



Our reference: FOI 242/11/12  
Your reference: [REDACTED]



Dear [REDACTED]

**NOTICE OF DECISION UNDER THE *FREEDOM OF INFORMATION ACT 1982***

1. I refer to your revised request, dated 2 May 2012, in which the [REDACTED] sought access, under the Freedom of Information Act 1982 (FOI Act), to:

*“[ITEM 1] For each recorded instance of detainees raising an allegation of mistreatment or a complaint with the Interdepartmental Detainee Monitoring Team that resulted in reporting upwards to DOD, formal reports associated with each instance held by the Afghan Section, International Policy Division.*

[REDACTED] understands that each report may contain some of or all of the following documentation: Diplomatic Cables, Individual detainee visit reports, Incident Reports, HQJF633 Situation reports, Daily Operations Summary (Provided to Minister for Defence), Noting Brief (HQJTF633 to CJOPS), Quick Assessments and Ministerial Submissions.

*[ITEM 2] Senate Estimates Briefs and Ministerial submissions regarding the United Nations Assistance Mission in Afghanistan Report into the “Treatment of conflict-related detainees” released on 10 October 2012, including in relation to the decisions to suspend transfers of detainees around July 2011 and then to recommence transfers to NDS in November 2011.”*

2. The purpose of this letter is to provide you with the decision relating to the documents that are the subject of your request.

**Background**

3. On 19 March 2013, Defence received [REDACTED] original request, dated 15 March 2012. By email dated 19 March 2012, you were advised that your original request was considered too broad to be processed and would therefore likely attract a practical refusal under section 24AA of the FOI Act.

4. Following extensive consultation with the department, you submitted the above revised request on 2 May 2012.
5. By email dated 3 May 2012, you were provided with a preliminary assessment of charges. By letter dated 10 May 2012, you requested a review of the preliminary assessment of charges. By email dated 12 June, you were advised that the charges had not been waived and that the charges had been imposed.
6. By letter dated 20 June 2012, you sought an internal review of the decision. By email dated 20 July 2012, you were advised that Mr Tony Corcoran, Assistant Secretary, Freedom of Information and Information Management Branch, had decided not to reduce or waive the processing charge.
7. On 26 September 2012, we were advised that you had requested external review of the above decision through the Office of the Australian Information Commissioner. To date, a decision on that review is outstanding.

#### **Statutory deadline**

8. By email dated 5 December 2012, [REDACTED] agreed to grant Defence a 30 day extension under section 15AA [Extension of time with agreement] of the FOI Act.
9. Following a request to the Office of the Australian Information Commissioner, dated 30 January 2013, Defence was granted a 45 day extension to the statutory deadline under section 15AB [Extension of time to process complex or voluminous requests] of the FOI Act.
10. Taking in to account these extensions, and those periods where the processing period was suspended to undertake consultation with [REDACTED] the statutory deadline to provide you with a decision on this request is 28 March 2013.

#### **FOI decision maker**

11. Ms Geraldine Gibson, Director, Afghanistan, International Policy Division, is the accredited decision maker, under section 23 of the FOI Act, in relation to your request.

#### **Documents identified and decision**

12. Ms Gibson identified 76 documents relevant to the request. A schedule of documents showing the decision for each document is at Enclosure 1. For the purposes of this request, Ms Gibson added an FOI serial number to each document.
13. A number of serials were duplicates of other documents. In accordance with the scope of the request, Ms Gibson has not provided copies of these documents, however, to provide context, Ms Gibson has indicated where these documents were attached.

#### **Material taken into account**

14. In making her decision Ms Gibson had regard to:
  - a) the content of the documents that fall within the scope of the applicant's request;
  - b) the relevant provisions of the FOI Act;
  - c) the *Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act*;
  - d) advice from Defence officers with responsibility for matters relating to the documents meeting the scope of the applicants request; and

- e) advice from other Australian Government agencies, including the Department of Prime Minister and Cabinet and the Department of Foreign Affairs and Trade.
- f) advice from a foreign government.

## **REASONS FOR DECISION**

### **Exemption of certain persons and bodies – section 7**

15. Section 7 of the FOI Act exempts Defence intelligence agencies, documents originating from those agencies, and extracts of those documents, from the provisions of the FOI Act.

