



Australian Government
Department of Defence
Defence Support and Reform Group

Ministerial and Information
Management Branch
Department of Defence

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Our reference: FOI 324/13/14



By email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 15 March 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“...any correspondence and reports showing the disciplinary action taken relating to the offences and breaches of policy by SOTG Charlie company rotation X in Afghanistan in 2009.

I would also like the outcomes of the investigations including those from last year which re examined whether the initial disciplinary action was appropriate.

I do not require the names or identifying details of anyone involved.”

Background

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. Colonel M.R.C. Kennedy, Deputy Chief of Staff, Army Headquarters is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

4. Colonel Kennedy identified one document, being a Quick Assessment, as matching the scope of your request.

Material taken into account

5. In making his decision Colonel Kennedy 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 Principles on open public sector information issued by the Information Commissioner.

Decision

6. Colonel Kennedy decided to release the identified document with deletions, in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, as the deleted material is exempt under sections 33 [documents affecting national security, defence or international relations] and 47F [public interest conditional exemptions- personal privacy] of the FOI Act.

Reasons for decision – section 47F

7. Colonel Kennedy found that the identified document contains personal information of individuals other than you and that it was appropriate to consider whether the information is exempt from release under the FOI Act.

8. The document contains names of Defence personnel as well as personal comments about an individual of a personal nature, which could easily be used to ascertain the identity of an individual. While it is possible that this information is known to certain elements, Colonel Kennedy was satisfied that it was not known to the general community or available from a publicly accessible resource.

9. Having considered the above, Colonel Kennedy was satisfied that the disclosure of the information would constitute an unreasonable disclosure of personal information belonging to persons other than you. Accordingly, he found that the material to be conditionally exempt under section 47F of the FOI Act.

10. Subsection 11A(5) [access to documents on request – exemptions and conditional exemptions] 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.

Public interest considerations – section 47F

11. In assessing whether disclosure is on balance, contrary to the public interest, Colonel Kennedy has considered a range of factors that favour access to a document as set out in section 11B(3) [public interest exemptions – factors] of the FOI Act.

12. Colonel Kennedy considered the public interest in promoting the objects of the FOI Act have been satisfied and he did not believe the release of personal information such as names of member of the ADF and information that could readily lead to identification would inform public debate on any matter of public importance in anyway. Additionally, the disclosure of this information would not promote oversight on public expenditure or allow a person to access his or her own personal information.

13. In coming to his decision, Colonel Kennedy also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. Accordingly, he considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the identified document. Therefore, Colonel Kennedy decided that it would be contrary to the public interest to release the information considered exempt under sections 47F of the FOI Act.

Reasons for decision - section 33

Security of the Commonwealth

14. Section 33 of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the security or Defence of the Commonwealth. 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.*

5.15 *"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. It is not a necessary consequence in all cases, but a matter of degree to be determined on the facts of each particular case.*

15. In regards to the 'security of the Commonwealth', the guidelines state:

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...*

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 of the Army's tactical response to terrorism and procedures for assistances in dealing with terrorism would pose a significant risk to security by revealing Australia's tactics and capabilities.

16. Some of the information contained within the documents could jeopardise the capability of the ADF, if released. This particular information pertains to the operations of Special Forces personnel.

17. Colonel Kennedy was of the view that if this information was disclosed it could be used by an adversary to identify operational information of the Special Forces, thus compromising the capability of the ADF.

18. Taking the above into account, Colonel Kennedy was therefore satisfied that the operational information identified within the documents is exempt under section 333(a)(i) of the FOI Act.

International relations of the Commonwealth

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

20. 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'*.

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

22. Information has been identified within the document that relates to the international relations of the Commonwealth and that, if disclosed, could diminish the positive working relationship between the Australian and Afghanistan Governments.

23. Colonel 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 was exempt under section 33(a)(iii) of the FOI Act.

Supplementary information

24. Colonel Kennedy provided the following contextual statement:

In 2009, a number of personnel had disciplinary action taken against them as a result of the behaviour demonstrated in the DVD. The majority of these members were subject to the Discipline Officer process, where penalties were handed down and undertaken whilst still in country. Others faced Administrative and Disciplinary actions which included charges of "failure to comply with a lawful general order." Two personnel were returned to Australia and did not complete their deployment as a result of their behaviour. A number of personnel who failed to act or report the behaviour demonstrated in the DVD were removed from positions of responsibility and re-tasked. Personnel involved were briefed on the inappropriate nature of their actions, and reminded of acceptable and responsible standards of behaviour.

Payment of Charges

25. In our letter, dated 27 March 2014, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. On 17 April 2014, you advised that the required deposit of [REDACTED] had made.

26. 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. Please complete the form at Enclosure 1 for an invoice to be generated. Documents will be released to you when you advise that payment has been made.

Rights of review

27. 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

28. 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

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

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

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

5 May 2014

Enclosures:

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