



Australian Government

Department of Defence

Office of the Chief Operating Officer

Freedom of Information and
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Our reference: FOI 169/11/12

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

1. I refer to your emails, dated 9 January 2012, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to documents relating to the gifting of four C-130 Hercules Aircraft to the Indonesian Air Force. By email, dated 10 January 2012, you were advised that your requests were considered too broad to be processed and would therefore attract a practical refusal under section 24AA of the FOI Act. By email, dated 14 January 2012, you advised that you wished to revise the scope of your request and provided a suggested revised scope. Following receipt of your email inquiries were made within the department to further assist in revising the scope.

2. I now refer to your email, dated 19 January 2012, in which you advised that you wished to proceed with the following revised scope:

"I seek under the Freedom of Information Act 1982 copies of Ministerial Submissions provided to the Minister of Defence and the Minister for Defence Materiel between 1 July 2011 and 30 December 2012 [sic] relating to the gifting or transfer of C-130 Hercules aircraft to Indonesia."

Clarification of date range

3. I note that the scope above contains the date range 1 July 2011 to 30 December 2012. Our office has interpreted the ending date to be 30 December 2011.

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

FOI decision maker

5. Ms Kathryn Hitchings, Director Strategic External Relations and Education, Strategic Policy Division, is the accredited decision maker, under the FOI Act, in relation to your request.

Documents identified

6. Ms Hitchings identified six documents (containing 24 attachments) which fell within the scope of your request. The documents are listed on the schedule of documents at Enclosure 1.

7. Ms Hitchings noted that the document identified as 6b on the schedule of documents is a draft letter, which was not sent.

Decision

8. Ms Hitchings decided to release 2 attachments intact and deny access to one document (including 2 attachments) under section 33 [documents affecting national security, defence or international relations] of the FOI Act; some material was also removed from these documents, in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, as it was considered irrelevant to the scope of the request. Ms Hitchings also decided to release the remaining five documents (and attachments) with material deleted, in accordance with section 22 of the FOI Act, on the grounds that the deleted material is exempt under sections 33(a)(ii), 33(a)(iii), 33(b) and 47G [public interest conditional exemptions – business] of the FOI Act.

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

Material taken into account

10. In making her decision, Ms Hitchings had regard to:

- the content of the identified documents in issue;
- relevant provisions of the FOI Act;
- the guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the guidelines).

Reasons for decision

Section 33

11. Ms Hitchings found that parts of the documents identified on the schedule of documents as Items 2, 2a, 3 and 3c contained information regarding Australian Defence Force (ADF) capability and capability planning. Ms Hitchings stated that disclosure of such information would damage the ADF's ability to defend Australia and as such the material is considered exempt under section 33(a)(ii) of the FOI Act. Ms Hitchings noted that information regarding ADF capability that is already in the public domain (such as that contained in the public Defence Capability Plan) was not exempted.

12. Ms Hitchings considered that parts of the documents identified on the schedule of documents as Items 1, 1a, 1b, 2, 2a, 2b, 2c, 2d, 3, 3a, 3b, 3c, 4, 4a, 4b, 4c, 4d, 5, 5b, 5c, 5d, 5e, 5f, 5g, 5h and 6, 6a, 6b and 6c were exempt under section 33(a)(iii) of the FOI Act as disclosure of the exempted material would damage Australia's relationships with foreign governments. Much of the exempted information was shared on the explicit or implied understanding that it was disclosed in confidence, particularly discussions and correspondence between senior officials. Ms Hitchings noted that *while some of the information is not harmful when taken in isolation, when combined with other information it could reasonably be expected to cause damage to bilateral relationships.*

13. Ms Hitchings also found that parts of the documents identified on the schedule of documents as Items 1, 1a, 2, 2a, 2c, 2d, 3, 3a, 3b, 3c, 5, 5b, 5c, 5d, 5f, 5h, 6a and 6b contained information communicated in confidence to the Australian Government by other foreign governments. Ms Hitchings noted that the information was communicated, often between senior officials in both formal and informal contexts, during negotiations with the implied understanding that the information would be kept confidential. As such, Ms Hitchings decided that the material is exempt under section 33(b) of the FOI Act.

