



Australian Government
Department of Defence
Defence Support and Reform Group

Ministerial and Information
Management Branch
Department of Defence

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Our reference: FOI 165/13/14



By email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your emailed letter of 1 November 2013, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

- "1. The final ADFIS Service Police report into an event I understand occurred on 3 Oct 2010 in Afghanistan regarding the shooting of a suspected insurgent by an SOTG officer, and any attachments to this report.*
- 2. Briefings from Joint Operations Command (JOC) regarding the above report, since the report was finalized."*

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. Group Captain John Martin, Commanding Officer, Headquarters Joint Operations Command is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

4. Group Captain Martin identified the following two documents as matching the description of your request:

- a. Noting Brief for CDF (F738186) of 18 Oct 13; and
- b. ADFIS Service Police Report of 10 Oct 13 (DSN-INV-ADF01-ADFIS-2012-1).

Decision

5. Group Captain Martin has decided to partially release the identified documents with exempt matter removed, in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, as the material is considered exempt under sections 33 [documents affecting national security, defence or international relations], 42 [documents subject to legal professional privilege] and section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

Material taken into account

6. In making his decision Group Captain Martin 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. the Principles on open public sector information issued by the Information Commissioner; and
- f. advice from Defence areas with responsibility for matters relating to the documents.

Reasons for decision

Section 33 – documents affecting national security and defence

7. Group Captain Martin decided to exempt the documents from release, in part, pursuant to subsection 33(a)(i) and 33(a)(ii) of the FOI Act.

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:*
 - (i) *the security of the Commonwealth;*
 - (ii) *the defence of the Commonwealth...*”

Section 33(a)(i)

8. 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.

9. Group Captain Martin formed the view that some of the information contained within the documents could jeopardise the capability of the Australian Defence Force (ADF), if released. This particular information pertains to the employment details of a number of Defence personnel, such as names, rank, position details and other identifying information, designated with Protected Identity Status.

10. Group Captain Martin formed the view that if this information was disclosed it could be used by an adversary to identify and target key individuals involved in Special Forces operations, in order to gain access to operational information, this compromising the capability of the ADF.

11. Taking the above into account, Group Captain Martin was satisfied that the names and other identifying information of Defence personnel with Protected Identity Status are exempt under section 33(a)(i) of the FOI Act.

Section 33(a)(ii)

12. Group Captain Martin decided to exempt documents from release, in part, pursuant to subsection 33(a)(ii) of the FOI Act. Group Captain Martin was satisfied that the relevant material is exempt under subparagraph 33(a)(ii) of the FOI Act because it is of a sensitive nature, and pertains to ADF operations, including techniques, tactics and procedures.

13. Group Captain Martin considered that if this information was to be released it would inform adversaries of the ADF's current and future capabilities, which would be a significant tactical disadvantage and could, expose ADF members to unnecessary risk. Group Captain Martin found that the exempt material pertains to operational security provisions which have been made for the safety of deployed members. If this information was released publicly it would place the safety of all deployed personnel at risk.

Section 42 – Documents subject to legal professional privilege

14. Group Captain Martin decided to exempt the documents from release, in part, pursuant to section 42(3)(a) of the FOI Act. Section 42 of the FOI Act exempts from disclosure material that would be privileged from production in legal proceedings on the grounds of legal professional privilege (LPP). Section 42 of the FOI Act relevantly provides:

(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the grounds of professional privilege;

(3) a document is not an exempt document under subsection (1) by reason only that:

(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1)...

15. Group Captain Martin reviewed the guidelines which set out a number of factors to be considered in relation to claiming an LPP exemption. During his review he considered those factors in relation to the subject documents as being exempt on the basis of LPP and state as follows:

- a. Group Captain Martin had reason to believe there exists a legal-client relationship on the basis that the legal advice was provided by qualified lawyers within the department's legal division and who were acting in their respective capacities as professional advisers. Group Martin considered that the legal division within the department is sufficiently independent in its function to satisfy the requirement that the advice was independent for the purposes of LPP.
- b. Group Captain Martin considered the material and opinions within the document contained confidential communications between parties for the dominant purpose of seeking or giving legal advice. Group Captain Martin stated that he was not aware of any waiver of confidentiality relating to the LPP material.

