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 296/13/14

[redacted]

By email: [redacted]

Dear [redacted]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email of 4 February 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

> *".... information (e.g., documents, reports, summaries, or similar items) related to the activities of any Canadian Forces personnel who served on a military exchange with the Australian Armed Forces and who, furthermore, were subsequently deployed with their Australian exchange units on operations outside the territory of Australia between 2000 and 2012."*

Revised scope

2. On 10 and 20 February 2014, you were advised that your request was not valid under subparagraph 15(2)(b) of the FOI Act. Following further discussion, on 22 February 2014, you revised the scope of your request to:

> *"copies of all correspondence received from the Canadian High Commission facilitating exchanges for the period 2000 to 2010."*

3. We interpreted your request as seeking access to:

> *"copies of all correspondence received from the Canadian High Commission facilitating military personnel exchanges for the period 2000 to 2010 (excluding duplicated documents; and personal information, such as, names, dates of birth, personal contact details, and service / identification numbers)."*

4. You did not disagree with this interpretation.

Background

5. On 28 February 2014 our office advised you of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. By email dated 6 March 2014, you sought a review of the charges. On 2 April 2014 I advised you of my charges decision. We received your receipt confirming your payment of the FOI processing charges on 28 April 2014 which re-activated the processing time. As such, the statutory processing time for your request was due to expire on 22 May 2014.

6. On 6 May 2014, our office informed you that the decision maker had determined that there was a requirement to consult with a foreign entity under subsection 15(7) [consultation with a foreign government] of the FOI Act, before finalising the decision. As such, in accordance with subsection 15(8) [extension of processing period] of the FOI Act, the statutory timeframe was amended to 21 June 2014.

7. I note that the above mentioned due date is a Saturday, in accordance with the FOI Guidelines issued by the Australian Information Commissioner, if the last day for notifying a decision falls on a Saturday, Sunday or a public holiday, the timeframe will expire on the first day following which is none of those days. As such, the due date for you to receive a response expires on 23 June 2014.

8. 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

9. Colonel N. Fox, Director Personnel Policy – Army, Captain C Clarke, Director Navy People Policy and Group Captain G Wallis, Director Coordination Air Force are the accredited decision makers, under the FOI Act, in relation to your request.

Documents identified

10. Despite thorough searches, Colonel Fox was unable to identify any documents matching the description of your request. Captain Clarke identified one document and Group Captain Wallis identified four documents as matching the description of your request. A schedule of documents is at Enclosure 1. For ease of reference and for the purpose of processing this request, the decision makers have added an FOI Item number to each of the documents, which corresponds with the schedule.

Decision

11. Colonel Fox decided to refuse access to this request under section 24A of the FOI Act. Captain Clarke has decided to partially release the document in accordance with 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 irrelevant or exempt under section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

12. Group Captain Wallis decided to:

    a. release one document intact; and

    b. partially release three documents with deletions made in accordance with section 22 of the FOI Act on the grounds that the deleted material is considered exempt under section 47F of the FOI Act.

Material taken into account

13. In making her decision, Colonel Fox had regard to:

    a. the terms of the request;
    b. relevant provisions in the FOI Act.
    c. paragraph 8.4 of the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
    d. advice received from officers within Army Headquarters, Forces Command, Special Operations Command, Career Management – Army and 1 Division.

14. In making her decision, Captain Clarke had regard to:

    a. the terms of the request;
    b. the content of the identified document in issue;
    c. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines);
    d. the Principles on open public sector information issued by the Information Commissioner;
    e. advice received from a third party as a result of consultation; and
    f. advice received from officers within the Department.

15. In making her decision, Group Captain Wallis had regard to:

    a. the terms of the request;
    b. the content of the identified documents in issue;
    c. relevant provisions of the FOI Act;
    d. paragraph 6.29 of the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines)
    e. the Principles on open public sector information issued by the Information Commissioner; and
    f. comments provided by a third party as a result of consultation.

Army reasons for decision - 24A

16. Section 24A(1) of the FOI Act states:

> **24A Requests may be refused if documents cannot be found, do not exist or have not been received**
>
> *Document lost or non-existent*
>
> (1) An agency or Minister may refuse a request for access to a document if:
>
> (a) all reasonable steps have been taken to find the document;

and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

17. Paragraph 8.41 of the Guidelines also gives guidance as to what is required to be included within this statement of reasons to refuse a request under section 24A(1);

> *8.41 The statement of reasons given to the applicant should sufficiently identify the document and give reasons as to why it cannot be found or why it is known that it no longer exists. The statement should describe the steps the agency took to search for it.*

18. Colonel Fox advised that the Australian Army has no formal exchange programs with the Canadian Army. Notwithstanding this, Colonel Fox still conducted the necessary searches for any documents that may exist that match the description of the request.

19. To locate documents, Colonel Fox advised that areas conducted searches of the Defence Records Management system (Objective), hard copy files, a standard windows search as well as seeking out persons who may know where the documents may be kept. The areas that conducted the searches included:

a. Army Headquarters;
b. Forces Command (Army);
c. Special Operations Command (Army);
d. Directorate of International Engagement – Army
e. Career Management – Army; and
f. 1 Division.

20. The search terms used by the areas above to search Objective included Canad, Canada, Canadian, HICOM and Exchange.

21. Based on the above, Colonel Fox was satisfied that "all reasonable steps" have been taken to locate any documents that would fall under the terms of this request. Therefore, Colonel Fox was satisfied that the documents cannot be found or do not exist, and refuse access to this request under section 24A(1) of the FOI Act.

