Our reference: FOI 85/14/15

By email: [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 2 October 2015 in which you agreed to the following revised request for access under the Freedom of Information Act 1982 (FOI Act) to:

"1. The documentation of the Defence Nature of Service Branch Review during the period 2006 - 30 April 2007; into the retrospective Reclassification of ADF Third Country Deployments (TCD) of ADF Aircrew from non-warlike service to warlike service for the following No-Fly-Zone (NFZ) Air Operations over IRAQ:

a. OP NORTHERN WATCH: Service as a member of the ADF assigned for service with the United Kingdom elements of the coalition force operation to patrol the Iraq No-Fly-Zones 1 January 1997 to 12 January 2003;

b. OP SOUTHERN WATCH: Service as a member of the ADF assigned for service with the United States elements of the coalition force operation to patrol the Iraq No-Fly-Zones during the period 31 August 1992 to 12 January 2003;

c. OP JURAL: the period Service as a member of the ADF assigned for service with the United Kingdom elements of the coalition force operation to patrol the Iraq No-Fly-Zones from 30 June 1991 to 12 January 2003;

d. OP PROVIDE COMFORT: Service as a member of the ADF assigned for service with the United States elements of the coalition force operation to patrol Iraq No-Fly-Zones during the period 11 August 1991 to 15 December 1996; and

e. OP BOLTON: Service as a member of the ADF assigned for service with the United Kingdom elements of the coalition force operation to patrol the Iraq No-Fly-Zones, during the period 31 August 1992 to 12 January 2003.

2. the methodology documentation (Decision Support Tool matrices) used by the Nature of Service Branch for the Conditions of Service reclassification of the above mentioned Operations"
Background

2. On 8 October 2015, I wrote to you 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 28 October 2015.

3. On 12 November 2015, our office informed you that the decision maker had determined that there was a requirement to consult with the UK and US Governments under section 15(7) [Extension of processing period to consult foreign entity] of the FOI Act, before finalising the decision. As such, the statutory timeframe was amended to 14 December 2015.

4. On 11 November 2015, you kindly agreed to a seven day extension under section 15AA [Extension of time with agreement] of the FOI Act. The final statutory timeframe is now 21 December 2015.

5. 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

6. Group Captain Michael Jansen, is the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

7. Group Captain Jansen identified one document matching the scope of item 1 of your request, being a Ministerial Submission titled “Nature of Service Review Anomalies – Third Country Deployments”.

Decision

8. Group Captain Jansen decided to:

   a. release the identified document matching the scope of Item 1 with material deleted, in accordance with section 22 of the FOI Act, on the grounds that the deleted material is exempt under sections 7 [Exemption of certain persons and bodies], 33 [Documents affecting national security, defence or international relations], and 47F [Public interest conditional exemptions – personal privacy] of the Act; and

   b. to refuse access to documents matching the scope of Item 2 of the request under subparagraph 24A(l)(b)(ii) [Requests may be refused if document cannot be found, do not exist or have not been received] of the FOI Act.

9. His reasons for this decision are set out below.

Material taken into account

10. In making his decision, he 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; and
d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
e. advice received from UK and US Governments.

Reasons for decision

Section 7 – Exemption of certain persons and bodies

11. Paragraphs 7(2A) and (2B) of the FOI Act state:

(2A) An agency is exempt from the operation of this Act in relation to the following documents:

(a) a document (an intelligence agency document) that has originated with, or has been received from, any of the following:
   (i) the Australian Secret Intelligence Service;
   (ii) the Australian Security Intelligence Organisation;
   (iii) the Inspector-General of Intelligence and Security;
   (iv) the Office of National Assessments;
   (v) the Defence Imagery and Geospatial Organisation;
   (vi) the Defence Intelligence Organisation;
   (vii) the Defence Signals Directorate;

(b) a document that contains a summary of, or an extract or information from, an intelligence agency document, to the extent that it contains such a summary, extract or information.

(2B) A Minister is exempt from the operation of this Act in relation to the following documents:

(a) an intelligence agency document;

(b) a document that contains a summary of, or an extract or information from, an intelligence agency document, to the extent that it contains such a summary, extract or information.

