



Our reference: FOI 326/14/15



By email: [Redacted]

Dear [Redacted]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your request under the *Freedom of Information Act 1982* (FOI Act) for access to “*A summary of incidents logged onto the Defence Policing & Security Management System (DPSMS) for the period 1 January 2014 to 15 April 2015. I am only interested in those incidents that are categorised as Major, Serious & Complex or Reportable Major.*”
2. I note that you revised the scope of your request on 11 May 2015 to capture only those incidents logged on DPSMS which had been investigated and where there was report of the investigation.

Background

3. On 15 May 2015 I wrote to you to advise of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. Your request was restarted on 19 May 2015, the day you advised that the required deposit towards the processing time had been paid. As such, the statutory deadline for processing your request was 7 June 2015.
4. 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 is today, 9 June 2015.
5. 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

6. Mr Mark Hill, Accredited Decision Maker, Defence Security Authority, was the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

7. Mr Hill identified 14 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, an FOI Item number has been added to each of the documents, which corresponds with the schedule.

Decision

8. Mr Hill decided to deny access to eight documents:

- a. One document under sections 33 and 37 of the FOI Act
- b. Two documents under section 33 of the FOI Act
- c. Four documents under section 37 of the FOI Act
- d. One document under section 47E of the FOI Act

9. Mr Hill decided to release the remaining documents with material deleted, in accordance with section 22 of the FOI Act, on the grounds that the material is considered exempt under sections 33, 37, 47E and 47F of the FOI Act. His reasons for this decision are set out below.

Material taken into account

10. In making his decision Mr Hill had regard to:

- a. the content of the identified documents in issue;
- b. relevant provisions in the FOI Act;
- c. Defence guidance material on the FOI Act and the guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the guidelines).

Reasons for decision

Section 33(a)(ii) – Documents affecting national security, defence or international relations

11. Mr Hill found that the documents identified as Items 1, 2, 3, 5, 8, 11 and 12 contained extensive material that would or could reasonably be expected to cause damage to the defence of the Commonwealth.

12. In regards to the terms ‘could reasonably be expected to’ and ‘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 documents.*

5.14 *The use of the word 'could' in this qualification is less stringent than 'would', and so requires no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences. Therefore, the reasonable expectation refers to activities that might reasonably be expected to have occurred, be 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 the future flow of confidential information from 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. A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.*

13. In regards to the 'defence of the Commonwealth', the Guidelines state:

Defence of the Commonwealth

5.28 *The Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term includes:*

- *meeting Australia's international obligations*
- *ensuring the proper conduct of international defence relations*
- *deterring and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

5.29 *Damage to the defence of the Commonwealth is not necessarily confined to monetary damage (see paragraph 5.25 above). However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.*

14. Disclosure of the material contained in the documents relates to sensitive investigations and release of the material has the potential to cause real harm to national security. Mr Hill was satisfied that the identified material meets the definition of material that would or could cause such damage, for the purposes of the FOI Act. He therefore considered the documents identified as 5 and 8 to be exempt in full under section 33(a)(ii) of the FOI act.

15. After considering section 22 of the FOI Act, he found documents 1, 2, 3, 11 and 12 could be disclosed with material removed that is exempt under Section 33 (a)(ii) of the FOI Act.

Section 37

16. Mr Hill found that documents 2, 4, 7, 10 and 13 contained material which, if disclosed, could reasonably be expected to prejudice the conduct of an investigation of a possible breach of the law and therefore I consider that the material is exempt under section 37(1)(a) of the FOI Act.

17. Subsection 37(1)(a) of the FOI Act relevantly provides:

“A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.”

18. Paragraph 5.77 of the Guidelines state that this section only applies:

“to documents only where there is a current or pending investigation and release of the documents would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in particular instance’, it is not sufficient that prejudice will occur to other or future investigation: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.

19. In forming his decision, Mr Hill considered paragraph 5.74 of the Guidelines and that the documents *“in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence”*.

