



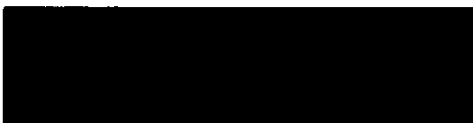
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Department of Defence

Ministerial and Executive Coordination and Communication Division

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ASIMA/OUT/2015/069
FOI 006/15/16

16 October 2015



By email: [Redacted]

Dear [Redacted]

Application for *internal review*

1. I refer to your email application of 16 September 2015, in which you sought an *internal review* under section 54 of the *Freedom of Information Act 1982* (FOI Act) of the decision by Group Captain Catherine Wallis, Director Corporate and Community Relations - Air Force, to partially release and refuse access to documents captured by your FOI request.

Contentions

2. In your application for *internal review* you advised that what you received did not contain material which you had sought. You requested to be ‘...*furnished with all materials – including briefs and emails – that were created from initial draft of the SI’s all the way through to final sign off.*

Background

3. On 6 July 2015, you sought access, under the FOI Act, to:

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.'

Fresh searches

4. Upon receipt of your application for *internal review*, my office arranged for fresh searches to be conducted by Headquarters 41 Wing. Sixteen additional documents were identified as matching the scope of your FOI request.

5. Set out below are the record keeping practices of 41 Wing and fresh searches that were conducted, as advised by Wing Commander Steve Madsen, Acting Staff Officer 1 Operations, Headquarters 41 Wing (41 WG).

6. 41 WG standing instructions are developed and reviewed in accordance with 41 WG Standing Instruction (SI) (ADMIN) 06-01 and reviewed annually by the sponsors. Individual sponsors draft their allocated standing instructions and submit them for review and release by the Officer Commanding (OC) 41 WG. Each draft SI is accompanied by a 41 WG SI draft amendment review form to record the approval process. Once approved, the SI is signed and released and an Adobe Acrobat version of the SI and the relevant 41 WG SI draft amendment review form is stored in Objective. Objective is the official document and records management system used by Defence and all records have been saved in Objective. No hard copies are retained by the unit.

7. All 41 WG standing instructions have been managed, stored and accessed digitally for over five years. This is consistent with current Defence data management practices, and meets legislated record keeping requirements. A thorough search of Objective was also conducted using the SI numbers and titles relating to Items 1 and 2 of your FOI request.

8. Additionally, Wing Commander Madsen advised that as the requested documents are quite simple instructions, in his experience in over 35 years of service, the documents would not have generated any additional discussion papers, minutes or reviews.

9. In light of the above, Wing Commander Madsen is satisfied that all avenues of searching for records which match the description of your FOI request have been exhausted.

Documents subject to *internal review*

10. The documents falling within the scope of your FOI request have been identified as serials in the schedule of documents (the Schedule) at Enclosure 1. My decision on *internal review* is detailed in the last column in the Schedule, highlighted in blue text.

11. The documents considered in conducting my review are identified in the Schedule, at Enclosure 1, totalling 16 documents. I note the following two documents have already been released in full to you, therefore they have not been considered as part of my review:

- a. Item 1, Serial 1, which was provided to you intact in Group Captain Wallis' decision; and
- b. Item 3, Serial 10, which has been released to you intact as part of your FOI request number FOI 076/15/16.

12. I note the SI matching Item 2 of your FOI request has been cancelled. Elements of the SI have since been subsumed into another SI, 41 WG SI (OPS) 04-05, which has been identified in the Schedule as Item 3, Serial 10. Further, the document referred to at paragraph 6 above, '41 WG Standing Instruction (SI) (ADMIN) 06-01' has been considered as part of the *internal review* and is listed as Item 3, Serial 1 in the Schedule.

Reviewing officer

13. I am authorised to make this decision under arrangements approved by the Secretary of Defence under section 23 of the FOI Act.

Decision

14. I found that information contained in Item 1, Serial 1A, Item 2, Serial 1 and Item 3, Serials 2B, 2C, 2D, 7 and 9 can be released to you with deletions 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 deleted material is considered to be exempt under paragraph 33(a)(ii) [Documents affecting the defence of the Commonwealth], subsection 47E(d) [Public interest conditional exemptions – certain operations of agencies] and section 47F [Public interest conditional exemptions – personal privacy] of the FOI Act.

15. Further to the above, material I regard as irrelevant to your request was removed under subparagraph 22(1)(a)(ii) [Access to edited copies with exempt or irrelevant matter deleted] of the FOI Act.

