



Our reference: FOI 292/13/14

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

1. I refer to your letter (Enclosure 1), of 14 February 2014, which we received on 19 February 2014, in which you requested access on behalf of the [REDACTED], under the *Freedom of Information Act 1982* (FOI Act), to documents relating to Australia-United States Joint Defence Facility at Pine Gap.

### **Background**

2. On 26 February 2014, our office advised you that the work involved in processing your request in its current form would likely attract a 'practical refusal reason' under section 24AA of the FOI Act, as the work involved in processing your request would substantially and unreasonably divert the resources of Defence from other operations. The statutory processing time for the request was suspended on this date.

3. After further consultation with our office, on 15 May 2014, the statutory processing time recommenced when you agreed to proceed with the following revised scope:

*"Item 1. Any correspondence, file notes and other records of communications between the Department of Defence and:*

- *The United States Department of Defense;*
- *The Department of Prime Minister and Cabinet;*
- *The Department of Foreign Affairs and Trade; and*
- *The State and Territory governments.*

*That refer to the attached (Enclosure 1, page 3) open letter to the Special Rapporteur on Counter-Terrorism and Human Rights from the HRLC and Human Rights Watch dated 16 August 2013, or to any of the following public (in specific or general terms):*

- *The "Joint Facilities" revisited – Desmond Ball, democratic debate on security, and the human interest' published by Richard Tanter as a*

*Nautilus Institute for Security and Sustainability Special Report on 12 December 2012;*

- *'Pine Gap Drives US Drone Kills' published by Philip Dorling in The Age on 21 July 2013;*
- *'Desert secrets' published by Phillip Dorling in The Age on 21 July 2013;*
- *'Drones put Australia in firing line' published by Shahzad Akbar in The Age on 25 July 2013;*
- *'Pine Gap's role in US drone strikes should be investigated – rights groups' published by Oliver Laughland in The Guardian on 19 August 2013;*
- *'Human rights groups urge UN to investigate Australia's role in US drone strike program' published by Mark Di Stefano on ABC Online on 20 August 2013;*
- *'Fraser backs call for Pine Gap probe', an interview published by Greg Dyett on SBS Online on 26 August 2013; and*
- *'The US military presence in Australia: Asymmetrical alliance cooperation and its alternatives' published by Richard Tanter in the Asia-Pacific Journal on 11 November 2013, and*

*Item 2. Any background briefs provided by the Department of Defence to the Minister of Defence on or after 1 July 2012 that were used as a basis of the Minister's statement to Parliament that the Pine Gap base operates with the 'Full Knowledge and Concurrence' of the Australian government and any subsequent briefs provided to the Minister of Defence in relation to the above matter."*

4. On 15 May 2014, our office provided you a notice of preliminary assessment of charges for the processing of your request. The statutory processing time for the request was suspended on this date. Our office received your payment in full on 29 May 2014, when the statutory processing time recommenced.
5. On 6 June 2014, our office informed you that the decision maker had determined that there was a requirement to consult a foreign government under subparagraph 15(7)(a)(i) of the FOI Act, before finalising the decision. As such, in accordance with subparagraph 15(8)(a) [extension of processing period of 30 days] of the FOI Act, the statutory timeframe expires on **14 July 2014**.
6. 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**

7. Ms Elizabeth McGregor, Director Afghanistan, Office of the Secretary and Chief of the Defence Force Group, was the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

## Documents identified

8. Ms McGregor identified a number of documents as matching the description of your request, some of these documents were considered to be exempt under section 7 of the FOI Act, the following two documents were considered:

- a. Email correspondence between the Department of Defence and the Department of Foreign Affairs and Trade including email attachment titled 'Joint Facilities and Full Knowledge and Concurrence (\*updated\*)'. Advice received from the relevant area identified that no correspondence, file notes and other records of communications between the Department of Defence and the United States Department of Defense, the Department of Prime Minister and Cabinet nor State and Territory governments exist **[Item 1]**, and
- b. Ministerial Submission titled 'Ministerial Statement – Joint Defence Facilities' including attachments titled:
  - i. Draft Ministerial Statement 2012 – Joint Defence Facilities; and
  - ii. Previous statements to Parliament (1984, 1988, 2007) **[Item 2]**.

9. Documents in the form approved for release are at Enclosure 2. For ease of reference and for the purpose of processing this request, the decision maker has added an FOI Item number to each of the documents.

10. Ms McGregor noted that the email attachment to Item 1 includes (\*updated\*) in the title as the document is held ready for updating as new information is at hand. The use of 'updated' in this case should not be taken to imply that there is a single previous version of Item 1 within the scope of the request that has not been released to you.

