



Our reference: FOI 265/13/14



By email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your letter of 3 February 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“copies of all documents constituting international agreements, arrangements or understanding, however designated, regarding the exercise of criminal jurisdiction over Australians -

1. present in Iraq as part of, in conjunction with, or as a consequence of, Australian Defence Force operations since 20 March 2003 (including, but not limited to, a Memorandum of understanding signed on or about 30 December 2008):

2. present in Afghanistan as part of, in conjunction with, or as a consequence of, Australian Defence Force operations in Afghanistan since 11 September 2001 (including, but not limited to, an exchange of letters constituting an arrangement for Australians deploying to Afghanistan that took effect on or about 29 August 2009)”.

Background

2. Our office interpreted the scope of your request as seeking access to:

“copies of all documents constituting international agreements, arrangements or understanding, however designated, regarding the exercise of criminal jurisdiction over Australian Defence Force and Defence Personnel -

present in Iraq as part of, in conjunction with, or as a consequence of, Australian Defence Force operations since 20 March 2003 (including, but not limited to, a Memorandum of understanding signed on or about 30 December 2008) [Item 1]

present in Afghanistan as part of, in conjunction with, or as a consequence of, Australian Defence Force operations in Afghanistan since 11 September 2001 (including, but not limited to, an exchange of letters constituting an arrangement for Australians deploying to Afghanistan that took effect on or about 29 August 2009) [Item 2]

The above also excludes duplicates. "

3. On 5 February 2014, I wrote to you to advise 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 6 February 2014. As such, the statutory processing time for your request expires on 6 March 2014.

4. 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

5. Wing Commander Chris Taylor, Acting Director Military Justice, Defence Legal, is the accredited decision maker, under section 23 the FOI Act, in relation to your request.

Documents identified

6. Wing Commander Taylor identified four documents as matching the description of your request. A schedule of documents is at Enclosure 1.

Decision

7. Wing Commander Taylor has decided to:

- a. release two documents, that is, Item 1 Serial 1 and Item 2, Serial 1 intact; and
- b. deny access to two documents that is, Item 1, Serial 2 and Item 2, Serial 2 on the grounds that they are considered exempt in accordance with section 33(a)(iii) of the FOI Act.

8. A copy of the documents in the form approved for release are at Enclosure 2.

Material taken into account

9. In making his decision Wing Commander Taylor 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. 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); and
- e. Advice from Director of International Agreements and Arrangements whose duties relate to the matters referred to in the documents.

Reasons for decision - Subparagraph 33(a)(iii)

10. Where access has been denied under section 33 of the FOI Act, Wing Commander Taylor considered that the material would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

11. In applying this exemption, Wing Commander Taylor considered the likelihood of damage occurring as a result of release of the material he considered to be exempt under section 33. In regards to the terms 'could 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 a document.

5.14 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is 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 document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments...

12. Wing Commander Taylor considered Item 1, Serial 2 and Item 2 Serial 2 to be exempt under sub-paragraph 33(a)(iii) because their release could reasonably be expected to cause damage to the international relations of the Commonwealth.

13. Section 26 of the FOI Act requires that where a document is refused, the decision maker shall give reasons for that decision. However, in accordance with subsection 26(2) a notice is not required to contain any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document. As such, Wing Commander Taylor has advised that he is unable, at this time, to provide any further reasons detailing why the documents are exempt as doing so would in itself reveal exempt material.

Reasons for decision—Section 22

14. 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. Wing Commander Taylor 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, Wing Commander Taylor 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

15. In our letter, dated 5 February 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 and on 13 February 2014 an invoice for the preliminary assessment deposit of [REDACTED] was subsequently sent directly from Defence Finance.

16. 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. In this instance, I have decided not to impose the FOI processing charges for the remaining balance ([REDACTED]) as the administrative cost of processing the payment would outweigh the collectable charge.

17. Accordingly, there are no outstanding charges for processing this request.

Rights of review

18. 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


19. 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 this request within five working days of receipt by you. Defence will also publish this decision notice with privacy deletions.

Further advice

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

21. All departmental action on your request is now complete. Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Melissa Davidson
Assistant Director
Freedom of Information

3 March 2014

Enclosures:

1. Schedule of documents
2. Documents in the form approved for release
3. Fact Sheet: Freedom of Information – Your Review Rights