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## 'AD' and Civil Aviation Safety Authority [2013] AICmr 51 (24 April 2013)

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**Decision and reasons for decision of  
Acting Freedom of Information Commissioner, Toni Pirani**

**Applicant:** 'AD'  
**Respondent:** Civil Aviation Safety Authority  
**Other parties:** The Association of Professional Engineers, Scientists & Managers, Australia  
**Decision date:** 24 April 2013  
**Application number:** MR11/00359  
**Catchwords:** Freedom of information – Scope of review of access grant decision — (CTH) [Freedom of Information Act 1982 s 27, 47, 47E, 47G](#)  
Freedom of Information — Whether documents affecting business affairs conditionally exempt from release — Whether adverse effect of release unreasonable — (CTH) [Freedom of Information Act 1982 ss 11A\(5\), 47G](#)

### Contents

#### Summary

1. I affirm the decision of the Civil Aviation Safety Authority (CASA) of 29 August 2011 to grant access to documents requested under the [Freedom of Information Act 1982](#) (the **FOI Act**).

#### Background

2. On 29 November 2010, the Association of Professional Engineers, Scientists & Managers, Australia (**APESMA**) wrote to CASA about work carried out on an Australian aircraft. CASA initiated an investigation which was finalised on 20 April 2011.
3. On 2 May 2011, APESMA applied to CASA for access to the investigation report.
4. On 26 May 2011, CASA consulted an affected third party (the **applicant**), under s 27 of the FOI Act in relation to the investigation report. In particular, CASA offered the applicant the

opportunity to make submissions that the investigation report was an exempt document under the business affairs exemption in s 47G of the FOI Act. On 7 June 2011 the applicant did so.

5. On 30 June 2011, CASA advised the applicant of its decision to release the Executive Summary to the investigation report, with the names of individuals removed under s 47F (personal affairs) of the FOI Act. The rest of the report was said to be exempt under both ss 47F and 47G.
6. On 29 July 2011, the applicant sought internal review of this decision on the basis that the Executive Summary contains a distilled version of the information in the body of the report, which was itself exempt.
7. On 29 August 2011, CASA advised the applicant that in addition to releasing the Executive Summary to the investigation report with the name of individuals removed to protect their personal privacy, CASA considered it was not contrary to the public interest to grant access to the investigation report, subject to deletions so that it would not name or refer to any persons.
8. By letter dated 27 October 2011, the applicant sought IC review of CASA's decision under s 54M of the FOI Act. [\[1\]](#)
9. On 20 December 2011, APESMA applied to the Information Commissioner under s 55A(2) of the FOI Act to be made a review party, as a party whose interests were affected by the IC reviewable decision. This application was granted under s 55A(3) of the FOI Act.

#### Decision under review

10. The decision under review is the decision of CASA on 29 August 2011 to grant access to the investigation report sought by APESMA, subject to deletions so that individuals referred to in the report are not named or identifiable.

#### The scope of IC review of access grant decisions

11. Section 27 of the FOI Act provides for consultation in relation to business documents. A decision to give access to a document after consultation under s 27 is an access grant decision under s 53B of the FOI Act.
12. As was noted by the FOI Commissioner in the decision of *'E' and National Offshore Petroleum Safety and Environmental Management Authority* [\[2012\] AICmr 3](#), the consultation provision in s 27 gives the applicant an opportunity to contend only that a specified exemption or conditional exemption should apply.
13. In its submissions to CASA dated 7 June 2011, the applicant contended that the investigation report was exempt under s 47G. In its application for IC review, the applicant contended that the investigation report was an exempt document under both ss 47F and 47G of the FOI Act.
14. Because the applicant was consulted under s 27 of the FOI Act, it was only able to make exemption contentions under ss 47 or 47G. CASA did not invite the applicant to make exemption contentions in relation to s 47F (under s 27A). As a consequence, in this IC review, I can only consider the applicant's submissions in relation to s 47G.

