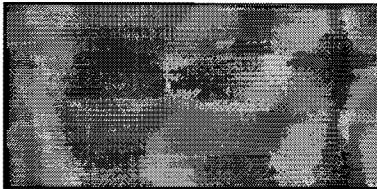




Our reference: FOI 090/14/15



Dear 

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

1. I refer to your email, dated 2 October 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

*The most recent Ministerial Submission sent to the Minister updating him on the investigation into the incorrect information regarding the nature and extent of administrative and or disciplinary action imposed in 2009 or any time since, relating to the making of the DVD 'The Fist' by SOTG Commandos [Item 1]*

*Internal Defence emails regarding the progression or status of the above mentioned investigation [Item 2]*

*Emails to the Minister's office regarding the progression or status of the above mentioned investigation [Item 3]*

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

### **Documents identified**

4. Colonel Fox identified one document that falls within the scope of Item 1 of your request.

5. In relation to Item 2 of your request, Colonel Fox interpreted the request as meaning any internal Defence emails between the Inquiry Officer and the Appointing Officer regarding the progression or status of the investigation described in Item 1. Colonel Fox identified four documents as matching the scope of Item 2 of your request.

6. Colonel Fox identified one document as matching the scope of Item 3 of your request.

### **Decision**

7. In relation to Item 1 of your request Colonel Fox decided to release the document with material deleted in accordance with section 22(a)(i)(ii) [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act. Colonel Fox noted that your request relates to the latest Ministerial submission sent to the Minister. Attached to the identified document are earlier Ministerial Submissions that she considered to be out of scope of your request.

8. In relation to Item 2 Colonel Fox decided to release the four identified documents with deletions in accordance with section 22 of the FOI Act, on the ground that the deleted material is exempt under section 38 [documents to which secrecy provisions of enactments apply] of the FOI Act.

9. Colonel Fox also decided to delete some material from the identified documents as the material was considered irrelevant to the scope of the request. Colonel Fox noted that the communication relates to communication between personnel that are not the Appointing Authority or the Inquiry Officer.

10. In relation to Item 3, Colonel Fox decided to release the identified document with deletions in accordance with section 22(a)(i) of the FOI Act, on the grounds that the deleted material is exempt under section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

11. Colonel Fox's reasons for her decision are set out below. A schedule of the identified documents and details of the decision on each is at Enclosure 1.

### **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, the Office of Parliamentary Business – Army and the Army Administrative Inquiries Cell.

## Reasons for decision

### Section 38 of the FOI Act

13. The documents identified as matching the scope of Item 2 of your request 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.

14. 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.*

15. Documents at Item 2 contain information that forms part of an Inquiry under the Defence Inquiry Regulations. This includes information such as Inquiry progress reports and the Inquiry plan. Such information 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.

16. 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.*

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

***Schedule 3 – Secrecy Provisions***

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

18. 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 2 is privy to subregulation 63(1) of the Regulations. Schedule 3 of the FOI Act affirms this protection and applies section 38 to Item 2, which allows for the release of only the applicant's personal information when the documents requested are subject to a secrecy provision.

19. Pursuant to subsection 38(2) of the FOI Act, Colonel Fox considered that you are entitled to your own personal information if it is contained with Item 2. Colonel Fox therefore reviewed the documents to identify your personal information.

20. When determining what information constitutes your 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.*

21. 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.*

22. The documents contained no personal information belonging to you. Accordingly, the material is exempt from disclosure under section 38 of the FOI Act.

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

23. The documents matching Items 2 & 3 of your request contain mobile phone numbers 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.

24. The guidelines issued by the Australian Information Commissioner 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.

25. Against these 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.

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

27. 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 of the FOI Act**

28. 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**

29. When assessing whether disclosure is on balance, contrary to the public interest, Colonel Fox considered the guidelines provided by the Australian Information Commissioner, 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

30. 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.

31. 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.

32. Accordingly, Colonel Fox consider 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, 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.

### **Payment of Charges**

33. In our letter, dated 7 October 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 8 October 2014. An invoice for the preliminary assessment deposit of [REDACTED] was subsequently sent directly from Defence Finance, you advised that the required deposit had been paid on 22 October 2014.

34. 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.

35. 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**

36. 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**

37. 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**

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

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

Yours sincerely



Theresa Stinson  
Assistant Director – Media Case Management  
Freedom of Information

7 November 2014

**Enclosures:**

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