12. The searches undertaken by the CDPP, referred to above, did not locate any documents as described in item 2 of your request. I am satisfied that no such document(s) exists.
13. I am refusing your request at item 2 of your request in accordance with paragraph 24A(1)(b)(ii) of the FOI Act, which provides:

*Document lost or non-existent*

*(1) An agency or Minister may refuse a request for access to a document is:*

- (a) all reasonable steps have been taken to find the document; and*
- (b) the agency or Minister is satisfied that the document:*
  - (i) ....*
  - (ii) does not exist*

#### Section 42 – documents subject to legal professional privilege (LPP)

14. Section 42(1) of the FOI Act states:
- A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional.*
15. The Guidelines provide, at paragraph 5.149, that in considering whether LPP exists, the following factors are required to be considered:
- *whether there is a legal adviser-client relationship;*
  - *whether the communication was for the purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation;*
  - *whether the advice given is independent; and*
  - *whether the advice given is confidential.*
16. I am satisfied that each of the following criteria has been met in relation to the relevant material:
- 16.1. that a legal adviser-client relationship exists between the Director of Public Prosecutions (Cth) and CDPP lawyers, CDPP lawyers and partner agencies who seek professional advice from CDPP lawyers, CDPP lawyers who seek professional advice;

- 16.2. that the dominant purpose of the communication was for the purpose of giving or receiving legal advice or use in actual or anticipated litigation;
  - 16.3. that the advice was given in confidence; and
  - 16.4. that there has been no waiver of privilege either express or implied.
17. I am, accordingly, satisfied that the relevant material is exempt from disclosure under section 42(1) of the FOI Act.

**Section 47E(d) - Certain operations of agencies**

**Document 1**

18. I have exempted document 1 from release on the basis that the section 47E(d) conditional exemption applies and release would be contrary to the public interest.
19. Section 47E(d) states:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

*...*

*have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

20. I am satisfied that disclosure of document 1 would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency by revealing detailed internal procedures and operations of this Office, including relating to security arrangements. This in turn could reasonably be expected to prejudice the enforcement of law and compromise the flow of information between agencies.

**Document 2**

21. I have exempted document 2 from release on the basis that the section 47E(d) conditional exemption applies and release would be contrary to the public interest.
22. I am satisfied that disclosure of document 2 would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency by revealing detailed internal procedures and operations of AFP, including relating to security arrangements.

**Document 3**

23. I have exempted document 3 from release on the basis that the section 47E(d) conditional exemption applies and release would be contrary to the public interest.
24. I am satisfied that disclosure of document 3 would, or could reasonably be expected to have a substantial effect on the proper and efficient conduct of the operations of agencies (OSI, AFP and Defence) by disclosing strategic information concerning how information relevant to Operation Emerald investigations is obtained and disclosed; and engagement with key partners on methods and partner arrangements for how relevant information is used, managed and stored.



25. Access to conditionally exempt material must be given unless I am satisfied that it would not be in the public interest to do so (section 11A of the FOI Act). I have considered the factors favouring access identified in section 11B(3) of the FOI Act. Disclosure may promote some of the objects of the FOI Act, such as recognition that information held by Government is a national resource. I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.
26. In my view disclosure of documents 1, 2 and 3, would be contrary to the public interest given the significant adverse impact I consider it could reasonably be expected to have on the proper and efficient operations of this Office and its referring agencies. Overall, I find the public interest in disclosing the documents is outweighed by the public interest against disclosure.

