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42/2016

**FREEDOM OF INFORMATION ACT REQUEST 175/16/17 - NOTICE OF DECISION
AND STATEMENT OF REASONS**

1. Pursuant to the *Freedom of Information Act 1982 (Commonwealth)* (the FOI Act), [REDACTED] (the applicant) has lodged a request (FOI Request Number 175/16/17) seeking access to:

... the Tri-service conviction documents/lists for 2009 - 2015 findings and punishments spreadsheets used to prepare the 2009 - 2015 JAG Reports.

Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents.

Decision making authority

2. In accordance with section 23 of the FOI Act, I am an officer authorised to make a decision in relation to this FOI request.

Identified documents

3. I have identified seven documents as containing the requested material, namely, seven spreadsheets spanning the period 2009-2015 summarising the outcome of court martial and Defence Force magistrate (DFM) proceedings.

4. Enclosure 1 is a schedule listing these documents as serials 1 – 7 and summarising my decision in relation to each document. Enclosure 2 contains the seven documents in the form approved for release. These seven documents have been annotated, at their top right-hand corner, with the relevant FOI request number and serial number.

Decision

5. In accordance with section 22 of the FOI Act, I have decided to release the seven identified documents with certain material deleted pursuant to section 22 (irrelevant material) and section 47F (public interest conditional exemptions – personal privacy).

Material taken into consideration

6. In making my decision I had regard to:

- a. Relevant provisions in the *Defence Force Discipline Act 1982 (Commonwealth)* (DFDA). Of particular relevance is subsection 140(1) of the DFDA, which provides that court martial and DFM proceedings shall be in public. This is subject only to the exceptions provided in subsection 140(2) of the DFDA, namely, that the court martial President or the DFM may order that some or all of the members of the public shall be excluded during the whole or a specified part of the proceedings if he/she considers it necessary in the interests of the security or defence of Australia, the proper administration of justice or public morals.
- b. Relevant provisions in the FOI Act.

- c. Guidelines Issued by the Australian Information Commissioner under Section 93A of the FOI Act (the Guidelines).
- d. Defence guidance on the FOI Act.
- e. The terms of the request.
- f. The nature of the identified documents and their content.

Reasons for decision - Section 22 of the FOI Act (irrelevant material)

7. Section 22 of the FOI Act makes provision for the release of a document with irrelevant material deleted. The third column of each of the seven spreadsheets contains information specifically excluded in the request (namely, PMKeys numbers). I have therefore decided that this information is irrelevant and deleted it.

Reasons for decision - Section 47F of the FOI Act (conditional exemption on the basis of personal privacy)

8. **Test.** Subsection 47F(1) of the FOI Act states that “A document is conditionally exempt if its disclosure would involve the *unreasonable disclosure* of *personal information* about *any person*” (my emphasis). To establish this conditional exemption, there are three elements that need to be established: first, the information must be ‘personal information’ (see paragraph 9); secondly, the personal information must be ‘about any person’ (this is usually self-evident, as it is in this case, and is therefore not discussed further); and, thirdly, the disclosure of the information must be ‘unreasonable’ (see paragraph 10).

9. **Personal information.** Section 4 of the FOI Act defines personal information as having the same meaning as in *the Privacy Act 1988 (Commonwealth)* (the Privacy Act). Section 6 of the Privacy Act defines ‘personal information’ as “information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not”. The information must say something about a person (see paragraph 6.129 of the Guidelines). Personal information can include a person’s name (see paragraph 6.130 of the Guidelines). This will depend on the context (see paragraph 6.136 of the Guidelines). For particular information to be personal information, an individual must be identified or reasonably identified (see paragraph 6.131 of the Guidelines). Whether an individual is reasonably identifiable takes into consideration practicality and likelihood (see paragraphs 6.132-6.133 of the Guidelines).

10. **Unreasonable disclosure.** The test of unreasonableness implies a need to balance the competing interests of public disclosure and the privacy of individuals to prevent an unreasonable invasion of personal privacy (see paragraph 6.138 of the Guidelines). This test is, however, different to the public interest test of section 11A(5) of the FOI Act which follows later in the decision making process, although it is possible that some factors will need to be considered twice (see paragraphs 6.138 of the Guidelines). Subsection 47F(2) of the FOI Act requires that regard be had to:

- a. The extent to which the information is well known;
- b. Whether the person to whom the information relates is known to be associated with the matters dealt with in the document;
- c. The availability of the information from publicly accessible sources; and

- d. Any other matter considered relevant. Other factors of relevance in this case include: the public interest in government transparency; the information is relevant to the affairs of government; the information sheds light on the workings of government; the existence of other statutory disclosure frameworks; the circumstances in which the information was obtained; the nature, age and current relevance of the information; the extent to which the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future; potential/actual objections by the person concerned; detriment or stress to the persons concerned; and the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act (see paragraphs 6.142 to 6.148 of the Guidelines and referenced case law).

11. Examination of documents and decisions with respect to conditional exemptions on basis of personal privacy. Upon examination of the identified documents, I found that they named/contained information in relation to the persons on trial. I have decided that, particularly noting the connection with court martial and DFM proceedings, the names of the accused/convicted persons constitute personal information, that it would be unreasonable to disclose this information and that this information is therefore conditionally exempt.

