



DEFENCE FOI 171/24/25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

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

1. *the document setting out the Chief of Defence Force's recommendations regarding medals made to the Defence Minister in about mid May 2023; and*
2. *subsequent correspondence or materials relating to the same topic.*

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 have identified 1 document as falling within the scope of the request.

Exclusions

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

Decision

5. I have decided to:
- a. partially release one (1) document 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 section 42 [Documents subject to legal professional privilege], section 47C [Public interest conditional exemptions - deliberative processes], section 47E [Public interest conditional exemptions – certain operations of agencies], section 47F [Public interest conditional exemptions – personal privacy] of the FOI Act; and
 - b. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

6. In making my decision, I have had regard to:
- a. the terms of the request;
 - b. the content of the identified document in issue;
 - c. relevant provisions of the FOI Act;

- d. consultation with the Office of the Special Investigator; and
- e. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

REASONS FOR DECISION

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

- 7. 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.
- 8. The document contains exempt material and information that does not relate to the request.
- 9. I am satisfied that in relation to the body of the document (two (2) pages) it is reasonably practicable to remove the exempt and irrelevant material and release the document to you in an edited form. It is not practicable to do so for the enclosure.

Section 42 – Documents subject to legal professional privilege

- 10. 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 privilege.

- 11. I have identified legal material within the document for which a claim of Legal Professional Privilege (LPP) is warranted.
- 12. The Guidelines provide at paragraph 5.149, that in considering whether LPP exists, the following factors should be considered:
 - a. whether there is a legal adviser-client relationship;
 - b. the communication was for the dominant purpose of giving or receiving advice, or for the use or in connection with actual or anticipated litigation;
 - c. the advice given is independent;
 - d. there have been confidential communications in respect of the document; and
 - e. the privilege has not been waived.
- 13. I am satisfied that the legal adviser/client relationship has been established, as the advice was provided by a qualified lawyer, who was acting in their capacity as a professional adviser.
- 14. I am satisfied that the specific material relevant to this request was created for the dominant purpose of a client seeking legal advice from a legal adviser.

15. Some material within the scope of this request represents communication between a legal adviser and a client made in confidence in relation to matters that might be reasonably expected to give rise to future litigation.
16. I find no evidence to call into question the independence of the legal adviser.
17. I note that LPP is the client's privilege to waive and I am satisfied that the waiver has not occurred.
18. On this basis, I am satisfied, therefore, that the parts of the document redacted under section 42 should be privileged from production and are exempt under section 42 of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

19. Section 47C of the FOI Act states:

*(1) 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:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);*
- (b) purely factual material.*

(3) This section does not apply to any of the following:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;*
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;*
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.*

20. The Guidelines provide:

6.54 Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

6.55-6.56 [The deliberative process must relate to] the functions of an agency, minister or government. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency.

6.57 *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 decision or deliberations.*

21. Further, in relation to the exclusion in section 47C(2)(b) of the FOI Act, the Guidelines, at paragraph 6.70, state that:

'[p]urely 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.

22. Upon examination of the document, including its enclosure, I find it contains deliberative matter in the nature of opinions and advice that were prepared to inform a decision making process relating to the management of Defence personnel, which is a function of both the agency and Minister for Defence.

23. I am also satisfied that:

- to the extent that the document contains material that may be considered of a factual nature, such material is not 'purely' factual as it forms an integral part of the deliberative content and purpose of the documents, and is embedded in or intertwined with the deliberative content such that it is impracticable to separate it;
- the deliberative material is not 'operational information' within the meaning of section 8A of the FOI Act; and
- the document is not a document of a kind specified in section 47C(3).

24. Therefore, I have decided that the material identified is conditionally exempt under section 47C of the FOI Act.

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

25. 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:

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency.

26. The Guidelines, at paragraph 6.105, provide that:

The decision maker may also need to consider the context of the document and the integrity of a system that may require those documents, such as witness statements required to investigate a workplace complaint, or referee reports to assess job applicants.

27. The document was created to assist the Minister to assess whether certain persons should retain their honours and awards. Third parties involved in this matter would reasonably expect that information relating to them and provided in confidence for a specified purpose would not be disclosed to parties not involved in the decision making process. As such, I am satisfied that if the information contained in the documents was made publically available it would substantially affect the integrity of the process and have an adverse effect on the management or assessment of personnel by Defence.
28. Accordingly, I am satisfied that all relevant information related to the honours and awards process is conditionally exempt under section 47E(c) of the FOI Act.

Section 47F – Public interest conditional exemptions - personal privacy

29. 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).

30. 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.*

31. I found that the documents contain personal information about an individual that is not well known and is not publically available.
32. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors in accordance with section 47F(2):
- a. the extent to which the information is well known;
 - b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - c. the availability of the information from publicly accessible sources; and
 - d. the effect the release of the personal information could reasonably have on the third party.
33. I found that the individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents and the information is not readily available from publicly accessible sources.
34. Taking into account the above factors, I consider that the release of the personal information of individuals other than the applicant would be an unreasonable

disclosure of personal information and conditionally exempt under section 47F of the FOI Act.

Public interest considerations - section 47C, 47E(c) and 47F

35. 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.

36. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act, that is, whether giving access to the document would:

(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.

37. I accept that there is a public interest in disclosing the information in the document insofar as doing so would:

- i. promote the objects of the FOI Act by facilitating access to government information in a general sense; and
- ii. contribute to public debate and transparency, and informing scrutiny or discussion of Defence activities and decision-making processes.

38. I have also considered public interest factors against disclosure. 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:

- i. the protection of an individual's right to privacy, insofar as the material comprises the third party personal information;
- ii. the interests of an individual or a group of individuals;
- iii. an agency's ability to obtain confidential information; and
- iv. an agency's ability to obtain similar information in the future.

39. Further,

- i. as discussed above, third parties involved in this matter would reasonably expect that information relating to them and provided in confidence for a specified purpose would not be disclosed to parties not involved in the decision making process;
- ii. to release personal information of a third party could reasonably impact their personal interests, diminish confidence in the management of sensitive matters by Defence and create a reluctance on the part of individuals to provide information in respect of future matters;

- iii. a reluctance of individuals to provide full and frank information would prejudice Defence's capacity to undertake decision-making processes in future;
 - iv. there is strong public interest in individuals involved in organisational decision making to provide voluntary, frank and timely information as part of organisational decision making and to have confidence in those processes; and
 - v. the disclosure of confidential statements would also be likely to impact detrimentally on the morale of Defence members and former members.
40. 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.
41. I am satisfied that in the circumstances, and based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and therefore disclosure would be contrary to the public interest. Accordingly, I find that the information is exempt under sections 47C, 47E(c) and 47F of the FOI Act.

FURTHER INFORMATION

42. The document matching the scope of this request contained a dissemination limiting marker (DLM). As the document has been approved for public release, the DLM has been struck through.

Catherine Wallis, CSM
Air Commodore
Accredited Decision Maker
Associate Secretary Group
Department of Defence