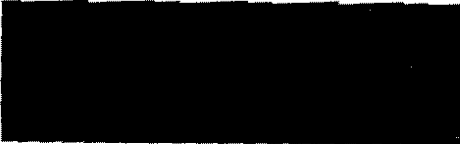




Our reference: FOI 395/13/14



By email: 

Dear 

NOTICE OF DECISION ON FREEDOM OF INFORMATION REQUEST

1. I refer to your email of 15 May 2014, which we received on 19 May 2014, in which you requested access, under the *Freedom of Information Act 1982* (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".

ITEM 3: DoD "OPTASK LINK Identification Supplement", promulgated by the Air and Space Operations Centre.

ITEM 4: RAAF "41 Wing Tasking Intentions". (Further details on this publication I am unsure of, but mention of it is made in our previous emails... "

Background

2. On 27 May 2014 I advised you of the preliminary assessment of charges associated with processing your request. We received your receipt showing payment of the deposit of charges on 14 June 2014. Accordingly, on 27 June 2014, I advised you that the charges had been imposed and the statutory deadline for you to receive a response was due to expire on 6 July 2014.

3. I note that the above mentioned due date is a Sunday, in accordance with the FOI Guidelines issued by the Australian Information Commissioner, if the last day for notifying a decision falls on a Saturday, Sunday or a public holiday, the timeframe will expire on the first day following which is none of those days. As such, the due date for you to receive a response expires on 7 July 2014.

4. The purpose of this letter is to provide you with the decision relating to the documents that are the subject of your request.

FOI decision maker

5. Group Captain C Wallis is the authorised officer pursuant to section 23 of the FOI Act, in relation to your request.

Documents identified

6. Group Captain C Wallis identified four documents as matching the description of your request. You will note when you receive the documents that for ease of reference and for the purpose of processing this request, the decision maker has added an FOI Item number to each of the documents.

Decision

7. Following examination of the documents, Group Captain Wallis has decided to
- a. partially release two documents with deletions made 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 exempt under section 33(a)(ii) [defence of the commonwealth] of the FOI Act; and
 - b. partially release two document with deletions made in accordance with subsection 22(1) of the FOI Act, on the grounds that the deleted material is considered exempt under section 47E(d) [public interest conditional exemptions – certain operations of an agency] of the FOI Act.

Material taken into account

8. In making her decision, Group Captain Wallis had regard to:
- a. the content of the identified documents in issue;
 - b. relevant provisions in the FOI Act;
 - c. paragraph 6.29 of the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
 - d. the Principles on open public sector information issued by the Information Commissioner.

Reasons for decision

Exemption claim – subparagraph 33(a)(ii) of the FOI Act

9. Subparagraph 33(a)(ii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to cause damage to the defence of the Commonwealth. For this exemption to be claimed the decision must be satisfied that there is a “real” and “substantial” risk of damage occurring. It is insufficient that there merely be a possibility of such damage.

10. In regards to the terms 'could reasonably be expected to' and 'damage', the Guidelines provide:

5.13 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of the documents.

5.14 The use of the word 'could' in this qualification is less stringent than 'would', and so requires no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences. Therefore, the reasonable expectation refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future.

5.25 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible...but [should be] determined on the facts of each particular case.

11. Group Captain Wallis found the disclosure of certain information, which relates to Defence security details and details of studies of present and future aircraft processes and procedures and other security identifiers, would cause or, could reasonably be expected to cause, damage to the defence of the Commonwealth.

12. In regards to the 'defence of the Commonwealth', the Guidelines state:

Defence of the Commonwealth

5.28 The Act does not define 'defence of the Commonwealth'. Previous AAT decisions indicate that the term includes:

- *meeting Australia's international obligations*
- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

5.29 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage. However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

13. Group Captain Wallis considered that the documents contain information which would assist third parties to identify certain security details and to understand unique procedures and processes used by Defence aircraft. In respect to the Mosaic theory, the Guidelines state:

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 mosaic that can damage Australia's national security, defence or international relations.

