



Australian Government
Department of Defence
Defence Support and Reform Group

Freedom of Information and
Information Management Branch
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Our reference: FOI 304/12/13

By email: [REDACTED]

Dear [REDACTED]

1. I refer to your email, dated 15 February 2013, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

"Post Operation Report 'Operation Habitat' dated 31 July 1991 and LHQ K91-00272 Medical Svcs 238191 dated Aug 91"

Background

2. Following your discussion with Mr Dudfield, Director of Freedom of Information, on 27 February 2013, you were advised that document LHQ K9 1-00272 Medical Svcs 238191 dated Aug 1991 is yet to be located and it is possible that this document may have been destroyed. The preliminary assessment of charges sent to you on the 27 February 2013, to which you agreed, identified that it was for the Post Operation Report 'Operation Habitat' dated 31 July 1991 only.

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. COL Natasha Fox, Director Personnel Policy - Army is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

5. COL Fox identified one document as matching the description of your request.

Decision

6. COL Fox decided to release the document with deletions under section 22 of the FOI Act [Access to edited copies with exempt or irrelevant matter deleted]. COL Fox deemed the deleted material exempt under sections 47F of the FOI Act [Public interest conditional exemptions – personal privacy] and 33 of the FOI Act [Documents affecting national security, defence or international relations].

Material taken into account

7. COL Fox had regard to:
- a. the content of the documents in issue;
 - b. relevant provisions in the FOI Act;

- c. the Guidelines issues by the Office of the Australian Information Commissioner under section 93A of the FOI Act; specifically paragraphs 5.14, 5.26 to 5.29, 5.31, 5.32, 5.35 and 5.36;
- d. the AATA decision Re Hocking and Department of Defence [1987] AATA 602; and
- e. the AATA decision Re Maksimovic and Attorney-General's Department [2008] AATA 1089.

Reasons for Decision

Exemption claim - Section 47F(1) of the FOI Act

8. Item 1 contains details of non-Defence civilians, details of members not connected to duties, ADF members injured, administrative findings made against a member, personal dealings of ADF members, signatures of LTCOL level personnel and below. This information could be used to reasonably ascertain the identity of an individual and therefore satisfies the definition of personal information in section 4 of the FOI Act. To determine whether the disclosure of the identified personal information was unreasonable, COL Fox had regard to the criteria specified in section 47F(2) of the FOI Act:

- 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; and
- c. the availability of the information from publicly accessible sources.

9. Against these three criteria, COL Fox found:

- a. the specific personal information listed is not well known;
- b. the individuals whose personal information is contained in the documents are not widely known to be associated with the matters dealt with in the documents; and
- c. the information is not readily available from publicly accessible sources.

10. With reference to the assessment above, COL Fox considered that the release of details of non-Defence civilians, details of members not connected to duties, ADF members injured, administrative findings made against a member, personal dealings of ADF members, signatures of LTCOL level personnel and below would be an unreasonable disclosure of personal information and therefore conditionally exempt under section 47F(1) of the FOI Act.

11. Section 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless access to the document would be contrary to the public interest.

Public interest considerations – Section 47F

12. When assessing whether the disclosure of the personal information is contrary to the public interest, COL Fox considered the factors that favour access to a document set out in section 11B(3) of the FOI Act [Public interest exemptions – factors]. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

13. In relation to section 11B(3)(a) of the FOI Act [Promote the objects of this Act (including all the matters set out in sections 3 and 3A)], information held by the Government is a national resource and release of the personal information would promote the object of the FOI Act specified in section 3(1)(b) of the FOI Act.

14. However disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

15. The public interest factors against disclosure outweigh the factors for disclosure of the identified personal information and COL Fox deem the information exempt under section 47F(1) of the FOI Act.

Details of current operational plan

16. Item 1 contains information that details a current operational plan. COL Fox considered what impact this has on a release of this document under the FOI Act.

Documents affecting national security

17. Section 33(a)(i) of the FOI Act states:

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;

18. For Item 1 to qualify for this exemption COL Fox considered whether Item 1 contained information that relates to the security of the Commonwealth, and secondly whether disclosure of that information would or could reasonably be expected to cause damage to the security of the Commonwealth.

