



Our reference: FOI 007/14/15



By email: 

Dear 

## **NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST**

1. I refer to your email, dated 10 July 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

*"...any documents, emails, reports, briefing notes relating to the investigation into the incorrect information regarding about the nature and extent of administrative and or disciplinary action imposed in 2009 or any time since, regarding the making of the making of the DVD The Fist by SOTG commandos.*

*I would like to include records, emails, reports which show the initial author of the "quick assessment" which was supplied to Fairfax Media FOI 324/13/14 and subsequently found to be wrong.*

*The time frame is from January 1, 2009 until July 9, 2014."*

### **Revised scope**

2. On 10 July 2014, you were advised that the scope of your request was being interpreted as a request for a copy of the Inquiry report and its enclosures/attachments etc of the inquiry which Colonel Kennedy advised was to be undertaken; my email to you of 23 May 2014 referred. You were also advised that the inquiry was appointed under the Defence (Inquiry) Regulations, and is yet to be complete. I further advised that, taking into account section 38 of the FOI Act, access would be denied.

3. You advised that you wished to proceed with your request and revised the scope of your request to:

*I would like to continue with this request particularly the request under freedom of information of laws any documents, emails, reports, briefing notes relating to the investigation into the incorrect information regarding about[sic] the nature and extent of administrative and or disciplinary action imposed in 2009 or any time since, regarding the making of the making of the DVD The Fist by SOTG commandos - to clartify [sic] my request is the emails and reports about the investigation not the[report] itself which I understand [sic] is not complete.*

*I would like to include records, emails, reports which show the initial author of the "quick assessment" which was supplied to Fairfax Media FOI 324/13/14 and subsequently found to be wrong. To clarify I would like the documents which show who wrote this assessment and when and who it was given to.*

4. By email correspondence, dated 31 July 2014, you agreed to extend the statutory processing time by 14 days in accordance with section 15 AA of the FOI Act. You also agreed to exclude duplicate documents.
5. The purpose of this letter is to provide you with the decision relating to the documents that are the subject of your request.

#### **FOI decision maker**

6. Colonel N.A. Fox, Director Personnel Policy – Army was the accredited decision maker, under the FOI Act, in relation to your request.

#### **Documents identified**

7. Colonel Fox identified 25 documents as matching the scope of Item 1 of your request.
8. Colonel Fox also identified a Quick Assessment (QA) which falls within the scope of Item 2 of the request. A copy of the QA was provided to you as part of FOI 324/14/15. As such, Colonel Fox provided the only relevant page of the QA (page 5) to satisfy this request.
9. A schedule of documents is at Enclosure 1.

#### **Decision**

10. In relation to Item 1, Colonel Fox decided to:
- a. release 2 documents in full;
  - b. release 21 documents with deletions in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act. Colonel Fox deemed the deleted material to be exempt under sections 38 [documents to which secrecy provisions of enactments apply] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act;
  - c. deny access to two documents under section 38 of the FOI Act; and

- d. remove some material from documents in accordance with section 22(1)(a)(ii) of the FOI Act, as the material was considered irrelevant to the scope of the request. The material relates to the SOTG DVD but does not directly relate to the Inquiry or the undertaking of the Inquiry.

11. In relation to Item 2, Colonel Fox decided to:

- a. partially refuse access to Item 2 of the request under subparagraph 24A(1)(b)(ii) [requests may be refused if the documents cannot be found, do not exist or have not been received] of the FOI Act; and
- b. release one document with deletions in accordance with section 33 [documents affecting national security, defence or international relations] of the FOI Act.

#### **Material taken into account**

12. In making her decision Colonel Fox 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. advice received from Headquarters Special Operations Command.

#### **Reasons for decision**

#### **Section 24 – requests may be refused if documents cannot be found, do not exist or have not been received**

13. No relevant documents could be located that identify who the QA was given to and when [Item 2]. It is appropriate to consider whether Colonel Fox can refuse access to this item on the basis that the documents cannot be found or do not exist.

#### **Section 24A(1) of the FOI Act**

14. Section 24A(1) of the FOI Act states:

*24A Requests may be refused if documents cannot be found, do not exist or have not been received*

*Document lost or non-existent*

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

- (a) all reasonable steps have been taken to find the document; and*
- (b) the agency or Minister is satisfied that the document:*

- (i) *is in the agency's or Minister's possession but cannot be found;  
or*
- (ii) *does not exist.*

15. Paragraph 8.41 of the Guidelines also gives guidance as to what is required to be included within this statement of reasons to refuse a request under section 24A(1);

*8.41 The statement of reasons given to the applicant should sufficiently identify the document and give reasons as to why it cannot be found or why it is known that it no longer exists. The statement should describe the steps the agency took to search for it.*

16. Colonel Fox consulted with Headquarters, Special Operations in relation to this request. The author of the QA has advised on completion of the QA a verbal briefing was given to Special Operations Command, and as such the QA stands alone as the only relevant document that matches the scope of Item 2 of this request. Colonel Cox did not consider there are any other areas within Army, or Defence generally, that would have any relevant documents as this matter is solely related to Special Operations Task Group members.

