



# Australian Government

## Department of Defence

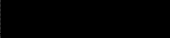
Office of the Chief Operating Officer

Freedom of Information and  
Information Management Branch  
CPI-6-001  
Campbell Park Offices  
PO Box 7910  
CANBERRA BC ACT 2610  
Tel: (02) 626 62200  
Fax: (02) 626 62112  
[FOI@defence.gov.au](mailto:FOI@defence.gov.au)

Our reference: FOI 245/11/12



By email: 

Dear 

1. I refer to your email, dated 8 March 2012, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

*"...all correspondence from March 31<sup>st</sup> 2011- April 19<sup>th</sup> 2011 between Minister Stephen Smith and:*

- *Chief of the Defence Force Angus Houston*
- *Vice Chief of the Defence Force David Hurley"*

2. By email, dated 22 March 2012, you agreed to proceed with the following revised scope:

*"Submissions relating to the ADFA Skype issues from 31 March 2011 to 19 April 2011 between the then CDF and VCDF and the Minister."*

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. Mr Tony Corcoran, Assistant Secretary, Freedom of Information and Information Management, is the accredited decision maker, under the FOI Act, in relation to your request.

### **Documents identified**

5. Mr Corcoran identified 7 documents (and attachments) as matching the scope of your request. The documents and details regarding the decision are contained in the schedule of documents at Enclosure 1.

## Decision

6. Mr Corcoran has decided to release the identified documents with material deleted, in accordance with section 22 of the FOI Act, as the deleted material is considered exempt under sections 37 [documents affecting enforcement of law and protection of public safety], 42 [documents subject to legal professional privilege], 47B [public interest conditional exemptions – Commonwealth-State relations etc], 47E [public interest conditional exemptions – certain operations of agencies] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

7. In accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, some material was also removed as it was considered irrelevant to the scope of the request.

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

## Material taken into account

9. In coming to his decision, Mr Corcoran had regard to:

- the content of the identified documents 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);
- Advice from relevant Australian Defence Force and departmental officers whose duties relate to the matters referred to in the documents; and
- third party responses to formal consultation.

## Section 22

10. Upon examination of the documents Mr Corcoran found that the document identified as Item 2 on the schedule of documents contained material regarding matters which does not relate to the so-called ADFA Skype issue. Mr Corcoran considered that the material would disclose information that would reasonably be regarded as irrelevant to the scope of the request. As such, in accordance with subparagraph 22(1)(a)(ii) of the FOI Act, he has decided to remove the material.

## Exemption claims

### Section 37

11. Mr Corcoran found that the document identified as Item 2 on the schedule of documents contained material which, if disclosed, could reasonably be expected to prejudice the conduct of an investigation of a possible breach of the law and therefore he considered that the material would be exempt under section 37(1)(a) of the FOI Act. The guidelines state that this section only applies where there is a current or pending investigation. Mr Corcoran noted that the guidelines state that *the exemption does not apply if the prejudice is about investigations in general*. Mr Corcoran was satisfied that the exempt material related to a particular investigation which is continuing.

## Section 42

12. Mr Corcoran found that Items 1, 2 and 3 on the schedule of documents contained material which falls within the purview of section 42 of the FOI Act, as it contains legal advice, which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP). Mr Corcoran noted that the FOI Act does not define LPP; however, the guidelines require that he consider each of the following:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving advice or for the use or in connection with actual or anticipated litigation;
- whether the advice given is independent; and
- whether the advice given is confidential.

13. In determining whether a legal adviser-client relationship exists, the guidelines state that the following points must be considered:

- legal advice given by a qualified lawyer employed by the government can be privileged;
- the legal adviser must be acting in their capacity as a professional legal adviser;
- the giving of the advice must be attended by the necessary degree of independence;
- the *dominant purpose* test must be satisfied; and
- the advice must be confidential.

14. Mr Corcoran was satisfied that the legal adviser-client relationship had been established, as the advice was provided by a qualified lawyer employed by the government who was acting in their capacity as a professional legal adviser.