12. Upon examination of the document, Group Captain Jansen found that it contained information sourced from an intelligence agency document which is exempt from the operation of the Act.

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

13. Paragraph 33 of the FOI Act states:

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;
   (ii) the defence of the Commonwealth; or
   (iii) the international relations of the Commonwealth; or

(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

14. Within the document there is information that addresses the military tactics, techniques and procedures of another nation. The disclosure of this information would diminish the confidence which another country would have in Australia as a reliable recipient of its
confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future. This would have a substantial adverse effect on Australian interests. For this reason, the information has been exempted.

Section 47F – personal privacy

15. Group Captain Jansen found that parts of the document contain material in respect of which a claim for exemption under section 47F of the FOI Act is warranted. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest. Subsection 47F(1) of the Act states:

   (I) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

16. The parts of the document considered to be conditionally exempt under section 47F of the FOI Act contain personal information related to personnel deploying on operations, such as their names, phone numbers and signatures, would have a reasonable expectation of privacy regarding their activities. There is also personal information on members responsible for drafting documents, but who were not responsible for the issue of those documents.

17. 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.

Section 47F – public interest considerations

18. 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.

19. In balancing the public interest in this case, Group Captain Jansen considered the following factors set out in section 11B(3) of the Act in favour of disclosure:

   a. Promoting the objects of the FOI Act; and
   
   b. To inform debate on the matter

20. Group Captain Jansen considered the following factors against disclosure:

   a. Could reasonably be expected to prejudice the protection of an individual’s right to privacy.

21. He noted that disclosure may promote some of the objectives of the FOI Act, as information held by the Government is a national resource, but the disclosure of the names, phone numbers and signatures of deployed personnel or the low level staff responsible for drafting the document would not increase public participation of the Defence process, nor would it increase scrutiny or discussion of Defence activities or inform public debate on any matter of public importance in any meaningful way. The decision-making process described by the document is not affected by the removal of identifying information. However, the disclosure of the information contained in the document would adversely affect the privacy of individuals.
22. It is for these reasons, that on balance Group Captain Jansen concluded that disclosure would be contrary to the public interest.

23. In coming to his conclusion, he has not considered any of the factors listed in subsection 11B(4) [public interest exemptions – irrelevant factors] of the Act.

Section 24A – Requests may be refused if documents cannot be found

24. Section 24A of the FOI Act states:

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 document:
   (i) is in the agency’s or Minister’s possession but cannot be found; or
   (ii) does not exist.

25. Paragraph 3.84 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):

3.84 The statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency’s possession, describe the steps the agency took to search for the document, and note the limitations of any search.

26. The Nature of Service Directorate has advised that the Decision Support Tool (DST) was in the early stages of development during the period 2006-2007. While several operations were subject to trial use of the DST, there is no evidence that the NFZ operations were assessed. The Defence records management system (‘Objective’) on both the Defence Restricted Network and the Defence Secret Network were searched for the terms “Operation NORTHERN WATCH”, “Operation SOUTHERN WATCH”, “Operation JURAL”, “Operation PROVIDE COMFORT” and “Operation BOLTON”. Other than the document attached, no other document was found matching the scope of this request. Examination of the Folio Sheets for hard copy files for each of the subject Operations did not identify any documents not contained in ‘Objective’.

27. Given the above, Group Captain Jansen is satisfied that no documents exist in relation to item 2.

Payment of Charges

28. In order to finalise your request, you are required to pay the remaining An invoice for the outstanding balance is attached to this decision letter. Documents will be released to you once proof of payment is received by our office. You can forward a copy of the receipt to POI@defence.gov.au or post to the address at the top of this letter.

Declassification of documents

29. 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

30. 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

31. 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
   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

32. 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
   Phone: 1300 363 992
   Fax: 02 9284 9666
   Post: GPO Box 2999
         Canberra ACT 2601

Complaints

33. 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
   Post: Tony Corcoran
         Assistant Secretary Information Management and Access Branch
         CP1-6-14
         PO Box 7911
         CANBERRA BC ACT 2610

34. 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

35. Contact details for the Information Commissioner are above.

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

Yours sincerely

Michelle Rueckert
Assistant Director
Freedom of Information

16 December 2015

Enclosures:
1. Invoice of outstanding charges