



**FOI 077/16/17 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the application by [REDACTED] (Request Number 2) under the *Freedom of Information Act 1982* (FOI Act), for access to:

*“Item 1. Any correspondence and other documents exchanged between the Department of Defence or any person or entity on its behalf, and Dr Andrew Bartholomaeus regarding advice in relation to the Human Health Risk Assessment in relation to the use of AFFF at the RAAF Base Williamtown;*

*Item 2. Any correspondence and other documents exchanged between the Department of Defence or any person or entity on its behalf, and Dr Roger Drew regarding advice in relation to the Human Health Risk Assessment in relation to the use of AFFF at the RAAF Base Williamtown;*

*Item 3. A copy of the head lease agreement between the Department of Defence and Newcastle Airport Pty Ltd dated 16 May 2016;*

*Item 4. Any agreement or other document in relation to airfield rescue and firefighting services or any other services provided by the Department of Defence or any person or entity on its behalf, to Newcastle Airport Pty Ltd or any person or entity on its behalf; and*

*Item 5. Any documents recording or referring to the trial or use of alternative products to AFFF as detailed in the ‘Environmental Guidelines for Management of Fire Fighting Aqueous Film Forming Foam (AFFF) Products’ prepared for Defence Environmental Managers and Users (June 2007) or any other source, in the period 1 January 2000 to date.”*

**FOI decision maker**

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

**Documents identified**

3. I identified 15 documents as matching the description of the request.

4. The decision in relation to each document is detailed in a schedule of documents.

5. I have added an FOI reference number and item number to each of the documents, which corresponds with the schedule.

## Decision

6. I have decided to:
- a. release 7 documents in full;
  - b. partially release 4 documents in accordance with section 22(1)(a)(ii) [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 section 47G [public interest conditional exemptions - business] and/or section 47E [public interest conditional exemptions – certain operations of an agency] of the FOI Act;
  - c. deny access to 4 documents on the grounds that the material is considered exempt under section 47G [public interest condition exemptions - business], section 47E [public interest conditional exemptions – certain operations of an agency] and/or section 47C [public interest conditional exemptions – deliberative processes] of the FOI Act;
  - d. refuse access to documents for Item1 of the request under sub paragraph 24A(1)(b)(ii) [requests may be refused if documents cannot be found or have not been received] of the FOI Act; and
  - e. remove irrelevant material that is not within the scope of the request in accordance with section 22(1)(a)(ii) of the FOI Act.

## Material taken into account

7. 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; and
  - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

## Reasons for decision

### Section 47C - deliberative process

8. Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure requirements “*if its disclosure under the Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of... an agency*”.

9. I have taken into account the Guidelines issued by the Australian Information Commissioner, noting that one consideration in the exemption under section 47C is whether the document includes content of a specific type, namely deliberative matter. I have determined that some of the material contained is exempt under section 47C as it is deliberative.

10. I also considered the question of purely factual material. In relation to section 47C considerations under the FOI Act, I have taken into account the Guidelines issued by the Australian Information Commissioner that ‘purely factual material’ that would not be regarded as deliberative matter would include:

- a. content that is merely descriptive;
- b. incidental administrative content;
- c. procedural or day-to-day content;
- d. the decision or conclusion reached at the end of the deliberative process; and
- e. matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

11. I have also taken into account that while purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to the provision of policy advice and elaborates its context or likely impact, it may potentially come within the deliberative document exemption.

12. In my view, the documents contain options, opinions, recommendations and matters that are currently being considered by the Department prior to briefing the Minister for Defence. The documents contain material about Defence's policy-forming processes, dealing with the merit of particular issues, and proposing options for consideration closely intertwined with factual information.

13. Options contained are still being considered and deliberated upon within Defence.

14. There is a risk, if the documents were released intact, that Defence would have options curtailed by the premature release of sensitive considerations, with a resultant detrimental impact on planning and implementation of future Defence capabilities.

15. Release of the deliberative matter contained in the documents would harm the smooth operation of Defence business including the ability for Defence to present and communicate frank preliminary advice at the highest levels to the Government. Taking the above into consideration, I have decided that documents are conditionally exempt under subsection 47C(1) of the FOI Act.

### **Section 47G – business**

16. Upon examination of the documents, I identified business information of a third party.

17. Section 47G of the FOI Act states:

*A document is conditionally exempt if it discloses under this Act 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.*

18. I note that the 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.

19. The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. I am satisfied that the effect of disclosing the identified material could have an adverse effect on a company as disclosure of their capabilities and the way in which Defence assessed their submission could diminish

the competitive nature of the business and could affect the profitability of their business operations.

20. In light of the above, I have decided that the specified material identified is conditionally exempt pursuant to section 47G of the FOI Act.

### **Section 47E – certain operations of agencies**

21. 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...*

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

23. 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 Air Force operations.

24. I am 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 divulge areas of capability interest. I have decided that the specified material identified in the documents is conditionally exempt pursuant to subsection 47E(d) of the FOI Act.

### **Public interest considerations – sections 47C, 47G and 47E(d)**

25. 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”.

26. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the Guidelines provided by the Australian Information Commissioner, together with a 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. Disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, the disclosure of advice, opinions, recommendations and matters currently being considered by the Department prior to a decision being made and a brief given to the Minister for Defence, would not increase public participation in Government processes nor would it, in my view, increase scrutiny or discussion of Government activities.

27. There is also a strong public interest in not releasing information that would unreasonably affect a business. Given Defence’s strong links with industry, it is imperative that Defence be able to collect and retain sensitive commercial information without fear that the material would be released without authorisation.

28. The disclosure of the information considered conditionally exempt under section 47E would potentially compromise details about the Royal Australian Air Force and its organisation and staffing at a particular site. Disclosing such information could undermine the

Air Force's ability to complete its mandated role, namely defending Australia and its national interests from the air.

29. Accordingly, I consider that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Therefore, I have decided that it would be contrary to the public interest to release the information considered exempt under sections 47C, 47G and 47E of the FOI Act.

30. None of the factors listed in section 11B(4) [irrelevant factors] were taken into account when making my decision.

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

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

*(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 or 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.*

**Searches conducted for Item 1**

32. Searches were undertaken within Estate and Infrastructure Group of both physical files and Defence's electronic records management system (Objective) using the search term 'Bartholomaeus'. No records could be located.

33. Defence has no records in relation to communications with Dr Andrew Bartholomaeus. My understanding is that he may have been engaged by the Commonwealth Department of Health.

34. Based on the above, I am satisfied that no documents could be found matching the scope for item 1. Accordingly I have decided to refuse access to this item under section 24A of the FOI Act.

**Further Information**

35. Some of the documents matching the scope of this request contained a dissemination limiting marker. As the documents are approved for public release the marker has been struck through.

**HelenBlain**

Digitally signed by HelenBlain

DN: c=AU, o=GOV, ou=DoD,

ou=PKI, ou=Personnel,

cn=HelenBlain

Date: 2016.12.12 09:20:17 +11'00'

Helen Blain  
Accredited Decision Maker  
Estate and Infrastructure Group

December 2016