



Australian Government
Department of Defence

Reference: AM2865727

FOI 147/16/17 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) the dates, flight and/or attack plans for each time Australian F/A-18 aircraft entered Syrian Air Space for the period 1 July 2016 - 30 September 2016; and

b) the legal advice provided to the government outlining the legal basis for Australia's involvement in the aerial bombing of Syria.

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 6 documents as matching the description of Item a. of the request.
4. JOC does not own any documents matching the description of Item b. of the request.
5. I have added an FOI reference number and Serial number to each of the documents.

Decision

6. I have decided to:
 - a. partially release 6 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 33(a)(i) [Documents affecting national security] of the FOI Act; and
 - b. remove irrelevant material as referred to in 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;
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
 - e. advice received from Headquarters Air Command, Air and Space Operations;

Reasons for decision

Section 22 – Edited copies with exempt or irrelevant matter deleted

8. Section 22 of the FOI Act provides that if an agency or Minister decides to:

(i) refuse access to an exempt document; or

(ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access;

and it is reasonably practicable to prepare a copy of the document modified by deletions, the agency or Minister must give the applicant access to the edited copy.

9. The documents referred to under this provision contained only a small amount of information relevant to the request. In consideration of the above I decided that it was reasonable to remove the irrelevant material, specifically the information that was not related to the dates, flight and/or attack plans for each time Australian F/A-18 aircraft entered Syrian Air Space for the period 1 July 2016 - 30 September 2016 as stated in the scope of the request and release the document in that form.

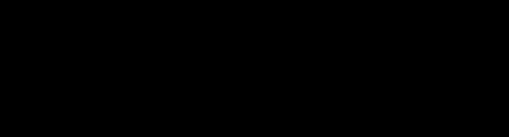
Section 33(a)(i) – Documents affecting national security

10. I decided to exempt material from release, in part, pursuant to subsection 33(a)(i) of the FOI Act. I was satisfied that the relevant material is exempt under subparagraph 33(a)(i) of the FOI Act because it is of a sensitive nature, and pertains to information relating to ADF operations.

11. I formed the view that, if this information was disclosed it could reasonably be expected to cause damage to the security of the Commonwealth and the ADF. If an adversary could identify the locations identified in the documents it would give away the specific location and routes involved in the ADF operations, thus compromising the capability and operational nature of the ADF.

Further Information

12. 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


COL Michael Collie
Accredited Decision Maker
Headquarters Joint Operations Command

15 December 2016



Australian Government
Department of Defence

Reference: R28329409

FOI 147/16/17 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) the dates, flight and/or attack plans for each time Australian F/A-18 aircraft entered Syrian Air Space for the period 1 July 2016 - 30 September 2016; and

b) the legal advice provided to the government outlining the legal basis for Australia's involvement in the aerial bombing of Syria.

FOI decision maker

2. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision in relation to Item b) of this FOI request. Item a) is subject to a separate Statement of Reasons.

Documents identified

3. Defence Legal Division identified one document as matching the description of Item b) of the request.

Decision

4. In relation to Item b) I have decided to deny access to the identified document under section 42 [documents subject to legal professional privilege] of the FOI Act.

Material taken into account

5. 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. advice from Defence Legal Division, as well as the Attorney-General's Department.

Reasons for decision

Section 42 –Documents subject to legal professional privilege

6. Upon examination of the identified document, I found it was a copy of advice from the Office of International Law, Attorney-General's Department to Defence. I note that the advice is unsigned and undated, and as such may be considered a draft document. Nonetheless, the information contained in the document is considered to be legal advice, which could be privileged from production in legal proceedings, on the grounds of legal professional privilege (LPP).

7. Paragraph 5.117 of the Guidelines state:

...The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

8. At common law, determining whether a communication is privileged requires a consideration of: whether there is a legal adviser-client relationship; whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation; whether the advice given is independent; and whether the advice given is confidential.

9. Taking into account the above requirements of the Guidelines, I found that the identified document is legal advice provided by legal professionals to their respective clients and was for the dominant purpose of providing legal advice in relation to a specific matter. The privilege created by that relationship for the provision of the legal advice has not been waived.

10. I find that the release of that information would involve the disclosure of information that would be exempt from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I am satisfied that the information is exempt under section 42 of the FOI Act.

Further Information

11. Defence Legal Division advised that, under the Legal Services Directions 2005, which are a set of binding rules issued by a former Attorney-General about the performance of Commonwealth legal work, the provision of legal advice to government on matters of national security and public international law must, with some very limited exceptions, be provided by the Attorney-General's Department. Consequently, if any legal advice has been provided which falls within the ambit of this request, it would have come from the Attorney-General's Department.

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Ms Nicola Viney
Accredited Decision Maker
Associate Secretary Group