



Reference: OCA/OUT/2019/BQ5667834

FOI 052/18/19 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act), for access to:

- a. *Investigation reports and/or briefing notes and/or emails regarding an incident involving a partnered operation between Special Operations Task Group (SOTG) and Afghan soldiers seeking to locate a rogue Afghan national army soldier who killed three Australian soldiers. This operation took place at Sula or Sola village on August 29, 2012. The timeframe for this request is 29 August 2012 to 31 December 2015.*
- b. *Investigation reports and/or briefing notes regarding a raid on Sarkhum village, Uruzgan, during which two locals were killed and six civilians injured and property destroyed on March 14-15 2012. The timeframe for this request is 14 March 2012 to 31 December 2015.*
- c. *Investigation reports and/or briefing notes regarding an incident dubbed "Weekend at Bernies" that took place in August 2010 where an Afghan man's body went missing. The timeframe for this is 1 August 2010 to 31 December 2014.*
- d. *Investigation reports and/or briefing notes regarding a raid at Spin Kecha village on September 26, 2013 where Bismillah Azadi and his son were killed during a raid involving Australian soldiers. The timeframe for this is 26 September 2013 to 31 December 2015.*

2. On 6 August 2019, in response to a notice of practical refusal (section 24AA issued by Defence), you amended the scope of your request to:

- a. *Investigation reports and/or briefing notes regarding a raid on Sarkhum village, Uruzgan, during which two locals were killed and six civilians injured and property destroyed on March 14-15 2012. The timeframe for this request is 14 March 2012 to 31 December 2014.*
- b. *Investigation reports and/or briefing notes regarding a raid at Spin Kecha village on September 26, 2013 where Bismillah Azadi and his son were killed during a raid involving Australian soldiers. The timeframe for this is 26 September 2013 to 31 December 2014.*

Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request and duplicates of documents are excluded from this request.

FOI decision maker

3. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

4. I identified 45 documents, totalling 200 pages, as matching the scope of this request.

Decision

5. I have decided to deny access to all the identified documents meeting the scope of the applicant's request under section 33 [documents affecting national security, defence or international relations], section 37(1)(a) [documents affecting enforcement of law and protection of publication safety – prejudice the conduct of an investigation] and section 38 [documents to which secrecy provisions of enactments apply] of the FOI Act.

Material taken into account

6. In making my decision, I had regard to:
- a. the terms of the request
 - b. the content of the identified documents in issue
 - c. relevant provisions in the FOI Act
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines)
 - e. the relevant provisions of the *Defence (Inquiry) Regulations 1985* and *Defence (Inquiry) Regulations 2018*
 - f. information provided by the Office of the Inspector General Australian Defence Force, Australian Defence Force Headquarters and Special Operations Command Headquarters.

Reasons for decision

Section 33 – Documents affecting national security, defence or international relations

7. Sections 33(a) (ii) and (iii) of the FOI Act exempts a document if its disclosure would, or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth or would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth.

8. Material contained within the identified documents comprises information on the tactics, techniques and procedures employed by the Defence Force during warlike operations. They also identify individuals who have Protected Identity Status. Further, the documents identify information and representatives of international agencies and their actions which were supplied to the Commonwealth in confidence.

9. 'Defence of the Commonwealth' is not defined in the Act, but has been held to include meeting Australia's international obligations, ensuring the proper conduct of international defence relations, deterring and preventing foreign incursions into Australian territory and protecting the Defence Force from hindrance or activities which would prejudice its effectiveness. Further, previous Administrative Appeals Tribunal decisions indicate that the term includes protecting the Defence Force from hindrance or from activities which would prejudice its effectiveness.

10. 'International relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisation and to protect the flow of confidential information between them, including relations between government agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information, the circumstances in which it was communicated, and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence

11. Particular consideration has been paid to the mosaic effect of releasing information that may on its own, appear insignificant, however, when combined with other publicly available information, would divulge specifics of capabilities which would impact on the security and defence of the Commonwealth. If released, this information could reasonably provide an adversary with a tactical advantage thereby diminishing the capability of the Australian Defence Force to defend the Commonwealth.

12. I find that disclosure of the documents would, or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth or breach confidentiality under which material was provided to the Commonwealth. Therefore the documents are exempt under section 33(a)(ii) and (iii) of the FOI Act.

Section 37 – Documents affecting enforcement of law and protection of public safety

13. Section 37(1)(a) of the FOI Act provides:

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance...

14. I have taken into account information provided by the office of the Inspector General Australian Defence Force and note that an inquiry into matters related to the documents is still underway.

15. I turned my mind to the Guidelines, specifically paragraph 5.79 and also considered paragraph 5.82 which states:

To be exempt under ss 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance,

and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence.

16. I consider the release of any material prior to the finalisation and conclusion of the investigation could impact the course of the investigation. Further, I consider the release of any material relating to the investigation, which may be used as evidence by the investigation body, could also jeopardise the outcome of the investigation.

17. Taking into account the above, I am satisfied the documents are exempt under section 37(1)(a) of the FOI Act.

Section 38 – Documents to which secrecy provisions of enactments apply

18. Material contained within the identified documents contains information from an Inquiry Officer Inquiry appointed pursuant to the Defence (Inquiry) Regulations 1985 (the Regulations), and it is appropriate to consider what effect this may have on the release of these documents under the FOI Act.

19. Section 38 of the FOI Act provides for the protection of documents where disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment. Schedule 3 of the FOI Act identifies the secrecy provisions applicable to section 38, which states, in part:

Schedule 3 – Secrecy Provisions

Defence (Inquiry) Regulations, subregulations 63(2)

20. On 18 June 2013, the Regulations were amended. The provisions previously applied by sub-regulation 63(2) were then provided for under sub-regulation 63(1). On

21. It should be noted that the FOI Act was not amended to reflect the change in the Regulations. It is Defence's position that the intent of the protections provided by section 38 of the FOI Act did not change, and therefore apply to sub-regulation 63(1) of the Regulations.

22. On 15 March 2018, the Defence (Inquiry) Regulations 2018 were enacted, repealing the Defence (Inquiry) Regulations 1985. Section 79 of the Defence (Inquiry) Regulations 2018 prescribes the continued application of regulation 63 of the Defence (Inquiry) Regulations 1985 and further applies the protection of section 38 of the FOI Act to inquiry information protected by the Defence (Inquiry) Regulations 1985. As such, only the applicant's personal information can be considered for release.

23. As there is no personal information of the applicant within the identified documents, no documents can be released.

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CN Watts
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Accredited Decision Maker
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