

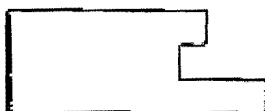


Australian Government
Department of Defence
Defence Support and Reform Group

Ministerial and Information
Management Branch
Department of Defence

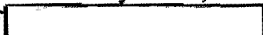
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610
Tel: 02 626 62200
Fax: 02 626 62112
FOI@defence.gov.au

Our reference: FOI 373/13/14



By email: 

Dear 

1. I refer to your correspondence dated 7 February 2014, received in our office on 1 May 2014, in which you sought access, on behalf , under the Freedom of Information Act 1982 (FOI Act), to:

“Reports from two inquiries addressing 'Attitude Adjustment Training' at the DFCE conducted by Captain R. G. Long, RANR;

Reports from an investigation into allegations of unlawful activities with AAT at the DFCE, undertaken by Group Captain CM. Stunden;

Reports from a review conducted by Brigadier M.W. Meecham to review DFCE, its concepts, processes, documentation, management and supervision to determine whether it was meeting the objectives of military rehabilitation and whether its operations were in line with contemporary standards, and

The Department of Defence submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into Military Justice Procedures in the Australian Defence Force, the report of which was tabled in both Houses of Parliament on 21 June 1999.”

Background

2. I also refer to your email of 28 May 2014 agreeing to a four-day extension.
3. 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

4. COL M Kennedy, Deputy Chief of Staff-Army Headquarters is the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

5. COL Kennedy identified three documents, as matching the scope of the request.

Material taken into account

6. In making his decision COL Kennedy had regard to:
- a. the content of the identified documents in issue;
 - b. relevant provisions in the FOI Act;
 - c. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines);
 - d. the Principles on open public sector information issued by the Information Commissioner; and
 - e. advice made by officers of the department.

Decision

7. COL Kennedy decided to
- a. release the one document with deletions, in accordance with section 22 of the FOI Act [Access to edited copies with exempt or irrelevant matter deleted]. I have deemed the deleted material exempt under sections 47F [public interest conditional exemptions – personal privacy], and 33 [documents affecting national security, defence or international relations] of the FOI Act, and
 - b. deny two documents in accordance with section 22 of the FOI Act [Access to edited copies with exempt or irrelevant matter deleted]. deleted material is exempt under section 38[documents to which secrecy provisions of enactments apply] of the FOI Act, and
 - c. refuse access to one document.
8. A copy of the document in the form approved for release is at Enclosure 1.

Reasons for decision

Section 24A – requests may be refused if documents can not be found

9. 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

Documents lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

- (a) all reasonable steps have been taken to find the document, and
- (b) the agency or Minister is satisfied that the documents:
 - (i) is in the agency's or Minister's possession but cannot be found; or
 - (ii) does not exist

10. Paragraph 8.41 of the Guidelines also gives guidance as to what is required to be included within this statement of reasons to refuse a request under section 24A(1);

8.41 The statement of reasons given to the applicant should sufficiently identify the document and give reasons as to why it cannot be found or why it is known that it no longer exists. The statement should describe the steps the agency took to search for it.

11. Objective (the Defence Records Management System) searches were undertaken by various areas of the Department including, Army, Air Force and the Chief Operation Officer (in relation to files or documents held by the SEC, CDF, VCDF, DMP and IGADF) to identify a file or document that would fit the scope of the request. The following terms (all or some) were used in the conduct of these searches:

- a. Attitude adjustment training
- b. AAT
- c. DFCE
- d. Defence Force Correctional Establishment
- e. unlawful
- f. signatory 'Stunden'.

12. Air Force advised that further confirmation was obtained by approaching the now retired GPCAPT Stunden, who does not recall conducting such an investigation.

13. A number of hard copy files within Directorate of Military Prosecutions were also searched with no results.

14. COL Kennedy was satisfied that "all reasonable steps" were taken to locate the documents that form [Item 2]. As such, COL Kennedy was satisfied that the document cannot be found or does not exist, and decided to refuse this Item under section 24A(1) of the FOI Act.

