



Our reference: FOI 349/14/15

By email: [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 1 May 2015, in which you requested access, under the Freedom of Information Act 1982 (FOI Act), to:

“Access to documents currently used as part of the training of:

- 1. recruits at the Army Recruit Training Centre*
- 2. officer cadets and midshipmen at the Australian Defence Force Academy*
- 3. staff cadets at the Royal Military College - Duntroon*

In relation to:

- 1. Rules of Engagement*
- 2. International Humanitarian Law (the Geneva Conventions)*
- 3. War Crimes”*

Background

2. On 7 May 2015 I wrote to advise you of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. Your letter agreeing to pay charges for the processing was received in this office on 7 May 2015. As such, the statutory deadline for processing your request is 1 June 2015.

3. On 21 May 2015, our office informed you that due to the volume of documents we were seeking a 30 day extension of the statutory guidelines under section 15AA of the FOI Act. You did not agree with the extension but did refine the scope to:

“Access to documents currently used as part of the training of:

- 1. recruits at the Army Recruit Training Centre*
- 2. officer cadets and midshipmen at the Australian Defence Force Academy*

In relation to:

- 1. Rules of Engagement*
- 2. War Crimes”*

4. 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 makers

5. LTCOL Damien Spendelove, Chief Legal Officer, Army headquarters and CAPT Gordon Andrew, Chief of Staff, Australian Defence College are the accredited decision makers, under the FOI Act, in relation to your request.

Documents identified

6. LTCOL Spendelove and CAPT Andrew identified seven documents as matching the description of your request. A schedule of documents will be provided when the documents are sent to you. You will note that 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

7. LTCOL Spendelove and CAPT Andrew have decided to:
- a. release in full five documents; and
 - b. partially release two documents with deletions made in accordance with subsection 22(1) [Access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under sections 47F [public interest conditional exemptions-personal privacy], 47E [operations of an agency] and 33 [Documents affecting national security] of the FOI Act.

Material taken into account

8. In making their decisions, LTCOL Spendelove and CAPT Andrew 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 Principles on open public sector information issued by the Information Commissioner.

Reasons for decision

Subsection 33(a)(iii) of the FOI Act - International Relations

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

10. LTCOL Spendelove has identified information that relates to military assets of Coalition Forces. The disclosure of that information would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.

11. In applying this exemption, LTCOL Spendelove considered the likelihood of damage occurring as a result of release of the material. 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 requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is 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...

12. The FOI guidelines state that ‘the phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them’.

13. Further, the guidelines state that ‘... the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government...’.

14. Information has been identified within the document that relates to foreign governments’ capabilities and Defence’s strategies in relation to these and, if disclosed, could diminish the positive working relationship between Australia and other governments.

15. LTCOL Spendelove is satisfied that the document contains information that could reasonably be expected to damage the international relations of the Commonwealth and deemed that the information is exempt under section 33(a)(iii) of the FOI Act.

Section 47E of the FOI Act - Certain operations of agencies

16. Section 47E(d) of the FOI Act states;

47E Public interest conditional exemptions – certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency*

17. Upon examination of the documents LTCOL Spendelove has identified information about the operation of military assets. This information includes details about the type of weapons systems that are currently in use by the ADF and ADF Rules of Engagement. This information if released could impact on the ability of personnel to safely and effectively undertake their operational duties.

18. Based on the above reasons, LTCOL Spendelove has decided to remove material under section 47E(d) of the FOI Act as the release of the documents could reasonably be expected to have a substantial adverse affect on the proper and efficient conduct of the operations of the ADF.

Section 47E of the FOI Act - Public Interest Considerations

19. When assessing whether release of the documents was within the public interest, LTCOL Spendelove 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.

20. LTCOL Spendelove acknowledges that disclosure may promote some of the objects of FOI Act, as information held by the Government is a national resource. However, the documents do not relate to matters of public expenditure (section 11B(3)(c)), nor would disclosure increase public participation in the Defence process (section 3(2)(a) of the FOI Act) or grant the applicant further access to their own personal information.

