



**Australian Government**

**Department of Defence**

Chief Operating Officer

Freedom of Information and Information  
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Our reference: FOI 020/12/13

By email: [REDACTED]

Dear [REDACTED]

1. I refer to your email of 3 July 2012, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to any documents relating to the decision-making process of the Australian Service Medal Clasp CT/SR for members of 126 Signal Squadron (1st Commando Regiment) from 1989-1999.
2. On 11 July 2012, we advised you that your request in its current form, was not considered valid under subparagraph 15(2)(b) of the FOI Act. Over the following weeks, we assisted you to refine the scope of your request so that it was considered valid under the FOI Act. Accordingly, on 20 July 2012, you refined the scope of your request as seeking access to:

*"A copy of the final versions of following documents held by Special Operations Command and excluding duplicates.*

*Minutes of the Meeting of the Hardboard held at SOHQ on 22 September 2011 [Item 1]*

*Decision Brief for DCA (through COS AHQ): Implementation of Medalic Recognition for members of the ADF Performing CT/SR Duties [Item 2]*

*Minutes of the Meeting of Hardboard held at HQJOC on 10 December 2010 [Item 3]*

*Special Operations Commander Australia Directive 27/2011 For the Coordination of Recognition of members involved in Counter Terrorism and Special recovery operations – revised [Item 4]*

*Minute from SOCAUST to DHA 1 December 2011 – Australian Service Medal with Clasp CT/SR – 126 Signals Squadron [Item 5]*

*Email: Re Application for the issues of medals – CT/SR, dated 5 September 2011 [Item 6]*

*Email: Re Application for the Issue of Medals – [REDACTED] dated 16 June 2011 [Item 7]*

*Email: Re CT/SRO Award dated 29 November 2010 [Item 8]*

*Email: RE: SOHQ – Call for Nominations of Eligible Personnel – ASM with Clasp CT/SR 9 November 2010 [Item 9]*

*Email: RE: Submission – ASM CT/SR18 October 2011 [Item 10]*

3. On 24 July 2012, we advised you that the charges associated with processing your request had been imposed and that the statutory deadline for providing you with a response was 20 August 2012.
4. On 15 August 2012, you agreed, under section 15AA [extension of time with agreement] of the FOI Act, to extend the time for processing your FOI request by 7 days. On 27 August 2012, you agreed to a further 7 day extension to the time for processing your FOI request. Accordingly, the statutory deadline for providing you with a response was 2 September 2012. As this day fell on a weekend, the decision is due 3 September 2012, which is the following business day.
5. The purpose of this letter is to provide you with a decision in response to your request.

#### **FOI decision maker**

6. Colonel Leigh Wilton, Deputy Chief of Staff Army Headquarters, is the authorised decision maker, under the FOI Act, in relation to your request.

#### **Identified documents**

7. Colonel Wilton identified a total of ten documents which fall within the scope of your request. Each item specified above corresponded with one document. A schedule of documents is at Enclosure 1.

#### **Decision**

8. Following examination of the documents, Colonel Wilton decided to:
  - a. partially release documents with deletions made in accordance with subsection 22(1) [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 47F [public interest conditional exemptions - personal privacy] and/or section 33(a)(i) [security of the Commonwealth] and/or section 46(b) [documents disclosure of which would be contempt of Parliament or contempt of court] of the FOI Act; and
  - b. release documents in full.
9. Please note that the schedule at Enclosure 1 outlines Colonel Wilton's decision against each document. For ease of reference and for the purposes of processing this request, an FOI item number has been added to each of the documents, which corresponds with the schedule.
10. Copies of the documents in the form approved for release are at Enclosure 2.
11. Colonel Wilton's reasons for this decision are set out below.

### **Material taken into account**

12. In making her decision, Colonel Wilton had regard to:
- a. the content of the 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 *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011* (the "Rules"); and
  - e. *Tribunal Operating Procedures* (the "Procedures") of 7 Aug 08.

### **Reasons for Decision**

#### **Exemption claim - Section 47F(1)**

13. Upon examination of the documents, Colonel Wilton identified information, specifically personnel names, personal contact numbers, personal email addresses and signatures, the disclosure of which would constitute an unreasonable disclosure of personal information.

14. Furthermore, as some of these documents were originally classified "restricted" and "honours-in-confidence", Colonel Wilton formed the view that it is likely that some personnel discussed within the documents had no knowledge either at the time, or presently, that they were being considered for the CT/SR clasp, especially where it was deemed that they were ineligible for the CT/SR clasp. For this reason, Colonel Wilton decided that their names must be removed under s47F(1).

15. 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.

#### **Public interest considerations - section 47F**

16. In assessing whether disclosure is, on balance, contrary to the public interest, Colonel Wilton considered the relevant factors favouring access to a document as set out in section 11B(3) [public interest exemptions - factors] of the FOI Act. In relation to the produced documents, personnel names, personal contact numbers, personal email addresses and signatures have been deleted. The nature of this information is such that it satisfies none of the factors favouring access in section 11B (3) of the FOI Act, and should not be released.

