



**FOI 305/15/16 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:

*Item 1.* “The assessment from the Director of Military Prosecutions, Brigadier McDade, of the three prosecutions arising from 12th February 2009 incident in Afghanistan requested by the Minister for Defence,, the Honorable Stephen Smith, on 30 August 2011 and

*Item 2.* any other submissions, assessments or advices the Minister received in relation to these prosecutions from Chief of Defence Angus Houston and Chief of Army Lieutenant General Ken Gillespie following the dismissal of the charges against the three soldiers.”

*excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request.”*

**FOI decision maker**

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

**Documents identified**

3. I identified one document, a ministerial submission, as matching the description of the request. I have not considered the attachments to the submission as they do not match the scope of the request. Consequently, I have treated them as irrelevant material.

**Decision**

4. I have decided to partially release item 1, on the grounds that the deleted material is considered exempt under section 47F [Personal privacy] of the FOI Act and to refuse access to Item 2 on the grounds that no documents exist. Item 2, therefore is considered exempt under section 24A(1)(b)(ii) [ documents cannot be found, do not exist or have not been received].

## **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 document 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 from officials within the Directorate of Military Prosecutions, Chief of Defence Force and Chief of Army offices.

## **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, including signatures and attachments and release the document in that form.

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

8. Upon examination of the documents, I identified information, specifically the names of individuals who provided witness statements. 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 personal 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) how the information was obtained, that is, in confidence or using information gathering powers;
- (d) whether any public purpose would be achieved through release of the documents; and
- (e) the availability of the information from publicly accessible sources.

9. Against these criteria, I found:

- a. the deleted material is not well known;
- b. the person to whom the information relates is 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.

10. In light of the above, I have decided that the specified material identified is in fact conditionally exempt pursuant to section 47F of the FOI Act. Section 11A (5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

### **Sections 47F - Public interest considerations**

11. In reviewing the request, I decided that releasing the requested documents may promote some of the objects of the FOI Act.

12. Regarding the deletions made in accordance with section 47F of the FOI Act, there is a public interest in protecting the privacy of individuals whose personal details appear in documents. Accordingly, I have decided that the section 47F deletions would not inform debate on a matter of public importance, nor would their release promote effective oversight of public expenditure or prevent the applicant’s access to their personal information.

13. Conversely, the release of this deleted 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.

14. In deriving my decision, I also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. I advise that none of the irrelevant factors have been taken into account in making my decision. After assessing of all these factors, I have 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 its release.

### **Section 24A**

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

15. *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 or Minister's possession but cannot be found; or*
  - (ii) does not exist.*

16. 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.*

17. Officers within the offices of the Chief of Defence Force and Chief of Army undertook what I consider to be exhaustive searches of the records management system (Objective) email holdings and I conducted a search of the Defence Parliamentary Workflow System and there are no documents which match the scope of item 2.

18. I am satisfied that all reasonable steps have been taken to locate documents relevant to the scope of the request and that no documents exist.

**Additional Information**

19. To assist the applicant further, I have provided a Defence Statement to provide context to this request and access to the following documentation that is already publicly available:

- a. Minute SEC/OUT/2007/176;200510675931/1 of 6 June 2007
- b. Media article dated 31 August 2011 – Minister seeks report on commandos' case
- c. Ruling by Chief Judge Advocate of 20 May 2011

Tony Corcoran  
Accredited Decision Maker  
Associate Secretary Group

5 May 2016