



Australian Government
Department of Defence
Defence Support and Reform Group

Freedom of Information and
Information Management Branch
Department of Defence

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Our reference: FOI 403/12/13



By email: [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 2 June 2013, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

"any documents produced by the Australian Defence Force in regards to the purchase and use of airsoft firearms, also known as soft air firearms, for the purpose of training.

This includes:

Any investigations into the safety of use, be it a laboratory report or a literary review.

Any business cases made for the use of airsoft.

Any testing in regards to compliance with customs safety regulations.

If airsoft firearms are in use by any branches or departments of the Australian Defence Force, information on any injuries sustained as a result of the use of them."

2. 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

3. Lieutenant Colonel George O'Kane, Chief Legal Officer, Army Headquarters, is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

4. Lieutenant Colonel O’Kane identified four documents as matching the description of your request. A schedule of documents is at Enclosure 1.

Decision

5. Lieutenant Colonel O’Kane has decided to partially release the documents identified in response to your request with deletions under section 22 [Access to edited copies with exempt or irrelevant matter deleted] on the basis that the deleted material is exempt under sections 33 [Documents affecting national security, defence or international relations] and 47E [Public interest conditional exemptions – Certain operations of an agency] of the FOI Act.

Material taken into account

6. In making his decision Lieutenant Colonel O’Kane 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)*;
 - e. the AATA decision *Re Hocking and Department of Defence* [1987] AATA 602; and
 - f. advice received from officers within Special Operations Command (SOCOMD) and the Directorate of Logistics – Army.

Reasons for decision

Section 33(a)(i) - Documents affecting national security

7. Lieutenant Colonel O’Kane found that Item 1 contains information that details the tactics and capabilities of SOCOMD.

8. Section 33(a)(i) of the FOI Act states:

33 Documents affecting national security, defence or international relations
A document is an exempt document if disclosure of the document under this Act:
(a) would, or could reasonably be expected to, cause damage to:
(i) the security of the Commonwealth;

9. For Item 1 to qualify for this exemption Lieutenant Colonel O’Kane considered whether the document contains information that relates to the security of the Commonwealth, and secondly whether disclosure of that information would or could reasonably be expected to cause damage to the security of the Commonwealth.

10. The Guidelines define the term “security of the Commonwealth” at paragraph 5.26(a):

5.26 The term ‘security of the Commonwealth’ broadly refers to:

(a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests...

11. On the term “*could reasonably be expected to*”, paragraph 5.14 of the Guidelines states:

“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”

12. Paragraph 5.27 of the Guidelines states:

5.27 A decision maker must be satisfied that damage to the security of the Commonwealth would be caused by disclosure of the information under consideration. The claim has been upheld in the following situations:

....(b) The disclosure of a defence instruction on the Army’s tactical response to terrorism and procedures for assistance in dealing with terrorism would pose a significant risk to security by revealing Australia’s tactics and capabilities...

13. The Guidelines excerpt above was relied upon in the case *Re Hocking and Department of Defence* [1987] AATA 602 (*Hocking*), in which C J Bannon stated:

“...Terrorism is the enemy of all forms of civilized government and of the peace, order and good government of both Commonwealth and State. However much one may guess at the types of procedures which the Army will adopt to meet terrorism, it is a very different thing, in our opinion, to describe and confirm those procedures in a public document so that possible enemies of government attain knowledge of those measures....”

14. Lieutenant Colonel O’Kane identified the following information in Item 1:

- a. Details of the structure of SOCOMD units;
- b. Details of SOCOMD training methods;
- c. Details of deficiencies in SOCOMD training methods; and
- d. Equipment configuration used by SOCOMD.

15. The information above is presented in the context of training of SOCOMD soldiers for combat scenarios. Army trains its officers to be better prepared to protect the Australian population from potential enemies. This information helps inform the protection of Australia and its population from activities that are hostile to or subversive of their interests. Information detailing the training of SOCOMD personnel is information that could potentially be exploited by enemies of Australia or could be pursued to better prepare counter-measures against any tactics employed by the Australian Army. Lieutenant Colonel O’Kane was satisfied that Item 1 contains information that relates to the security of the Commonwealth.

16. Protected Identity (PI) status is granted to members of SOCOMD due to the sensitive nature of their work and to prevent identification of members in specialist roles. Whilst there are certain positions within SOCOMD that are arguably more sensitive than others, a blanket PI status is applied to SOCOMD personnel to make it more difficult for potential enemies of Australia to identify the persons in the more sensitive roles and in turn information about the tasks and operations they execute. These tasks and operations include but are not limited to counter-terrorism operations. For this reason details relating to persons privy to PI can be interpreted as information that helps inform the Army's protection of Australia and its population from activities that are hostile to or subversive to their interests, including threats from terrorist groups.

17. Lieutenant Colonel O'Kane was satisfied that Item 1 contains information, specifically information relating to persons with PI status and information detailing the training of SOCOMD personnel that describe Army's tactics and capabilities that relate to the security of the Commonwealth.

18. Following the reasoning above, whilst one may guess at the types of procedures that Army adopts in response to enemy threats, our capabilities and deficiencies, it is a different thing to confirm those procedures in a public document. This would allow possible enemies of the Commonwealth to attain knowledge of them. To release such information publicly could reasonably damage the security of the Commonwealth.

