



Australian Government

Department of Defence

Defence Reform and Support Group


Freedom of Information and
Information Management
Branch
CP1-6-003
PO Box 7910
CANBERRA BC
ACT 2600
Tel: 02 626 62200
Fax: 02 626 62112
FOI@defence.gov.au

Our reference: FOI 206/12/13



Via email: 

Dear 

1. I refer to your letter of 19 November 2012, received in this office on 21 November 2012, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act),
'Item 1 - Correspondence, reports (interim and final), emails or other communications between the International Committee of the Red Cross and the Australian Defence Force or Department of Defence,
Item 2 - Communications, reports (interim and final), emails or other communications received by the Australian Defence Force or Department of Defence, and
Item 3 - Communications, reports (interim and final), emails or other communications generated by the Australian Defence Force or Department of Defence
Item 4 - Medical records
Relating to an alleged incident which took place in or around 2008 in or near Uruzgan Province in Afghanistan involving an Afghani or Pakistani man who sustained injuries to either or both of his hands while in the custody of the Australian Defence Force.'
2. By email dated 23 November 2012, you were advised that there were charges relating to your request.
3. By email on 6 December 2012 you requested a review of charges. On 4 January 2013 Mr Dudfield responded not to waive or reduce the charges.
4. By email on 23 January 2013 you requested an internal review of charges. On 15 February 2013 Mr Corcoran responded not to waive or reduce the charges.
5. On 11 April 2013 you paid a deposit of  Taking in to account those periods where the processing period was suspended, the statutory deadline to provide you with a decision on this request is 9 May 2013.

Background

6. The purpose of this letter is to provide you with the decision relating to the document that is the subject of your request.

FOI decision maker

7. Group Captain (GPCAPT) J Martin, Director – Coordination, Head Quarters Joint Operations is the authorised decision maker, under the FOI Act, in relation to your request.

Documents identified

8. GPCAPT Martin identified 17 documents as matching the description of your request. A schedule of documents is at Enclosure 1. For ease of reference and for the purposes of processing this request, the decision maker has added the FOI Item number on each of the documents, which corresponds with the schedule.

Decision

9. GPCAPT Martin decided to:
- a. partially release 10 documents with deletions made in accordance with subsection 22(1) [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 sections 22[Access to edited copies with exempt or irrelevant matter deleted], 33[Documents affecting national security, defence or international relations] and/or 47F [public interest conditional exemptions-personal privacy] of the FOI Act;
 - b. deny access to seven documents of the request under section 33[Documents affecting national security, defence or international relations] of the FOI Act; and
 - c. refuse access to one documents under section 24A [document cannot be found or do not exist] of the FOI Act.

Material taken into account

10. In making his decision, GPCAPT Martin had regard to:
- a. the terms of the request;
 - b. the content of the documents that fall within the scope of the applicant's request;
 - c. the relevant provisions of the FOI Act;
 - d. the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act;
 - e. the Principles on open public sector information issued by the Information Commissioner; and
 - f. advice from Defence officers with responsibility for matters relating to the documents meeting the scope of the applicants request.

Reasons for Decision**Section 22(1) - Access to edited copies with exempt or irrelevant matter deleted**

11. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document, consideration must be given to releasing the documents with the exempt material removed.

12. GPCAPT Martin considered the merits of releasing documents to which he has denied access, by removing the exempt material. He decided against this course of action because

deletion of the exempt material would necessarily render the document meaningless and of little or no value to the applicant.

13. Upon examination of the documents GPCAPT Martin found that the document identified as Item 2 Serial 1 on the schedule of document contained material regarding matters which does not relate to the scope of your request. GPCAPT Martin considered that the material would disclose information that would 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, GPCAPT Martin decided to remove the material.

Section 24A(1) - Documents do not exist

14. GPCAPT Martin refused access to document identified in the schedule, under section 24A(1)(b)(ii) [documents do not exist] of the FOI Act. Section 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.

15. 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.

