



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 231/13/14

[REDACTED]

By email [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email of 10 January 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to documents relating to the Lithgow (Marrangaroo Training Centre) Bushfire 16 October 2013. Specifically, you requested the following:

"Item 1 - Department of Defence investigation/incident report

Item 2 - Witness statements obtained from Department of Defence members relating to their explosive training operations on 16 October 2013 or the origin and/or cause of the bushfire.

Item 3 - Transcript, audio or video recordings of the Commission of Inquiry held before Judge John O'Meally at the Defence Plaza, 270 Pitt Street, Sydney

Item 4 - Any investigation reports obtained for the purposes of the Commission of Inquiry

Item 5 - Submissions prepared by the Department of Defence for the purposes of the Commission of Inquiry

Item 6 - Photographs of the site of origin of the bushfire

Item 7 - Photographs of the bushfire loss and damage

Item 8 - Internal correspondence between Department of Defence members relating to the cause of the bushfire

Item 9 - External correspondence between Department of Defence members and any external agencies including the NSW Rural Fire Service, NSW Police and Coroners Office relating to the cause of the bushfire

Item 10 - *Department of Defence policies and procedures relating to ordnance training operations at Marangaroo Training Centre*

Item 11 - *Department of Defence policies and procedures relating to ordnance training operations during bushfire risk days*

Item 12 - *Documentation from the NSW Rural Fire Service relating to hazard reduction recommendations at the Marangaroo Training Centre*

Item 13 - *2011 report from GHD consultants relating to Marangaroo Training Centre.*"

Background

2. On 16 January 2014, you were advised that your request was at risk of being refused under section 24 of the FOI Act as the work involved in processing your request would substantially and unreasonably divert the resources of Defence from its other operations. Following further discussion, on 30 January 2014, you provided our office with the following revised scope:

"Item 1 - Department of Defence investigation/incident report

Item 2 - Witness statements obtained from Department of Defence members relating to their explosive training operations on 16 October 2013 or the origin and/or cause of the bushfire.

Item 3 - Transcript of the Commission of Inquiry held before Judge John O'Meally at the Defence Plaza, 270 Pitt Street, Sydney

Item 4 - Any investigation reports obtained for the purposes of the Commission of Inquiry

Item 5 - Submissions prepared by the Department of Defence for the purposes of the Commission of Inquiry

Item 6 - Photographs of the site of origin of the bushfire; and

Item 7 - 2011 report from GHD consultants relating to the Marangaroo Training Centre."

3. On review of your request, our office interpreted the scope as:

"Item 1 - Department of Defence investigation/incident report held by Air Force

Item 2 - Witness statements obtained from Department of Defence members relating to their explosive training operations on 16 October 2013 or the origin and/or cause of the bushfire

Item 3 - Transcript of the Commission of Inquiry held before Judge John O'Meally at the Defence Plaza, 270 Pitt Street, Sydney

Item 4 - Any investigation reports obtained for the purposes of the Commission of Inquiry

Item 5 - Submissions prepared by the Department of Defence for the purposes of the Commission of Inquiry

Item 6 - Photographs of the site of origin of the bushfire; and

Item 7 - 2011 report from GHD consultants relating to the Marangaroo Training Centre held by Defence Support

All items above are for the final versions and excluding duplicates."

4. You did not disagree with this interpretation.

5. On 31 January 2014, I wrote to advise you of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. Your letter agreeing to pay charges for the processing was received in this office on 4 February 2014. As such, the statutory processing time for your request was due to expire on 26 February 2014.

6. On 12 February 2014, our office informed you that the decision maker had determined that there was a requirement to consult with third parties under section 27 [consultation – business documents] 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 28 March 2014.

7. 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

8. Group Captain C Wallis, Director Coordination Air Force, Colonel J Waddell, Director Chief of the Defence Force Commissions of Inquiry and Ms S Brown, Acting Assistant Secretary Environment and Engineering Branch, are the accredited decision makers, under the FOI Act, in relation to your request.

Documents identified

9. Group Captain Wallis identified three documents, Colonel Waddell identified 25 documents and Ms Brown identified two documents, matching the description of your request. A schedule of documents is at Enclosure 1.

Decision

10. Group Captain Wallis has decided to partially release the documents identified in Item 1 of your request with exempt matter removed under section 22 [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 section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

11. Colonel Waddell has decided to:

- a. Deny access to Items 2, 3, 4, 5 and Item 6 Serials 2 and 3 on the grounds that the documents are exempt under section 38 [documents to which secrecy provisions of enactments apply] of the FOI Act; and
- b. Release Item 6 Serial 1 intact.