Section 33 – Documents affecting national security, defence or international relations

15. Where access has been denied under section 33 of the FOI Act, COL Kennedy considered that the material would, or could reasonably be expected to, harm the national security, defence and/or international relations of the Commonwealth.

16. In applying this exemption, COL Kennedy considered the likelihood of damage occurring as a result of release of the material COL Kennedy considered to be exempt under section 33. 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...*

Subsection 33(a)(iii)

17. Section 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.

18. 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.'*

19. Further, the guidelines state that *'... the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government...'*

20. 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 the Australian and other Governments.

21. COL Kennedy was 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 38 – Documents to which secrecy provisions of enactments apply

1. Subregulation 63(1) of the Regulations states:

Disclosure of records or reports of Courts of Inquiry

Offence relating to disclosure

(1) A person to whom this regulation applies commits an offence if:

(a) the person does any of the following things:

(i) discloses to a person, or makes available to the public generally, information contained in the records or report of a Court of Inquiry;

- (ii) *copies a document, or part of a document, that forms part of the records or report of a Court of Inquiry;*
 - (iii) *discloses to a person, or makes available to the public generally, a document, or part of a document, or a copy of all or part of a document, that forms part of the records or report of a Court of Inquiry; and*
- (b) *the information or document referred to in paragraph (a) came to the knowledge, or into the possession, of the person in the course of the person's employment as a person to whom this regulation applies; and*
 - (c) *the information or document referred to in paragraph (a) does no relate to oral evidence given in public in the course of a inquiry..*

Penalty: 10 penalty units or imprisonment for 3 months.

2. Subregulation 78(1) of the Regulations states:

Application of provisions to Inquiry Officers and inquiry assistants

- (1) *If a person is appointed as an Inquiry Officer, regulations 49,50, 53, 56, 57, subregulations 60(5) and (6), regulations 61 and 63 and subregulations 64(1) and (3) apply to and in relation to the Inquiry Officer as if the Inquiry Officer constituted a Court of Inquiry.*

3. Captain R.G. Long, RANR was appointed as an Inquiry Officer under regulations 69 and 70A of the Regulations. It then follows that regulation 78(1) applies to the documents that form Item 1, as they were created by CAPT Long, RANR in the process of an Inquiry. The result is that the documents that form Item 1 are privy to restrictions on disclosure as a result of regulation 63(1), and ordinarily disclosing them without ministerial approval would constitute an offence, punishable by fine or imprisonment.

4. Section 38 of the FOI Act states, in part:

Documents to which secrecy provisions of enactments apply

- (1) *Subject to subsection (1A), a document is an exempt document if:*
 - (a) *disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and*
 - (b) *either:*
 - (i) *that provision is specified in Schedule 3; or*
 - (ii) *this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.*

- (1A) *A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.*
- (2) *... if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.*

5. Schedule 3 of the FOI Act states, in part:

Schedule 3 – Secrecy Provisions

... Defence (Inquiry) Regulations, subregulation 63(2)

6. On 18 Jun 13, the Regulations were amended. The provisions previously applied by subregulation 63(2) are now provided for under subregulation 63(1) as described at paragraph 21 above, however, the FOI Act has not yet been amended to reflect the change in the Regulations. As established above, Item 1 is privy to subregulation 63(1) of the Regulations. Schedule 3 of the FOI Act affirms this protection and applies section 38 to Item 1, which allows for the release of only the applicant's personal information when the documents requested are subject to a secrecy provision.

7. Pursuant to subsection 38(2) of the FOI Act, COL Kennedy considered that your client is entitled to his own personal information contained with Item 1. COL Kennedy has therefore reviewed the documents to identify the applicant's personal information.

8. When determining what information constitutes the applicant's personal information, COL Kennedy had regard to the definition of personal information in section 4 of the FOI Act:

...information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained from the information or opinion.