### **Section 37 – Documents affecting enforcement of law and protection of public safety**

27. **Section 37(1)(a)** of the FOI Act states:

*A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:*

*prejudice the conduct of an investigation of a breach, or possible breach, of the law, .... or prejudice the enforcement or proper administration of the law in a particular instance;*

28. I have exempted document 2 from release on the basis that section 37(1)(a) of the FOI Act applies to document 2.
29. I am satisfied that disclosure of the contents of document 2, would or could reasonably be expected to prejudice the conduct of an investigation or a breach, or possible breach, of the law or prejudice the enforcement in a particular instance. Specifically, the conduct of Operation Emerald investigations.
30. **Section 37(2)(b)** of the FOI Act states:

*A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:*

*disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to prejudice the effectiveness of those methods or procedures;*

31. I have exempted document 2 from release on the basis that section 37(2)(b) of the FOI Act applies to document 2.
32. I am satisfied that disclosure of the contents of document 2, would or could reasonably be expected to disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to prejudice the effectiveness of those methods or procedures.
33. The Guidelines [paragraphs 5.127 and 5.128], relevantly provide that:

*This exemption requires satisfaction of 2 factors. There must be a reasonable expectation that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure. If the only result of disclosing the methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice. However, where a method might be described as 'routine', but the way in which it is employed can reasonably be said to be 'unexpected', disclosure could prejudice the effectiveness of the method.*

*The exemption will not apply to routine techniques and procedures that are already well known to the public or documents containing general information. ...*

34. Document 2 contains detailed information on methods and procedures used for the purpose of ongoing Operation Emerald investigations. Specifically, how material is obtained and in facilitating current and future prosecutions.

#### **Section 22 – Access to edited copied with exempt of irrelevant matter deleted**

35. Section 22 of the FOI Act provides that if an agency decides to refuse to give access to an exempt document and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request the agency must prepare and give the applicant access to the edited copy. I am satisfied that removal of the irrelevant parts of document 3 would render document 3 of little or no value.
36. I have exempted documents 1, 2 and 5 – 10 inclusive, in their entirety.

#### **RIGHTS OF REVIEW**

37. Under section 26 of the FOI Act I am required to inform you of your rights of review.
38. Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing to grant access to documents. An application for internal review of the decision must be made in writing within 30 days of receipt of this letter. No particular form is required but it is desirable to set out in the application the grounds on which you consider that the decision should be reviewed. An application may be sent to [foi@cdpp.gov.au](mailto:foi@cdpp.gov.au) or to the following postal address:

FOI Coordinator  
Commonwealth DPP  
PO Box 3104  
CANBERRA ACT 2617

39. If the decision on internal review goes against you, you are entitled to seek a review of that decision by the Information Commissioner. Alternatively, you are entitled to bypass the internal review process and make an application directly with the Office of the Information Commissioner pursuant to section 54L of the FOI Act.
40. An application to the Information Commissioner may be made in writing and should be made online using the Information Commissioner Review Application form available on the OAIC website.
41. Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

- Email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)
- Mail to FOI Regulatory Group, GPO Box 5288, Sydney NSW 2001

Yours faithfully,



David Bahlen  
Deputy Director  
Melbourne

**Encl**

- 1. The schedule**
- 2. Prosecution Policy of the Commonwealth**

Schedule

Column 1 Document No.	Column 2 Date	Column 3 Document description	Column 4 Decision on access	Column 5 Reason
1.	February 2023	CDPP Review Team Protocol	Access refused	Section 47E(d) – certain operations of agencies
2.		Operation Emerald SOP	Access refused	Section 37(1)(a) – documents affecting enforcement of law and protection of public safety. Section 37(2)(b) - documents affecting enforcement of law and protection of public safety. Section 47E(d) – certain operations of agencies. Section 42(1) – legal professional privilege
3.	21 March 2024	Defence-AFP-OSI Protocols for referrals, information sharing and communications - Operation Emerald	Access refused	Section 47E(d) – certain operations of agencies
4.	24 February 2021	Prosecution Policy of the Commonwealth	Access granted	-
5.	April 2024	LPP Document 1	Access refused	Section 42(1) – legal professional privilege
6.	April 2024	LPP Document 2	Access refused	Section 42(1) – legal professional privilege
7.	April 2024	LPP Document 3	Access refused	Section 42(1) – legal professional privilege
8.	July 2024	LPP Document 4	Access refused	Section 42(1) – legal professional privilege
9.	September 2023	LPP Document 5	Access refused	Section 42(1) – legal professional privilege
10.	January 2024	LPP Document 6	Access refused	Section 42(1) – legal professional privilege