12. Reasons for decisions with regard to conditional exemptions on the basis of personal privacy for person on trial. In reaching the decision outlined at paragraph 11, I have taken into consideration and weighed up the following:

- a. **In favour of disclosure.** The following factors in favour of disclosure are relevant: the public interest in government transparency; the information sheds light on the discipline system and its operation; court martial and DFM proceedings are generally open to the public (including the media); there are no 'court' orders prohibiting the release of the information; the information was obtained as a result of the proceedings; the information is relatively recent and current; and the persons concerned should reasonably have expected that some level of information would be open to public scrutiny.
- b. **Against disclosure.** The following factors against disclosure are relevant: in applying the FOI Act, a cautious approach to the classification and disclosure of personal information is preferred; the documents contain information which is 'known' (but not 'well known'); the details of the proceedings are known (but, again, not 'well known'); the information is not currently available from publicly accessible sources; the persons concerned should not reasonably have expected that all information would be open to public scrutiny; it is likely that the persons concerned would object to having all information open to public scrutiny; it is likely that the release of names will cause detriment or stress to those concerned; and there are no controls on further dissemination.

Sections 11A and 11B of the FOI Act (public interest exemptions)

13. Subsection 11A(5) of the FOI Act requires that the applicant must be given access to a document (or information) which is "conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest".

14. Subsection 11B(5) of the FOI Act requires that that regard be had to the Guidelines in applying this 'public interest' test.

15. The Guidelines set out a six step process for determining whether a document/information is conditionally exempt and applying the public interest test:

- a. **Step 1: Determine if the document/information is conditionally exempt.** The relevant harm threshold which must be reached is ‘the unreasonable disclosure of personal information’ (see paragraphs 6.10-6.13 of the Guidelines). As explained at paragraphs 8-12 (above), I have determined that the names of accused persons and convicted persons are conditionally exempt.
- b. **Step 2: Identify the specific harm threshold.** The specific harm threshold is ‘the unreasonable disclosure of personal information’ (see paragraphs 6.14-6.16 of the Guidelines).
- c. **Step 3: Identify the factors favouring of disclosure.** Subsection 11B(3) of the FOI Act provides that the factors favouring access to the document/information in the public interest include whether access to the document would assist with any of the following: (a) promote the objects of the FOI Act (including all the matters set out in sections 3 and 3A); (b) inform debate on a matter of public importance; (c) promote effective oversight of public expenditure; or (d) allow a person to access his or her own personal information. Paragraph 6.19 of the Guidelines notes that this is not an exhaustive list and provides a further non-exhaustive list of factors that may be relevant. Of the factors listed in subsection 11B(3) of the FOI Act and paragraph 6.19 of the Guidelines, those relevant in this case are:
 - i. Promoting the objects of the FOI Act (see paragraph 11B(3)(a) of the FOI Act and paragraph 6.19(a) of the Guidelines).
 - ii. Informing debate on a matter of public importance (see paragraph 11B(3)(b) of the FOI Act and paragraph 6.19(b) of the Guidelines).
 - iii. Contribute to the administration of justice, the enforcement of the criminal law, or reveal or substantiate unlawful conduct (see paragraphs 6.19 (b)(ii), (f), (g) and (h) of the Guidelines).
- d. **Step 4: Identify any factors against disclosure.** The FOI Act does not list any factors weighing against disclosure. However, the harm/harm threshold (in this case, the unreasonable disclosure of personal information) will guide the type of factors that may be relevant (see paragraphs 6.20-6.21 of the Guidelines). Paragraph 6.22 of the Guidelines provides a non-exhaustive list of factors that may be relevant. Of relevance in this case are:
 - i. The disclosure could reasonably be expected to prejudice the protection of an individual’s right to privacy (see paragraph 6.22(a) of the Guidelines).
 - ii. The disclosure of certain information could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of unlawful conduct (see paragraph 6.22(b) of the Guidelines). This factor is of relevance to those persons not convicted.
 - iii. Although not a factor listed in paragraph 6.22 of the Guidelines, and although I would have reached the same decision without taking this into consideration, I am mindful in this context, too, that there are no controls on further dissemination.

- e. **Step 5: Ensure that no irrelevant factor will be considered.** Subsection 11B(4) of the FOI Act stipulates a number of 'irrelevant factors' which must not be taken into consideration. I have not taken any of these factors into consideration.
- f. **Step 6: Weigh the relevant factors to determine where the public interest lies.** Having already decided to release the seven identified documents, the only matter in issue is whether I redact the names of the accused persons and the convicted persons. At paragraphs 8-12 (above), I have determined that this information is conditionally exempt. However, the applicant must nonetheless be given access to this information unless, in the circumstances, access to this information, at this time, would, on balance, be contrary to the public interest. Having regard to the factors favouring disclosure identified at paragraph 15(c) (above), I am particularly mindful of: the importance of openness, transparency and a right to access (as emphasized by both the DFDA and the FOI Act); the public nature of DFDA proceedings and the right of the public (including the media) to attend and the media to report; the importance of justice being done and seen to be done; and promoting understanding of and confidence in the discipline system. However, I am also of the view that these are all satisfied without providing the names of the accused persons and convicted persons. Further, having regard to the factors against disclosure identified at paragraph 15(d) (above), I am of the view that any additional public interest in providing this information is significantly outweighed by the public interest of observing certain privacy protections, particularly in the case of those who were not convicted. Accordingly, I conclude that giving the applicant access to the names of the accused persons and convicted persons is contrary to the public interest and, accordingly, that the applicant is not to be given access to this information.



NL Harvey
GPCAPT
Authorised Decision Maker
Office of the Judge Advocate General

8 Feb 17

Enclosures:

1. Schedule of documents
2. Documents (serials 1-7) in the form for release