9. COL Kennedy also had regard to paragraph 6.115 of the Guidelines:

... personal information:

- *identifies, or could identify, a person*
- *says something about a person*
- *may be opinion*
- *may form part of a database*
- *may be true or untrue*
- *relates to a natural person.*

10. The documents contained no personal information belonging to your client. Accordingly, the documents identified as forming Item 1 are exempt from disclosure under section 38 of the FOI Act.

Section 22

22. Where a decision maker decides to deny access to a document they must consider whether the document can be released with the exempt matter deleted in accordance with subparagraph 22(1) of the FOI Act. COL Kennedy considered providing you with an edited version of the documents, having regard to subparagraph 22(1)(c) of the FOI Act and paragraph 5.3 of the Guidelines. However, COL Kennedy decided against this course of action as it would not be practicable to delete the exempt material and retain a meaningful non-exempt version of the document as all of the material within the document would be deleted.

Section 47F – Personal Privacy

23. Upon examination of the documents, COL Kennedy identified names and personal information of persons other than your client. COL Kennedy considered the disclosure of this material would constitute an unreasonable disclosure of personal information of a person other than your client.

24. The Guidelines note that *'the personal privacy exemption is designed to prevent 'unreasonable' invasion of third parties privacy'*. In accordance with subsection 47F(2), in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, COL Kennedy had regard to:

- a. the extent to which the information is well known;
- b. 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;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

25. Against those criteria, COL Kennedy found that:

- a. the specific personal information is not well known;
- b. the people to whom the information relates are not known to have been associated with the matters dealt with in the documents;
- c. the personal information is not readily available from publicly available sources; and
- d. the material considered to be exempt is information that the individuals would reasonably be expected not to have disclosed to a third party without their consent.

26. Accordingly, COL Kennedy found this material to be exempt under section 47F of the FOI Act.

Rights of access

27. Subsection 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest. The Guidelines state (at 6.8-6.9):

...The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered...

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.

Public interest considerations

28. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, COL Kennedy considered a range of factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. They both noted that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of this information would not increase public participation in Government processes, nor would it increase scrutiny or discussion of Government activities.

29. COL Kennedy noted that the release of this material may be of some interest to your client. However, it would not inform public debate on any matter of public importance in any meaningful way. Additionally, the deleted material would not allow your client any further access to his or her own personal information.

Irrelevant factors

30. In coming to the above decision, COL Kennedy had regard to subsection 11B(4) [irrelevant factors] of the FOI Act, which lists factors which must not be taken into account in deciding whether access would, on balance, be contrary to the public interest. None of the factors either decision maker took into account were listed under subsection 11B(4) of the FOI Act.

31. Accordingly, COL Kennedy considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Therefore, COL Kennedy has decided that it would be contrary to the public interest to release the information considered under section 47F of the FOI Act.

Item 4

32. Item 4 is a publically available document and can be addressed through the publicly available process of contacting the Parliamentary Committee Secretariat (as per the Committee website for the inquiry - http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/military/subs.htm) to request a copy of the submission.

Additional document

33. While searching for documents COL Kennedy did identify one document that included your client's name, but does not fall within the scope of the request. COL Kennedy is therefore releasing this document to your client administratively.

Rights of review

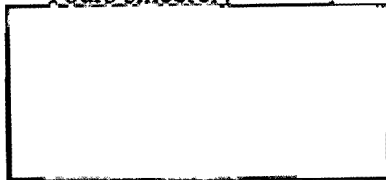
34. The FOI Act provides for rights of review of decisions. A copy of the fact sheet, "Freedom of Information – Your Review Rights", setting out your rights of review is at Enclosure 2.

Further information

35. The FOI Act may be accessed at: <http://www.comlaw.gov.au/Details/C2011C00803>.

36. All departmental action on your request is now complete. Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Philip Connery
Case Manager
Freedom of Information

3 June 2014

Enclosures:

1. Documents in the form for release
2. Fact Sheet: Freedom of Information – Your Review Rights