20. Mr Hill was satisfied that documents 2, 4, 7, 10 and 13 relate to current investigations which are continuing. The release of this information could impact on the direction of the investigations and pre-emptively release material that may be used as evidence by the investigative bodies which would jeopardise the investigations.

Section 47E – operations of an agency

21. Mr Hill found that Document 11 contained information relating to the operation of DSA as it contains methods and procedures for undertaking certain actions arising from investigations. Mr Hill also found that the investigation to which Document 14 relates was treated as a public interest disclosure under the Public Interest Disclosure Act 2013 (PID Act). Under the PID Act Defence has a statutory obligation to protect the identity and interests of the Discloser. Mr Hill considered that this investigation is an issue of specific relevance to the operations of DSA, in particular, and to the operations of Defence as an agency.

22. Defence Instruction (G) PERS 45-8: “*Defence Public Interest Disclosure Scheme*” (DPIDS) establishes and sets out the operational details of the DPIDS. Key elements of the DPIDS relate to confidentiality and identity protection for disclosers. In particular, the DPIDS contains material referring to maintenance of confidentiality, and the protection of a discloser’s identity and interests. Protection of a discloser’s identity, personal details and interests are fundamental aspects of the PID Act and the DPIDS.

23. Accordingly Mr Hill must consider whether the release of the document could reasonably be expected to have a substantial adverse affect on the proper and efficient conduct of the operations of DSA and Defence as an agency.

24. When considering whether the document in question is conditionally exempt under section 47E(d) of the FOI Act, Mr Hill found the OAIC Review Decision ‘Australian Broadcasting Corporation and Commonwealth Ombudsman [2012] AICmr 11’ to be particularly relevant. In this case, a request was made seeking documents in the possession of the Commonwealth Ombudsman obtained from the Australian Sports Commission (ASC) and Cycling Australia pertaining to “[a named bicycle designer]”. The Ombudsman refused access to 31 documents under section 47E of the FOI Act. This decision was made on the basis that the documents formed part of an investigation conducted by the Ombudsman into the actions of two Commonwealth agencies. The applicant appealed this decision.

25. On appeal the OAIC upheld the original decision to refuse access to the documents. The OAIC found that disclosure “under the FOI Act, of information provided...in such circumstances would undermine the confidential nature of its conciliations and affect the willingness of people to engage in an open and frank manner...in the future”. The OAIC then concluded that if the documents sought were to be released, this “would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman’s operations” as they rely “on the willingness of participants to be open and frank during the conciliation process”. This approach was affirmed in ‘L’ and Australian Human Rights Commission [2012] AICmr 21, which involved a request for documents relating to a complaint.

26. Mr Hill considered that the ability of the DSA to obtain information in a relationship of confidentiality is an important function, and that disclosure under the FOI Act of the material identified would undermine the confidential nature of DSA investigations and inquires.

27. Mr Hill would like to note that disclosure of the material in Document 14 would also compromise protecting the interests of the Discloser and the integrity of the DPIDS, as a critical mechanism in Defence corporate arrangements for managing Defence business and Defence personnel (including human resource management, and workplace health and safety issues), and, in particular, for identifying, managing and mitigating misconduct and unacceptable behaviour.

28. In summary, release of the material would impair the DSA investigative function as it would affect the willingness of people to engage in an open and frank manner in the future. Furthermore, any failure to protect the identity of the Discloser can reasonably be expected to prejudice or cause detriment on a wide range of matters of concern to the agency, including misconduct and unacceptable behaviour, which impacts the proper and effective operation of DSA, DPIDS and Defence as an agency.

29. Accordingly, Mr Hill was satisfied that Documents 11 & 14 contained material that was conditionally exempt under subsection 47E(d) of the FOI Act.

Public interest considerations – section 47E

30. When considering whether release of the documents was in the public interest, Mr Hill had regard to the public interest factors favouring disclosure of the documents as set out in section 11B(3) of the FOI Act [Public interest exemptions – factors] and the public interest factors against disclosure as set out in paragraph 6.29 of the Guidelines. None of the factors in section 11B(4) [Irrelevant factors] were taken into account in his decision.

