



Australian Government
Department of Defence
Defence Support and Reform Group

Ministerial and Information
Management Branch
Department of Defence

CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610
Tel: 02 626 62200
Fax: 02 626 62112
FOI@defence.gov.au

Our reference: FOI 69/14/15



Email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 14 September 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

"Item 1 - Correspondence relating to the offer of the Liberation of Kuwait Medal aka The Wisam Al-Tahrir from The State of Kuwait to Australia, relating to the Gulf War of 1991 and any subsequent ADF Operations from August

Item 2 - Decision-making documents that relate to the Australian Government's and ADF's consideration toward the offer of the Liberation of Kuwait Medal aka The Wisam Al-Tahrir from The State of Kuwait."

2. On 17 September 2014, I sought further clarification specifically in relation to Item 1. You confirmed the following date range to be:

"2 August 1990 through to 31 August 1993 respectively, of which ADF assets were deployed in the region Gulf during this period."

Background

3. On 18 September 2014 our office wrote to advise you of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. Our office received your receipt confirming payment of the FOI processing charges on 25 September 2014. As such, the statutory processing time for your request was due to expire on 24 October 2014.

4. On 9 October 2014, our office informed you that the decision maker had determined that there was a requirement to consult with a foreign government under subparagraph 15(7)(a)(i) [consultation with a foreign government] of the FOI Act, before finalising the decision. As such, in accordance with section 15(8) [extension of processing period to comply with requirement of section 15(7)] of the FOI Act, the statutory timeframe was amended to 23 November 2014.

5. On 12 November 2014, you kindly agreed to a 14-day extension under section 15AA [extension of time with agreement] of the FOI Act to enable us to finalise your request. Accordingly, the deadline for you to receive a response is now 7 December 2014

6. I note that the above mentioned due date is a Sunday, in accordance with the FOI Guidelines issued by the Australian Information Commissioner, if the last day for notifying a decision falls on a Saturday, Sunday or a public holiday, the timeframe will expire on the first day following which is none of those days. As such, the due date for you to receive a response expires on 8 December 2014.

7. 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

8. Mrs Helen Gouzvaris, Director Honours and Awards, is the authorised decision maker, under the FOI Act, in relation to your request.

Documents identified

9. Mrs Gouzvaris identified 26 documents as matching the description of your request. A schedule of documents is at Enclosure 1.

Decision

10. Mrs Gouzvaris has decided to:

- a. release documents in full; and
- b. partially release documents with exempt matter removed 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 47F [public interest conditional exemptions – personal privacy] and/or 6A [Official Secretary to the Governor-General], and/or 47C [public interest conditional exemptions-deliberative processes], and/or section 33(a)(iii) [the international relations of the Commonwealth] of the FOI Act.

Material taken into account

11. In making her decision Mrs Gouzvaris 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. Consultation with the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade and the Office of the Official Secretary to the Governor-General; and
- f. Consultation with a foreign government.

Reasons for decision

Section 33 – Documents affecting international relations

12. Mrs Gouzvaris decided to deny access to material pursuant to subsection 33(a)(iii) of the FOI Act.

13. Section 33 of the FOI Act relevantly provides:

“A document is an exempt document if disclosure of the document under this Act:

- (a) *would, or could reasonably be expected to, cause damage to:*
- (iii) *the international relations of the Commonwealth*

14. Where access has been denied under section 33 of the FOI Act, Mrs Gouzvaris considered that the material would, or could reasonably be expected to, harm the national security, defence and/or international relations of the Commonwealth.

15. In applying this exemption, Mrs Gouzvaris considered the likelihood of damage occurring as a result of release of the material she considered to be exempt under section 33. 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 a document.

5.14 The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is 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 foreign government or agency. In determining whether damage was likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments. [11] 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.

16. On examination of the document, Mrs Gouzvaris found that it was written by and belonged to a foreign government.

17. With regards to international relations, the Guidelines provides:

5.30 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. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between government agencies...

5.32 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.[22] On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.

18. In considering the above, Mrs Gouzvaris found the document contained information regarding the wearing of medals communicated in confidence to the Commonwealth by or on behalf of a foreign government or an authority of a foreign government. If the exempt material were to be released without the explicit agreement of the foreign government/s it could reasonably be expected to impact on the ability of the Australian Government to maintain good working relationships with those foreign governments. Based on the above, Mrs Gouzvaris removed material under subsections 33(a)(iii) of the FOI Act.

Section 47C [deliberative process] of the FOI Act

19. Mrs Gouzvaris found that a document contained material regarding the decision-making surrounding the wearing of medals. The document contains consultation and advice relating to a draft letter from Defence's International Policy Division to the Assistant Chief of Kuwait Liaison Office. Mrs Gouzvaris 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.

20. Under section 47C(1) of the FOI Act, a document is conditionally exempt if its disclosure would disclose matter (deliberative matter) in the nature of, 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.

21. Mrs Gouzvaris 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

22. 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.’

23. In balancing the public interest in this case Mrs Gouzvaris 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; and
- c. promoting effective oversight of public expenditure.