21. Although the release of such material may contribute to discussion of Defence activities (section 3(2)(b) of the FOI Act), the release of this information may also provide an adversary with information that would impact on the ADF's ability to effectively perform their duties within the operational environment. While LTCOL Spendelove accepts that there may be some public interest in the release of this information, there is a greater responsibility in protecting the safety and confidence of Defence personnel while on operations.

22. After considering the public interest factors above, LTCOL Spendelove has concluded that the disclosure of the identified information on the documents would be against the public interest, and the information is, therefore, exempt from release under the FOI Act.

Section 47F of the FOI Act - Personal privacy

23. Upon examination of item 1 serial A, LTCOL Spendelove identified information, specifically, imagery of ADF personnel and civilians.

24. Upon examination of item 2 serial A, CAPT Andrew identified information, specifically, names and e-mail addresses belonging to people other than you.

25. To determine whether the disclosure of the identified personal information and imagery of ADF personnel and civilians was unreasonable, LTCOL Spendelove and CAPT Andrew had regard to the criteria specified in section 47F(2) of the FOI Act:

- a. the extent to which the information is well known
- b. whether the persons to whom the information relates are known to be (or to have been) associated with the matters dealt within the document

- c. the availability of the information from publicly accessible sources.
26. Against these three criteria, LTCOL Spendelove and CAPT Andrew found:
 - a. the specific personal information listed is not well known
 - b. the individuals whose personal information is contained in the document are not widely known to be associated with the matters dealt with in the documents
 - c. the information is not readily available from publicly accessible sources.
27. With reference to the assessment above, LTCOL Spendelove and CAPT Andrew considered that the release of the personal information and imagery that identifies persons other than you would be an unreasonable disclosure of personal information and therefore this information is conditionally exempt under section 47F(1) of the FOI Act.

Section 47F of the FOI Act - Public Interest Considerations

28. Section 11 A (5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless access to the documents would be contrary to the public interest.
29. In making their decision LTCOL Spendelove and CAPT Andrew had regard to paragraph 6.9 of the Guidelines which states:

'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.'

30. LTCOL Spendelove and CAPT Andrew considered a range of factors that favour access to the documents, as set out in section 11B(3) of the FOI Act. Specifically, they considered whether disclosure would:
 - a. promote the objects of the Act
 - b. inform debate on a matter of public importance
 - c. promote effective oversight of public expenditure
 - d. allow a person to access his or her personal information.
31. Factors favouring disclosure in this case are that doing so may promote some of the objects of the FOI Act, as information held by the Government is a national resource. The remaining factors contained in section 11B(3) are not relevant to the present case.

32. On balance, however, LTCOL Spendelove considers that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The redaction of the imagery in Item 1 does not detract from the information contained within the documents. The images are as a visual aide for the students. LTCOL Spendelove decided to redact the faces of the personnel as he is of the opinion that the public interest is better served in this case by maintaining the personal privacy of these personnel and civilians.

33. CAPT Andrew has found that release of the exempt material would not achieve the intended outcomes of sub-paragraphs 11.b. and 11.c. and that 11.d. is not relevant in this case. CAPT Andrew does not believe that the factors in favour, therefore, outweigh the public interest of respecting the privacy of the individuals concerned. On balance, CAPT Andrew has concluded that disclosure would be contrary to the public interest.

34. In coming to their decisions, LTCOL Spendelove and CAPT Andrew also considered subsection 11 B (4) [public interest exemptions – irrelevant factors] of the FOI Act.

35. Therefore, LTCOL Spendelove and CAPT Andrew decided that it would be contrary to the public interest to release the information considered exempt under section 47F of the FOI Act.

Payment of Charges

36. In our letter, dated 7 May 2015, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request on 7 May 2015. An invoice for the preliminary assessment deposit of [REDACTED] was subsequently sent from Defence Finance.

37. 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.

38. 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 it to foi@defence.gov.au.

Rights of review

39. 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

40. 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

19. The FOI Act may be accessed online at:
<http://www.comlaw.gov.au/Details/C2015C00013>.

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

Yours sincerely



Vanessa Elphick
FOI Case Officer
Freedom of Information

1 June 2015

Enclosures:

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