19. The Guidelines define the term “security of the Commonwealth” at paragraph 5.26(a):

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...

20. On the term “could reasonably be expected to”, paragraph 5.14 of the Guidelines states:

“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”

21. Paragraph 5.27 of the Guidelines states:

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

22. The Guidelines excerpt above relied upon in the case *Re Hocking and Department of Defence* [1987] AATA 602 (*Hocking*), in which C J Bannon stated:

“...Terrorism is the enemy of all forms of civilized government and of the peace, order and good government of both Commonwealth and State. However much one may guess at the types of procedures which the Army will adopt to meet terrorism, it is a very different thing, in our opinion, to describe and confirm those procedures in a public document so that possible enemies of government attain knowledge of those measures....”

23. COL Fox also referenced advice from the Command Security Adviser at Army Headquarters. He advised;

“there are direct references to the current capability and the priorities that are placed on training and in particular specific types of airframes. This includes details of training regimes for particular airframes and training deficits that have been recognized. I feel that this information would be of value to third parties and would be used to target Defence particularly those area of deficit identified by this document”.

24. Army has the primary purpose of protecting Australia. Army’s operational plans details Army’s tactics when responding to threats from enemies both foreign and domestic. This is information that helps inform our protection of Australia and its population from activities that are hostile to or subversive of their interests. Army uses operational plans and the tactics within them to protect the Australian population from potential enemies. COL Fox was satisfied that Item 1 contains information, specifically operational plans, that relates to the security of the Commonwealth. This reasoning falls in line with *Hocking* where tactics of Army were accepted as relating to the “security of the Commonwealth”.

25. Following the reasoning in *Hocking* above, whilst one may guess at the types of procedures that Army adopts in response to enemy threats, our capabilities and deficiencies, it is a different thing to confirm those procedures in a public document. This would allow possible enemies of the Commonwealth to attain knowledge of them. To release such information publicly could reasonably damage the security of the Commonwealth.

26. COL Fox was satisfied that document contains information that could reasonably be expected to damage the security of the Commonwealth and deem that information exempt under section 33(a)(i) of the FOI Act.

Documents affecting defence of the Commonwealth

27. Section 33(a)(ii) of the FOI Act states:

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:

(ii) the defence of the Commonwealth;

28. For Item 1 to qualify for this exemption COL Fox firstly considered whether Item 1 contained information that related to the defence of the Commonwealth, and secondly whether disclosure of that information would or could reasonably be expected to cause damage to the defence of the Commonwealth.

29. The Guidelines at paragraphs 5.28 and 5.29 state:

Defence of the Commonwealth

5.28 The Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term includes:

...protecting the Defence Force from hindrance or activities which would prejudice its effectiveness....

5.29 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage...However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

30. Item 1 contains operational plans that are currently used by Army. COL Fox was satisfied that this information relates to the defence of the Commonwealth, particularly as Army is an organisation with the purpose of defending the Commonwealth.

31. If this information were to be released it could potentially be used by enemies of the Commonwealth to take advantage of any deficiencies that are identified within our operational plans of Army or to otherwise better prepare counter-measures in response to tactics employed through execution of them.

32. COL Fox was satisfied on the balance of probabilities that release of the operational plans could reasonably be expected to cause damage to the defence of the Commonwealth and deem it exempt under section 33(a)(ii) of the FOI Act.

Information pertaining to a foreign defence force

33. Item 1 describes the activities of a foreign defence force. It is appropriate to consider what effect this may have on a release of this document under the FOI Act.

Documents affecting international relations

34. Section 33(a)(iii) of the FOI Act states:

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:

(iii) the international relations of the Commonwealth

35. For Item 1 to qualify for this exemption COL Fox firstly considered whether Item 1 contains information, the disclosure of which would affect the international relations of the Commonwealth. Secondly COL Fox considered whether disclosure of that information would or could reasonably be expected to cause damage to the international relations of the Commonwealth.

