I refer to your email of 25 June 2011, in which you requested access, under the Freedom of Information Act 1982 (FOI Act), to a review which has just been completed into the processes for applications made under section 51(6) of the Defence Force Retirement Benefits Act 1948 and section 37 of the Defence Force Retirement and Death Benefits Act 1973 to change the mode of separation for superannuation purposes. Specifically, you requested access to:

"...a copy of the review [Item 1], the recommendations [Item 2] and the responses to the recommendations from the Defence Department [Item 3]."

2. On 27 July 2011, our office advised you that there was a requirement to consult with a third party in relation to a document that fell within the scope of your request, and that the new time limit for providing you with a decision was 27 August 2011.

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. Mrs Nikki Curtin, Director, Directorate of Transition Support Services, is the authorised decision maker, under the FOI Act, in relation to your request.

Documents identified – Items 1 to 3

5. Mrs Curtin identified seven documents as matching the description of your request. A schedule of documents is at Enclosure 1.
6. Mrs Curtin found that:
   a. Document 1 on the schedule of documents matches Items 1 and 2 of your request; and
   b. Documents 2 to 7 on the schedule of documents match Item 3 of your request.

Decision

7. For the reasons set out below, Mrs Curtin decided to:
   a. release document number 1 with deletions made in accordance with section 22 [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 subparagraph 47G(1)(a) [public interest condition exemptions - business] of the FOI Act; and
   b. release documents 2 to 7 intact.

8. Copies of the documents in the form approved for release are at Enclosure 2.

Material taken into account

9. In making the decision, Mrs Curtin had regard to:
   • The content of the 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);
   • Principles on open public sector information issued by the Information Commissioner;
   • Information provided by a third party as a result of consultation; and
   • Information provided by ComSuper as a result of a courtesy consultation.

Reasons for decision Document 1

Section 47G

10. On review of document number 1, Mrs Curtin identified business information belonging to a third party. In accordance with section 27 [consultation - business documents] of the FOI Act, Mrs Curtin determined that there was a requirement to consult with that third party prior to finalising her decision.
11. Mrs Curtin considered that some of the material contained in document 1, specifically the names of individuals who were involved in the preparation and approval of the relevant report, is conditionally exempt under subparagraph 47G(1)(a) of the FOI Act. Mrs Curtin found that the release of the material could reasonably be expected to unreasonably affect those persons adversely in respect to his or her lawful business or professional affairs. Mrs Curtin formed the view, that if the names were to be released it would afford the opportunity for others, including current or prospective employers, to form a judgment on document without having the benefit of all the factors that contributed to creating the document.

**Public interest conditional exemptions**

12. Section 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document would, on balance, be contrary to the public interest.

13. In assessing whether disclosure of the material is, on balance, contrary to the public interest, Mrs Curtin considered the range of factors that favour access to a document set out in section 11B(3) [public interest exemptions - factors favouring access] of the FOI Act. In relation to these, Mrs Curtin noted that disclosure may promote the objects of the FOI Act as information held by the Government is a national resource. However, the disclosure of the names of individuals involved in the report would not increase public participation in Government processes, nor would it increase scrutiny or discussion of Government activities.

14. Mrs Curtin recognises that the names of the individuals may be of some interest to you, however Mrs Curtin formed the view that the material would not inform public debate on any matter of public importance in any meaningful way.

15. Additionally, disclosure of the information would not promote oversight of public expenditure, nor would they allow you to have access to your own personal information.

16. In coming to the above decision, Mrs Curtin considered subsection 11B(4) [public interest exemptions - irrelevant factors] of the FOI Act.

17. Accordingly, Mrs Curtin considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the document. Therefore, Mrs Curtin decided that it would be contrary to the public interest to release the information considered exempt under subsection 47G(1)(a) of the FOI Act.

