



Our reference: FOI 197/13/14



By email:

FREEDOM OF INFORMATION REQUEST NO: 197/13/14 – NOTICE OF DECISION

Dear

1. I refer to your email of 21 November 2013 to The Commonwealth Attorney-General's Department which was transferred under section 16(1)(a)/(b) of the FOI Act to the Department of Defence, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

"a copy of the Avalon Airport lease and any documents amending that document."

2. We interpreted your request as:

Item 1 - A copy of the Commonwealth of Australia ("the Lessor") and Avalon Airport Geelong Pty Limited ACN 069 136 652 ("the Lessee") Lease of Avalon Airport dated the 7 February 1997; and

Item 2 - any documents amending the Lease of Avalon Airport.

3. You did not disagree with our interpretation of your request.

Background

4. Following the receipt of your email of 21 November 2013, your request was registered under the FOI Act. The thirty-day statutory period for processing your request commenced on that date, but was suspended when we dispatched our preliminary assessment of charges letter to you on 27 November 2013. The thirty-day statutory period for processing recommenced when we received your authorisation to pay the required deposit against the estimated charges on 28 November 2013. Therefore, the thirty-day statutory deadline was due expire on 21 December 2013.

5. By email of 5 December 2013, you were advised of the requirement to consult a third party under section 27 [Consultation – business documents] of the FOI Act, before making a decision on the release of the document.

6. Subsection 15(6) of the FOI Act provides for an extension of 30-days to the statutory time limit for processing requests. Therefore, the deadline for providing you with the decision on your request is now **20 January 2014**.

7. 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

8. Mr Anthony Atkinson, Project Manager, Strategic Information Management, Defence Support and Reform Group is the accredited decision maker, under the FOI Act, in relation to your request.

Document identified

9. Mr Atkinson identified one document as matching interpretation of your request “Lease of Avalon Airport dated 7 February 1997”.

Decision

10. Following examination of the document and third party consultation, Mr Atkinson decided to:

- a. release one document (Item 1) with deletions made in accordance with section 22 [Access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is exempt under section 47 [Documents disclosing trade secrets or commercially valuable information] of the FOI Act, and
- b. refuse access to one Item (Item 2) under section 24A [document cannot be found or do not exist] of the FOI Act.

Material taken into account

11. In making his decision, Mr Atkinson had regard to:

- a. the terms of the FOI request;
 - b. the content of the document that falls within the scope of the request;
 - c. the provisions of the FOI Act;
 - d. the *guidelines published by the Office of the Australian Information Commissioner (OAIC) under section 93 of the FOI Act (the guidelines)*;
 - e. advice received from departmental subject matter experts; and
 - f. response received from the third party consultation process.
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Reasons for decision

Section 47 – Documents disclosing trade secrets or commercially valuable information

12. Section 47 of the FOI Act relevantly provides:

- (1) A document is an exempt document if its disclosure under this Act would disclose:*
- (a) trade secrets; or*
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed."*

13. In Mr Atkinson's view, subsection 47(1)(b) of the FOI Act applies on the basis that the information disclosed in the relevant document has a commercial value pursuant to section 47.

14. In making this assertion, Mr Atkinson noted that the subject of the lease, a commercial airport, is uncommon and its value is intrinsically related to the negotiated terms.

15. Mr Atkinson was satisfied that, if released, this material would, or could reasonably be expected to destroyed or diminish the commercial value for the company.

16. Section 93A of the FOI Act provides that the Australian Information Commissioner can issue guidelines about the operation of the FOI Act (Guidelines). Section 93A also requires that regard must be had to the Guidelines when performing a function or exercising a power under the FOI Act.

17. Part 5 of the Guidelines relates to information having a commercial value. Paragraph 5.188 of the Guidelines relevantly provides:

To be exempt under s 47(1)(b) a document must satisfy two criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body*
- the commercial value of the information would, or could reasonably be expected to be, destroyed or diminished if it was disclosed.*

18. Mr Atkinson considered the following factors as identified in Paragraph 5.189 of the Guidelines, to assist in deciding whether the information contained in the requested document had commercial value:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors*
- whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information*
- whether the information is still current or out of date (out of date information may no longer have any value)*
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.*
- the information in the Document has commercial value consistent with the Guidelines because it is current and because it confers a competitive advantage in negotiations with potential sub-tenants. Disclosure of the information would destroy this advantage and have an adverse effect on Avalon Airport's business.*

19. Mr Atkinson considered that the information in the document has commercial value consistent with the Guidelines, because it is current and because it confers a competitive advantage in negotiations with potential sub-tenants. Disclosure of the information would destroy this advantage and have an adverse effect on Avalon Airport's business.

20. In light of this, Mr Atkinson can not grant access to the requested documents under section 47(1)(b) of the FOI Act

Section 24A(1) of the FOI Act – Documents do not exist

21. Mr Atkinson has refused access to the document requested in Item 2, under section 24A(1)(b)(ii) [documents do not exist] of the FOI Act. 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 lost 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 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.

22. Paragraph 8.41 of the Guidelines also gives guidance as to what is required to be included within this statement of reasons to refuse a request under section 24A(1);

8.41 The statement of reasons given to the applicant should sufficiently identify the document and give reasons as to why it cannot be found or why it is known that it no longer exists. The statement should describe the steps the agency took to search for it.

23. With respect to Item 2, the relevant area in Defence advised that no documents amending the Lease of Avalon Airport exist as there have been any amendments made to the Lease.

24. In light of this, Mr Atkinson can not grant access to the requested documents under section 24A(1)(b)(ii) of the FOI Act.

Third party consultation

25. Where release of a document may disclose a trade secret or commercially valuable information belonging to an individual, organisation or undertaking other than the applicant, the decision maker must consult the relevant parties.

26. Upon consultation, the third party objected to the release of information contained within the document. Mr Atkinson considered the third party's comments, and decided to release the document with deletions, as set out in the decision recorded in paragraph 5 of this letter.

27. In accordance with subsection 27(6) [Notice of decision to give access] of the FOI Act, I am required to advise the objecting third party of Mr Atkinson's decision to release their business information.

28. This Department is prevented by paragraph 27(7) [Access not to be given until review or appeal opportunities have run out] of the FOI Act, from providing documents to you until it

becomes apparent that the third party does not propose to exercise their right to seek review of the decision or until the review process has been completed. Accordingly, the third party has until 20 February 2014 to appeal the decision. Accordingly, I will write to you after this date to inform you of the outcome

29. The FOI Act may be found at website <http://www.comlaw.gov.au> .

Payment of Charges

30. In our letter, dated 27 November 2013, the department estimated the cost associated with processing your request to be [] You agreed to pay charges for the administration of your request on 27 November 2013.

31. Accordingly, you will be required to pay the remaining []. We will provide you with a payment authority form to be completed when it becomes apparent that either the third party does not propose to exercise its right to seek review or the review process have been completed.

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" is at Enclosure 1.

Further advice

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

Yours sincerely

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Andrea Sansom
Acting Director
Freedom of Information
17 January 2014

Enclosure 1 Fact Sheet: Freedom of Information – Your Review Rights