17. Accordingly, Colonel Wilton considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the documents that match the scope of the request. Therefore, Colonel Wilton decided that it would be contrary to the public interest to release the information considered exempt, under subsection 47F(1) of the FOI Act.

### Exemption claim – Sub-Section 33(a)(l) of the FOI Act

18. Section 33 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.*

*5.25 '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) on question, a decision maker could have regard to the relationships between individuals representing respective governments. A dispute between individuals may have sufficient ramifications to affect relations between 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.*

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

#### *Security of the Commonwealth*

*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.*

20. Colonel Wilton formed the view that some of the information contained within the documents could jeopardise the capability of the Australian Defence Force (ADF), if released. This particular information pertains to the names and contact details of Defence personnel designated with Protected Identity Status.

21. Colonel Wilton formed the view that if this information was disclosed it could be used by an adversary to identify and target key individuals involved in Special Forces operations, in order to gain access to operational information, thus compromising the capability of the ADF.

22. Taking the above into account, Colonel Wilton was satisfied that the names and contact details of Defence Personnel with Protection Identity Status are exempt under section 33(a)(i) of the FOI Act.

**Exemption claim – Section 46(b) of the FOI Act**

23. Upon examination of the document, Colonel Wilton found that it contained classified information and information taken *in-confidence* by the Tribunal. Colonel Wilton noted that the Defence Honours and Awards Appeals Tribunal is a tribunal having power to take evidence on oath as detailed in section 24 of the Rules and therefore satisfies the criteria of subsection 46(b) of the FOI Act.

24. Colonel Wilton further noted that the guidelines detail that:

*“This provision takes its scope from the principles of privilege and the general law of contempt of court. While these powers have a wide application, FOI decision makers will usually encounter them in connection with the disclosure of documents that may have been prepared for or are relevant to parliamentary or court proceedings*

*Documents protected by s 46(b) are documents subject to an order prohibiting their publication, made by a Royal Commission, tribunal or other body having power to take evidence on oath. Royal Commissions are established for a fixed time period. However any confidentiality orders continue in effect past this period.”*

25. In considering the application for exemption, Colonel Wilton had regard to section 21(2) of the Rules which requires that “the published report must not contain classified information”. In accordance with this legislative requirement, Colonel Wilton decided not to release classified information contained within the *Tribunal-in-Confidence* version of the report which is under consideration.

26. Colonel Wilton noted that paragraph 42 of the Procedures states that:

*"All submissions will be received by the Tribunal in confidence and will not be made public. However, the Tribunal reserves the right to use the content of a submission for the purposes of research and in reaching a decision on the matter which it is investigating. This may involve the disclosure of the submission to government agencies or other organisations or persons. The content of a submission may be included in the Tribunal's response for decision."*

27. Accordingly, Colonel Wilton decided not to release the information identified by the Tribunal as *in-confidence*.

28. Colonel Wilton considered that the practical effect of the Tribunal's order (as mentioned above) is that it does not allow access to the requested document, other than in a form that is in direct accordance with the order. Accordingly, full disclosure of the identified document to you would be contrary to the order of the Tribunal. Therefore, Colonel Wilton decided to release the document to you with material removed that is covered by the order.

#### **Additional Information**

29. Colonel Wilton noted that the published version of the document entitled *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, available on the Tribunal's website, has been redacted in a different manner from that which is attached to this decision. For example, on the published version, classified information is removed totally rather than being blocked by highlighting. According to Colonel Wilton, these differences are not material to this decision.

30. Copies of relevant sections of the FOI Act are at Enclosure 3.

#### **Payment of charges**

31. In our letter dated 20 July 2012, after deducting the free decision making time, the department estimated the cost associated with processing your request to [REDACTED]. You agreed to pay the charges for the administration of your request and paid the preliminary assessment in full on 20 July 2012.

32. Upon completion of your request, the actual amount for processing exceeded the original estimate. However, as explained in paragraph 10 of the above mentioned letter, the amount payable can only be more than the preliminary assessment if the decision is to release all of the documents requested in full. In this instance, you are not required to pay any further processing charges.

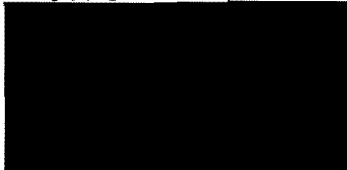
#### **Rights of review**

33. 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.

**Further advice**

34. All departmental action on your request is now complete. Should you have any questions relating to the matter, please contact me, either by telephone on (02) 6266 4713 or via email to [FOI@defence.gov.au](mailto:FOI@defence.gov.au).

Yours sincerely



Phillip Connelly  
Case Officer  
Freedom of Information

3 September 2012

**Enclosure:**

1. Schedule of documents.
2. Copies of documents in form approved for release.
3. Copies of relevant sections of the FOI Act.
4. "Freedom of Information - Your Review Rights".