16. Searches were undertaken with:

- a. International Policy Division, Office of the Secretary and Chief of the Defence Force Group;
- b. Military Strategic Commitments Branch, Vice Chief of the Defence Force Group;
- c. Joint Operations Command (operations, legal and medical disciplines); and
- d. JTF 633 MEAO, (operations, legal and medical disciplines).

17. Searches were undertaken on:

- a. DSN Objective (Defence Records Management System);
- b. DSN Emails and archives;
- c. Hard copy files; and
- d. Group (G) Drives.

18. Military and civilian Defence personnel in Australia and overseas, identified in paragraph 11, that had either personal knowledge of or corporate information relating to this matter provided advice that documents could not be located.

19. In light of this, GPCAPT Martin cannot grant access to the requested documents under section 24A(1)(b)(ii) of the FOI Act.

Section 33 - Documents affecting national security, defence or international relations

20. Where access has been denied under section 33 of the FOI Act, GPCAPT Martin considered that the deleted material would, or could reasonably be expected to, cause damage to the defence and/or international relations of the Commonwealth.

21. In applying this exemption, GPCAPT Martin considered the likelihood of damage occurring as a result of release of the material that he considered to be exempt under section 33. In regards to the terms 'would 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 documents(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments ...

Subparagraph 33(a)(i) - Security of the Commonwealth

22. 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.

23. GPCAPT 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 names of Defence personnel designated with Protected Identity Status.

24. GPCAPT 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, thus compromising the capability of the ADF.

25. Taking the above into account, GPCAPT Martin was satisfied that the names of Defence Personnel with Protection Identity Status are exempt under section 33(a)(i) of the FOI Act.

Subparagraph 33(a)(ii) - Damage to the Defence of the Commonwealth

26. Subparagraph 33(a)(ii) exempts a document if disclosure of the document would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

27. GPCAPT Martin found that disclosure of the information exempted under Subparagraph 33(a)(ii) would cause, or could reasonably be expected to cause, damage to the defence of the Commonwealth.

28. The Guidelines relevantly state that 'defence of the Commonwealth' includes:

5.28 ...

- *meeting Australia's international obligations*
- *ensuring the proper conduct of international defence relations ...[and]*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

29. GPCAPT Martin found that a number of the documents within the scope of this request contained specific information pertaining to Australian Defence Force (ADF) operations including tactics, techniques and procedures of the ADF. GPCAPT Martin was satisfied that the release of such information could inform adversaries of sensitive Australian capabilities.

30. Accordingly, GPCAPT Martin decided to exempt this information from release under subparagraph 33(a)(ii) of the FOI Act, on the basis that its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth.

Subsection 33(b) - Information or matter communicated in confidence by a foreign government

31. Section 33(b) exempts a document if its disclosure would divulge any information or matter communicated in confidence to the Australian Government or agency by another government or one of its authorities, or by an international organisation.

32. To avoid doubt, section 4(10) of the FOI Act states that *information or matter communicated in the way mentioned in section 33(b) includes information or matter so communicated pursuant to any treaty or formal instrument on the reciprocal protection of classified information between the Government of the Commonwealth, or an authority of the Commonwealth, and:*

- (a) *a foreign government or an authority of a foreign government; or*
- (b) *an international organisation.*

33. GPCAPT Martin found that a number of the documents contained material that was officially communicated in confidence to Australia by international organisations. GPCAPT Martin was satisfied that, if released, this material would, or could reasonably be expected to harm the positive working relationship that Australia has with international organisations.

34. The information includes information provided by international humanitarian organisations and information explicitly provided in accordance with extant security of information agreements.

35. GPCAPT Martin found that disclosure of this information would divulge information or matters communicated in confidence by an international organisation.

36. Accordingly, GPCAPT Martin decided to exempt this information from release under paragraph 33(b) of the FOI Act, on the basis that its disclosure would divulge information or matter communicated in confidence to the Australian Government by an international organisation.

