



Reference: AF28536110

FOI 234/16/17 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:

“1. Any meeting agenda, meeting invites, or correspondence regarding the same in relation to the meeting at Taylors Beach convened by Ian Lyle of NSW Department of Primary Industries in conjunction with Department of Defence, NSW Environmental Protection Authority and the NSW Food Authority in relation to issues relating to the use of AFFF and attended by oyster farmers on or around 1 October 2015;

2. Any file notes, memos, or reports relating to the meeting at Taylors Beach convened by Ian Lyle of NSW Department of Primary Industries in conjunction with Department of Defence, NSW Environmental Protection Authority and the NSW Food Authority in relation to issues relating to the use of AFFF and attended by oyster farmers on or around 1 October 2015;

3. Any meeting agenda, meeting invites, or correspondence regarding the same in relation to the meeting attended by RAAF Base personnel (including but not limited to Air Commodore Craig Heap) in relation to issues relating to the use of AFFF and attended by oyster farmers in or around April or May 2016; and

4. Any file notes, memos, or reports recording the meeting attended by RAAF Base personnel (including but not limited to Air Commodore Craig Heap) in relation to issues relating to the use of AFFF and attended by oyster farmers in or around April or May 2016.

Excluding personal email addresses, signatures, personnel (PMKeyS) numbers and mobile telephone numbers contained in documents that fall within the scope of this request. Also excluding duplicates of documents.”

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 5 documents as matching the description of the request.

4. The decision in relation to each document is detailed in a schedule of documents. I have added an FOI reference number and serial number to each of the documents, which corresponds with the schedule.

Decision

5. I have decided to:

- a. release 4 documents for Items 3 and 4 in full;

- b. partially release one document for Items 3 and 4 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 considered exempt under section 42 [documents subject to legal professional privilege];
- c. refuse access to documents for Items 1 and 2 of the request under subparagraph 24A(1)(b)(ii)[requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and
- d. remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

6. 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 third parties consulted under section 27 [consultation – Commonwealth State relations] of the FOI Act.

Section 42 – documents subject to legal professional privilege

7. I found that the identified sections contained legal advice to inform decision makers, which could be privileged from production in legal proceedings on the grounds of legal professional privilege (LPP).

8. Paragraphs 5.128 to 5.118 of the Guidelines state:

...The underlying policy basis for [Legal Professional Privilege] 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.

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. I found that the legal advice provided in the documents was provided by legal professionals to Defence 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 LPP. Accordingly, I am satisfied that the information is exempt under section 42 of the FOI Act.

Section 24A (1) of the FOI Act

11. 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.

12. Extensive searches were conducted across Estate and Infrastructure Group, Air Force and Defence Legal for documents regarding a meeting at Taylors Beach on 1 October 2015.

13. Based on the above, I am satisfied that no documents could be found matching the scope of Items 1 and 2 of this request. Accordingly, I have decided to refuse access to Items 1 and 2 under section 24A of the FOI Act.

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Kim Arthur
Accredited Decision Maker
Estate and Infrastructure Group

April 2017