



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 328/13/14

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 18 March 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

A copy of the video/DVD referred to as The Fist which features members of 2 Commando Regiment Charlie Company during 2009; and

A copy of the final report resulting from an investigation undertaken by Army Headquarters in 2013 following receipt of the above mentioned DVD.

Background

2. In my letter, dated 7 May 2014, you were advised that access to the report listed above was sought by another applicant under the FOI Act. I also advised that the report was to be made publicly available as a result of that request and as such advised that this request would continue for a request for access to the DVD only.

3. The purpose of this letter is to provide you with the decision relating to the document that is the subject of your request.

FOI decision maker

4. Colonel M.R.C. Kennedy, Deputy Chief of Staff, Army Headquarters is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

5. Colonel Kennedy advised that he identified one document that falls within the scope of your request, being a DVD which contains 4 episodes of *The Fist*.

Decision

6. Colonel Kennedy decided to release the identified document with deletions in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act. Colonel Kennedy deemed the deleted material exempt under sections 33 [documents affecting national security, defence or international relations] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

Material taken into account

7. In making his decision Colonel Kennedy 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. the results of third party consultation.

Reasons for decision

Subsection 33(a)(i) of the FOI Act

8. Subsection 33(a)(i) exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth. 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) on 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.

9. Some of the information contained within the documents could jeopardise the capability of the ADF, if released. This particular information includes the tactics, techniques and procedure used by Australian soldiers within a theatre of operation. Release of this material would provide a significant tactical advantage to an adversary and could expose our soldiers to unnecessary risk.

10. Colonel Kenney found that document also contains imagery of personnel that have been granted Protected Identity Status (PIS). He was of the view that if this footage was released, it would allow these members to be easily identified which would provide a significant tactical advantage to an adversary and expose those soldiers to unnecessary risk and jeopardise the capability of the ADF.

11. Taking the above into account Colonel Kennedy was therefore satisfied that the operational information identified within the document was exempt under subsection 33(a)(i) of the FOI Act.

Subsection 33(a)(iii) of the FOI Act

12. Subsection 33(a)(iii) exempts a document if disclosure of the document would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

13. Colonel Kennedy positively identified coalition force Unmanned Aerial Vehicles (UAV) and Air Weapons Team (AWT) footage within the identified document. The nation which owns the platform (UAV or AWT) owns copyright of the imagery and the disclosure of that information would, or could reasonably be expected to cause damage to the international relations of the Commonwealth. 'International Relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relationships with other governments and international organisations. If this material was to be released without the explicit agreement of the coalition forces it could reasonably be expected to impact on the ability of the Australian Government to maintain good working relationships with those foreign governments.

14. Taking the above into account Colonel Kennedy was satisfied that the footage of UAVs and AWTs within the identified document is exempt under section 33(a)(iii) of the FOI Act.

Personal Information of third parties

15. Colonel Kennedy found that the identified document contained personal information of individuals other than you. It is appropriate to consider whether this information is exempt from release under the FOI Act. As part of the decision making process Colonel Kennedy undertook third party consultation. Colonel Kennedy considered those responses when making his decision.

Section 47F of the FOI Act

16. Colonel Kennedy found that the identified document contained names, imagery and identifying features of two members that were Killed in Action. If this material was released it would highlight these individuals, as the remaining Special Forces personnel have been afforded protected identity status. Colonel Kennedy considered the impact that the release of this material may have on the deceased's families and considered the material to be conditionally exempt under section 47F of the FOI Act. Colonel Kennedy advised that the document also contains imagery of a highly personal nature of one soldier which would be improper to release.

17. Having considered the above Colonel Kennedy was satisfied that the disclosure of this information would constitute an unreasonable disclosure of personal information belonging to persons other than you. Accordingly, he considered the material to be conditionally exempt under section 47F of the FOI Act.

18. 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

19. In assessing whether disclosure is on balance, contrary to the public interest, Colonel Kennedy considered the guidelines provided by the Australian Information Commissioner, together with a range of factors that favour access to a document as set out in section 11B(3) [Public interest exemptions – factors] of the FOI Act.

20. Colonel Kennedy considered that the public interest in promoting the objects of the FOI Act had been satisfied and did not believe the release of the specific personal information of these members of the ADF, information that could readily lead to identification, would inform public debate on any matter of public importance in any way. Additionally the disclosure of this information would not promote oversight on public expenditure or allow a person to access his or her own personal information. He also considered that while the identities of the members should be protected the public interest is appropriately satisfied as the mosaic effect applied does not detract from the activities being undertaken in anyway.

21. In coming to his decision, Colonel Kennedy also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. Accordingly, he considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the document that match the scope of the request. Therefore, he decided that it would be contrary to the public interest to release the information considered exempt, under subsection 47F(1) of the FOI Act.

Payment of Charges

22. In our letter, dated 28 March 2014, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. You sought waiver of the estimated charges on both financial hardship and public interest ground on 8 April 2014. By letter, dated 7 May 2014, I advised that I had decided to reduce the charges amount to [REDACTED]. On 5 June 2014, we received the required deposit to enable processing to begin.

23. 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.

24. Accordingly, you are required to pay the remaining [REDACTED] in order to finalise your request. Please find attached at Enclosure 1 a Payment Authorisation Form for the balance. Once you have completed the form please return to foi@defence.gov.au. The documents will not be released until the outstanding charges amount is received by the Department.

Additional Information

25. Colonel Kennedy note that your original request sought access to:

A copy of the final report resulting from an investigation undertaken by Army Headquarters in 2013 following receipt of the above mentioned DVD.

26. He acknowledged you withdrew this part of the request after being advised that the document would be published on Defence's FOI Disclosure Log, in response to another request, prior to the completion of this request. Colonel Kennedy asked that you be advised that Army has been made aware that the information contained in the Quick Assessment was deficient or incorrect, and the Chief of Army has directed an Inquiry which will seek to determine:

- a. the precise nature and extent of the administration and/or disciplinary action imposed in 2009; and
- b. an accurate record of the quantity and veracity of the sanctions imposed.

Rights of review

27. 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 2.

FOI Disclosure Log

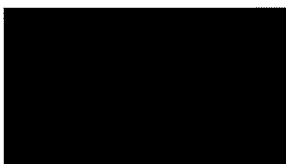
28. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish details of information released under the FOI Act. Defence will publish the identified documents relating to this request within five working days of receipt by the applicant. Defence will also publish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

Further advice

29. The FOI Act can be accessed online at: <http://www.comlaw.gov.au/Details/C2011C00803>.

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

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

25 July 2014

Enclosures:

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