



FOI 288/15/16 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED], under the *Freedom of Information Act 1982* (FOI Act), for access to:

“1. Company and Platoon orders for Operation Pakula and the IPB for that operation contained as part of the Brief of Evidence, and

2. Any summary or brief of the inquiry outcome written by ADFIS investigators and passed on to the Director of Military Prosecutions which resulted in the laying of the charges..:

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, exclude duplicates of documents.”

FOI decision maker

2. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

3. I identified one document as matching the scope of Item 1 of your request and one document as matching the scope of Item 2 of your request.

Decision

4. I have decided to:

- a. Partially release Item 1 on the grounds that the document is exempt under section 33(a)(ii) and subsection 33(b) [documents affecting national security, defence or international relations]; and
- b. partially release Item 2 on the grounds that the deleted material is considered exempt under section 47F [public interest conditional exemptions-personal privacy]; section 33(a)(ii) and 33(b) [documents affecting national security, defence or international relations] and/or section 22 [irrelevant material deleted] of the FOI Act.

Material taken into account

5. In making my decision, I 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. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and

- e. advice received from officials within Special Operations Command (SOCOMD) and Australian Defence Force Investigative Service (ADFIS).

Reasons for decision

Section 22 – Edited copies with exempt or irrelevant matter deleted

6. Section 22 of the FOI Act provides that if an agency or Minister decides to:

(i) refuse access to an exempt document; or

(ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access;

and it is reasonably practicable to prepare a copy of the document modified by deletions, the agency or Minister must give the applicant access to the edited copy.

7. Considering all of the above, I decided that it was reasonably practicable to remove the irrelevant material, specifically signatures, document register stamps and the listed Annexes of Item 2 and release the documents in that form.

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

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

Section 33(b) – matter communicated in confidence by a foreign government

9. Subsection 33(b) of the FOI Act exempts material from release if its disclosure would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth. The guidelines state that:

Section 33(b) exempts information communicated in confidence to the Australian Government or agency by another government or one of its authorities, or by an international organisation. One example is the confidential exchange of police information or information received from a foreign defence force agency.

The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made – it is not a matter of determining whether the information is of itself confidential in nature. Information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations. They may assist the decision maker to determine whether, on the balance of probabilities, information was communicated in confidence.

10. In considering Item 1, I reviewed from whom and how the material was received. The material was provided by a foreign Government for a specific purpose. I have further found

that the material was received under an express understanding that it would be kept confidential. As such, I consider that the material would divulge information or a matter communicated in confidence by a foreign Government.

Section 33(a)(ii) – defence of the Commonwealth

11. I considered that if this information was to be released it would inform adversaries of our tactics, techniques and procedures and could expose ADF members to unnecessary future risk. In making the above decision, I took into account paragraphs 5.28, 5.29, 5.33 and 5.34 of the OAIC Guidelines. I have decided to exempt this operational information.

12. I formed the view that some of the information contained within the documents, if released, could jeopardise the capability of the Australian Defence Force (ADF) thus adversely and substantially affect the defence of the Commonwealth. This particular information relates to, among other matters, classified information relating to the command and control arrangements in place for Afghanistan operations, reporting arrangements, Force Element tasking and interrelationships and also information, that if made publicly available, could compromise certain tactics, techniques and procedures.

Item 2 - Section 47F - Personal privacy

13. Section 47F(1) of the FOI Act provides that a document is conditionally exempt if 'disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person)'.

14. In making my decision, I considered whether:

- a. the document contained personal information;
- b. the disclosure of the personal information would be unreasonable; and
- c. whether the disclosure of this information would, at this time, be contrary to public interest.

15. Upon examination of the documents, I identified information, specifically, the names of people involved in ADFIS investigation satisfies the definition of personal information in section 4 of the FOI Act. In accordance with section 47F(2) of the FOI Act, in determining whether the disclosure of the identified personal information would be unreasonable, I 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 documents; and
- c. the availability of the information from publicly accessible sources.

16. Against those criteria, I found that:

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

17. Noting the findings against the above criteria, I decided the disclosure of this information would constitute an unreasonable disclosure of personal information belonging to

people other than you. Accordingly, I considered this material to be conditionally exempt under section 47F of the FOI Act.

18. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

Sections 47F - Public interest considerations

19. I considered section 11B of the FOI Act which sets out factors favouring access and irrelevant factors when considering the public interest test.

20. Subsection 11B(3) states factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- a. promote the objects of the Act
- b. inform debate on a matter of public importance
- c. promote the effective oversight of public expenditure; and
- d. allow a person to access his or her own personal information.

21. I considered that the public interest in promoting the objects of the Act have been satisfied as, in my opinion, merely removing signatures and personal information of third parties does not detract from public disclosure of government-held information.

22. I did not consider the final two considerations were relevant in this instance as the information does not deal with public expenditure or relate to the applicants own personal information. Furthermore, the disclosure of personal information could reasonably be expected to prejudice the protection of an individual's right to privacy.

23. Additionally the irrelevant factors at 11B (4) have not been taken into account. Taking all of the above into consideration, on balance, I considered that disclosure of personal information of third parties would be contrary to the public interest.

Further Information

24. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

Mr Tony Corcoran PSM
Accredited Decision Maker
Associated Secretary Group

17 May 2016