



Our reference: FOI 017/14/15



By email: 

Dear 

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

1. I refer to your email, dated 18 July 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

*“All advice to the Minister of Defence dealing with the adequacy of helicopter support for ADF personnel serving in combat operations in Afghanistan. The period for this advice is 1 July 2005 until the end of calendar 2013.”*

2. 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**

3. Ms Andrea Sansom, Acting Director, Freedom of Information is the accredited decision maker, under the FOI Act, in relation to your request.

### **Documents identified**

4. Ms Sansom identified six documents that fall within the scope of your request, being ministerial submissions. A schedule of documents is at Enclosure 1, which provides further details of the identified documents and Ms Sansom’s decision as set out below.

### **Decision**

5. Ms Sansom decided to deny access to four documents on the grounds that they are exempt under sections 33 [documents affecting national security, defence or international relations], 34 [cabinet documents] and 47C [public interest conditional exemptions – deliberative processes] of the FOI Act.

6. She decided to release the remaining two documents with deletions made in accordance with section 22(1) [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 33, 34, 47C and 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

7. Ms Sansom also decided to remove some material from four 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.

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

8. In making her decision, Ms Sansom had regard to:

- a. the terms of the request;
- b. the content of the documents to which access is sought;
- c. the relevant provisions of the Act;
- d. Defence's guidance material on the Act;
- e. the Australian Information Commissioner's guidelines on FOI, available on the Office of the Australian Information Commissioner's website;
- f. advice from Defence officers with responsibility for matters relating to the documents to which access was sought;
- g. advice from the Defence's in-house legal team; and
- h. advice from PM&C regarding the application of section 34 of the FOI Act

#### **Reasons for decision**

##### **Subsection 33(a)(iii) [Documents affecting international relations] of the FOI Act**

9. After examining the documents Ms Sansom found that Documents 1 and 4 contained material, the disclosure of which would, or could, cause damage to the international relations of the Commonwealth.

10. The FOI Guidelines state that *'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'*.

11. Further, the guidelines state that *'...the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Governments.'*

12. If the identified material was to be released without the explicit agreement of the foreign governments and/or organisations involved it could reasonably be expected to impact on the ability of the Australian Government to maintain good working relationships with those governments and/or organisations. Further, the release of the information could lessen

the confidence in Australia's ability to protect sensitive operational information, and restrict the future flow of such information to the Commonwealth.

13. As such, Ms Sansom was satisfied that the identified material is exempt under subsection 33(a)(iii) of the FOI Act.

#### **Section 34 [Cabinet documents] of the FOI Act**

14. The Guidelines relating to section 34 of the FOI Act state that agencies *should note that the Cabinet Handbook requires agencies to consult with the Department of Prime Minister & Cabinet (PM&C) on any cabinet-related material identified as being within the scope of an FOI request.*

15. Ms Sansom found that three of the identified documents contained material that she considered would be exempt under section 34 of the FOI Act. Ms Sansom undertook the required consultation and based her decision on the response received from PM&C.

16. Ms Sansom found that Documents 1, 2 and 5 contained material that had been submitted to Cabinet for consideration, or was prepared for the dominant purpose of submission for consideration of Cabinet.

17. Specifically, Ms Sansom found that Documents 1 and 5 contained material that was a draft of a document which was prepared for the dominant purpose of submission for consideration of Cabinet. She found that Documents 1, 2 and 5 also contained material that contained information the disclosure of which would reveal Cabinet deliberation or decision.

#### **Section 47C [deliberative process] of the FOI Act**

18. Ms Sansom found that Documents 3, 4 and 6 contained material regarding decision-making surrounding the use and planning for Helicopters in theatre. She found that the material contained advice and recommendations for the purposes of the deliberative processes involving this issue and for decision making by the government of the day.

