



Australian Government
Department of Defence

Freedom of Information
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FOI 006/15/16

[REDACTED]
By email: [REDACTED]

Dear [REDACTED]

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

I refer to your email of 6 July 2015, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“...copies of all hard-copy documents and digital materials related to the creation, formulation and original implementation of the two RAAF 41 Wing Standing Instructions listed below:

***Item 1:** RAAF 41 Wing Standing Instruction (Operations) 3-19 Contact Of Interest Reporting Process”*

***Item 2:** “RAAF 41 Wing Standing Instruction (Operations) 3-15 Unauthorised Aircraft Movements Reporting and Investigation Process”.*

*By this, I mean any and all copies of: **[Item 3]** internal emails; interagency emails; external to 41 Wing emails (ie emails with RAAF Air Command, HQ NORCOM (J3S), etc); any similar material between 41 Wing and its 4 subordinate units; any minutes of meetings; defgrams; pictorials and images; tasking materials to staff; applicable statistical summaries and tables of historical aircraft track trends and radar plotting; applicable case studies regarding historical offensive or unlawful aircraft movements, etc. Simply, I wish to obtain all material that "went in" to creating and implementing the above two Standing Instructions.”*

Background

On 7 July 2015, our office wrote to you to advise of the preliminary assessment of charges associated with your request. The statutory processing time for the request was suspended on this date. You provided the receipt for your payment of the required deposit on 15 July 2015. As such, the statutory deadline for processing your request was 13 August 2015.

On 24 July 2015, we again wrote to you with a proposed revised scope for your request. The statutory processing time was again suspended. However, as you did not provide a response by 11 August 2015, the processing of your request was re-commenced. As such, the statutory deadline is now 1 September 2015.

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

Group Captain (GPCAPT) C Wallis, Director of Corporate and Community Relations – Air Force, is the authorised officer pursuant to section 23 of the FOI Act to make a decision on your request.

Decision

GPCAPT Wallis decided to:

- a. release in full the document identified for Item 1;
- b. partially release the document matching Item 2 with deletions made in accordance with subsection 22(1) [Access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the material is considered exempt under section 47E [certain operations of agencies] of the FOI Act, and
- c. refuse access to Item 3 under section 24A(1)(b)(ii) [documents do not exist] of the FOI Act.

Material taken into account

In making her decision she had regard to:

- a. the terms of the request;
- b. the content of the document in issue;
- c. relevant provisions in the FOI Act;
- d. paragraph 6.29 the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
- e. principles on open public sector information issued by the Information Commissioner.

Section 22 - irrelevant matter deleted

Upon examination of the documents, GPCAPT Wallis found some documents contained material regarding matters that did not relate to the scope of the request. Therefore GPCAPT Wallis considered that the material would disclose information that would reasonably be regarded as irrelevant to the scope of the request. As such, in accordance with subparagraph 22(1)(a)(ii) of the FOI Act, GPCAPT Wallis decided to remove the material.

Section 47E(d) - certain operations of an agency

Section 47E (d) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

... (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency...

Where access has been denied to information under section 47E(d) of the FOI Act, GPCAPT Wallis considered that the material could reasonably be expected to have substantial adverse effect on the proper and efficient conduct of operations of Defence.

As noted above, use of the word ‘could’ in this provision requires no more than a degree of reasonableness being applied in deciding whether disclosure would cause the consequences specified. The reasonable expectation refers to material regarding details of the processes and procedures relating to aircraft.

GPCAPT Wallis was satisfied that the expected effect of disclosing to the applicant material identified exempt under section 47E(d) could have a substantial adverse effect on the proper and efficient conduct of the operations of Defence; in that once the information was made publically available it could be used by individuals to circumvent our detection procedures and enter or leave Australian Sovereign Territory airspace without clearance or detection. Additionally release of the material provide insight into Air Force surveillance capability and potentially allow operations to be compromised.

In light of the above, GPCAPT Wallis has decided that specified material identified in the document located matching Item 2 is conditionally exempt pursuant to subsection 47E(d) of the FOI Act.

Subsection 11A (5) [access to documents on request] of the FOI Act requires Defence to allow access to such conditionally exempt material unless, in the circumstances and on balance, access would be contrary to the public interest.