36. The Guidelines state at paragraphs 5.31 and 5.32:

5.31 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature and extent of the relationship. There must also be real and substantial grounds for the conclusion that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

5.32 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future. On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.

37. COL Fox also had reference to the case *Re Maksimovic and Attorney-General's Department* [2008] AATA. In this case as part of a criminal investigation into the applicant, Australian authorities sought assistance from Costa Rican authorities under the Mutual Assistance in Criminal Matters Act 1987. The applicant was subsequently charged and convicted of drug offences. The applicant then made an application under FOI for "all Mutual assistance requests involving the Commonwealth Director of Public Prosecutions for 'outgoing requests' involving Costa Rica and Serbia and Montenegro". The documents requested included names of Costa Rican intelligence officers. These names were initially removed under section 33(a)(iii) on the basis that their details were given in confidence to Australian authorities for the purpose of their investigation. The applicant appealed this decision.

38. On appeal G. D. Friedman upheld the original decision to not release the Costa Rican intelligence officer's names under section 33(a)(iii) stating:

...there are real and substantial grounds for the expectation that damage to Australia's international relations by way of a lessening of trust or confidence would occur if the names of the officers were disclosed to Mr Maksimovic. The Tribunal concludes that disclosure would reasonably be expected to lead to damage to international relations between Australia and Costa Rica, and finds that the names of the Costa Rican intelligence officers are exempt from disclosure under s 33(1)(a)(iii) of the FOI Act.

39. Whilst the participation of a foreign defence force in an overseas operation is not necessarily protected information in itself, in Item 1 the unit which is identified is one ordinarily deals with sensitive operations for that nation's Army, and is often privy to additional protections over other units within that foreign defence force. Without the opportunity to consult with the foreign defence force COL Fox cannot determinatively decide whether the foreign defence force would object to the release of this information, however COL Fox can decide that if the foreign defence force were to object, they would have reasonable grounds to do so. To reveal this unit's information could potentially threaten their security or defence of their country. In turn this could reasonably lessen the foreign defence force's trust or confidence in Australia, and following the reasoning in *Maksimovic* above, this could be reasonably expected to lead to damage between Australia and the foreign defence force.

40. COL Fox was satisfied that disclosure of this information would have an effect on the international relations of the Commonwealth, specifically those between Army and the foreign defence force agency.

41. For Army to disclose the information relating to a sensitive unit of a foreign defence force without the foreign defence force having the input as to whether they are comfortable with the information's release could reasonably diminish the confidence of the foreign defence force agency in Australia as a reliable recipient of its confidential information. This could reasonably have the effect of making both the foreign defence force agency and other foreign government entities less willing to impart confidential information to the Australian

Army in the future to avoid the information being publicly released through Australian FOI laws.

42. Following the reasoning in paragraph 5.32 of the Guidelines, a release of the information could reasonably result in the foreign defence force agency being less willing to provide confidential information to Australia, and this would damage the international relations between the Commonwealth and the foreign defence force agency. COL Fox was satisfied that disclosure of information would result in damage to international relations of the Commonwealth. COL Fox deemed any information provided by the foreign defence force agency that was imparted into Item 1 exempt under section 33(a)(iii) of the FOI Act.

Payment of Charges

43. In our letter, dated 27 February 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 you were sent an invoice for the preliminary assessment deposit of [REDACTED] on 11 March 2013.

44. Upon completion of your request, the actual amount for processing was calculated to be [REDACTED]. The remaining balance is the difference between preliminary assessment of charges and the deposit you have already paid.

45. Accordingly you are required to pay the remaining [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. The FOI Act can be accessed online at:
<http://www.comlaw.gov.au/Details/C2011C00803>

49. The size of the document is larger than 10MB, it will therefore be posted out on CD when the outstanding balance of charges have been paid.

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

Yours sincerely



Andrea Sansom
Assistant Director
Freedom of Information

27 March 2013

Enclosures:

1. Payment authorisation form
2. Fact Sheet: Freedom of Information – Your Review Rights