16. Ms Gibson was advised, and she was satisfied, that Serials 11.3 and 69.2 contained extracts from documents that originated with a defence intelligence agency. Accordingly, Ms Gibson did not consider for release those parts of these serials that originated with the Defence intelligence agency.

### **Documents affecting national security, defence or international relations – section 33**

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

18. In applying this exemption, Ms Gibson considered the likelihood of damage occurring as a result of release of the material that she 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 ...*

### **Damage to the Defence of the Commonwealth - subparagraph 33(a)(ii)**

19. Section 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.

20. Ms Gibson found that disclosure of the information exempted under section 33(a)(ii) would cause, or could reasonably be expected to cause, damage to the defence of the Commonwealth.

21. 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.*

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

23. Documents within the scope of this request also included the names and other identifying details of past and current members of the Interagency Detainee Monitoring Team (IDMT). More broadly, Ms Gibson considered that the release of identification details of Defence members and other Australian officials who work in close proximity with past and current members of the Afghan insurgency could jeopardise the ability of Defence members and Australian officials to carry out these operations in future, and may also expose Australian personnel to unnecessary risk of harm.

24. Accordingly, Ms Gibson 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.

Damage to the international relations of the Commonwealth - Section 33(a)(iii)

25. Section 33(a)(iii) exempts a document if disclosure of the document would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. ‘International relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them, including relations between government agencies.

26. Ms Gibson found that many of the documents within the scope of the request contained reports of unsubstantiated allegations from detainees that they had been mistreated by foreign governments. Australia cannot consult with foreign governments implicated in some detainee allegations, as some detainees have not provided consent for Australia to raise the allegations.

27. Accordingly, Ms Gibson decided to exempt this information from release under subparagraph 33(a)(iii) of the FOI Act, on the basis that its disclosure would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth.

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

28. 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.

29. 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.

30. Ms Gibson found that a number of the documents contained material that was officially communicated in confidence to Australia by foreign governments and/or international organisations. Ms Gibson was satisfied that, if released, this material would, or could reasonably be expected to, harm the positive working relationship that Australia has with other governments and international organisations.

31. The information includes operational and intelligence reporting from foreign governments, information provided by international humanitarian organisations and information explicitly provided in accordance with extant security of information agreements.

32. Ms Gibson found that disclosure of this information would divulge information or matters communicated in confidence by or on behalf of a foreign government or an international organisation.

33. Accordingly, Ms Gibson 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 another government or one of its authorities, or by an international organisation.

#### **Cabinet documents – section 34**

34. Section 34(1)(c) exempts a document that is brought into existence for the dominant purpose of briefing a Minister on a document to which section 34(1)(a) applies. Section 34(2) provides that a document is also an exempt document to the extent that it is a copy or a part of, or contains an extract from, a document to which section 34(1)(c) applies.

35. Ms Gibson found that the information exempted under section 34(1)(c) has been brought into existence for the dominant purpose of briefing a Minister on a document to which section 34(1)(a) applies. Ms Gibson obtained advice from Defence officers with responsibility for matters relating to the documents and also from the Department of Prime Minister and Cabinet, which confirmed her finding.

36. Accordingly, Ms Gibson decided to exempt this information from release under section 34(1)(c).

37. Ms Gibson also considered whether the document contained purely factual material. To the extent that it did, Ms Gibson made no claim for exemption under section 34(1)(c).

#### **Documents containing material obtained in confidence - section 45**

38. Section 45 exempts a document if its disclosure would found an action by a person for breach of confidence.

39. To found an action for breach of confidence a decision maker must be able to:

- a) specifically identify the information in question;

- b) show that the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge);
- c) show that the information was communicated in a mutual understanding that the receiver was to keep the information confidential; and
- d) show that there is actual or threatened misuse of that information.

40. Many of the documents matching the scope of this request, in particular the detainee monitoring reports, contain information that was provided in confidence to Australia's Interagency Detainee Monitoring Team (IDMT). Other documents contain extracts of information that was provided in confidence to members of the IDMT.

41. The IDMT conducts interviews with detainees who have been apprehended by the ADF and subsequently transferred to US or Afghan custody. The IDMT meets with each detainee in person and asks questions to gauge their wellbeing and standard of treatment, including questions on their access to exercise, sleep, sustenance, health, sanitation, and medical treatment. The IDMT also inspects and reports on the conditions of detention facilities.