Navy reasons for decision – outcome of searches

22. Despite thorough and diligent searches being conducted, only one document matching the description of the request could be located by Captain Clarke. Specific details of the searches include:

a. Electronic searches of the Navy People Career Management Agency (NPCMA) records management system and physical searches of four files specifically relating to Canadian Exchange positions.
b. Electronic and physical searches of files within the Directorate of Navy International Engagement (DNIE).

c. A search of Commander Submarines (COMSUB) records to identify Canadian exchange personnel who served in an ongoing exchange in Royal Australian Navy submarines. This identified five people covering the 2000 to 2010 period. Of these five people, four personnel files were recovered and physically searched.

d. Electronic searches of the Defence Record Management System (Objective) for 'Corporate Files' including the following search parameters:

   i. Canada and Navy;

   ii. Canada and Exchange;

   iii. Canadian and Exchange;

   iv. Canadian and Navy;

   v. Navy and Exchange; and

   vi. Personnel and Canada.

Section 47F

23. Upon examination of the document, Captain Clarke identified a mobile telephone number belonging to a person other than you. Captain Clarke further considered that a person's identity is apparent or reasonably ascertainable from this information, and as such constitutes personal information.

24. 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'.

25. In determining whether release of the above personal information is unreasonable, Captain Clarke took into account, inter alia:

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 within the document; and

c. the availability of the information from publicly accessible sources.

26. Against these criteria, Captain Clarke found:

a. the deleted material is not well known;

b. in some cases, the people to whom the information relates are not widely known to be (or to have been) associated with the matters dealt with in the documents; and

c. the deleted information is not available from publicly accessible sources.

27. Captain Clarke advised that where individuals have been indentified as acting in their official capacity, this information has not been deleted as this does not constitute an unreasonable disclosure of personal information.

28. 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.

29. In determining whether to release the document, Captain Clarke considered the guidelines provided by the Australian Information Commissioner, together with a range of factors that favour access to a document set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. Captain Clarke had regard to whether giving access to you at this time would, on balance, be contrary to the public interest. Specifically, Captain Clarke considered if disclosure of the document would:

a. promote the objects of the Act,

b. inform debate on a matter of public importance,

c. promote effective oversight of public expenditure, and

d. allow a person to access her or his personal information.

30. In reviewing the request, Captain Clarke decided that releasing the requested document may promote some of the objects of the FOI Act.

31. Regarding the deletions made in accordance with section 47F of the FOI Act, Captain Clarke considered that there is a public interest in protecting the privacy of individuals whose personal details appear in document. Given the nature of the deleted information, Captain Clarke decided that it would not inform debate on a matter of public importance, nor would release promote effective oversight of public expenditure or prevent a person's access to his or her personal information.

32. Conversely, the release of this information could reasonably be expected to result in a decline in confidence in Defence's ability to maintain the privacy of its members and other third parties.

33. In deriving her decision, Captain Clarke also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. After assessing of all these factors, Captain Clarke decided that the harm that could arise from disclosure of the personal information far outweighs any favourable public interest factors that could be gained from their release.

34. As such, Captain Clarke decided that the material is exempt under section 47F of the FOI Act.

Section 22

35. Section 22(1)(a)(ii) of the FOI Act provides that material may be deleted if it would be reasonably regarded as irrelevant to the request. You will note that material has been removed from the above mentioned document (Navy Serial 1) as Captain Clarke considered it to be irrelevant as it is outside the date range requested in your application.

Air Force reasons for decision – 47F

36. Upon examination of the document, Group Captain Wallis identified the ranks, names and signatures of persons other than you. Group Captain Wallis considered the disclosure of this material would constitute an unreasonable disclosure of personal information of a person other than you.

37. 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 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.

38. Against those criteria, Group Captain Wallis 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.

39. 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.*

40. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Group Captain Wallis 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. Group Captain Wallis 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.

41. Group Captain Wallis 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.

42. In coming to the above decision, Group Captain Wallis 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 Group Captain Wallis took into account were listed under subsection 11B(4) of the FOI Act.

43. Accordingly, Group Captain Wallis 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 decided that it would be contrary to the public interest to release the information considered under subsection 47F of the FOI Act.

Document markings

44. VCDS Instruction (Air Force Serial 4) contained yellow highlighting throughout the document, which now appears as black boxes around selected text. The highlighting bears no significance to this Freedom of Information request.

Payment of Charges

45. In my charges decision letter dated 2 April 2014, I advised you that after deducting the free decision making time, the department estimated the cost associated with processing your request to be [redacted]. We received your receipt confirming your payment of the FOI processing chares on 28 April 2014.

46. Upon completion of your request, after deducting the free decision making time, the actual amount for processing exceeded the estimate provided to you. However, as explained in our original preliminary assessment of charges 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. As all of the documents have not been released in full, the remaining balance is the difference between the preliminary assessment amount ([redacted]) and the deposit you have already paid.

47. 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. Once the outstanding payment has been finalised, I will send you a copy of the documents in the form approved for release without further delay.

Rights of review

48. 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

49. 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 the applicant. Defence will also publish this decision notice with privacy deletions.

Further advice

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

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

Yours sincerely

[redacted]

Melissa Davidson
Assistant Director
Freedom of Information

13 June 2014

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