



Defence Reference: FOI 529/19/20

Air Force Reference: BP10058066

**FOI 529/19/20 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:

*“I am seeking documents under the Freedom of Information Act 1982 Specifically my request refers to the provision of pdf format Flight Manuals for ADF aircraft, commonly referred to as DI (AF) AAP (Air Australia Publications) for the following aircraft: AF-18A Hornet S-70A-9 Blackhawk PC-21 Hawk 127 The Flight Manuals for these aircraft do not usually contain sensitive information, or data that is not already in the public domain, My request, as an Australian Citizen, is to enhance an historic collection of Australian flight manuals and is for personal use only. I recognise the sensitivity of various Flight Manual supplements and am not requesting those volumes. My request pertains specifically to what are commonly referred to as "I" Flight Manuals which pertain to basic operation of the aircraft including systems, normal and non-normal procedures, limitations, flight characteristics etc. The aircraft I have requested documents for are either approaching end-of-service life or are designated training assets”*

**FOI decision maker**

2. I am the authorised officer, pursuant to section 23 of the FOI Act to make a decision on this FOI request.

**Documents identified**

3. I identified 10 documents as matching the description of the request.

**Decision**

4. I have decided to deny access to all documents on the grounds that the material is considered exempt under section 33 [Documents affecting national security, defence or international relations], section 45 [Documents containing material obtained in confidence] and section 47 [Documents disclosing trade secrets or commercially valuable information] 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); and

e. advice provided by relevant Defence subject matter experts.

### **Reasons for decision**

#### **Section 33 – Documents affecting national security, defence or international relations**

6. Section 33(a)(i) exempts a document if disclosure of the document would, or could reasonably be expected to, cause damage to the security of the Commonwealth. The term “security of the Commonwealth” broadly refers to “the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests”. In order for the exemption to apply, it must be shown that disclosure “would, or could reasonably be expected to” cause damage.

7. The Guidelines provide that the term “reasonably expected” in the context of section 33(a)(i) requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27 the Guidelines indicate that there must be “real” and “substantial” grounds for expecting the damage to occur which can be supported by evidence or reasoning.

8. A mere allegation or mere possibility of damage will be insufficient for the purposes of the exemption. The term “damage” is not confined to loss or damage in monetary terms and the relevant damage may be of an intangible nature.

9. I find that disclosure of the document exempted under section 33(a)(i) would cause, or could reasonably be expected to cause, damage to the “security of the Commonwealth”. The documents identified contain information relating to the performance capabilities of the aircraft.

10. Notwithstanding the basis of your request is for “personal use only”, disclosure of this information would expose these performance capabilities and allow bad actors with hostile intentions to exploit the Australian Defence Force while these aircraft are in operational service. In light of this, I have decided that the specified material identified within scope of this request is exempt pursuant to section 33(a)(i) of the FOI Act.

11. Further, section 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”. The guidelines state:

*Defence of the Commonwealth*

*5.34 The FOI Act does not define 'defence of the Commonwealth'. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes: ...*

- *Protecting the Defence Force from hindrance or activities which would prejudice its effectiveness ...*

12. Having regard to the Guidelines relating to what “could reasonably be expected” to “cause damage” to the defence of the Commonwealth, and notwithstanding the basis of your request is for “personal use only”, I consider that the information in the identified documents falls within this category. Specifically, in evaluating the potential harmful effects of disclosing information in the document that would affect Australia's national security, in regards to the content of the materials.

13. I have also taken into account the intelligence technique known as the “mosaic theory”. This theory holds that the aggregation of individual pieces of information, when combined with information already in the public domain, can generate a composite “mosaic” which could lead to an adversary applying this information and therefore undermining Defence's capability and effectiveness.

14. Having particular regard to the nature of the information within these documents, I have decided that the release of this material could reasonably be expected to cause damage to the defence of the Commonwealth. It is for those reasons I have decided that the specified material identified within scope of this request is exempt pursuant to section 33(a)(ii) of the FOI Act.

15. Finally, section 33(a)(iii) of the FOI Act exempts material from release if its disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. I have identified information that could reasonably be expected to cause damage to the international relations of the Commonwealth. Paragraph 5.36 of the Guidelines, describes international relations as the ability of the Australian Government to maintain good working relations with other governments and international organisations.