17. Given the above, Colonel Fox was satisfied that "all reasonable steps" had been taken to locate relevant documents. Further, she was satisfied that the documents do not exist and decided to refuse access to Item 2 under section 24A(1) of the FOI Act.

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

18. Section 33 exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the security or defence of the Commonwealth. In regards to the terms, 'could reasonably be expected to' and 'damage', the guidelines provide:

*5.13 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of the documents.*

*5.14 The use of the word 'could' in this qualification is less stringent than 'would', and so requires no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences. Therefore, the reasonable expectation refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future.*

*5.25 '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 from a foreign government or agency. In determining whether damage was likely to result from disclosure of the document(s) on 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.*

19. In regards to the 'security of the Commonwealth', the guidelines state:

***Security of the Commonwealth***

5.26 *The term 'security of the Commonwealth' broadly refers to:*

(a) *the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests...*

5.27 *A decision maker must be satisfied that damage to the security of the Commonwealth would be caused by disclosure of the information under consideration. The claim has been upheld in the following situations:*

(b) *The disclosure of a defence instruction of the Army's tactical response to terrorism and procedures for assistances in dealing with terrorism would pose a significant risk to security by revealing Australia's tactics and capabilities.*

20. Colonel Fox identified information within the documents at Item 1, Serial 7 and Item 2 that, if released, could jeopardise the capability of the ADF. This particular information pertained to the operational information and names of Special Forces personnel who have been awarded Protected Identity Status.

21. Colonel Fox was of the view that if this information was disclosed it could be used by an adversary to identify operational information of the Special Forces, thus compromising the capability of the ADF.

22. Taking the above into account Colonel Fox was therefore satisfied that the operational information identified within the documents is exempt under section 33(a)(i) of the FOI Act.

**Section 38 – Documents to which secrecy provisions of enactments apply**

23. Item 1, serials 6-8 and 16 consist of documents that contain information about or were created pursuant to the Defence (Inquiry) Regulations 1985 (the Regulations), and it is appropriate to consider what effect this may have on the release of these documents under the FOI Act.

24. Subregulation 63(1) of the Regulations states:

***Disclosure of records or reports of Courts of Inquiry***

*Offence relating to disclosure*

(1) *A person to whom this regulation applies commits an offence if:*

(a) *the person does any of the following things:*

- (i) *discloses to a person, or makes available to the public generally, information contained in the records or report of a Court of Inquiry;*
- (ii) *copies a document, or part of a document, that forms part of the records or report of a Court of Inquiry;*
- (iii) *discloses to a person, or makes available to the public generally, a document, or part of a document, or a copy of all or part of a document, that forms part of the records or report of a Court of Inquiry; and*

- (b) *the information or document referred to in paragraph (a) came to the knowledge, or into the possession, of the person in the course of the person's employment as a person to whom this regulation applies; and*
- (c) *the information or document referred to in paragraph (a) does not relate to oral evidence given in public in the course of an inquiry.*

*Penalty: 10 penalty units or imprisonment for 3 months.*

25. Documents at Item 1 contain information that forms part of a Defence Inquiry. They are privy to restrictions on disclosure as a result of regulation 63(1), and ordinarily disclosing them without ministerial approval would constitute an offence, punishable by fine or imprisonment.

26. Section 38 of the FOI Act states, in part:

***Documents to which secrecy provisions of enactments apply***

(1) *Subject to subsection (1A), a document is an exempt document if:*

- (a) *disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and*
- (b) *either:*
  - (i) *that provision is specified in Schedule 3; or*
  - (ii) *this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.*

(1A) *A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.*

(2) *... if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.*

27. Schedule 3 of the FOI Act states, in part:

***Schedule 3 – Secrecy Provisions***

*... Defence (Inquiry) Regulations, subregulation 63(2)*

28. On 18 June 2013, the Regulations were amended. The provisions previously applied by subregulation 63(2) are now provided for under subregulation 63(1) as described above, however, the FOI Act has not yet been amended to reflect the change in the Regulations. As established above, Item 1 is privy to subregulation 63(1) of the Regulations. Schedule 3 of the FOI Act affirms this protection and applies section 38 to Item 1, which allows for the release of only the applicant's personal information when the documents requested are subject to a secrecy provision.

29. Pursuant to subsection 38(2) of the FOI Act, Colonel Fox considered that you are entitled to your own personal information contained with Item 1. She therefore reviewed the documents to identify any of your personal information in the documents.