Section 47G

14. Ms Hitchings found that parts of Item 3, 5, 6 and 6a contained information regarding a commercial organisation. She considered that this information, if released, would adversely affect the organisation in respect of their lawful business and commercial affairs. Therefore, Ms Hitchings was satisfied that those parts of the above mentioned documents are conditionally exempt under section 47G of the FOI Act.

Section 47G – public interest considerations

15. Section 11A(5) of the FOI Act provides that conditionally exempt matter must be released unless, in the circumstances, access to that document would, on balance, be contrary to the public interest.

16. In assessing whether disclosure of the material, is on balance, contrary to the public interest, Ms Hitchings considered the range of factors that favour access set out in section 11B(3). She considered that disclosure of the identified documents, generally, may promote the objects of the FOI Act, by granting access to government held information. However, she did not consider that disclosure of the specific conditionally exempt material would inform debate on a matter of public importance, nor promote effective oversight of public expenditure.

17. Ms Hitchings has considered that the conditionally exempt material was provided to Defence on an ad hoc basis by a commercial organisation, it is plausible that this entity would be less likely to provide such candid information in the future were it to be released. Furthermore, if the conditionally exempt material was released it could diminish their competitive advantage over their competitors in the future. Ms Hitchings considered it is in the public interest that Defence is seen to protect sensitive proprietary information of commercial organisations it deals with.

18. On balance, Ms Hitchings concluded that the disclosure of the conditionally exempt material would be contrary to the public interest.

Section 22

19. Ms Hitchings considered section 22 of the FOI Act in deciding whether documents could be provided with irrelevant and exempt matter deleted.

20. Ms Hitchings found that parts of the documents identified on the schedule of documents as Items 1 and 1a and all of Item 1b contained information which did not relate to the '*gifting or transfer of C-130 Hercules aircraft to Indonesia*' and is therefore considered irrelevant to the scope of the request. Material relating to matters other than this issue have been removed in accordance with section 22(1)(a)(ii) of the FOI Act.

21. Further, in regards to the documents identified on the schedule of documents as Items 1, 1a, 1b, 2c, 2d, 3b, 4b, 4c, 5c, 5d, 5f, 5h and 6c, Ms Hitchings decided to deny access as once the exempt material was removed there was no information of relevant substance remaining in the documents.

Payment of Charges

22. In our letter, dated 24 January 2012, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. By email, dated 13 February 2012, you sought a review of the estimated charges on financial hardship grounds.

23. In a letter, dated 9 March 2012, you were advised of my decision to reduce the charges payable to one quarter of the original estimate; accordingly, the charges were imposed at [REDACTED]. By email, dated 16 April 2012, you agreed to pay the reduced charges and paid the full amount.

24. Upon completion of your request, the actual amount for processing was calculated, after deducting the 5 hours free decision making time, to be [REDACTED]. While the actual charges far exceeded the original and revised estimates, as explained in our letter, dated 24 January 2012, the amount payable can only be more than the preliminary assessment if the decision is to release all of the requested documents in full. As such, you are not required to pay any further processing charges in respect to this request.

Rights of review

25. The FOI Act provides for rights of review of decisions. A copy of the fact sheet "Freedom of Information – Your Review Rights" setting out your rights of review is at Enclosure 2.

Dispatch of the documents

26. Defence is currently finalising the documents in the form for release, the documents will be provided, by email, as soon as possible but no later than 18 May 2012.

FOI Disclosure Log

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

Further advice

28. Should you have any questions in regard to this matter please contact me directly on (07) 3332 6359. Alternatively, the FOI team can also be contacted on the details at the top of this letter.

Yours sincerely



Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

11 May 2012

Enclosures:

1. Schedule of documents
2. Fact Sheet: Freedom of Information – Your Review Rights