## Decision

11. Ms McGregor has decided to:

- a. partially release Item 1 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 section 47F [public interest conditional exemptions-personal privacy] of the FOI Act; and
- b. partially release Item 2 with deletions made in accordance with subsection 22(1) of the FOI Act, on the grounds that the deleted material is considered exempt under subparagraph 33(a)(iii) [Documents affecting international relations] of the FOI Act.

## Material taken into account

12. In making her decision Ms McGregor 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 officers within the department; and from a foreign government.

### **Reasons for decision Section**

#### **Section 22 – Irrelevant matter deleted**

13. Upon examination of the document identified as Item 1, Ms McGregor found that it contained material regarding matter which does not relate to the scope of your request. Ms McGregor considered that the material would disclose information that would reasonably be regarded as irrelevant to the scope of the request. As such, in accordance with subparagraph 22(1)(a)(ii) of the FOI Act, Ms McGregor decided to remove the material.

#### **Section 33 – Documents affecting international relations**

14. Ms McGregor decided to exempt the document from release, in part, pursuant to subparagraph 33(a)(iii) of the FOI Act.

15. subparagraph 33(a)(iii) of the FOI Act relevantly provides:

*“A document is an exempt document if disclosure of the document under this Act:*

*(a) would, or could reasonably be expected to, cause damage to:*

*.....(i) the international relations of the Commonwealth...”*

16. After examination of Item 2, Ms McGregor found that disclosure of one part of the document is exempt under subparagraph 33(a)(iii) of the FOI Act. The redacted material was of a sensitive nature, communicated in confidence between the United States (US) Government and the Australian Government. The redacted sentence was drafted by the Department of Defence but was not accepted by the US Government on the basis that it did not accurately represent the nature of cooperative activities. Ms McGregor therefore considered that the public release of this material could reasonably be expected to have negative implications for working relations between Australia and the US Government.

17. The Guidelines state: *“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”*.

18. In applying this exemption, Ms McGregor considered the likelihood of damage occurring as a result of the release of the material she considered to be exempt under subparagraph 33(a)(iii). In regards to the terms ‘could reasonably be expected to’ or ‘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 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 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...*

19. Accordingly, Ms McGregor was satisfied that if the exempt material was released publicly, it would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth.

#### **Section 47F – Personal Privacy**

20. Upon examination of the document for Item 1, Ms McGregor identified information, specifically, names, positions, contact details and personal mobile telephone numbers belonging to people other than the applicant. This material satisfies the definition of personal information in section 4 of the FOI Act. In accordance with subsection 47F(2) of the FOI Act, in determining whether the disclosure of the identified personal information would be unreasonable, Ms McGregor 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;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

21. Against those criteria, Ms McGregor found that:

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

22. Noting the findings against the above criteria, Ms McGregor decided that the disclosure of this information would constitute an unreasonable disclosure of personal information belonging to a person other than you. Accordingly, Ms McGregor considered this material to be conditionally exempt under section 47F of the FOI Act.

23. 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.

#### **Public interest considerations – section 47F**

24. Ms McGregor noted that conditionally exempt documents carry a public interest test. Ms McGregor considered section 11B of the FOI Act which sets out factors favouring access and irrelevant factors when considering the public interest test.

25. 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 this 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.*

26. Ms McGregor considered that the public interest in promoting the objects of the Act have been satisfied as, in her opinion, merely removing, names, positions, contact details and personal mobile telephone numbers from the document does not detract from public disclosure of government-held information. Ms McGregor did not consider the other factors were relevant in this instance.

27. Taking all of the above into consideration, on balance, Ms McGregor considered that disclosure of the names, positions, contact details and personal mobile telephone numbers would be contrary to the public interest.

28. In coming to the above decision, Ms McGregor 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 Ms McGregor took into account were listed under subsection 11B(4) of the FOI Act.

29. Accordingly, Ms McGregor considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the documents that match the scope of this request. Therefore, Ms McGregor decided that it would be contrary to the public interest to release the information considered exempt under subsection 47F(1) of the FOI Act.

#### **Administrative release**

30. Ms McGregor noted that part of Item 2 (specifically pages 14 – 34), have been released to you administratively (outside of the FOI Act). Whilst these pages are already in the public domain, Ms McGregor decided to provide them to you due to the duration that has lapsed since the documents were made publicly available.

#### **Rights of review**

31. 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**

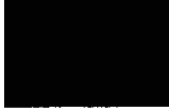
32. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish details of information released under the FOI Act. Defence publishes identified documents relating to requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

**Further information**

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

34. 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



Sally Philp  
Assistant Director  
Freedom of Information

14 July 2014

Enclosures:

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