24. Mrs Gouzvaris considered that the following are factors against public disclosure of the document:

- a. no public purpose would be achieved through the release of the material;
- b. the material relates to internal Commonwealth deliberations that were not part of any final response to Kuwait. Release could damage Australia’s relations with Kuwait; and
- c. release of the material would reduce the quality, clarity of frankness of advice provided by agencies including PM&C in relation to honours and awards. The integrity of the system of honours and awards requires that assessments of possible award of honours remain confidential.

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

Section 47F – Conditionally exempt personal information

26. On review of the documents Mrs Gouzvaris found that one document contained names, service numbers and dates of birth of individuals other than you. 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, Mrs Gouzvaris had regard to the criteria specified in section 47F(2) of the FOI Act:

- a. the extent to which the information is well known;
- b. whether the persons to whom the information relates are known to be (or to have been) associated with the matters dealt within the document; and
- c. the availability of the information from publicly accessible sources.

27. Against these three criteria, Mrs Gouzvaris found:

- a. the specific personal information listed is not well known;
- b. the individuals whose personal information is contained in the document are not widely known to be associated with the matters dealt with in the documents; and
- c. the information is not readily available from publicly accessible sources.

28. With reference to the assessment above, Mrs Gouzvaris considered that the release of names, service numbers and dates of birth of individuals other than you would be an unreasonable disclosure of personal information and therefore conditionally exempt under section 47F(1) of the FOI Act.

29. 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.

Public Interest Considerations - Section 47F - Public interest considerations

30. Section 11A(5) of the FOI Act allows access to exempt documents unless, in the circumstances, access to the documents would, on balance, be contrary to the public interest.

31. In making her decision Mrs Gouzvaris had regard to paragraph 6.9 of the guidelines.

32. Mrs Gouzvaris considered a range of factors that favour access to the document, as set out in section 11B(3) of the FOI Act. Specifically, she considered if disclosure would:

- a. promote the objects of the Act;
- b. inform debate on a matter of public importance;
- c. promote effective oversight of public expenditure; and
- d. allow a person to access his or her personal information.

33. Mrs Gouzvaris acknowledged that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, there is a public interest in protecting the privacy of individuals whose personal details appear in a document.

34. Although the release of the material maybe of some interest to you, it would not inform public debate on any matter of public importance in any meaningful way. Additionally, disclosure of the information would not promote oversight of public expenditure or prevent a person's access to his or her personal information.

35. Conversely, the release of this information could reasonably be expected to result in a decline in confidence in Defence's ability to maintain the privacy of its members.

36. In coming to her decision Mrs Gouzvaris also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act.

37. After assessing all of these factors, Mrs Gouzvaris decided that the harm that could arise from disclosure of the personal information far outweighs any favourable public interest factors that would be gained from their release.

38. As such, Mrs Gouzvaris deemed the information exempt under section 47F of the FOI Act.

Section 6A

39. On review of the documents, Mrs Gouzvaris found that elements of material are attributed to Her Majesty The Queen and are intended to be communication between Her Majesty and her representative in Australia, the Governor-General. Such communications are private and confidential and are the property of Her Majesty the Queen. These communications are currently subject to seal for 50 years. As such, Mrs Gouzvaris considered that this document is protected from release as per the provisions in section 6A [Official Secretary to the Governor-General] of the FOI Act. Section 6A(1) states that

"This Act does not apply to any request for access to a document of the Office of the Official Secretary to the Governor-General unless the document relates to matters of an administrative nature."

40. When reviewing the document Mrs Gouzvaris also considered that the Federal Court found (*Kline v Official Secretary to the Governor-General* (2013) HCA 52), that the FOI Act did not apply to certain documents of the Office relating to the Australian honours system as these documents did not relate to matters of an administrative nature, within the meaning of Section 6A.

41. Even though the document in question is held by Defence rather than the Office of the Official Secretary to the Governor-General Mrs Gouzvaris considered that the Federal Court in 2012 (as part of their consideration of *Kline v Official Secretary to the Governor-General* (2012) FCAFC 1841) noted that section 6A would apply even where the document was in the possession of another agency.

42. In considering this document, Mrs Gouzvaris consulted with the Office of the Official Secretary to the Governor-General who has advised that the document should not be released as per the provisions in section 6A.

43. In light of the above, Mrs Gouzvaris considered this document to be exempt under section 6A of the FOI Act.

Payment of Charges

44. In our letter, dated 18 September 2014, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. Our office received your receipt confirming payment of the FOI processing charges on 25 September 2014.

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. As this has not occurred on this occasion, you are requested to pay the difference between the preliminary assessment amount ([REDACTED]) and the deposit you have already paid ([REDACTED]).

46. Accordingly, you are required to pay the remaining 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. Once the outstanding charges have been finalised, our office will send the documents to you in the form approved for release.

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 requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Further advice

19. The FOI Act may be accessed online at:
<http://www.comlaw.gov.au/Details/C2014C00673>

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

Yours sincerely



Melissa Davidson
Assistant Director
Freedom of Information

8 December 2014

Enclosures:

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