Dear [Name],

1. I refer to your letter of 4 July 2011, received in our office on 11 July 2011, in which you requested access, under the Freedom of Information Act 1982 (FOI Act), to:

   "...final summary documents provided to the Defence Minister(s) pertaining to the wounding of Australian soldiers in Afghanistan..."

2. On 13 July 2011, Mrs Melissa Davidson contacted you to clarify the scope of your application. In that conversation, you agreed to refine the scope of your request to the following:

   "...Attachment A to CDF/OUT/2011/655 - Defence Wounded in Action (WIA) Tracking Spreadsheet..."

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. Colonel V.G. Khan, Chief of Staff to the Chief of Defence Force, is the authorised decision maker, under the FOI Act, in relation to your request.

Documents identified

5. Colonel Khan identified the document mentioned at paragraph 2 above as matching the description of your request.
Decision

6. For the reasons set out below, Colonel Khan has decided to release the identified document with deletions made in accordance with section 22 [deletion of exempt matter] of the FOI Act, on the grounds that the deleted material is considered exempt under sections 33(a)(ii) [documents affecting defence of the Commonwealth] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

7. A copy of the document in the form approved for release is at Enclosure 1.

Material taken into account

8. In making his decision, Colonel Khan had regard to:

- The content of the document in issue
- Relevant provisions in the FOI Act
- The Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines)
- Principles on open public sector information issued by the Information Commissioner; and
- Advice from Director General Personnel – Army and Director Coordination – Army, whose duties relate to the matters referred to in the document.

Reasons for decision

Section 33

9. Subsection 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the defence of the Commonwealth of Australia. 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...
10. Taking the above into consideration, and on review of the document, Colonel Khan found that some of the material contained in the document, if released, would disclose information on the structure and composition of particular units deployed in Afghanistan. Specifically, the identified information reveals the rank of each individual soldier, along with their posted unit.

11. Colonel Khan is of the view that the release of this material could endanger the lives of Australian Defence Force personnel by providing potential enemy combatants with valuable insights into the overall structure and function of deployed units. It provides an indication of combat capability and such knowledge could provide the enemy with a significant tactical and strategic advantage over Australian forces. For this reason, Colonel Khan decided that the material should be removed.

Section 47F

12. In addition to the above, Colonel Khan advised that the document also contains personal information, namely gender and the return to work date of individual soldiers, belonging to persons other than the applicant. In accordance with subsection 47F(2), in determining whether the disclosure of this information would involve the unreasonable disclosure of personal Information, Colonel Khan 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 documents; and
   c. the availability of the information from publicly accessible sources.

13. Against those criteria, Colonel Khan found that:

   a. the specific personal information is not well known;
   b. the people whose information appears in the document are not publicly known to have been associated with the matters dealt with in the document; and
   c. this information is not readily available from publicly accessible sources

14. Therefore, Colonel Khan decided that the disclosure of this material would involve the unreasonable disclosure of personal information belonging to another person.

Public interest conditional exemptions

15. Section 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document would, on balance, be contrary to the public interest.
16. In assessing whether disclosure of the material is, on balance, contrary to the public interest, Colonel Khan considered the range of factors that favour access to a document set out in section 11B(3) [public interest exemptions — factors favouring access] of the FOI Act. In relation to these, Colonel Khan notes that disclosure may promote the objects of the Act, as information held by the Government is a national resource. However, the disclosure of the gender and return to work dates of individuals would not increase public participation in Government processes.

17. Furthermore, Colonel Khan acknowledged that the redacted material may be of interest to the public, especially in relation to the gender data. However, Colonel Khan does not feel that it would inform debate on a matter of public importance in any meaningful way. Furthermore, he was of the view that, when taken in combination with other information available to the public, this information could allow specific individuals to be identified. In Colonel Khan's view, the need to maintain the personal privacy of injured soldiers outweighs the public interest in the material.

18. Additionally, disclosure of the information would not promote oversight of public expenditure, nor would it allow the applicant access to his own personal information.

19. In coming to the above decision, Colonel Khan considered subsection 11B(4) [public interest exemptions—irrelevant factors] of the FOI Act.

20. Accordingly, Colonel Khan considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the document. Therefore, Colonel Khan decided that it would be contrary to the public interest to release the information considered exempt under subsection 47F(1) of the FOI Act.

21. Copies of relevant sections of the FOI Act are at Enclosure 2.

Payment of Charges

22. In our letter dated 14 July 2011, the department estimated the cost associated with processing your request to be Taking into account the free decision making time of up to five hours, the estimate came to You agreed to pay charges for the administration of your request, and paid the preliminary assessment amount in full on 28 July 2011.