14. Group Captain Wallis advised that while some of the information may be considered harmless in isolation, when taken in conjunction with other documented information a mosaic is created that may reveal damaging information about certain Defence security details and aircraft processes and procedures.

15. Having considered the above, Group Captain Wallis considered that disclosure of this information, if it were to fall into the wrong hands, could endanger the effectiveness of existing and future Defence processes and activities in an operational environment.

16. Accordingly, Group Captain Wallis was satisfied that the deleted material is exempt under section 33(a)(ii) of the FOI Act.

Exemption claim – section 47E(d) of the FOI Act

17. 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...

18. Where access has been denied to information under section 47E(d) of the FOI Act, Group Captain Wallis 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.

19. 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. Group Captain Wallis noted that the reasonable expectation refers to material regarding details of present and future aircrafts processes and procedures.

20. Group Captain Wallis was satisfied that the expected effect of disclosing the 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 (i.e. published on the FOI Disclosure Log) it could be used by individuals to circumvent Defence's detection procedures and enter or leave Australian Sovereign Territory airspace without clearance or detection.

21. In light of the above, Group Captain Wallis decided that specified material identified in the Schedule is in fact conditionally exempt pursuant to subsection 47E(d) of the FOI Act.

22. Subsection 11A(5) [Access to documents on request] of the FOI Act requires Defence to allow access to such conditionally exempt material unless, in the circumstances and on balance, access would be contrary to the public interest.

Rights of access – section 11A

23. Subsection 11A(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. 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 facts 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 the 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.

24. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, Group Captain Wallis considered the range of factors that favour access to a document set out in section 11B(3) [public interest exemptions – factors favouring accessing] of the FOI Act. Group Captain Wallis noted that disclosure may promote some of the objectives of the FOI Act, as information held by the Government is a national resource. However, the disclosure of this information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

25. While Group Captain Wallis noted that the release of this material would be of some interest to you it would not inform public debate on any matter of public importance in any meaningful way. Additionally, disclosure of the information would not promote oversight of public expenditure.

26. Group Captain Wallis also found that disclosure of the information would not allow you further access to your own personal information.

27. In coming to the above decision, Group Captain Wallis had regard to subsection 11B(4) [irrelevant factors] of the FOI Act, which lists factors which must not be taken into account in deciding whether access would, on balance, be contrary to the public interest. None of the factors Group Captain Wallis took into account were listed under subsection 11B(4) of the FOI Act.

28. Accordingly, Group Captain Wallis considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Therefore, Group Captain Wallis decided that it would be contrary to the public interest to release the information considered under subsection 47E(d) of the FOI Act.

Payment of Charges

29. In our letter, dated 27 May 2014, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request on 3 June 2014, and subsequently provided us with a receipt showing your payment of the deposit amount of [REDACTED] on 14 June 2014.

30. Upon completion of your request, after deducting the free decision making time, the actual amount for processing exceeded the original estimate provided to you. However, as explained in the above mentioned letter the amount payable can only be more than the preliminary assessment if the decision is to release all of the documents requested in full. As the documents have not been released to you in full on this occasion the remaining balance is the difference between preliminary assessment of charges [REDACTED] and the deposit [REDACTED] you have already paid.

31. Accordingly you are required to pay the remaining [REDACTED] in order to finalise your request. Please find attached at Enclosure 1 a Payment Authorisation Form for the balance. Once you have completed the form please return to foi@defence.gov.au.

32. Once the remaining charges have been finalised, documents in the form approved for release will be provided to you.

Rights of review

33. 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 2.

FOI Disclosure Log

34. 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 will publish the identified documents relating to this requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Further advice

35. The FOI Act may be accessed online at: <http://www.comlaw.gov.au/Details/C2011C00803>

36. Should you have any questions, please contact this office.

Yours sincerely



Melissa Davidson
Assistant Director
Freedom of Information

2 July 2014

Enclosures:

1. Freedom of Information Payment Authorisation Form
2. Fact Sheet: Freedom of Information – Your Review Rights