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'D' and Civil Aviation Safety Authority [2013] AICmr 13 (28 February 2013)

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

| | |
|---------------------|--|
| Applicant: | 'D' |
| Respondent: | Civil Aviation Safety Authority |
| Other parties: | Anonymous |
| Decision date: | 28 February 2013 |
| Application number: | MR11/00119 |
| Catchwords: | Freedom of information — Documents disclosing commercially valuable information — Operations Manual — (CTH) Freedom of Information Act 1982 s 47 |

Contents

Summary

1. I affirm the decision of the Civil Aviation Safety Authority (CASA) of 9 May 2011 to refuse access to documents requested under the [Freedom of Information Act 1982](#) (the **FOI Act**) on the basis that those documents are exempt under s 47(1)(b) of the FOI Act.

Background

2. On 25 March 2011, the applicant made an FOI request to CASA for access to the Operations Manuals of a business, the affected third party in this IC review, in particular:
 - o Manual 1 – 2007/103 Flight Operations Manual, Volume 1, Parts 1–3
 - o Manual 14 – 2006/7 Drop Master/Visual Obs
 - o Manual 27 – 2007/633 Operations Manual Vol 1, Part 3 Search Rescue.
3. On 9 May 2011, CASA advised that the documents requested by the applicant (the **manuals**) were exempt documents under s 47 of the FOI Act because they contained trade secrets or commercially valuable information.
4. On 23 May 2011, the applicant sought Information Commissioner (IC) review of this decision

under s 54L of the FOI Act.

Decision under review

5. The decision under review is the decision of CASA of 9 May 2011 to refuse the applicant access to the documents sought.

Documents disclosing commercially valuable information (s 47(1)(b))

6. Section 47(1) of the FOI Act provides:

47 Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this 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.

7. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that:

Whether information has a commercial value, and the extent of any destruction or diminution of the value, are questions of fact for the decision maker. Information has commercial value ... if it is valuable for the purposes of carrying on the commercial activity in which that agency other person is engaged. That information may be valuable because it is important or essential to the profitability or the viability of a continuing business operation.^[1]

8. In its 9 May 2011 decision CASA stated that ‘while there may be some doubt as to whether the Operations Manuals contain trade secrets, they clearly contain valuable commercial information relating to the compliance model used by [the affected third party] in conducting its air operations’. CASA contends that the documents are exempt under s 47(1)(a), but its reasons and submissions are directed to the application of s 47(1)(b). I will therefore consider this exemption first.

Does the document contain information of commercial value?

9. The Guidelines explain that the following factors may assist in determining whether information has a commercial value:
 - o whether the information is known only to the person in question, or the extent to which it is known to others
 - o whether the information confers a competitive advantage on the person against any competitors
 - o whether a genuine ‘arm’s length’ buyer is prepared to pay to obtain that information
 - o whether the information is still current or out of date.^[2]
10. The manuals were developed by the affected third party for its own use following a tender process in which it was awarded contracts with the Australian Maritime Safety Authority (AMSA) to deliver certain services.
11. The manuals were provided to CASA in accordance with the requirement in regulation 215 of the *Civil Aviation Regulations 1998* that ‘an operator shall provide an operations manual for the use and guidance of the operations personnel of the operator’ and that a copy of the operations

manual shall be provided to CASA.

12. The applicant contends that he is aware of the contents of the manuals as he has inspected them. He suggested that information similar to that contained in the manuals is publicly available or available for purchase.
13. Both CASA and the affected third party have contended that the affected third party provides a unique and highly specialised service to AMSA and the manuals contain information about the specialised practices and procedures developed by the affected third party in order to deliver this service. Accordingly, they have claimed that the contents of the manuals are not matters of general knowledge within the industry and that the information is known only to a limited number of people.
14. The affected third party claims that the manuals are commercially valuable. They contend that release of the manuals would 'critically affect' their competitive position for future tenders to provide the specialised services to AMSA.
15. The affected third party also submitted that it spent a considerable amount of money in developing the manuals and that it would be costly and time-consuming for a competitor to develop the same information.
16. I have examined the manuals and note that they are a compilation of different types of information. Parts of the manuals contain information that is factual or 'common knowledge' whereas other parts of the manuals are highly technical and specific to the operating procedures of the affected third party.
17. On its own, information that is purely factual would not be found to be commercially valuable. However, when considering the commercial value of the manuals, I consider it to be appropriate to initially assess each document in its entirety rather than to consider whether specific parts of the document are commercially valuable.
18. I accept that the work undertaken by the affected third party for AMSA is highly specialised and requires the use of sophisticated equipment and techniques which are specific to the service provided. Details about this equipment and techniques are set out in the manuals. This information is not well known.
19. Even though some of the information in the documents is factual, I consider that significant effort and expertise was involved in compiling the manuals. I am satisfied that this work gives the affected third party a competitive advantage in tender processes conducted by AMSA for the services. I also consider that a competitor of the affected third party would be prepared to pay to obtain or develop a compilation of technical and factual information like the manuals.
20. Further, as the affected third party's contracts with AMSA are in place for some time to come, I consider that the information is current and that this is relevant to the determination that the manuals are commercially valuable.

Would disclosure destroy or diminish the commercial value?

21. As I am satisfied that the manuals are commercially valuable information, under s 47(1)(b), I must also consider whether there is a reasonable expectation that the value would be destroyed or diminished by the disclosure of the information.
22. In light of the specialised nature of the services provided by the affected third party, I consider that the manuals have significant commercial value and that potential competitors of the affected third party would be prepared to pay to obtain them. Disclosure of the manuals would result in them being available to the world at large and reduce the likelihood of competitors being prepared to pay for them. I therefore find that it is reasonable to expect that the inherent value of the manuals would be diminished if they were disclosed.
23. Further, disclosure of the manuals would result in the material contained in them being revealed and available to potential competitors in any future tender process for the services currently being provided by the affected third party to AMSA. This would obviously diminish the commercial value of the manuals to the affected third party as it would diminish its competitive advantage against other applicants in future tender processes.
24. I am satisfied that the disclosure of the manuals would destroy or diminish their commercial value.

Findings

25. I find that the manuals are commercially valuable and that it is reasonable to expect that the disclosure of the manuals would destroy or diminish this value. Accordingly, those documents are exempt under s 47(1)(b) of the FOI Act.

Documents disclosing trade secrets (s 47(1)(a))

26. CASA and the affected third party also contended that the manuals were exempt under s 47(1)(a) (trade secrets). As I have found that the manuals are commercially valuable and exempt under s 47(1)(b), it is not necessary for me to consider the possible application of any other exemptions under the FOI Act.

Findings

27. I make no finding as to whether the manuals contain any information that is a trade secret.

Access to edited copy with exempt or irrelevant matter deleted (s 22)

28. I have found that the manuals are exempt under ss 47(1)(b). However, normally when a document contains exempt material, it is open to the agency to prepare an edited version of the document with exempt material deleted under s 22.
29. I have inspected the manuals. As noted above, they contain some factual information. However, as the commercial value of the documents derives, in part, from the compilation of the information, I consider this value would be destroyed or diminished if an edited copy of the documents were provided to the applicant.

Findings

30. I find that it would not be reasonably practicable to prepare edited copies of the documents for release to the applicant.

Decision

31. Under s 55K of the FOI Act, I affirm CASA's decision of 9 May 2011.

Toni Pirani

Acting Freedom of Information Commissioner

28 February 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) or by telephoning 1300 366 700.

^[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.175].

[2] *Guidelines* [5.175].

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