



Australian Government
Department of Defence
Defence Support and Reform Group

Freedom of Information and
Information Management Branch
Department of Defence

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Our reference: FOI 262/12/13



By email: 

Dear 

1. I refer to your email, dated 9 January 2013, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

"...the documents identified in processing FOI 181/12/13 that relate to proposals to reform Part VI of the DFDA."

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. Mr Ted Bilton, Deputy Defence General Counsel, Defence Legal is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

4. Mr Bilton identified 27 documents which matched the scope of your request. The identified documents are listed on the schedule at Enclosure 1.

Decision

5. Mr Bilton decided to deny access to 7 documents, on the grounds that they are exempt under section 42 [documents subject to legal professional privilege] of the FOI Act.

6. He also decided to release the remaining documents with material removed, in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, as the deleted material is considered exempt under section 47C [public interest conditional exemptions – deliberative process] and/or section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

Material taken into account

7. In making his decision Mr Bilton had regard to:

- The content of the identified 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)

Exemption claim – section 42

8. Section 42 of the FOI Act exempts from disclosure material that would be privileged from production in legal proceedings on the grounds of legal professional privilege (LPP).

9. Mr Bilton reviewed the guidelines which set out a number of factors to be considered in relation to claiming an LPP exemption. Mr Bilton considered those factors in relation to each document identified in the Schedule as being exempt on the basis of LPP and state as follows:

- a. Mr Bilton considered that there exists a legal adviser-client relationship on the basis that the authors of the documents were all qualified lawyers within the department's legal division and were acting in their respective capacities as professional legal advisers. Mr Bilton considered the legal division within the department is sufficiently independent in its function to satisfy the requirement that the advice was independent for the purposes of LPP.
- b. Mr Bilton considered the material within the documents contained confidential communications between parties for the dominant purpose of seeking or giving legal advice. Mr Bilton advised that he was not aware of any circumstances whereby the confidentiality of that advice has been waived or whereby LPP itself has been waived.

10. Mr Bilton was satisfied that the documents would be privileged from production in legal proceeding on the basis of LPP.

11. The guidelines state at paragraph 5.130 that Agencies should not assert LPP unless 'real harm' would result from that disclosure. In Mr Bilton's view there would be real harm associated with failing to uphold privilege of this information. The documents are recent in nature and if published would disclose the confidential legal assessment of the effectiveness of the Defence Force Discipline Act (DFDA). Mr Bilton stated that the public disclosure of this privileged information in advance of the matter being considered by the department would result in real harm to the department's ability to effectively administer the DFDA.

Conditional exemption claim – section 47C

12. Subsection 47C(1) of the FOI Act provides that:

A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of...an agency or...the Government of the Commonwealth...

13. Mr Bilton decided that the documents identified in the schedule contain material that satisfies the conditional exemption under subsection 47C(1) of the FOI Act.

Public interest considerations – section 47C

14. Under subsection 11A(5) of the FOI Act, the department must provide access to the documents unless in the circumstances it would be, on balance, contrary to the public interest to do so.

15. When weighing up the public interest for and against disclosure under subsection 11A(5) of the FOI Act, Mr Bilton took into account the extent to which disclosure would:

- a. promote the objects of the FOI Act;
- b. inform debate on a matter of public importance;
- c. promote effective oversight of public expenditure; and
- d. allow a person to access his or her own personal information.

16. Mr Bilton also considered the extent to which disclosure would:

- a. prejudice the confidentiality necessary for the proper functioning of ordinary business of government; and
- b. adversely impact on the ability of Ministers and public servants to discuss options and the nature and time of Cabinet deliberations for the resolution of high level, complex and sensitive policy issues.

17. In this particular matter the public disclosure of the department's assessment of the effectiveness of the DFDA in advance of the department formally determining a position on the matter would, in Mr Bilton's view, prejudice the ability of the department to properly consider the matter. Based on these factors, Mr Bilton has decided that in the circumstances of this particular matter, the public interest in disclosing the deliberative matter in the document is outweighed by the public interest against disclosure.

18. Mr Bilton noted that he did not take into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act in making his decision.

19. Accordingly, Mr Bilton is satisfied that the documents referred to in the schedule contain conditionally exempt material under section 47C of the FOI Act. Furthermore, he decided, on balance, that it would be contrary to the public interest to release this information. Taking all of the above into consideration, Mr Bilton found that the material could not be disclosed.

Conditional exemption claim – section 47F

20. Upon examination of the documents, Mr Bilton found that some of the documents contained personal information belonging to Defence employees and individuals external to Defence. The specific pieces of personal information were mobile phone numbers, which he considered satisfied the definition of personal information details in section 4 of the FOI Act.

21. In accordance with section 47F(2) of the FOI Act, in determining whether the disclosure of the identified personal information would be unreasonable, Mr Bilton had regard to:

- a. the extent to which the information is well known;
- b. whether the person to whom the information related 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.

22. Against the above criteria, Mr Bilton found:

- a. the specific pieces of personal information are not well known;
- b. the majority of people to whom the information relates are not known to be (or to have been) associated with the matters dealt with in the document; and
- c. the specific pieces of personal information is not readily available from publicly accessible sources.

23. Based on the assessment of the criteria above, Mr Bilton considered that the release of the specific pieces of personal information would be an unreasonable disclosure of personal information and is therefore conditionally exempt under section 47F of the FOI Act.

Public interest considerations – section 47F

24. As detailed above section 11A(5) of the FOI Act, requires Defence to allow access to exempt documents unless, in the circumstances access to the documents would, on balance, be contrary to the public interest. In this matter Mr Bilton considered that the disclosure of mobile telephone numbers would not promote greater public participation in government processes, promote better-informed decision making or promote effective oversight of public expenditure, it would also not inform debate on any matters of public importance or provide you with your own personal information. For these reasons, Mr Bilton decided to exempt the mobile telephone numbers under section 47F of the FOI Act.

Consideration of section 22

25. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document, he or she must consider releasing that document with exempt matter deleted, where possible. Mr Bilton decided that some of the documents could be disclosed with exempt material removed. However, in regards to the documents identified as being exempt under section 42 of the FOI Act, Mr Bilton decided against this course of action, because it would necessarily involve a significant number of deletions of the exempt material and render the documents meaningless and of little or no value to you.

Payment of Charges

26. In our letter, dated 14 January 2013, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request and paid the preliminary assessment deposit of [REDACTED] on 9 January 2013.

27. Upon completion of your request, 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.

28. Accordingly you are required to pay [REDACTED] in order to finalise your request. Please complete and return the form at Enclosure 2 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

29. 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 3.

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 two working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions. I will advise you of the publication date when the documents are dispatched to you.

Further advice

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

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

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

15 February 2013

Enclosures:

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