



Australian Government
Department of Defence
Defence Support and Reform Group

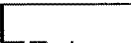
Ministerial and Information
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Our reference: FOI 096/13/14



By email: 

Dear 

1. I refer to your email, dated 3 October 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

- “1. Copies of any communications between the Department of Defence and any other Government Departments, Agencies or individuals regarding the arrest, detention and welfare of our client on the Swan Island Military facility including but not limiting, any communications with Victoria Police and the Australian Federal Police;*
- 2. Any memorandums of understanding or agreements made between Victoria Police, the Australian Federal Police and external Government Departments, Agencies or individuals regarding the arrest or detention of our client;*
- 3. Copies of all briefings, communications, forms, reports or notes regarding the arrest, detention and treatment of our clients held by the Department of Defence or any of its agents;*
- 4. Names of all persons involved in the arrest or detention of our client on the Swan Island military facility, including the names and roles of any person who authorized or instructed for their arrest or detention;*
- 5. All statements taken by defence personnel, their agents and other witnesses involved in or relating to the arrest and detention of our client;*
- 6. Any photographs taken of our client;*
- 7. Any CCTV footage of our client;*
- 8. Any thermal imaging or any other visual information relating to our client’s arrest or detention.”*

Background

2. On 23 October 2014, our office informed you that the decision maker had determined that there was a requirement to consult with third parties under section 27A [Consultation – documents affecting personal privacy] of the FOI Act, before finalising the decision. As such, in accordance with section 15(6) [extension of processing period to comply with requirement of section 26A, 27 or 27A] of the FOI Act, the statutory timeframe was amended to 2 December 2014.

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. Colonel M. Kennedy, Deputy Chief of Staff, Army is the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

5. Colonel Kennedy identified:

- a. 13 documents that fall with the scope of Item 3:
- b. no documents that fall within the scope of Items 1, 2, 6-8:
- c. in relation to Item 4 the names of Defence Personnel involved in the incident at Swan Island are contained within the QA [document contained in item 3]: and
- d. three statements have been identified that fall within the scope of Item 5. All statements taken by Defence were attached to the Quick Assessment and are provided as part of Item 3.

6. A schedule of documents is at Enclosure 1. For ease of reference and for processing this request Colonel Kennedy has added an FOI Item number to each of the documents, which corresponds with the schedule. A copy of the documents in the form for release is at Enclosure 2.

Decision

7. Colonel Kennedy has decided to:

- a. refuse access to the items 1, 2, 6-8 under s24A. Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act, on the basis that the documents do not exist or could not be located.; and
- b. release 12 documents in relation to Item 3 - 5 with deletions 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 exempt under section 33 [Security of the Commonwealth], section 47E(d) [Operations of an Agency] and 47F [Personal Information] of the FOI Act.

Material taken into account

8. In making his decision Colonel Kennedy had regard to:
- a. the terms of the request;
 - b. the content of the identified document 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 Army Headquarters and Special Operations Command; and
 - f. the result of third party consultation.

Reasons for decision Section

Section 22 - Irrelevant

9. Upon examination of the documents Colonel Kennedy found that the document identified as Item 3 Serial 12 on the schedule of documents contained material regarding matters which does not relate to the scope of your request. Colonel Kennedy considered that the material would disclose information that would be reasonably be regarded as irrelevant to the scope of your request. As such, in accordance with subparagraph 22(1)(a)(ii) of the FOI Act, he has decided to remove the material.

Subsection 24A(1) - documents cannot be found, do not exist or have not been received

10. Subsection 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.*

11. 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.

12. No documents could be located for item 1 of the request. Colonel Kennedy was advised by Special Operations Command that there were no written communications between the Department of Defence and other government agencies or individuals regarding the detention of the individuals who were trespassing on Swan Island on the 2 Oct 14. Communications were limited to mobile phone calls with VICPOL to alert them to the presence of unauthorised persons within the SIAD.

13. No documents could be located for item 2 of the request. Colonel Kennedy was advised by Special Operations Command that there was no memorandum of understanding or agreement made between the Department of Defence and either Victoria Police or the Australian Federal Police with regards the detention of the individuals who were trespassing on Swan Island on the 2 Oct 14.

14. No documents could be located for item 6-8 of the request. Defence captured no photographs, CCTV footage, thermal imaging or other visual information relating to the incident on Swan Island on 2 Oct 14.

15. Given the above, Colonel Kennedy was satisfied that “all reasonable steps” have been taken to locate relevant documents. Further Colonel Kennedy was satisfied that the documents cannot be found or do not exist, and refuse access to these Items under section 24A(1) of the FOI Act.

Subsection 33(a)(i) – Security of the Commonwealth of the FOI Act

16. Subsection 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 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.

17. 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.*

18. Colonel Kennedy identified information within the documents that, if released, could jeopardise the capability of the ADF. This particular information pertained to the operational information such as training, tactics and procedures of ADF Special Forces Personnel as well as names of members who have been awarded Protected Identity Status. Colonel Kennedy also identified information that relates to the type of software used by the ADF.