16. Section 33(b) of the FOI Act exempts material from release if its disclosure “*would divulge any information or matter communicated in confidence by or on behalf of a foreign government...to the Government of the Commonwealth...*”. Information within the documents identified has been obtained via an internationally binding agreement to protect the information. The International Traffic in Arms Regulations (ITARs) requires the receiving nation of US provided military equipment, either through direct commercial sales, or foreign military sales to protect the information.

17. Any breach of the Regulations could lead to penalties being imposed, which can include financial penalties, loss of licences, loss of future relationships or loss of the further provision of military equipment. The F/A-18A Hornet and S-70A-9 Blackhawk aircraft are both ITARs encumbered defence items of United States origin and remain so during disposal from Australian Defence Force service.

18. Release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interests. Further, this information is not readily available to the public. As such any release of the information would cause a loss of trust and confidence in the Australian government, and foreign officials who may be less willing to engage with Australian Government officials and Australian businesses in the future. The national interest in not disclosing this information outweighs interest in disclosure.

19. Accordingly, I consider the release of the information would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth and exempt the release of this information under section 33(a)(iii) of the FOI Act. Any requests for information relating to these aircraft should be directed to the United States manufacturer.

#### **Section 45 – Documents containing material obtained in confidence**

20. Where access has been denied under section 45 of the FOI Act, I considered that the material would, or could reasonably be expected to cause damage to ongoing commercial relationships of the Commonwealth by divulging information communicated in confidence.

21. Section 45(1) of the FOI Act states “A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.” In relation to a breach of confidence, the Guidelines, paragraphs 5.158 and 5.159, provide that:

*5.158 A breach of confidence is the failure of a recipient to keep information, which has been communicated in circumstances giving rise to the obligation of confidence, confidential. The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.*

*5.159 To found an action for breach of confidence (which means that s45 would apply), the following five criteria must be satisfied in relation to the information:*

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual understanding of confidence*
- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

22. Upon examination of the documents identified, and taking into account advice received from relevant subject matter experts within Defence, I formed the view that there exists an obligation between Pilatus and Lockheed Martin Australia, and the Department of Defence to maintain confidentiality of Intellectual Property (IP). This IP is owned by the relevant companies and has been provided to the Commonwealth in confidence for Defence purposes only.

23. Accordingly the material being sought is of a confidential nature, and was provided to the Commonwealth on the basis of a mutual understanding of confidence. Release of such information without the explicit agreement of the other party would breach that confidence, and could diminish the contractual relationship with Defence and the Commonwealth. If the information was made public it could reasonably cause an adverse effect on Defence’s ability to conduct and manage working relationships with contracted companies in the future.

#### **Section 47 – Documents disclosing trade secrets or commercially valuable information**

24. Section 47 of the FOI Act provides that a document is exempt from disclosure requirements “if its disclosure under the 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”. In regards to the terms “commercial value” and “destroyed or diminished”, the Guidelines provide:

*5.205 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have ‘exchange value’, in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case whether information has 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.*

*5.206 The time and money invested in generating information will not necessarily mean that it has commercial value. Information that is costly to produce will not necessarily have intrinsic commercial value.*

*5.207 The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — must be established separately by satisfactory evidence. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known. Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.*

25. Upon examination of the documents, I formed the view that there exists an obligation on the Department of Defence to ensure commercially sensitive information is protected. The documents contain commercially valuable information that was communicated to the Commonwealth for Defence purposes only. This information is considered as valuable intellectual property of the developer, and is not generally known information.

26. Notwithstanding the basis of your request is for “personal use only”, release of this information could reasonably be expected to provide competitors of the relevant companies with critical and sensitive information that would otherwise only be known to limited parties.

27. The material being sought was provided to the Commonwealth on the basis of a mutual understanding of contractual confidence. Release of such information without the explicit agreement of BAE Systems, Pilatus and Lockheed Martin Australia, could diminish the relationship with Defence and the Commonwealth and could breach that confidence and undermine any trust in Defence’s ability to protect company intellectual property and commercial information, and restrict the future flow of such information. If the information was made public it could reasonably cause an adverse effect on Defence’s ability to conduct and manage working relationships with its contractors in the future.

28. In light of the above, I have decided that the specified material identified is exempt pursuant to section 47(1) of the FOI Act.



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