16. The guidelines state, as paragraph 5.130, that agencies should not assert LPP unless 'real harm' would result from that disclosure. In his view there would be real harm associated with failing to uphold privilege of this information. The documents, if published without redaction under section 42, would disclose the confidential legal assessment of certain tactics, techniques and procedures and that the public disclosure of this privileged information would result in real harm to the department's ability to effectively administer detainee operations.

17. Group Captain Martin was satisfied that the document should be privileged from production on the basis of LPP. Where Group Captain Martin considered that material pertains to LPP, he has made such deletions, under section 42 of the FOI Act, as necessary to preserve the LPP.

Section 47F – Documents affecting personal privacy

18. A document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). In accordance with section 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, he had regard to the following matters:

- 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; and
- c. the availability of the information from publicly accessible sources.

19. Group Captain Martin found that the identified documents contained personnel identification numbers and names for members of the ADF and a foreign national (deceased). Group Captain Martin considers that this information constitutes personal information under section 4 of the FOI Act. While it is possible this information is known to certain elements, he was satisfied that it is not well known to the general community. Further, this information is not available from publicly accessible sources.

20. Having considered the above, Group Captain Martin decided that the disclosure of this information would be an unreasonable disclosure of personal information belonging to persons other than the applicant. Accordingly, he considered this material to be conditionally exempt under section 47F of the FOI Act.

21. Section 11A(5) [access to documents on request] of the FOI Act requires Defence to allow access to a conditionally exempt document unless in the circumstances access to the documents would, on balance, be contrary to the public interest.

Section 47F - Public interest consideration

22. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Group Captain Martin considered the guidelines, together with a range of factors that favour access to a document as set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act.

23. Group Captain Martin considered that the public interest in promoting the objects of the FOI Act has been satisfied and he did not believe that the release of personal information such as personnel identification numbers and names of members of the ADF and a foreign national would inform public debate on any matter of public importance in a meaningful way. Additionally, disclosure of this information would not promote oversight of public expenditure or allow a person to access his or her own personal information.

24. In coming to his decision, Group Captain Martin also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. Accordingly, he was satisfied that on balance the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained on the documents.

Declassification of documents and redactions

25. The documents, originally classified at SECRET, have been de-classified as part of the FOI process and have been annotated to reflect this change.

26. Please note that redactions to the documents have been made using Adobe Professional, unfortunately, some of the section numbers have formatted incorrectly due to technical difficulties. Please contact me if you have any queries about this issue.

Payment of Charges

27. In our letter dated 5 November 2013, 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 5 November 2013, noting that a deposit was not required.

28. 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. Accordingly, you are only required to pay the original estimated amount of [REDACTED]

29. Please complete the authorisation form at Enclosure 1 and return it to FOI@defence.gov.au. Upon receipt of the form an invoice will be generated, which may take up to 3 business days. Details about payment of the invoice are on the form. The documents in the form approved for release will not be sent to you until a receipt for payment has been forwarded to us.

Rights of review

30. 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

31. In accordance with the requirements of section 11C [publication of information in accessed documents] 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, or immediately following publication of an article referencing the material and or publication by the applicant. Defence will also publish this decision notice with privacy deletions. I will advise you of the publication date when the documents are dispatched to you.

Further advice

32. The FOI Act may be accessed online at: <http://www.comlaw.gov.au/Details/C2011C00803> .

33. Should you have any questions about this matter please contact me directly on (07) 3332 6359. Alternatively, the FOI team can also be contacted on the details at the top of this letter.

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

2 December 2013

Enclosures:

1. Freedom of Information Payment Authorisation Form /Invoice for balance of charges
2. Fact Sheet: Freedom of Information – Your Review Rights