Section 47F - Documents affecting personal privacy

37. A document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person). In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, GPCAPT Martin 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;

38. GPCAPT Martin found that many of the documents within the scope of the request contain names and phone numbers for members of the ADF, names, detainee identification numbers and biographical and other identifying information for detainees apprehended by the ADF in Afghanistan. In accordance with sub-section 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, GPCAPT Martin 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; and
- c. the availability of the information from publicly accessible sources.

39. Against those criteria, GPCAPT Martin found that:

- a. the specific personal information is not well known to the general community;
- b. the persons to whom the information relates are not known by the general community to have been associated with the matters dealt with in the documents; and
- c. the personal information is not available from publically accessible sources.

40. Australia recognises the application of Common Article 3 of the Geneva Conventions to detainee operations in Afghanistan and, as a matter of policy, applies Article 13 of the Third Geneva Convention including the obligation to protect detainees from 'public curiosity'. Disclosing information that identifies detainees may also place these individuals at risk of possible retribution

41. Having considered the above, GPCAPT Martin decided to exempt this information from release under section 47F of the FOI Act.

42. Section 11A(5) 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.

Public Interest considerations -section 47F

43. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, GPCAPT Martin 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 favouring access] of the FOI Act.

44. GPCAPT Martin considered the public interest in promoting the objects of the FOI Act have been satisfied and did not believe the release of the information 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, nor would it allow further access to PIAC's personal information.

45. In coming to the above decision, GPCAPT Martin also considered subsection 11B(4) [public interest exemptions - irrelevant factors] of the FOI Act. Accordingly, GPCAPT Martin was satisfied that on balance the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents.

Declassification of documents

46. A number of the original documents matching the scope of this request were classified; following the FOI process the versions of the documents that are approved for release are unclassified.

Payment of Charges

47. In accordance with section 11 of the Freedom of Information (Charges) Regulations 1982, access will not be granted to the documents until such time as Defence receives payment of the outstanding balance, or an alternative amount as decided by the Information Commissioner or the Information Commissioner decides to waive the charge.

48. In our letter, dated 23 November 2012, the department estimated the cost associated with processing your request to be [REDACTED]. As discussed with Mr Neil Phillips on 27 March 2013 you agreed to pay the deposit to initiate processing but reserved your review rights in relation to these charges, pending the current review of charges before the Office of the Australian Information Commissioner.

49. In Mr Corcoran's letter of 15 February 2013 in response to your request for an internal review, paragraph 1 states that Mr Dudfield had decided to impose a charge of [REDACTED] in respect of your request for documents. This was a typographical error, our email dated 23 November 2012 identified the preliminary assessment to be [REDACTED] however Defence will honour the charge of [REDACTED].

50. Upon completion of your request, the actual amount for processing was calculated to be [REDACTED] which exceeded the estimated processing charge 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, the outstanding balance is the difference between the preliminary assessment of charges and the deposit you have already paid. Therefore, the outstanding balance of charges is [REDACTED].

51. If you wish to receive the documents without awaiting a decision from the Information Commissioner, please complete and return the payment authorisation form – balance of charges at Enclosure 2 to the FOI Directorate, this form is an agreement to pay outstanding charges and enables the FOI Directorate to continue processing your request without delay. Upon receipt of the form an invoice will be generated, noting this can take up to 3 business days. Details about payment of the invoice are on the form.

52. Alternatively, you may choose to await the decision from the Information Commissioner on your request for review of the processing charge.

FOI Disclosure Log

53. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish, on its website, information released under the FOI Act within 10 working days of the applicant being given access to documents. Defence will also publish the decision notice, with personal and business information deleted. The information published does not include personal information or the business, commercial, financial or professional affairs of any person if publication of that information would be unreasonable. Other information not published also includes that which the Australian Information Commissioner determines is unreasonable to publish.

Rights of review

54. The FOI Act provides for rights of review of decisions. A copy of fact sheet “Freedom of Information – Your Review Rights” setting out your rights of review is at Enclosure 3.

Further advice

55. Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Andrea Sansom
Assistant Director
Freedom of Information

9 May 2013

Enclosures:

1. Schedule of document
2. Payment Authorisation form – balance of charges
3. Fact Sheet: Freedom of Information – Your Review Rights