42. The IDMT relies on the willing cooperation of detainees to obtain information essential to the efficient and effective conduct of its monitoring activities. The ability of the IDMT to carry out these activities assists in ensuring that ADF-transferred detainees are not subject to torture or cruel, inhumane or degrading treatment.

43. To this end, the IDMT advises detainees that the information they provide will be passed to the Australian Government and will only be provided to certain detaining authorities, should the detainee agree. This includes assurances that should the detainee raise an allegation or complaint, the IDMT shall seek the detainee's consent to raise the allegation with the relevant authorities for investigation.

44. Ms Gibson found that disclosure under FOI would constitute a misuse of the relevant information. Such disclosure would be inconsistent with the understanding that the IDMT would keep the information confidential. Based on advice from relevant officers within Defence and in consultation with the Department of Foreign Affairs and Trade, Ms Gibson was satisfied that disclosure of the information could found an action by a person for breach of confidence.

45. Accordingly, Ms Gibson was satisfied the information is exempt under section 45 of the FOI Act.

#### **Documents affecting personal privacy – section 47F**

46. 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, Ms Gibson 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;

47. Ms Gibson found that many of the documents within the scope of the request contain personnel identification numbers and phone numbers for members of the ADF, and biographical and other identifying information for detainees apprehended by the ADF in Afghanistan, including names and detainee identification numbers. Ms Gibson considered this information constitutes personal information. While it is possible this information is known to certain elements, Ms Gibson

was satisfied it is not well known. Further, this information is not available from publicly accessible sources.

48. 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.

49. Having considered the above, Ms Gibson decided to exempt this information from release under section 47F of the FOI Act.

50. 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**

51. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Ms Gibson 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.

52. Ms Gibson 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 [REDACTED] personal information.

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

**Material deleted pursuant to section 22 of the FOI Act  
Section 22**

54. 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.

55. Ms Gibson considered the merits of releasing documents to which she has denied access, by removing the exempt material. Ms Gibson 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.

**Subparagraph 22(1)(a)(ii) - material irrelevant to the request**

56. Subparagraph 22(1)(a)(ii) allows an agency to delete irrelevant material from a document that is not relevant to an applicant's FOI request. Ms Gibson found that the documents, as identified in the attached schedule, contain material that is irrelevant to the applicant's FOI request. This information includes broader operational, diplomatic and departmental reporting, that was not related to allegations of mistreatment raised with the IDMT, the 2011 United Nations Assistance Mission in Afghanistan Report into the "Treatment of conflict-related detainees" or decisions to

suspend and then recommence the transfer of ADF-apprehended detainees to the National Directorate of Security in 2011.

57. In accordance with subparagraph 22(2)(b)(ii) of the FOI Act, Ms Gibson deleted this material on the basis that it was irrelevant to the scope of the request.

#### **Document irregularities**

58. At the time of receipt of the request, the version of Item 1 Serial 11.6 held by International Policy Division did not contain the final page of the document. However, for the sake of completeness, a copy of that page was obtained from the originating area and attached to the document.

#### **Declassification of documents**

59. A number of the original documents matching the scope of this request were classified. Ms Gibson has declassified the versions of the documents that are approved for release.

#### **Payment of Charges**

60. 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.

61. In Mr Corcoran's letter, dated 20 July 2012, he advised that the estimated processing charge for your request was [REDACTED]. Notwithstanding the pending decision of the Information Commissioner discussed at paragraph 7, on 14 November 2011, we received your agreement to pay the deposit in the amount of [REDACTED], so as to initiate processing of the request while awaiting the Information Commissioner's decision.

62. Upon completion of your request, the actual amount for processing your request 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]

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

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

#### **Rights of review**

65. 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**

66. 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 two working days of receipt by the applicant. Defence will also publish the decision notice with privacy deletions. I will advise you of the publication date when the documents are dispatched to you.

**Further advice**

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

68. Should you have any questions in regard to the matter please contact the office.

Yours sincerely



Brendan Wright  
Acting Assistant Director  
Freedom of Information

28 March 2013

**Enclosures:**

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