



**Australian Government**  
**Department of Defence**

**FOI 317/15/16 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 “ Copy of drone footage recorded during the 12th February, 2009 raid on the compound in Afghanistan by Australian commandos working under Operation Pakula, which resulted in 6 civilian deaths.*

*Item 2. The Concept of Operations document (CONOPS) authorising the raid by Australian soldiers known as Force Element Charlie on the compound in the village of Sorgh Morghab (there are various spellings of this including Surgh Morghab) in Oruzgan Province in Afghanistan on the 12th February 2009 which resulted in 6 civilian deaths and*

*Item3. CONOPS for any other operations in that area or village on that night.*

*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 DVD and one document as matching the description of the request.

**Decision**

4. I have decided to:

a. fully exempt Item 1 on the grounds that the documents being sought are exempt under subsection 33(b) [documents affecting national security, defence or international relations] of the FOI Act;

b. partially release Item 2, on the grounds that the deleted material is considered exempt under section 33(a)(i) and (a)(ii) [documents affecting national security, defence or international relations]; and

c. refuse access to Item 3 on the grounds that the documents being sought do not exist under section 24A(1)(b)(ii) [documents do not exist] 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 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 Special Operations Command.

## 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 document register stamps.

### Item 1: Section 33(b) of the FOI Act

8. 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.*

9. In considering Item 1, I reviewed from whom and how the material was received. The material was received under a formal covering letter from a foreign Government. The letter states that the material was provided for the specific purpose "for ADF use in proceedings". 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 matching Item 1 would divulge information or a matter communicated in confidence by a foreign Government.

**Item 2: Section 33(a)(i) – security of the Commonwealth**

10. I decided to exempt material in Item 2 from release, in part, pursuant to subsection 33(a)(i) of the FOI Act. I was satisfied that the relevant material is exempt under subparagraph 33(a)(i) of the FOI Act because it is of a sensitive nature, and pertains to information relating to ADF operations and details of individuals that have designated Protected Identity Status.

11. I formed the view that, if this information was disclosed, it could be used by an adversary to identify and target key individuals involved in Special Forces operations in order to gain access to operational information, thus compromising the capability of the ADF. In making the above decision, I took into account paragraphs 5.26, 5.33 and 5.34 of the OAIC Guidelines.

**Item 2: Section 33(a)(ii) – defence of the Commonwealth**

12. 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.

**Item 3 Section 24A(1)(b)(ii) – documents do not exist**

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.*

13. Officers within Special Operations Command undertook what I consider to be exhaustive searches of the records management system (Objective), email holdings and sought advice from personnel that were in theatre at the time of the operation.

14. I did not consider it was necessary to approach any other business areas to undertake searches as Special Operations Command is the only Unit involved in the matter as requested at Item 3. 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.

Tony Corcoran PSM  
Accredited Decision Maker  
Associate Secretary Group

10 May 2016