

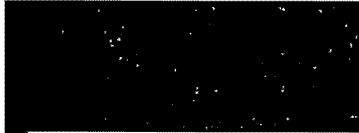


Australian Government
Department of Defence

Office of the Secretary and
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Our reference: FOI 321/10/11



By email: 

Dear 

1. I refer to your email of 1 June 2011, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to the military court hearings of two commandos who faced charges over the deaths of six Afghan civilians. The case is titled "12 February 2009 – Civilian Casualty Court Martial": Specifically, you requested access to:

"..The court transcripts for the days of two pre-hearings, [except for the days when Brigadier Westwood classified the hearings as secret] [Item 1]

The judgement [Item 2]..."

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. Colonel G Cameron, Registrar of Military Justice is the authorised decision maker, under the FOI Act, in relation to your request.

Document identified

4. Colonel Cameron identified the following documents as matching the description of your request.

Certified transcripts of the open court sessions of pre-trial directions hearing for 28, 29, 30 and 31 March 2011, and for 16, 17 18 and 20 May 2011.

Decision

5. Following examination of the document identified in paragraph 4 above, Colonel Cameron decided to:

- a. release the certified transcripts for open court sessions of the pre-trial directions hearing for 28, 29, 30 and 31 March 2011 and 16, 17 and 18 May 2011 in full. However, pursuant to paragraph 21(1)(c) of the Act, Colonel Cameron decided to defer access to these documents until six weeks after the two courts martial currently in progress have been finalised; and
 - b. release the certified transcript for the pre-trial directions hearing for 20 May 2011 in full. This document comprises the judgement sought by you, referred to as Item 2 above.
6. A copy of the document, matching the description of Item 2, in the form approved for release is at Enclosure 1.

Material taken into account

7. In making his decision, Colonel Cameron had regard to:
- a. the content of the documents in issue;
 - b. relevant provisions in the FOI Act; and
 - c. the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (Information Commissioner's Guidelines).

Reasons for decision to defer access [Item 1]

8. In balancing the public interest in this case Colonel Cameron advised that he considered the following factors in favour of disclosure:
- a. Promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of Government activities.
 - b. Ensuring that military justice is open, transparent and subject to public scrutiny.
9. Colonel Cameron considered the following factors against disclosure:
- a. The risk of prejudice to the fair trial of a soldier currently facing trial by court martial and the potential adverse impact disclosure of the documents may have on the impartial adjudication of the trial of the soldier.
 - b. The risk that finalisation of the courts martial of the soldier may be delayed as a result of successful challenges to the appointment of selected court martial panel members.
10. Colonel Cameron further advised that the certified transcripts are a record of legal argument, certified as being correct by the judge advocate, relating to court martial proceedings against two soldiers charged by the Director of Military Prosecutions as a result of an incident that took place on 12 February 2009 in which civilians were killed during the conduct of military operations in Afghanistan. The charges included manslaughter and dangerous conduct with negligence as to consequences.

11. Colonel Cameron advised that, in accordance with usual practice, the legal argument took place at two pre-trial directions hearings in the absence of the court martial panel to ensure that information that may unfairly influence the panel members was not discussed or heard in their presence. The information included evidence that may not be admissible at trial and argument concerning legal principles that may influence court martial panel members.

12. Colonel Cameron confirmed that the outcome of the pre-trial directions hearings was that the Chief Judge Advocate firstly found that the charges against the two soldiers did not disclose a service offence and, secondly, indicated an intention to refer the charges back to the Director of Military Prosecutions. Despite the fact that the Chief Judge Advocate's decision was favourable to the two soldiers, release of the transcripts (save for the transcript for 20 May 11), in Colonel Cameron's view, could prejudice military justice for the following reasons:

- a. Should the transcripts be released in response to the FOI request Defence would publish them on the Defence website (FOI Disclosure Log) in accordance with the FOI Act and Departmental FOI policy and procedures. The [REDACTED] would also be at liberty to publish the transcripts in any way it saw fit to do so. In the circumstances, the transcripts would become public documents and Defence would have no means of restricting access by Australian Defence Force (ADF) officers to the transcript material. ADF officers will comprise the court martial panel in respect of a further soldier charged by the Directorate of Military Prosecutions (DMP) in respect of service offences alleged to arise out of the same incident in Afghanistan.
- b. These latter charges are the subject of separate court martial proceedings which are currently listed for a pre-trial directions hearing on 31 August 2011 and trial before the court martial panel on 19 September 2011. Evidence and legal principles discussed during the pre-trial directions hearing associated with the court martial of the first two soldiers will also be relevant to proceedings against the third soldier and, if court martial panel members have access to the transcripts prior to the hearing, the chances of a fair trial for this matter may also be compromised.
- c. Colonel Cameron advised that he is also concerned that, in both cases, the defending officer may successfully apply to dismiss the respective court martial panel in respect of the third soldier on grounds that the members of the panel may have had the opportunity to inform themselves regarding issues associated with the case from sources other than the evidence before them at trial. As a consequence, the hearings against the third soldier concerned could be delayed which would not be in the interests of the accused soldier or the ADF.

13. Colonel Cameron advised that the circumstances are in some respects analogous to the situation that arises in a civilian trial where members of the jury may become aware of facts associated with a case as a result of media reporting. In those circumstances, the judge usually gives strong directions to the jury to consider their verdict solely on the basis of the evidence before them.

14. Although similar directions could be given to a court martial panel by a judge advocate, in Colonel Cameron's view there is a high risk that such directions would be ineffective. This is because the relevance of the issues discussed during argument to the law of armed conflict as it applies to current and future military operations is such that many officers may be motivated by professional curiosity to consider the transcripts and the facts surrounding the incident in detail. Even if the officers selected for the panel do not read the transcripts themselves, they are likely to discuss information from the transcripts with colleagues who have read them.

15. In addition, Colonel Cameron believes many commissioned officers in the army have legal training and experience in conducting and appearing before disciplinary proceedings. Colonel Cameron further believes there is a risk that officers will form their own views regarding legal issues that may arise in the case if they have had access to arguments raised during the hearings that are consistent with their own views.

16. For the reasons discussed above, Colonel Cameron considers disclosure of the documents could reasonably be expected to prejudice the fair trial of the third soldier or adversely impact upon the impartial adjudication of the charges against him.

17. Colonel Cameron had regard to paragraph 21(1)(c) of the FOI Act which provides, in effect, that an agency or Minister may defer access to a document under the Act if the "premature release of the document concerned would be contrary to the public interest - until the expiration of any period of time beyond which the release if the document would not be contrary to the public interest".

18. Colonel Cameron advised that his reason for deferring access in this instance is that, while he acknowledges that there is a public interest, expressed by the enactment of the FOI Act, in disclosure of official information, there is, in his view, a greater public interest in ensuring that legal proceedings against the third soldier are conducted fairly, with appropriate impartiality and without delay.

19. Colonel Cameron has therefore decided to defer access to the certified transcripts (open court material hearings), save for the transcript for 20 May 2011, until six weeks after the charges against the third soldier have been finalised by the latest of any of the following events:

- a. the completion of a court martial and the expiration of any appeal period;
- b. the completion of any appeal and any retrial;
- c. confirmation from the Director of Military Prosecutions that the case will not proceed.

20. Section 21 of the FOI Act is at Enclosure 1.

Payment of FOI charges

21. In our letter dated 3 June 2011, 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 on 7 June 2011 we received the deposit amount of [REDACTED]. Accordingly, the charges associated with processing your request were imposed.

22. After the completion of your request, the actual amount for processing was [REDACTED] after taking into consideration the free decision making time. Accordingly, you are required to pay [REDACTED] in order to finalise your request. Cheques or Money Orders should be made out to the 'Receiver of Public Monies' and forwarded to the address at the top of this letter. Credit card payments can be made by completing the form at Enclosure 2 and returning it to the FOI Directorate.

23. Once the outstanding charges are paid, our office will dispatch the document approved for release, without further delay.

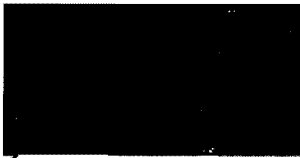
Review rights

24. 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 3.

Further information

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

Yours sincerely



**Melissa Davidson
Assistant Director
Freedom of Information**

22 June 2011

Enclosures:

1. Section 21 of the FOI Act
2. Credit Card Payment Form
3. Fact sheet "Freedom of Information – Your Review Rights"