19. Lieutenant Colonel O'Kane was satisfied that the document contains information that could reasonably be expected to damage the security of the Commonwealth and he decided that information is exempt under section 33(a)(i) of the FOI Act.

Section 33(a)(ii) - Documents affecting the defence of the Commonwealth

20. Section 33(a)(ii) of the FOI Act states:

33 Documents affecting national security, defence or international relations

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:*
- (ii) the defence of the Commonwealth;*

21. For Item 1 to qualify for this exemption Lieutenant Colonel O'Kane considered whether Item 1 contains information that relates to the defence of the Commonwealth, and secondly whether disclosure of that information would or could reasonably be expected to cause damage to the defence of the Commonwealth.

22. The Guidelines at paragraphs 5.28 and 5.29 state:

Defence of the Commonwealth

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

...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...However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

23. Item 1 contains details of persons subject to PI status and deficiencies in the training of SOCOMD personnel. I am satisfied that this information relates to the defence of the Commonwealth, particularly as Army is an organisation with the purpose of defending the Commonwealth.

24. If this information were to be released it could potentially be used by enemies of the Commonwealth to take advantage of the deficiencies identified or to otherwise better prepare counter-measures in response to tactics described within Item 1.

25. Lieutenant Colonel O’Kane was satisfied on the balance of probabilities that release of the details of persons subject to PI status, and training deficiencies of SOCOMD personnel, could reasonably be expected to cause damage to the defence of the Commonwealth and deem it exempt under section 33(a)(ii) of the FOI Act.

Section 47E – Certain operations on an agency

26. Item 1, Serial 4 contains information that could reasonably have a substantial adverse effect on the procedures that SOCOMD undertakes to train their soldiers. Lieutenant Colonel O’Kane considered what effect this could have on a release of the documents through the FOI Act.

27. 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.

28. Lieutenant Colonel O’Kane identified information that, if released, would or could reasonably result in substantial changes to the procedures employed by SOCOMD to train their soldiers for active combat. This information relates to SOCOMD’s introduction of risks in the training of their soldiers. Through introducing a lesser controlled risk during training for operations, SOCOMD allows their soldiers to improve and hone their skills required to reduce the risk of friendly fatalities whilst deployed on operations. As one of SOCOMD’s primary roles is to provide soldiers for active combat, the comprehensive training that the soldiers receive forms part of the “proper and efficient conduct of operations” of SOCOMD.

29. To release details of the risks that SOCOMD soldiers are exposed to whilst training would reasonably result in SOCOMD varying their training regime to be less comprehensive. This would increase the risk to soldiers who are deployed to active combat zones who may have undertaken a less-than comprehensive training regime. Lieutenant Colonel O’Kane found this information conditionally exempt under s47E(d) of the FOI Act.

Public interest considerations – section 47E(d)

30. When considering whether release of the identified was within the public interest, Lieutenant Colonel O’Kane 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 Lieutenant Colonel O’Kane’s 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. The information would also grant the applicant further access to his own personal information, promoting section 11B(3)(d) of the FOI Act.

32. However, disclosure of the documents would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), it would not 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. One factor is particularly relevant to this request – that disclosure of the information “*could reasonably be expected to prejudice security, law enforcement, public health or public safety*”. The release of the information would or could reasonably lead to SOCOMD employing a less comprehensive manner of training for its soldiers. This would increase the risk for future generations of soldiers whom are deployed to combat areas with less training than their predecessors. As explained above, the training of SOCOMD soldiers forms part of the tactics and capabilities of SOCOMD and if released would then have a prejudicial adverse effect on the security of Australia.

34. After considering the public interest factors above, Lieutenant Colonel O’Kane gave the greatest weight to the factors against disclosure, particularly taking into account the impact the release of the information could reasonably have on the future training capabilities of SOCOMD. The disclosure of the documents identified would be against the public interest, and are exempt from release under the FOI Act.

Payment of Charges

35. In our letter, dated 6 June 2013, the department estimated the cost associated with processing your request to be ██████████. By email dated 7 June 2013 you requested a review of the charges. By email dated 14 June 2013, you were advised the charge had been reduced to ██████████. You agreed to pay charges for the administration of your request on 27 June 2013 and an invoice for the preliminary assessment deposit of ██████████ was subsequently sent to you directly from Defence Finance.

36. Upon completion of your request, the actual amount for processing was calculated to be ██████████. The remaining balance is the difference between actual charges and the deposit you have already paid.

37. Accordingly, prior to receiving a copy of the documents in the form approved for release, you are required to pay the remaining ██████████. Please find attached at Enclosure 3 an invoice for the balance. Details about payment of the invoice are on the form. Once you have completed your payment **please provide a copy of the receipt to foi@defence.gov.au** and your documents will be dispatched as soon as practical.

Rights of review

38. 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 4.

FOI Disclosure Log

39. 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 two working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions. I will advise you of the publication date when the documents are dispatched to you.

Further advice

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

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

Yours sincerely



Brendan Wright
Acting Assistant Director
Freedom of Information

19 July 2013

Enclosures:

1. Schedule of documents
2. Freedom of Information Payment Authorisation Form /Invoice for balance of charges
3. Fact Sheet: Freedom of Information – Your Review Rights