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

Material taken into account

17. In arriving at my decision, I had regard to:

- a. the documents identified in the Schedule;
- b. the decision made by Group Captain Wallis;
- c. fresh searches conducted by Headquarters 41 Wing;
- d. the relevant provisions of the FOI Act; and
- e. the *Guidelines issued by the Australian Information Commissioner under section 93A of the Freedom of Information Act 1982* ('the Guidelines').

Findings and reasons for the decision

18. In providing my reasons why access to some documents is not being granted, I am mindful that it is not appropriate to include information in my decision which makes the statement of reasons itself exempt from disclosure.

19. Where I have denied access to material considered to be exempt under paragraph 33(a)(ii) and subsections 47E(d) and 47F of the FOI Act, I have done so for the following reasons.

Under paragraph 33(a)(ii) [Documents affecting the defence of the Commonwealth]

20. Paragraph 33(a)(ii) of the FOI Act states:

'A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

...

(ii) the defence of the Commonwealth; or'

21. While the FOI Act does not define 'defence of the Commonwealth', the Information Commissioner's guidelines refer to previous Administrative Appeals Tribunal decisions which include 'protecting the Defence Force from hindrance or activities which would prejudice its effectiveness'.

22. I found that release of some material contained in the documents included specific information pertaining to internal methodology of and the capability of Defence's detection procedures which, if released, would hinder Defence in its operational airspace activities. Release of information about tactics, techniques and procedures of the Australian Defence Force (ADF) could allow an enemy to take effective countermeasures. Any hindrance of Defence's activities would, in my view, prejudice Defence in its effectiveness to undertake military operations required by the Government and to be ready for future tasks as part of the Government's overall national security strategy. Release of information that could reasonably be expected to cause damage to the defence of the Commonwealth is exempted under paragraph 33(a)(ii) of the FOI Act.

23. In evaluating potential harmful effects of disclosing information in the documents that would affect Australia's defence, I have also taken into account the intelligence technique known as the 'mosaic theory'. This theory holds that individual pieces of information, when combined with other pieces, can generate a harmful composite – a mosaic – that can damage Australia's defence.

24. In this case the documents in issue include a range of highly specific operational detail. This includes Air Force operations as well as securing measures put in place to protect personnel and Air Force incident response times and capabilities and other information which, if released, could be used to jeopardise Australian military forces. Further, I considered that if this information was to be released it would inform adversaries of both the Air Force's current and future capabilities, which would be a significant tactical disadvantage and could expose Australia to possible unnecessary risk. Accordingly, due to the sensitivities contained in the documents, I am satisfied that some material identified is exempt under paragraph 33(a)(ii) of the FOI Act.

Under subsection 47E(d) [Public interest conditional exemptions – certain operations of the agency]

25. Subsection 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.'

26. I found that some parts of the documents contain material that is considered to be exempt under subsection 47E(d) of the FOI Act. In particular, I found the documents contain material which outlines specific information relevant to processes conducted by the Australian Defence Force in the course of detecting air/surface activity in a specified area.

27. The material I regard to as exempt provides information on the way Defence and Air Force perform their operations. Specifically, the information relates to the radar and monitoring conducted by the ADF and, if released, could enable individuals to circumvent our capabilities and thereby leave our airspace open to foreign invasions.

28. I also consider that the exempt material pertains to Air Force techniques, tactics and procedures and capabilities relating to airspace activities which, if combined with other pieces of information available, could generate a composite that would provide information resulting in the prejudice of the effectiveness of those operational activities.

29. In deciding that material was exempt under subsection 47E(d) of the FOI Act, I again considered the mosaic effect (as mentioned in paragraph 23 above) in the Guidelines which state that:

5.33 Normally when assessing the potential harm in releasing a document, a decision maker looks at the contents of the document in question. But when evaluating potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account the intelligence technique usually known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite - a mosaic that can damage Australia's national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.

30. Further, I have taken into account that the Guidelines (refer to 6.112) note that the predicted effect must bear on the agency's *proper and efficient* operations; that is, the agency is undertaking its expected activities in an expected manner.

31. In light of the above, I am satisfied that release of the exempt material would have a substantial adverse effect on Defence's proper and efficient conduct of its operations if the documents were released in an unredacted form. As such, I consider the material is conditionally exempt under subsection 47E(d) of the FOI Act.

32. Subsection 11(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.

Public interest considerations – section 47E

33. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines, together with a range of factors that favour access to a document as set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. I turned my mind to assess whether access to the documents would do any of the following:

- a. promote the objects of the FOI 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.

