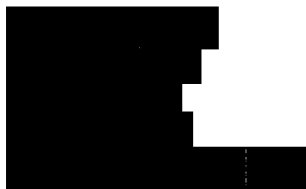





Our reference: FOI 038/14/15



By email: 

Dear 

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

1. I refer to your email, dated 6 August 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

- *Email correspondence, briefings, submissions generated by the Department and/or ADF in response to a media enquiry submitted to Defence Media Ops by James Brown on 15th April 2014.*
- *Advice provided to Defence Media Ops regarding the above media enquiry.*
- *The Inquiry Officers Report submitted to CJOPS on 26 July 2013 regarding a SOTG incident in Afghanistan that occurred in 2013*

### **Background**

2. In an earlier letter you were advised that there were likely to be duplicate copies of email trails and to advise whether you were happy to exclude duplicates. You did not object to the exclusion of duplicates.

3. 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**

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

**Documents identified**

5. A total of five documents were identified as relevant to your request, being the last email in a trail of correspondence relating to the issue, including the attachments.

**Decision**

6. Following examination of the documents Ms Sansom decided to partially release the documents with deletions made 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 conditionally exempt under section 47F [Public interest conditional exemptions – Personal privacy] of the FOI Act.

7. Ms Sansom also decided to deny access to the third item, under section 38 [Documents to which secrecy provisions of enactments apply] of the FOI Act.

**Material taken into account**

8. In making her decision, Ms Sansom had regard to:
- a. the terms of the FOI request;
  - b. the content of the documents in issue;
  - c. relevant provisions in the FOI Act,
  - d. Defence guidance material on the FOI Act and the guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the guidelines); and
  - e. advice provided by the areas who undertook searches and provided the documents.

**Reasons for Decision****Section 47F of the FOI Act**

9. Upon examination of the documents Ms Sansom found that Document 1-5 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.*

10. 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.*

11. 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.

12. 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.

### **Section 47F - Public interest considerations**

13. 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.

14. 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'.*

15. 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.

16. Ms Sansom 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.

17. 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 Ms Sansom took into account were listed under subsection 11B(4) of the FOI Act.

18. Accordingly, she 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, Ms Sansom 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 38 of the FOI Act**

19. Item 3 of the request seeks access to a document that contains information about or was 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.

20. 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.*

21. The document at Item 3 contains information that forms part of a Defence Inquiry. The document is 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.

22. 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.*

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

***Schedule 3 – Secrecy Provisions***

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

24. 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 3 is privy to subregulation 63(1) of the Regulations. Schedule 3 of the FOI Act affirms this protection and applies section 38 to Item 3, which allows for the release of only the applicant's personal information when the documents requested are subject to a secrecy provision.

25. Pursuant to subsection 38(2) of the FOI Act, Ms Sansom considered that the applicant is entitled to their own personal information contained with Item 3.

26. When determining what information constitutes the applicant's personal information, Ms Sansom 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.*

27. Ms Sansom 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.*

28. The documents contained no personal information belonging to you. Accordingly, the document identified as matching Item 3 is exempt from disclosure under section 38 of the FOI Act.

**Section 22**

29. 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. Ms Sansom considered providing you with an edited version of the documents, having regard to subparagraph 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 practicable to delete the exempt material and retain a meaningful non-exempt version of the document as all of the material within the document would be deleted.

**Document 1 – further information**

30. Please note that Document 1 contains a redacted version of an Inquiry Report, specifically on pages 13-29 of the pdf document. The redactions were made to the document for the purpose of public release at that time and were made outside of the provisions of the FOI Act.

**Payment of Charges**

31. In our letter, dated 12 August 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 2 September 2014, an invoice for the preliminary assessment deposit of [REDACTED] was subsequently sent directly from Defence Finance. You advised that the invoice had been paid on 3 September 2014.

32. Upon completion of your request, after deducting the free decision making time, the actual amount for processing was calculated to be [REDACTED]. The remaining balance is the difference between actual charges and the deposit you have already paid.

33. Accordingly you are required to pay the remaining [REDACTED] in order to finalise your request. Please find attached at Enclosure 1 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**

34. 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 2.

**FOI Disclosure Log**

35. 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**

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

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

Yours sincerely



Theresa Stinson  
Assistant Director – Media Case Management  
Freedom of Information

30 September 2014

**Enclosures:**

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