30. When determining what information constitutes the applicant's personal information, Colonel Fox had regard to the definition of personal information in section 4 of the FOI Act:

*...information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained from the information or opinion.*

31. Colonel Fox also had regard to paragraph 6.115 of the Guidelines:

*... personal information:*

- *identifies, or could identify, a person*
- *says something about a person*
- *may be opinion*
- *may form part of a database*
- *may be true or untrue*
- *relates to a natural person.*

32. Colonel Fox found that the documents contained none of your personal information. Accordingly, she decided that the documents identified at Item 1, Serials 6-8 and 16 are exempt from disclosure under section 38 of the FOI Act.

### **Section 47F – personal privacy**

33. All documents at Item 1 contain mobile phone numbers, personal phone numbers, signatures and personal information of defence personnel. This information could be used to reasonably ascertain the identity of an individual and therefore satisfies the definition of personal information in section 4 of the FOI Act. To determine whether the disclosure of the identified personal information was unreasonable, Colonel Fox had regard to the criteria specified in section 47F(2) of the FOI Act.

34. The guidelines note that 'the personal privacy exemption is designed to prevent 'unreasonable' invasion of third parties privacy. In accordance with subsection 47F(2), in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, Colonel Fox had regard to:

- 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
- d. any other matters that the agency or Minister considers relevant.

35. Against those criteria, Colonel Fox found:

- a. the specific personal information listed is not well known
- b. the information is not readily available from publicly accessible sources
- c. it is not standard practise for Army to release mobile phone numbers of personnel.

36. With reference to the assessment above, Colonel Fox considered that the release of this information would be an unreasonable disclosure of personal information and was therefore conditionally exempt under section 47F(1) of the FOI Act.

37. Section 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless access to the document would be contrary to the public interest.

#### **Section 11A – right of access**

38. Subsection 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest. The Guidelines state (at 6.8-6.9):

*...The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered...*

*To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies, based on the particular facts of the matter at the time the decision is made.*

#### **Public interest considerations**

39. When assessing whether disclosure is on balance, contrary to the public interest, Colonel Fox considered the guidelines, together with a range of factors that favour access to a document as set out in section 11B(3) [Public interest exemptions – factors] of the FOI Act. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making her decision

40. Subsection 11B(3) states factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- a. promote the objects of this Act
- b. inform debate on a matter of public importance
- c. promote the effective oversight of public expenditure



d. allow a person to access his or her own personal information.

41. In considering the above points Colonel Fox found that disclosure of the requested documents may promote some objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of this information would not increase scrutiny or discussion of Government activities.

42. Accordingly, Colonel Fox considered that, on balance, the public interest factors against disclosure outweighed the factors for disclosure of the documents that match the scope of the request. Therefore, Colonel Fox decided that it would be contrary to the public interest to release the information considered exempt, under subsection 47F(1) of the FOI Act.

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

43. As noted above, Colonel Fox found that the documents identified as Serials 7 & 8 of Item 1 were exempt in full. Where a decision maker decides to deny access to a document they must consider whether the document can be released with the exempt matter deleted in accordance with subparagraph 22(1) of the FOI Act. Colonel Fox considered providing you with an edited version of the document, having regard to section 22(1)(c) of the FOI Act and paragraph 5.3 of the Guidelines. However, she decided against this course of action as it would not be possible, nor practical, to delete the exempt material and retain a meaningful non-exempt version of the document as all of the information would be deleted.

### **Payment of Charges**

44. In our letter, dated 21 July 2014, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request on 22 July 2014, noting that a deposit was not required at that stage.

45. Upon completion of your request, after deducting the free decision making time, the actual amount for processing exceeded the original estimate provided to you. However, as explained in the above mentioned letter the amount payable can only be more than the preliminary assessment if the decision is to release all of the documents requested in full.

46. Accordingly, on this occasion you are only required to pay the original estimated amount of [REDACTED]. Please find attached at Enclosure 2 a Payment Authorisation Form for the balance. Once you have completed the form please return to [foi@defence.gov.au](mailto:foi@defence.gov.au). An invoice will be raised and forwarded to you directly from Defence Finance; once you make payment you must provide a copy of the receipt to [foi@defence.gov.au](mailto:foi@defence.gov.au). The documents will not be released to you until the receipt is received.

### **Rights of review**

47. The FOI Act provides for rights of review of decisions. A copy of the fact sheet, “Freedom of Information – Your Review Rights” is at Enclosure 3.

**FOI Disclosure Log**

48. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish details of information released under the FOI Act. Defence will publish the identified documents relating to this request within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

**Further advice**

49. The FOI Act can be accessed online at: <http://www.comlaw.gov.au/Details/C2014C00122> .

50. Should you have any questions, please contact this office.

Yours sincerely



Theresa Stinson  
Assistant Director – Media Case Management  
Freedom of Information

22 August 2014

Enclosures:

1. Schedule of documents
2. Freedom of Information Payment Authorisation Form
3. Fact Sheet: Freedom of Information – Your Review Rights