



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

Freedom of Information  
CP1-6-001  
PO Box 7910  
CANBERRA BC ACT 2610  
Tel: 02 626 62200  
Fax: 02 626 62112  
FOI@defence.gov.au

Our reference: FOI 369/14/15



By email: 

Dear 

#### **NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST**

I refer to your email, dated 1 July 2015, in which you revised the scope of your request for access, under the *Freedom of Information Act 1982* (FOI Act), to:

*"Access to Senate Estimates briefs from the last hearing on Theft and Loss of Defence Weapons, Munitions and Explosives."*

#### **Background**

Following discussions with this office to revise the scope of your request, on 2 July 2015 our office wrote to you by email 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. You provided the receipt for your payment of the required deposit on 10 July 2015. As such, the statutory deadline for processing your request is 6 August 2015.

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**

Mr Mike Sullivan, Director Security Performance Review, Defence Security and Vetting Services is the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

#### **Documents identified**

Mr Sullivan identified two documents as matching the description of your request.

#### **Decision**

Mr Sullivan has decided to:

- a. release one document in full; and

- b. partially release one document 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 paragraph 33(a)(i) [Documents affecting national security] and paragraph 37(1)(a) [Documents that could reasonably be expected to prejudice the conduct of an investigation] of the FOI Act.

#### **Material taken into account**

In making his decision, he had regard to:

- a. the terms of the request;
- b. the content of the identified documents 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);
- e. the Principles on open public sector information issued by the Information Commissioner; and
- f. advice received from officers within the department.

#### **Reasons for decision**

##### **Section 33 of the FOI Act – Documents affecting national security, defence or international relations**

Paragraph 33(a)(i) of the FOI Act provides that a document is exempt from release if its disclosure could reasonably be expected to cause damage to the security of the Commonwealth. For this exemption to be claimed, Mr Sullivan must be satisfied that there is a 'real' and 'substantial' risk of damage occurring. It is insufficient that there merely may be a possibility of such damage.

In regards to the terms 'could reasonably be expected to' and 'damage', paragraphs 5.13 and 5.14 of the Guidelines provide that:

*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.*

In regards to the term 'damage' paragraph 5.25 states:

*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...but [should be] determined on the facts of each particular case.*

Having reviewed the information in light of the Guidelines, Mr Sullivan is satisfied of the real and substantial risk of damage to national security that release of the withheld information would pose. His reason for reaching this decision is that, pending resolution of the ongoing

investigation, details of the incident may expose vulnerabilities in the transport and storage of weapons, munitions and explosives.

### **Section 37 of the FOI Act – Documents affecting enforcement of law and protection of public safety**

Section 37 of the FOI Act provides that a document is exempt from release if its disclosure would or could reasonably be expected to affect law enforcement or public safety. Mr Sullivan also noted that the following occurrences are relevant to this case, in that release of the documents while there is an ongoing investigation, could:

- a. prejudice the conduct of an investigation of a breach, or possible breach, of the law; and
- b. prejudice the fair trial of a person, or the impartial adjudication of a particular case.

Mr Sullivan considered that the Guidelines state that the documents should have a connection with the criminal law which includes investigations such as Defence Force Police activities, 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. Mr Sullivan is satisfied that the documents relate to an ongoing investigation of a breach of the law and therefore satisfy the considerations in the Guidelines.

In addition to the above, Mr Sullivan also noted that section 37 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. He noted that the investigation into the matter concerning this case is still ongoing and formed the view that release of the material would prejudice the conduct of the investigation.

### **Payment of Charges**

In order to finalise your request, you are required to pay the remaining [REDACTED]. Please find attached at Enclosure 1 a Payment Authorisation Form for the balance for you to complete and return.

### **Declassification of documents**

A number of the documents matching the scope of this request were classified. The decision maker has declassified the versions of the documents that are approved for release.

### **FOI Disclosure Log**

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 publishes identified documents relating to requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

## **Your Review Rights**

### ***Internal Review***

Under the provisions of section 54 of the FOI Act, you are entitled to request a review of this decision. You must request a review, in writing, within 30 days of the date of this letter, or the date you receive the documents. Requests can be sent to:

Email: [FOIReview@defence.gov.au](mailto:FOIReview@defence.gov.au)  
 Fax: 02 626 62112  
 Post: Freedom of Information Directorate - Reviews  
 Department of Defence  
 CP1-6-029  
 PO Box 7910  
 CANBERRA BC ACT 2610

### ***Australian Information Commissioner***

Under the provisions of section 54 of the FOI Act, you are also entitled to request an external review of this decision by the Australian Information Commissioner. You have 60 days to lodge such a request, using one of the contact methods below:

Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
 Phone: 1300 363 992  
 Fax: 02 9284 9666  
 Post: GPO Box 2999  
 Canberra ACT 2601

### ***Complaints***

You may complain to Defence, the Information Commissioner or the Commonwealth Ombudsman about an action taken by Defence in the exercise of its power or the performance of its functions under the FOI Act. There is no fee for making a complaint. Should you wish to complain to the Department of Defence, your complaint can be addressed to Mr Tony Corcoran using the contact details below:

Email: [Tony.corcoran@defence.gov.au](mailto:Tony.corcoran@defence.gov.au)  
 Post: Tony Corcoran  
 Assistant Secretary Information Management and Access Branch  
 CP1-6-14  
 PO Box 7911  
 CANBERRA BC ACT 2610

Contact details for the Commonwealth Ombudsman are below:

Phone: 1300 362 072)  
 Fax: 02 6276 0123  
 Post: Commonwealth Ombudsman  
 GPO Box 442  
 CANBERRA ACT 2601

Contact details for the Information Commissioner are as above.

Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Michelle Rueckert  
Assistant Director

6 August 2015

Enclosures:

1. Freedom of Information Payment Authorisation Form