15. Further, he was satisfied that the specific material contained in the documents relevant to this request was created for the dominant purpose of giving legal advice, and there is no reason to doubt the legal advisers independence in providing such advice.

16. Mr Corcoran noted that LPP is the client's privilege to waive and he was satisfied that waiver had not occurred. Mr Corcoran noted that while the material in question is contained in documents being disclosed to more than one person in Defence, he considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed in paragraph 5.128 of the guidelines, which states *modern organisations often work in teams and several people may need to know about privileged communications*.

17. Mr Corcoran considered that the advice was intended to be confidential. This is based on the seniority of those privy to the communications, together with the caveats contained on the documents, indicating the need for the documents to remain confidential.

18. Finally, after reviewing the specific material and obtaining advice from the legal adviser, Mr Corcoran was satisfied that any disclosure would result in 'real harm' if those parts of the documents were disclosed.

## **Public interest conditional exemptions**

### **Section 47B – Commonwealth State relations deliberative processes**

19. Mr Corcoran found that the document identified as Item 2 on the schedule of documents contained information which was communicated, in confidence, between Defence and a State Authority.

20. Prior to making his decision, Mr Corcoran undertook formal consultation with the State Authority. In coming to his final decision, he considered the comments provided by the State Authority, and concluded that disclosure of the identified information would divulge information communicated in confidence.

21. The guidelines state that, when assessing whether the communication was communicated in confidence, the test is whether the communication was considered to be confidential at the time of the communication. The guidelines also state that the circumstances of the communication may also need to be considered, such as:

- whether the communication was ad hoc, routine or required;
- whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and State concerning the exchange or supply of information; and
- how the information was subsequently handled, disclosed or otherwise published.

22. Mr Corcoran noted that the exchange in relation to this specific incident occurred on an ad hoc basis. However, he is aware that exchanges of this nature occur on an ad hoc basis, relating to other matters, as required. Further, there are existing arrangements in place for this exchange of information. Finally, he noted that the material is continuing to be handled, by both organisations, as a confidential matter.

### **Section 47B – Public interest considerations**

23. Mr Corcoran noted that subsection 11A(5) of the FOI Act requires Defence to allow access to conditionally exempt documents unless, in the circumstances, access to the documents, would, on balance, be contrary to the public interest.

24. In assessing whether disclosure is on balance, contrary to the public interest, he considered the range of factors set out in section 11B(3) of the FOI Act, which favours access to a document. He noted that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a natural resource. However, the disclosure of this information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

25. Mr Corcoran noted that while release of this material may be of some interest to the applicant, disclosure of the specific conditionally exempt material would not inform public debate on any matter of public importance in any meaningful way.

26. Additionally, disclosure of the information would not promote oversight of public expenditure. In coming to his decision, Mr Corcoran also considered subsection 11B(4) of the FOI Act.

27. However, Mr Corcoran considered that maintaining the integrity of the processes in place between Defence and the State Authority far outweighs any interest that may be served from the disclosure of the specifically exempt material. As such, he decided it would be contrary to the public interest to release the conditionally exempt material and decided to exempt that material under subsection 47B(b) of the FOI Act.

#### **Section 47E – Certain operations of an agency**

28. After examining the documents Mr Corcoran found that the document identified as Item 3 on the schedule of documents contained material which details the processes followed by Defence in managing cases such as the one at the heart of this matter. Mr Corcoran considered that the material, if disclosed, could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by an agency. As such, he considered that some material in the identified documents is conditionally exempt under subsection 47E(c) of the FOI Act.

#### **Section 47E – Public interest considerations**

29. In assessing whether disclosure is, on balance, contrary to the public interest, Mr Corcoran again considered the relevant factors set out in section 11B(3) of the FOI Act. As detailed above, Mr Corcoran noted that disclosure may promote some of the objects of the FOI Act, and that disclosure may be of some interest to you. However, disclosure of this information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

30. Mr Corcoran took into account that this issue has received widespread media attention, but there would be no benefit to releasing the conditionally exempt material, as it would not inform public debate on any matter of public importance in any meaningful way. Additionally, disclosure of the information would not promote oversight of public expenditure.