#### The business exemption (s 47G)

15. The applicant contends that the investigation report is conditionally exempt under s 47G of the FOI Act.
16. Section 47G(1) of the FOI Act provides:

##### **Public interest conditional exemptions—business**

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional

affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or  
 (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

17. Part 6 of the Guidelines discusses the business exemption under s 47G.

**Unreasonable adverse effect of disclosure**

6.165 The presence of 'unreasonably' in s 47G(1) implies a need to balance public and private interests, but this does not amount to the public interest test of s 11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance. This is inherent in the structure of the business information exemption.

6.166 The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business's activities pose a threat to public safety may have a substantial adverse effect on that business but it may be reasonable in the circumstances to disclose it. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality.<sup>[2]</sup> These considerations necessitate a weighing of a public interest (public safety) against a private interest (preserving the profitability of a business) but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.<sup>[3]</sup>

...

**Business or professional affairs**

6.169 The use of the term 'business or professional affairs' distinguishes an individual's personal or private affairs and an organisation's internal affairs. The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.<sup>[4]</sup>

Would or could unreasonably adversely affect

18. Section 47G(1)(a) of the FOI Act applies if disclosure of the information in the documents 'would, or could reasonably be expected to, unreasonably affect [the applicant] adversely in respect of [its] lawful business ... affairs'.
19. The applicant says that the commercial disadvantages that may flow from the release of the investigation report include:
  - (a) an adverse effect on the applicant's business, reputation and goodwill
  - (b) diminishment (sic) of the competitive advantage held by the applicant over its competitors
  - (c) an effect on share price and investor confidence.
20. CASA's primary function is to conduct the safety regulation of civil air operations in Australia and the operation of Australian aircraft overseas.<sup>[5]</sup> The investigation report subject to this review relates to an incident that, prima facie, raises issues of public safety. For this reason, the threshold is high for deciding that the effect of disclosure upon the applicant's business would be unreasonable.<sup>[6]</sup> A party seeking IC review of an access grant decision bears the onus of establishing that access should be refused (s 55D(2)).<sup>[7]</sup>

21. The applicant argues that the investigation report contains significant errors of fact and incorrect findings, and that release in its current form would be unfairly prejudicial to its business. The applicant also says that the report was intended to be an internal document and has not been written for a public audience. As a consequence, specialised knowledge of the subject area is needed to evaluate the report's findings. The applicant says that if the report is released there is the risk the applicant would be exposed to misleading publicity about its maintenance practices and aircraft.
22. I make no comment about the accuracy of CASA's investigation report. However, I consider that the adverse effects identified by the applicant in its submissions could occur, regardless of the accuracy of the report. Maintenance and safety are issues critical to an operator's business and I accept that if CASA's report is released to APESMA, it could reasonably be expected to unreasonably adversely affect the applicant's business.
23. I consider the investigation report is conditionally exempt under s 47G(1)(a) of the FOI Act.

#### Could prejudice the future supply of information

24. Section 47G(1)(b) applies if disclosure of the information in the document 'could reasonably be expected to prejudice the future supply of information to ... an agency for the purpose of the administration of a law of the Commonwealth ... or the administration of matters administered by an agency'.
25. The applicant says that disclosure of the report, or any part of it, would have implications for the future voluntary disclosure of information to CASA by operators and individuals in the industry and voluntary cooperation by industry participants. This, it argues, would make it more difficult for CASA to conduct investigations into safety breaches.
26. The applicant submitted, and I accept, that 'CASA's effective discharge of its functions is dependent to a substantial degree on [this] free flow of information'.
27. In my view, CASA is best placed to identify, and be concerned about, whether disclosure of the investigation report could reasonably be expected to prejudice the future supply of information to it. The applicant raised this issue in its submissions to this IC review, which have been provided to CASA. CASA has not indicated that it considers this to be a real risk and in my view, the applicant has not discharged its onus to establish that access should be refused.

#### Findings

28. The investigation report is conditionally exempt under s 47G(1)(a) of the FOI Act.

#### The public interest test (s 11A(5))

29. I have found that the investigation report is conditionally exempt under s 47G of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'.
30. As the Guidelines explain:
 

[t]he pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure.<sup>[8]</sup>
31. Section 11B(3) of the FOI Act lists factors that favour access when applying the public interest test.<sup>[9]</sup> I consider that two of those factors are applicable in this IC review: promoting the objects of the FOI Act and informing debate on a matter of public importance.
32. Against these factors must be balanced the factors against disclosure. The FOI Act does not specify any factors against disclosure, but the Guidelines contain a non-exhaustive list of factors against disclosure.<sup>[10]</sup> These factors include when disclosure of a document could reasonably be expected to impede the administration of justice generally, including procedural fairness and

when disclosure of a document could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.