Section 47E - public interest consideration

Subsection 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest. The Guidelines state (at 6.8-6.9):

...The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered...

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies, based on the particular facts of the matter at the time the decision is made.

In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, GPCAPT Wallis considered the range of factors that favour access to a document, as set out in section 11B(3) [public interest exemptions – factors favouring accessing] of the FOI Act.

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; and*
- d. allow a person to access his or her own personal information.*

GPCAPT Wallis noted that disclosure may promote some of the objectives of the FOI Act, as information held by the Government is a national resource, however, the disclosure of this information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

While GPCAPT Wallis noted that the full release of the information contained in the document would be of interest to you it would not inform public debate on any matter of public importance in a meaningful way. Furthermore, disclosure of the information would not promote oversight of public expenditure or allow the applicant further access to his own personal information.

In coming to the above decision, GPCAPT Wallis had regard to subsection 11B (4) [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 GPCAPT Wallis took into account were listed under subsection 11B(4) of the FOI Act.

Accordingly, GPCAPT Wallis considered that, on balance, the public interest factors against disclosure outweighed the factors for disclosure of the exempt material contained in the document. Therefore, GPCAPT Wallis decided that it would be contrary to the public interest to release the information considered under subsection 47E (d) of the FOI Act.

Section 24A(1) - documents cannot be found

Section 24A(1) of the FOI Act states:

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document list or non-existent

- (1) *An agency or Minister may refuse a request for access to a document if:*
- (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency of Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found; or*
 - (ii) *does not exist.*

Paragraph 3.84 of the Guidelines also gives guidance as to what is required to be included within this statement of reasons to refuse under section 24A(1):

3.84 The statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search.

A search of all documents held in Objective was conducted using the search parameters of: 'contact of interest', 'COI', 'unauthorised aircraft movements' and 'UAM', however no further documentation matching the request for Item 3 was found. Further to this, 41WG confirmed that it does not produce statistical analysis, summaries or tables of historical data or that such information would be used to create the identified standing instructions. Rather 41WG have advised that the standing instructions would instead generate data.

GPCAPT Wallis was satisfied that "all reasonable steps" have been taken to locate documents matching the request. Therefore, GPCAPT Wallis was satisfied that the documents cannot be found or do not exist, and refused access to these items under section 24A(1) of the FOI Act

Payment of Charges

On this occasion, I have decided to exercise my delegation and to cap the charges payable to the deposit amount already paid.

Declassification of documents

A number of the documents matching the scope of this request were classified. The decision maker has declassified the versions of the documents that are approved for release.

FOI Disclosure Log

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 five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Your Review Rights

Internal Review

Under the provisions of section 54 of the FOI Act, you are entitled to request a review of this decision. You must request a review, in writing, within 30 days of the date of this letter, or the date you receive the documents. Requests can be sent to:

Email: FOIReview@defence.gov.au
 Fax: 02 626 62112
 Post: Freedom of Information Directorate - Reviews
 Department of Defence
 CP1-6-029
 PO Box 7910
 CANBERRA BC ACT 2610

Australian Information Commissioner

Under the provisions of section 54 of the FOI Act, you are also entitled to request an external review of this decision by the Australian Information Commissioner. You have 60 days to lodge such a request, using one of the contact methods below:

Email: enquiries@oaic.gov.au
 Phone: 1300 363 992
 Fax: 02 9284 9666
 Post: GPO Box 2999
 Canberra ACT 2601

Complaints

You may complain to Defence, the Information Commissioner or the Commonwealth Ombudsman about an action taken by Defence in the exercise of its power or the performance of its functions under the FOI Act. There is no fee for making a complaint. Should you wish to complain to the Department of Defence, your complaint can be addressed to Mr Tony Corcoran using the contact details below:

Email: tony.corcoran@defence.gov.au
 Post: Tony Corcoran
 Assistant Secretary Information Management and Access Branch
 CP1-6-14
 PO Box 7911
 CANBERRA BC ACT 2610

Contact details for the Commonwealth Ombudsman are below:

Phone: 1300 362 072)
 Fax: 02 6276 0123
 Post: Commonwealth Ombudsman
 GPO Box 442
 CANBERRA ACT 2601

Contact details for the Information Commissioner are above.

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

Yours sincerely



Andrea Sansom
Case Officer
Freedom of Information

28 August 2015