19. Colonel Kennedy 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.

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

Section 47E – Certain operations of Agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

(c) *have a substantial adverse affect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;*

(d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

21. Upon examination of the documents, Colonel Kennedy identified that they contained information that forms part of a current Inquiry Officers Inquiry. Colonel Kennedy received advice from the Inquiry Officer that if this information is released it may jeopardise the continuing Inquiry process. This information includes witness statements of defence personnel and a member of the Victorian Police. The public release of such information may impact the evidence gathered during the inquiry process.

22. Colonel Kennedy also identified information about the tactics, techniques and procedures of ADF personnel which if released would impact of the function of the unit and the ability of them to undertake their role within the ADF.

23. Based on the above reasons, Colonel Kennedy decided to remove material under section 47E(d) of the FOI Act of the Act as the release of the documents could reasonably be expected to have a substantial adverse affect on the proper and efficient conduct of the operations of Swan Island Army Detachment.

24. Accordingly, Colonel Kennedy considered this material to be conditionally exempt under section 47E(d) of the FOI Act.

Public Interest Considerations

25. When assessing whether release of the documents was within the public interest, Colonel Kennedy had regard to the public interest factors favouring disclosure of the documents as set out in section 11B(3) of the FOI Act [Public interest exemptions – factors] and the public interest factors against disclosure as set out in paragraph 6.29 of the Guidelines. None of the factors in section 11B(4) [Irrelevant factors] were taken into account in my decision.

26. In relation to section 11B(3)(a) of the FOI Act [Promote the objects of this Act (including all the matters set out in sections 3 and 3A)], information held by the Government is a national resource and releasing the document would promote section 3(1)(b) of the FOI Act as a result. The information would also grant the applicant further access to their own personal information, promoting section 11B(3)(d) of the FOI Act.

27. However, disclosure of the documents would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), it would not contribute to discussion of Defence activities (section 3(2)(b) of the FOI Act) and does not relate to matters of public expenditure (section 11B(3)(c)).

28. Paragraph 6.29 of the Guidelines prescribes a list of public interest factors against disclosure. The factors that are relevant to this request are that disclosure ‘could reasonably be expected to prejudice an agency’s ability to obtain confidential information’ and ‘could reasonably be expected to prejudice an agency’s ability to obtain similar information in the future’. As explained in paragraph 14 and paragraph 19 above, the ability of Army to conduct investigations and manage complaints in private is an essential function of command, and must be preserved. Releasing the material through FOI would prevent Army from collecting confidential information such as statements and/or representations in the future, specifically in the context of complaint management and investigative functions, impacting the health and well-being of staff members, other parties to the Inquiry and line management; and compromising the outputs and outcomes for the work area.

29. This Inquiry was appointed by the Chief of Army to ascertain the facts about the arrest of SPIC members on Swan Island. The release of any information subject to that Inquiry, including information contained in the Quick Assessment, would jeopardise the outcome of the investigation process and the Inquiry. Further, the release of this information may provide an adversary with information that would impact on the ADF’s ability to effectively perform their duties.

30. After considering the public interest factors above, Colonel Kennedy gave the greatest weight to factors against disclosure, particularly taking into account the framework that allows Army to manage complaints and investigative functions in a confidential manner and the impact on the outputs and outcomes for the work area. The disclosure of the identified document would be against the public interest, and is, therefore, exempt from release under the FOI Act.

Section 47F – Personal Privacy

31. On examination of the documents, Colonel Kennedy identified information, specifically names, mobile phone numbers, signatures and personal information of individuals other than the applicant. 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 Kennedy had regard to the criteria specified in section 47F(2) of the FOI Act.

32. 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 Kennedy 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; and
- d. any other matters that the agency or Minister considers relevant.

33. Against these criteria, Colonel Kennedy found:

- a. the specific personal information listed is not well known in the general community;
- b. the specific information is not readily available from publicly accessible sources; and
- c. it is not Defence policy to release mobile phone numbers of personnel.

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

35. 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.

Rights of access – Section 11A of the FOI Act

36. 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

37. When assessing whether disclosure is on balance, contrary to the public interest, Colonel Kennedy 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 my decision

38. 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; and
- d. allow a person to access his or her own personal information.

39. Colonel Kennedy 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.

40. 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.

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

42. In coming to his decision Colonel Kennedy also considered subsection 11 B (4) [public interest exemptions – irrelevant factors] of the FOI Act.

43. After assessing all of these factors, Colonel Kennedy 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. As such, Colonel Kennedy deemed the information exempt under section 47F of the FOI Act.

Declassification of documents

44. A document matching the scope of this request was classified. The decision maker has declassified the versions of the documents that are approved for release.

Rights of review

45. The FOI Act provides for rights of review of decisions. A copy of the fact sheet, "Freedom of Information – Your Review Rights", setting out your rights of review is at Enclosure 3.

FOI Disclosure Log

46. 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 publishes identified documents relating to requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Further information

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

48. All departmental action on your request is now complete. Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Andrea Sansom
A/Director
Freedom of Information

2 December 2014

Enclosures:

1. Schedule of documents
2. Documents in the form for release
3. Fact Sheet: Freedom of Information – Your Review Rights