31. On balance, Mr Corcoran considered that if the conditionally exempt material was to be released it would actually impede Defence's ability to manage its people as they may be less likely to participate in Defence processes following incidents occurring. He also considered that it could affect Defence's ability to obtain confidential information.

32. For these reasons, Mr Corcoran considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of those parts of the documents which are conditionally exempt. Therefore, he decided that it would be contrary to the public interest to release the information and decided to exempt the material under section 47E(c) of the FOI Act.

#### **Section 47F – Personal privacy**

33. Mr Corcoran found that all of the documents identified on the schedule of documents contained material relating to a number of Defence personnel, including mobile telephone numbers, ranks, names, and other personal information relating to their circumstances. He considered that disclosure of this material would constitute an unreasonable disclosure of personal information, and is therefore conditionally exempt under section 47F of the FOI Act.

34. In accordance with subsection 47F(2), in determining whether the disclosure of this information would involve an unreasonable disclosure of personal information, Mr Corcoran has 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 matter dealt with in the documents; and
- c. the availability of the information from publicly accessible sources.

35. Mr Corcoran took into account that this matter has been widely reported in the media, but he was not convinced that the specific material referred to above has been reported and as such, he considered that the information is not well known. While the names of the persons involved in this matter have been released, he is mindful that one party has only been known by a pseudonym, and release of that person's personal details would reveal their association with the matter.

36. For the same reason, he considered that the personal information contained in the identified documents would not be readily available from publicly accessible sources.

37. Accordingly, Mr Corcoran considered that the material is conditionally exempt under section 47F of the FOI Act.

#### **Consultation with third party – personal information**

38. Following examination of the documents, Mr Corcoran decided to consult in respect to personal information belonging to two third party under section 27A [Consultation – business documents] and one third party under section 26A [consultation – documents affecting Commonwealth-State relations etc.] of the FOI Act.

39. Upon consultation, one third party objected to the release of some information contained within the documents. However, Mr Corcoran considered the comments, and decided to release the documents with deletions, as set out in paragraph 6 above.

#### **Release of documents**

40. In accordance with subsection 27A(5) [Decision to give access] of the FOI Act, Mr Corcoran is required to advise the objecting third party of his decision to release the material.

41. Although, Mr Corcoran decided to release the document with deletions, he is prevented by paragraph 27A(6) of the FOI Act, from providing any material subject to review to you, until it becomes apparent that either the third party does not propose to exercise its right to seek review of their decision, or until all review processes have been completed. Accordingly, the third party has until **27 June 2012** to appeal Mr Corcoran's decision.

#### **Payment of Charges**

42. In our letter, dated 21 March 2012, the department estimated the cost associated with processing your original request to be [REDACTED]. After revising your request, you were advised by email, dated 23 March 2012, that the cost for processing your request was [REDACTED].

43. You agreed to pay the revised charges for the administration of your request and paid the preliminary assessment deposit of [REDACTED] on 28 March 2012.

44. Upon completion of your request, the actual amount for processing exceeded the revised estimate. However, as explained in 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.

45. Accordingly you are required to pay [REDACTED] in order to finalise your request. Please complete and return the form at Enclosure 1 to the FOI Directorate, this form is an agreement to pay charges and enables the FOI Directorate to continue processing your request without delay. Upon receipt of the form an invoice will be generated, noting this can take up to 3 business days. Details about payment of the invoice are on the form.

#### **Rights of review**

46. The FOI Act provides for rights of review of decisions. A copy of the fact sheet "Freedom of Information – Your Review Rights" setting out your rights of review is at Enclosure 2.

#### **FOI Disclosure Log**

47. 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.

#### **Further advice**

48. Should you have any questions in regard to this matter please contact me directly on (07) 3332 6359. Alternatively, the FOI team can be contacted on the details at the top of this letter.

Yours sincerely



Theresa Stinson  
Assistant Director – Media Case Management  
Freedom of Information

28 May 2012

#### **Enclosures:**

1. Schedule of documents
2. Fact Sheet – "Freedom of Information – Your Review Rights"