19. Under section 47C(1) of the FOI Act, a document is conditionally exempt if its disclosure would disclose matter (deliberative matter) in the nature or, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberations that have taken place in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

20. Ms Sansom considered that the material is conditionally exempt at this time, under subsection 47C(1) of the FOI Act.

#### **Section 47C of the FOI Act – Public interest considerations**

21. Section 11A(5) Section 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 in balance the public interest lies, based on the particular facts of the matter at the time the decision is made.'*

22. In balancing the public interest in this case Ms Sansom considered the following factors in favour of disclosure:

- a. promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act);
- b. informing debate on a matter of public importance, namely the disposition of Defence non-operational overseas workforce; and
- c. promoting effective oversight of public expenditure.

23. Ms Sansom considered that the following are factors against premature public disclosure of the Report:

- a. no public purpose would be achieved through the premature release of the material, the matters at hand are operationally sensitive and continue to be so while we are involved in overseas conflict ;
- b. exempting the material at this stage would allow this issue to be given careful consideration, including further engagement with stakeholders both within the government and with overseas governments as necessary

24. She formed a view that disclosure of the material, at this time, would reveal sensitive material that could place our military forces currently deployed in harms way.

25. On balance, Ms Sansom considered that the factors against disclosure and the substantial adverse effect or harm disclosure would create, considerably outweigh those factors supporting the release of the material. As such Ms Sansom considered that the specific material should be exempted from disclosure.

#### **Section 47F of the FOI Act**

26. Upon examination of the documents Ms Sansom found that Document 1 contained mobile phone numbers of ADF and Defence APS personnel. She considered this material meets the definition of personal information as contained in section 4 of the FOI Act. In accordance with subsection 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, Ms Sansom 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 documents.
- c. the availability of the information from publicly accessible sources.

27. Against these three criteria, Ms Sansom found that:

- a. the specific pieces of personal information relating to the individuals are not well known to the general public.
- b. the persons to whom the information relates is not known to be, or to have been, associated with the matters dealt with in the document.
- c. this specific information is not readily available from publicly accessible sources.

28. Noting the above findings, Ms Sansom decided that disclosure of the specific information would be an unreasonable disclosure of personal information belonging to other individuals. Accordingly, she considered that the material is conditionally exempt under section 47F of the FOI Act.

29. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

#### **Public interest consideration – Section 47F**

30. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Ms Sansom considered the range of factors that favour access to a document set out in section 11B(3) of the FOI Act.

31. 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'.*

32. Ms Sansom noted that disclosure may promote some of the objectives of the FOI Act, as information held by the Government is a national resource, 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.

33. She also noted that this specific information does not have an effect on the promotion of the effective oversight of public expenditure, nor would it allow a person to access his or her own personal information.

34. In coming to her decision, Ms Sansom also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act which lists factors which must not be taken into account in deciding whether access would, on balance, be contrary to the public interest. None of the factors she took into account were listed under subsection 11B(4) of the FOI Act.

35. Accordingly, Ms Sansom considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the documents that match the scope of the request. Therefore, she 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**

36. Ms Sansom considered, as required by section 22 of the FOI Act, whether elements of Documents 2, 3, and 5 could be redacted and a version of the documents released to you. However, she found that those documents in their entirety were exempt and purely due to the nature of the section 34 exemptions could not be redacted and released. In regards to Document 4, she found that disclosing the documents with the exempt material removed would necessarily involve the deletion of the entire document.

## **Payment of Charges**

37. 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 23 July 2014, an invoice for the preliminary assessment deposit of [REDACTED] was subsequently sent directly from Defence Finance. You advised 30 July 2014 that the required deposit had been paid.

38. 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.

39. Accordingly you are required to pay the remaining [REDACTED] in order to finalise your request. 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).

## **Rights of review**

40. 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**

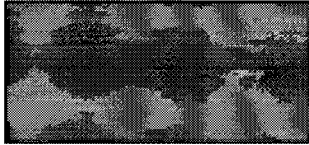
41. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish details of information released under the FOI Act. Defence will publish the identified documents relating to this request within five working days of receipt by the applicant. Defence will also publish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

**Further advice**

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

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

Yours sincerely



Theresa Stinson  
Assistant Director – Media Case Management  
Freedom of Information

25 September 2014

**Enclosures:**

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