23. Upon completion of your request, the actual amount for processing exceeded the initial estimate. However, as detailed in paragraph 10 of my letter of 14 July 2011, the amount payable can only be more than the preliminary assessment if the decision is to release all of the documents in full.

24. As the documents have not been released in full, no further charges are payable for this request.

Rights of review

Further advice

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

Yours sincerely

Trevor Greenberg  
Case Manager  
Freedom of Information

11 August 2011

Enclosures:
1. Copy of the document in the form approved for release  
2. Copies of sections 11A, 11B, 22, 33 and 47F of the FOI Act  
11A Access to documents on request

Scope

(1) This section applies if:
(a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
(i) a document of the agency; or
(ii) an official document of the Minister; and
(b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:
(a) section 12 (documents otherwise available);
(b) section 13 (documents in national institutions);
(c) section 15A (personnel records);
(d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

(3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

(4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

(6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
(a) a conditionally exempt document; and
(b) an exempt document:
(i) under Division 2 of Part IV (exemptions); or
(ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).
11B Public interest exemptions—factors

Scope

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
(b) inform debate on a matter of public importance;
(c) promote effective oversight of public expenditure;
(d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.
Section 22 of the FOI Act

Access to edited copies with exempt or irrelevant matter deleted

Scope

(1) This section applies if:
   (a) an agency or Minister decides:
       (i) to refuse to give access to an exempt document; or
       (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
   (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
       (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
       (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
   (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
       (i) the nature and extent of the modification; and
       (ii) the resources available to modify the document; and
   (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

(2) The agency or Minister must:
   (a) prepare the edited copy as mentioned in paragraph (1)(b); and
   (b) give the applicant access to the edited copy.

Notice to applicant

(3) The agency or Minister must give the applicant notice in writing:
   (a) that the edited copy has been prepared; and
   (b) of the grounds for the deletions; and
   (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.

(4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.
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;
(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.

Note: See also subsection 4(10).
47F Public interest conditional exemptions—personal privacy

General rule

(1) 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).

(2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
   (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;
   (d) any other matters that the agency or Minister considers relevant.

(3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

(4) Subsection (5) applies if:
   (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
   (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.

(5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
   (a) carries on the same occupation, of a kind mentioned in the definition of qualified person in subsection (7), as the first-mentioned qualified person; and
   (b) is to be nominated by the applicant.

(6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
(7) In this section:

*qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

(a) a medical practitioner;
(b) a psychiatrist;
(c) a psychologist;
(d) a counsellor;
(e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).
Freedom of Information – Your Review Rights

If you disagree with the decision made by the Department of Defence or the Minister under the Freedom of Information Act 1982 (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by Defence, or external review by the Australian Information Commissioner.

Internal review

If Defence makes an FOI decision that you disagree with, you can ask Defence to review its decision. Generally the review will be conducted by the FOI Directorate, however in some instances it will be referred to the area that made the decision, but it will be conducted by someone at a more senior level. There is NO charge for internal review.

You must apply within 30 days of being notified of the decision, unless you have sought an extension from Defence.

Defence must make a review decision within 30 days. Where Defence has not met its review obligation, you may then approach the Information Commissioner.

Internal review is not available if the Minister or the principal officer of the agency made the decision personally.

How to apply for internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points to which you are objecting and why.

You can lodge your application in one of the following ways:

Post: Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610

Fax: +61 2 626 62112
Email: FOI.inquiries@defence.gov.au

External Review

Do I have to go through the Defence’s internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the Defence internal review process gives Defence the opportunity to reconsider its initial decision and your concerns will most likely be addressed more quickly, without undergoing an external review process.

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the revised FOI Act, you must seek external review through the Information Commissioner prior to applying to the AAT for such a review.

Making a complaint

You may make a complaint to the Information Commissioner about actions taken by Defence in relation to your application. The complaint needs to be in writing.
Contacting the Information Commissioner

Further information about the external review process or how to make a complaint to the Information Commissioner is available at the following:

Online: www.oalc.gov.au
Post: GPO Box 2999, Canberra ACT 2601
Fax: +61 2 9284 9666
Email: enquiries@oalc.gov.au

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint, then all relevant documents and information must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency’s actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

Defence FOI contacts

Freedom of Information Directorate
Department of Defence
CP1-G-001
PO Box 7910
CANBERRA BC ACT 2600

Ph: +61 2 626 6200
Fax: +61 2 626 62122

Email: FOI.Inquiries@defence.gov.au
Website: www.defence.gov.au/foi