34. I considered that the public interest in promoting the objects of the FOI Act had been satisfied by assessing this case on its merits and in accordance with the guidance on good decision making principles. I acknowledge that while there may be a limited amount of public interest in the issue of unauthorised aircraft movement in general, I do not consider that the identified documents would promote the effective oversight of public expenditure.

35. I am also of the view that the disclosure of this information would not increase public participation in Government processes, nor would it increase scrutiny or discussion of Government activities.

36. 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 factors 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 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.

37. I consider that disclosure of the requested material would be contrary to the public interest as it would only serve to compromise the effectiveness of the processes of the relevant agencies to conduct air space detection.

38. As part of my review, I consulted with Air Force and have listed its views on public interest below.

39. Air Force contends that there is a strong public interest in preventing the potential risk to our security procedures associated with radar detection from foreign incursions, and that this factor weighs heavily against disclosure of the conditionally exempt information. The following factors support that contention:

- a. Providing intelligence with official information in relation to airspace activities:

- i. undermines the tactical advantage that surveillance and response assets have over foreign incursions, by providing asset location/projection details,
 - ii. allows foreign intelligence entities to conduct trend analysis of past operational activity to assist with their predictions of future activity and to make assumptions about future activity,
 - iii. assists foreign intelligence entities in identifying, with a high degree of certainty, the success or failure of separate ventures.
- b. Denying foreign intelligence entities official information undermines the certainty with which they can confirm the success (or otherwise) of ventures and, in turn, restricts the opportunity to invade Australian airspace and/or borders.

40. In coming to the above decision, I have also considered subsection 11B(4) [public interest exemptions – irrelevant factors] of the FOI Act. I considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the document. Therefore, I have decided that it would be contrary to the public interest to release the information considered exempt under subsection 47E(d) of the FOI Act.

Under section 47F [Public interest conditional exemptions – personal privacy]

41. Subsection 47F(1) of the FOI Act states: *'A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person)'*.

42. *'Personal information'* is defined in section 4 of the FOI Act as *'information or an opinion about an identified individual, or an individual who is reasonably identifiable'*

- (a) *whether the information or opinion is true or not; and*
- (b) *whether the information or opinion is recorded in a material form or not'*.

43. I found some information in the documents listed in the Schedule contains personal information belonging to individuals, in form of signatures, which satisfies the definition of *'personal information'* in section 4 of the FOI Act. I also found that the disclosure of the personal information would be considered to be unreasonable.

44. The Guidelines issued by the Australian Information Commissioner note that *'the personal privacy exemption is designed to prevent the 'unreasonable' invasion of third parties' privacy'*. In accordance with subsection 47F(2) of the FOI Act, in determining whether the disclosure of this information would involve the unreasonable disclosure of personal information, I 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 documents;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

45. Against those criteria, I found:

- a. the specific personal information is not well known;
- b. the specific personal information is not readily available from publicly accessible sources; and
- c. the material considered to be exempt is information that an individual would not wish to have disclosed to without their consent.

46. Section 11A(5) [Access to documents] of the FOI Act requires an agency to allow access to an exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest. My public interest considerations are set out below.

Public interest considerations – section 47F

47. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I have again taken into account the factors that favour access to a document set out in subsection 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. Disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the material would not increase public participation in Government processes nor would it, in my view, increase scrutiny or discussion of Defence activities.

48. While release of this material may be of some interest to you, it would not inform public debate on any matter of public importance in any meaningful way. Again, I do not consider disclosure of the information would promote oversight of public expenditure.

49. In coming to the above decision, I also considered again subsection 11B(4) of the FOI Act. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the document that matches the scope of the request. I therefore decided that it would be contrary to the public interest to release the information considered exempt, under subsection 47F(1) of the FOI Act.

Charges

50. I note in Ms Sansom's decision letter of 28 August 2015, she exercised her discretion and her delegation to cap the charges payable to the deposit amount already paid. Accordingly, you are not required to pay any further charges.

Declassification of documents

51. A number of documents falling within the scope of your request were classified. However, I have declassified these documents in their form approved for release.

Disclosure log

52. 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. I confirm the publication date of these documents will be 23 October 2015.

Rights of review

53. The FOI Act provides for rights of review of decisions. Should you be dissatisfied with my decision you have the right to seek review. Please find attached a copy of the fact sheet "Freedom of Information – Your Review Rights" setting out your rights of review at Enclosure 3.

54. If you have any questions in relation to this matter please contact me.

Yours sincerely



Tony Corcoran PSM

Enclosures:

1. Schedule of documents
2. Documents in the form approved for release
3. Freedom of Information – Your Review Rights