33. In relation to the factors favouring disclosure, CASA argues there is a public interest in people being aware of what CASA considers to be maintenance and, regardless of the applicant's views, it considers that the activity subject to the report constituted maintenance. I agree that release of the report would inform debate on a matter of public importance, namely what activities constitute maintenance.
34. In relation to the factors against disclosure the applicant submitted that CASA usually provides affected parties with a draft report, so that submissions can be made before the report is finalised. The applicant says that CASA did not follow its usual practices when preparing the report under review and as a consequence it has been denied procedural fairness because it was not able to make comments on CASA's findings.
35. CASA has advised this office it does not usually consult before finalising investigation reports. CASA says the applicant has raised concerns about the report with it and although those concerns have been considered, CASA has decided not to make any changes to its report. CASA confirmed that the investigation report under review is CASA's final one in relation to the issues raised by APESMA.
36. I note that in the significant period of time that has elapsed since the FOI request was made, the applicant has had the opportunity to make detailed submissions to CASA in relation to the contents of the report. I do not consider that release of the report at this time would impede the administration of justice or deny the applicant procedural fairness.
37. The applicant also says that release of the report would be contrary to the public interest because it would have an adverse effect on the open reporting regime which is essential for CASA's safety management role. As discussed above, CASA has not identified this as an issue it anticipates as affecting its ability to undertake investigations and I do not consider it to be a real possibility.
38. The applicant submitted that the report is factually inaccurate in a number of respects and that its release would prejudice the fair treatment of individuals. It also claimed that the inaccuracies in the report would be likely to mislead or confuse the public.
39. I am not qualified to make any findings in relation to the factual or technical accuracy of CASA's report. Irrespective of its accuracy, the report is an official document of the Government and should be released unless its disclosure would be contrary to the public interest. As CASA has decided to release the document with material deleted to remove identifying details, I do not consider that release of the document would prejudice the fair treatment of individuals.
40. In relation to its submissions that the report would be likely to mislead or confuse the public, the applicant noted the decision of *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 as support for its proposition that:

Whether a document would be likely to mislead or confuse has been considered relevant when considering whether there is sufficient public interest to warrant its disclosure.

41. I note that this case was decided prior to the commencement of the 2010 amendments to the FOI Act that inserted s 11B. Section 11B(4) of the FOI Act lists factors which must not be taken into account in deciding whether access to a document would, on balance, be contrary to the public interest. Two of these factors are: when access to the document could result in any person misinterpreting or misunderstanding it, or when access to the document could result in confusion or unnecessary debate. As a consequence, I am not able to give any weight to the applicant's contention that it would be contrary to the public interest to release the investigation report because it might be confusing or misleading.
42. In balancing the factors for and against disclosure, I find that the factors favouring access outweigh those that do not.
43. I consider that giving APESMA access to the investigation report is not contrary to the public

interest.

## Findings

44. The document subject to this IC review is not exempt under s 47G of the FOI Act.

## Decision

45. Under s 55K of the FOI Act, I affirm CASA's decision of 29 August 2011.

Toni Pirani  
Acting Freedom of Information Commissioner

24 April 2013

## Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.

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[1] The OAIC granted the applicant an extension of time under s 54T(2) of the FOI Act to file its application for IC review.

[2] *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241; (1992) 108 ALR 163.

[3] In relation to the test of reasonableness, see *'E' and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

[4] *Re Mangan and The Treasury* [2005] AATA 898.

[5] See [www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC\\_91621](http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91621).

[6] *'E' and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3 (11 January 2012) [26].

[7] By contrast, in IC review of access refusal decisions, the onus is on the agency or minister to establish that access should be refused (s 55D(1)).

[8] *Guidelines* [6.12].

[9] These are whether access to the document would promote the objects of the FOI Act; inform debate on a matter of public importance; promote effective oversight of public expenditure; or allow a person to access his or her own information.

[10] *Guidelines* [6.29].

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