



Our reference: FOI 231/14/15

Mr Les Stockley

By email: foi+request-890-5a6fdaxx@xxxxxxxxxxxxx.xxx.xx

Dear Mr Stockley

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email, dated 1 February 2015, which we received on 2 February 2015, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“...a copy of the charge summary for the assault committed by the then Cpl Jacqui Lambie, now senator of Australia.”

Background

2. On 20 February 2015, our office informed you that the decision maker had determined that there was a requirement to consult with a third party under section 27A [Consultation – documents affecting personal privacy] of the FOI Act, before finalising the decision. As such, in accordance with section 15(6) [extension of processing period to comply with requirement of section 26A, 27 or 27A] of the FOI Act, the statutory timeframe was amended to 6 April 2015.

3. I note that the above mentioned due date was a public holiday. In accordance with the FOI Guidelines issued by the Australian Information Commissioner, if the last day for notifying a decision falls on a Saturday, Sunday or a public holiday, the timeframe will expire on the first day following which is none of those days. Noting the due date was a gazetted public holiday in the ACT (from where all FOI requests are administered), the due date for you to receive a response is today [7 April 2015].

4. The purpose of this letter is to provide you with the decision relating to the document that is the subject of your request.

FOI decision maker

5. Colonel MRC Kennedy, Director Personnel Policy – Army was the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

6. Colonel Kennedy identified one document, being the ‘Summary Proceedings Report’ as falling within the terms of your request.

Decision

7. Colonel Kennedy decided to partially release the identified document with deletions in accordance with section 22 of the FOI Act [Access to edited copies with exempt or irrelevant matter deleted]. Colonel Kennedy deemed the deleted material exempt under sections 47F [public interest conditional exemptions - personal information] and 47E(d) [public interest conditional exemptions - certain operations of agencies] of the Act.

8. Colonel Kennedy’s reasons for this decision are outlined below.

Material taken into account

9. Colonel Kennedy had regard to:

- a. the terms of the request
- b. the content of the documents in issue
- c. relevant provisions in the FOI Act
- d. the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act
- e. third party response to consultation.

Reasons for Decision

Personal information of third parties

10. Colonel Kennedy noted that the identified document contained personal information of individuals other than you. It is appropriate to consider whether this information is exempt from release under the FOI Act. As part of the decision making process Colonel Kennedy sought third party consultation. He considered the results of the third party consultation when making his decision.

Section 47F of the FOI Act

11. Colonel Kennedy found that the document contains information relating to then Corporal Lambie’s military charge of ‘*Assault in a Public Place*’. Colonel Kennedy considered this information to be widely known and readily available from publicly available resources. Senator Lambie has made this information known and spoken publicly about the incident on a number of occasions. As such, Colonel Kennedy considered that it is reasonable to release this information.

12. Colonel Kennedy also found that the document contained personal information, including witness names, ranks and PMKeyS (personnel identification) numbers of other people. He considered the disclosure of this material would constitute an unreasonable disclosure.

13. The guidelines issued by the Australian Information Commissioner note that ‘the personal privacy exemption is designed to prevent ‘unreasonable’ invasion of third parties privacy’. In accordance with subsection 47F(2), in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, Colonel Kennedy had regard to:

- 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
- c. the availability of the information from publicly accessible sources
- d. any other matters that the agency considers relevant.

14. Against those criteria, Colonel Kennedy found:

- a. the specific personal information listed is not well known
- b. the information is not readily available from publicly accessible sources.

15. With reference to the assessment above, Colonel Kennedy considered that the release of this information would be an unreasonable disclosure of personal information and conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations – section 47F

16. 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.

17. When assessing whether disclosure is, on balance, contrary to the public interest, Colonel Kennedy considered the guidelines provided by the Australian Information Commissioner, together with a range of factors that favour access to a document as set out in section 11B(3) [Public interest exemptions – factors] of the FOI Act.

18. Subsection 11B(3) states 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
- b. inform debate on a matter of public importance
- c. promote the effective oversight of public expenditure
- d. allow a person to access his or her own personal information.

19. In considering the above points Colonel Kennedy found that disclosure of the requested document may promote some objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the requested document would not increase public participation in Government processes, nor would it increase the scrutiny or discussion of Government activities. While Colonel Kennedy noted that the release of the requested material may be of interest to you, it would not you access to your own personal information.

20. In coming to this decision Colonel Kennedy also took into account the guidelines which discuss other factors considered to be relevant, in particular he considered paragraph 6.132 which states '*whether it would shed light on the workings of government*'. Further, at 6.133 the guidelines state '*...if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed... disclosure would be unreasonable.*'

21. Colonel Kennedy further considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act which lists factors which must not be taken into account in deciding whether access would, on balance, be contrary to the public interest. None of the factors he took into account were listed under subsection 11B(4) of the FOI Act.

22. After assessing all of these factors, Colonel Kennedy decided that the harm that could arise from disclosure of the personal information far outweighs any favourable public interest factors that would be gained from the release and he deemed the information exempt under section 47F of the FOI Act.

Section 47E(d) of the FOI Act

23. A document is conditionally exempt under section 47E(d) if its disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of Defence. The document contains the names, signatures and PMKeyS numbers of Defence personnel that were involved in the prosecution of the offence.

24. Colonel Kennedy noted that the ability of Defence members to undertake a military prosecution is an important function to the command of the Army. Discipline within Defence is paramount in maintaining the safety of our members. He also noted that participating in military justice proceedings is a secondary duty of Defence members. Given the named party's standing in the community, there is a possibility that releasing the personal information of other Defence members involved in the proceedings could lead to unsolicited contact including undue media attention. This could directly affect the willingness of Defence members to participate in proceedings in the future.

25. Accordingly, Colonel Kennedy considered this material to be conditionally exempt under section 47E(d) of the FOI Act.

Public interest considerations – section 47E

26. Colonel Kennedy found that the identified information is conditionally exempt under section 47E of the FOI Act. Section 11A (5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

27. Colonel Kennedy considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factors being that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource and it would not allow access to your own personal information. Arising from these factors, Colonel Kennedy considered the importance of transparency in investigations of the work-related conduct of Government employees.

28. Colonel Kennedy further had regard to paragraph 6.140 of the Guidelines, which outlines that careful consideration should be given to the release of information that does not relate to a public servant’s usual duties and responsibilities. Colonel Kennedy considered that members undertaking duties such as Prosecuting Officer and Defending Officer are not the usual, everyday duties and responsibilities of these members.

29. Subsection 11B(4) [irrelevant factors] of the FOI Act lists factors which must not be taken into account in deciding whether access would, on balance, be contrary to the public interest. Colonel Kennedy stated that he did not take into account these factors when making his decision.

30. Colonel Kennedy found that the public interest factors against disclosure outweigh the factors for disclosure of the identified personal information due to the impact on the operations of this Agency and deemed the information exempt under section 47E (d) of the FOI Act.

31. A copy of the document in the form approved for release is at Enclosure 1.

Rights of review

32. 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.

Further information

33. The FOI Act may be accessed at: <http://www.comlaw.gov.au/Details/C2015C00013>.

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'T. Stinson', with a stylized flourish at the end.

Theresa Stinson
Assistant Director - Media Case Management
Freedom of Information

7 April 2015

Enclosures:

1. Document in the form for release
2. Fact Sheet: Freedom of Information – Your Review Rights