31. In relation to section 11B(3)(a) of the FOI Act [Promote the objects of this Act (including all the matters set out in sections 3 and 3A)], information held by the Government is a national resource and releasing the documents would promote section 3(1)(b) of the FOI Act as a result.

32. However, disclosure of the documents would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), contribute to discussion of Defence activities (section 3(2)(b) of the FOI Act) and does not relate to matters of public expenditure (section 11B(3)(c)).

33. Paragraph 6.29 of the Guidelines prescribes a list of public interest factors against disclosure. The factors that are relevant to this request are that disclosure “could reasonably be expected to prejudice an agency’s ability to obtain confidential information” and “could reasonably be expected to prejudice an agency’s ability to obtain similar information in the future”. As explained in above, the ability of the DSA to conduct investigations and inquiries in confidence is an integral function of Defence, furthermore maintaining the integrity of the DPIDS, is a critical mechanism for Defence as an agency.

34. After considering the public interest factors above, Mr Hill gave the greatest weight to the factors against disclosure, particularly taking into account the investigative framework that allows the DSA to conduct investigations in a confidential manner and maintaining the integrity of the DPIDS. The disclosure of the documents identified would be against the public interest, and he found that the material is exempt from release under the FOI Act.

Section 47F – documents affecting personal privacy

35. Mr Hill found that the documents identified as matching Items 1, 3, 6, 9, 11 and 12 contained names, contact details and signatures of DSA investigators. Mr Hill found that they also contained identifying information such as names, gender, dates of employment and other identifying information of ADF members, Defence personnel and contractors to Defence. He was satisfied that the identified material meets the definition of personal information for the purposes of the FOI Act.

36. In accordance with section 47F (2) of the FOI Act, in determining whether the disclosure of the identified personal information would be unreasonable, Mr Hill had regard to:

- i. the extent to which the information is well known;
- ii. 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; and
- iii. the availability of the information from publicly accessible sources.

37. Against these criteria Mr Hill found:

- i. the specific pieces of personal information are not well known;

- ii. the majority of people to whom the information relates are not known to be (or to have been) associated with the matters dealt with in the documents; and
- iii. the specific pieces of personal information are not readily available from publicly accessible sources.

38. Noting the findings of the above criteria, Mr Hill considered that the release of this material would be an unreasonable disclosure of personal information and therefore, he was satisfied that the material was conditionally exempt under section 47F of the FOI Act.

Section 47F – public interest considerations

39. Section 11A(5) of the FOI Act required Defence to allow access to exempt documents unless, in the circumstances, access to the documents would, on balance, be contrary to the public interest.

40. In regards to the applicant of the ‘Public Interest’ test, the Guidelines state:

6.9 ‘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’.

41. Mr Hill considered the range of factors that favour access to a document, as set out in section 11B(3) of the FOI Act. He considered that the public interest in promoting the objects of the FOI Act have been satisfied by assessing this case on its merits and in accordance with the guidance on good decision making principles. He did not believe that the release of the identified personal information would inform public debate on any matter of public importance in a meaningful way.

42. On balance, Mr Hill also considered that the release of the identified personal information could cause unreasonable stress on the parties identified in the documents and he considered that there would not be any public benefit from such a release. Further, Mr Hill considered that there is a greater public interest in Defence being seen to protect individuals from releases such as this.

43. Accordingly, after taking all of the above into consideration Mr Hill was satisfied that the public interest factors against disclosure outweigh the factors for disclosure and find the material identified is exempt under section 47F of the FOI Act.

Declassification of documents

44. Two of the documents matching the scope of this request carried a national security classification. The decision maker has declassified the versions of the documents that are approved for release.

Payment of Charges

45. In our letter, dated 15 May 2015, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED].

46. Upon completion of your request, after deducting the free decision making time, the actual amount for processing was calculated to be [REDACTED]. The remaining balance is the difference between actual charges 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 and the documents will be sent to you as soon as practicable.

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 can be accessed online at: <http://www.comlaw.gov.au/Details/C2015C00013>.

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

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

9 June 2015

Enclosures:

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