12. Ms Brown has decided to partially release the documents identified in Item 7 of your request with exempt matter removed under section 22 [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 section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

Material taken into account

13. In making her decision, Group Captain Wallis had regard to:
 - a. the content of the identified documents in issue;
 - b. relevant provisions in the FOI Act;
 - c. paragraph 6.29 of the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
 - d. principles on open public sector information issued by the Information Commissioner.

14. Colonel Waddell had regard to:
 - a. the specific parameters of the request
 - b. relevant provisions of the FOI Act; and
 - c. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines).

15. Ms Brown had regard to:
 - a. the content of the identified documents in issue;
 - b. relevant provisions in the FOI Act; and
 - c. Defence guidance material on the FOI Act and the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines).

Reasons for decision

Exemption claim - Section 47F of the FOI Act

16. Upon examination of the documents, Group Captain Wallis and Ms Brown identified signature blocks and mobile phone numbers of persons other than you. In addition, Group Captain Wallis also identified personnel identification numbers (PMKeyS numbers) and names of third parties. Group Captain Wallis and Ms Brown considered the disclosure of this material would constitute an unreasonable disclosure of personal information of a person other than you.

17. The Guidelines 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, Group Captain Wallis and Ms Brown 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 considers relevant.

18. Against those criteria, Group Captain Wallis and Ms Brown found that:

- a. the specific personal information is not well known;
- b. the people to whom the information relates are not known to have been associated with the matters dealt with in the documents;
- c. the personal information is not readily available from publicly available sources; and
- d. the material considered to be exempt is information that the individuals would reasonably be expected not to have disclosed to a third party without their consent.

19. Accordingly, Group Captain Wallis and Ms Brown found this material to be exempt under section 47F of the FOI Act.

Rights of access – section 11A

20. 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 – section 47F

21. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Group Captain Wallis and Ms Brown considered the range of factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. They both noted that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of this information would not increase public participation in Government processes, nor would it increase scrutiny or discussion of Government activities.

22. They both noted that the release of this material may be of some interest to you. However, it would not inform public debate on any matter of public importance in any meaningful way. Additionally, the deleted material would not allow you any further access to your own personal information.

Irrelevant factors – section 11B (4)

23. In coming to the above decision, Group Captain Wallis and Ms Brown had regard to subsection 11B(4) [irrelevant factors] of the FOI Act, which lists factors which must not be taken into account in deciding whether access would, on balance, be contrary to the public interest. None

of the factors either decision maker took into account were listed under subsection 11B(4) of the FOI Act.

24. Accordingly, Group Captain Wallis and Ms Brown considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Therefore, Group Captain Wallis and Ms Brown decided that it would be contrary to the public interest to release the information considered under section 47F of the FOI Act.

Exemption claim - Section 38 of the FOI Act

25. Colonel Waddell noted that Items 2, 3, 4, 5 and Item 6 Serials 2 and 3 are exempt documents under section 38 of the FOI Act because their disclosure is prohibited under a provision of an enactment specified in Schedule 3 of the FOI Act, viz., sub-regulation 63(2) of the *Defence (Inquiry) Regulations 1988*.

26. As a result of amendments made to the Regulations by Statutory Rules No.113 of 2013, the secrecy provision formerly contained in sub-regulation 63(2) is now contained in sub-regulation 63(1) which prohibits disclosure of information contained in, or of a document forming part of, the records or report of a Court of Inquiry (including a Commission of Inquiry). The combined effect of section 10 of the *Acts Interpretation Act 1901* and section 13 of the *Legislative Instruments Act 2003* is that the reference to sub-regulation 63(2) shall now be read as a reference to sub-regulation 63(1).

27. Accordingly, these documents are exempt from disclosure under section 38 of the FOI Act.

Section 22

28. Where a decision maker decides to deny access to a document they must consider whether the document can be released with the exempt matter deleted in accordance with subparagraph 22(1) of the FOI Act. Colonel Waddell considered providing you with an edited version of the documents, having regard to subparagraph 22(1)(c) of the FOI Act and paragraph 5.3 of the Guidelines. However, he decided against this course of action as it would not be practicable to delete the exempt material and retain a meaningful non-exempt version of the document as all of the material within the document would be deleted.

Payment of Charges

29. In our letter, dated 31 January 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 4 February 2014. On 10 February 2014, you provided us with a receipt showing that the preliminary assessment deposit of [REDACTED] had been paid.

30. 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.

31. 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.

Rights of review

32. 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

33. 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 requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Further advice

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

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

Yours sincerely



Melissa Davidson
Assistant Director
Freedom of Information

14 March 2014

Enclosures:

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