18. Copies of the relevant sections of the FOI Act referred to above are at Enclosure 3.

**Payment of Charges**

19. In our letter dated 29 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 paid the preliminary assessment deposit of [redacted] on 30 June 2011.
20. Upon completion of your request, the actual amount for processing was calculated to be [redacted] which leaves an outstanding balance of [redacted]. However, Ms Theresa Stinson, Assistant Director Freedom of Information, has decided that you are not liable to pay any further FOI charges on this occasion.

Rights of review


Further advice

22. All departmental action on you request is now complete. Should you have any questions in regard to this matter please contact this office.

Yours sincerely

Phillip Connelly
Case Officer
Freedom of Information

29 August 2011

Enclosures:
1. Schedule of documents
2. Documents in the form approved for release
3. Sections of the FOI Act
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<th>File Reference</th>
<th>Author</th>
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<th>Pages</th>
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<td>ZAF155534</td>
<td>Christine Svarcas</td>
<td>ComSuper response to Review of Changes to ADF Mode of Separation for Superannuation Purposes [Item 3 of request]</td>
<td>Full disclosure</td>
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<tr>
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<td>CAPT M Hill</td>
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<td>Full disclosure</td>
<td>1</td>
</tr>
</tbody>
</table>
11A Access to documents on request

Scope

(1) This section applies if:

(a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
   (i) a document of the agency; or
   (ii) an official document of the Minister; and
(b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:
(a) section 12 (documents otherwise available);
(b) section 13 (documents in national institutions);
(c) section 15A (personnel records);
(d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

(3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

(4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

(6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:

(a) a conditionally exempt document; and
(b) an exempt document:
   (i) under Division 2 of Part IV (exemptions); or
   (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).
11B Public interest exemptions—factors

Scope

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
   (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
   (b) inform debate on a matter of public importance;
   (c) promote effective oversight of public expenditure;
   (d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
   (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
   (b) access to the document could result in any person misinterpreting or misunderstanding the document;
   (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
   (d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.
47G Public interest conditional exemptions—business

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

(b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

(2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.

(3) Subsection (1) does not have effect in relation to a request by a person for access to a document:

(a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or

(b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or

(c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.

(4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.

(5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).
Freedom of Information – Your Review Rights

If you disagree with the decision made by the Department of Defence or the Minister under the Freedom of Information Act 1982 (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by Defence, or external review by the Australian Information Commissioner.

Internal review

If Defence makes an FOI decision that you disagree with, you can ask Defence to review its decision. Generally the review will be conducted by the FOI Directorate, however in some instances it will be referred to the area that made the decision, but it will be conducted by someone at a more senior level. There is NO charge for internal review.

You must apply within 30 days of being notified of the decision, unless you have sought an extension from Defence.

Defence must make a review decision within 30 days. Where Defence has not met its review obligation, you may then approach the Information Commissioner.

Internal review is not available if the Minister or the principal officer of the agency made the decision personally.

How to apply for internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points to which you are objecting and why.

You can lodge your application in one of the following ways:

Post: Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610

Fax: +61 2 6266 62112
Email: FOI.inquiries@defence.gov.au

External Review

Do I have to go through the Defence's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the Defence internal review process gives Defence the opportunity to reconsider its initial decision and your concerns will most likely be addressed more quickly, without undergoing an external review process.

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the revised FOI Act, you must seek external review through the Information Commissioner prior to applying to the AAT for such a review.

Making a complaint

You may make a complaint to the Information Commissioner about actions taken by Defence in relation to your application. The complaint needs to be in writing.
Contacting the Information Commissioner

Further information about the external review process or how to make a complaint to the Information Commissioner is available at the following:

Online: www.oaic.gov.au
Post: GPO Box 2999, Canberra ACT 2601
Fax: +61 2 9284 9666
Email: enquiries@oic.gov.au

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint, then all relevant documents and information must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

Defence FOI contacts

Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA ACT 2600

Ph: +61 2 626 62200
Fax: +61 2 626 62122

Email: FOI.Inquiries@defence.gov.au
Website: www.defence.gov.au/foi