



# Australian Government

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## Civil Aviation Safety Authority

LEGAL, INTERNATIONAL AND REGULATORY AFFAIRS

RMS Ref: F23/6839

5 June 2023

BS

By email: [foi+request-9950-25cb69ac@righttoknow.org.au](mailto:foi+request-9950-25cb69ac@righttoknow.org.au)

### **INTERNAL REVIEW - REQUEST FOR ACCESS UNDER THE *FREEDOM OF INFORMATION ACT 1982***

#### **Background**

By email dated 18 February 2023, you sought access to the following documents under the *Freedom of Information Act 1982 (the Act)*:

*I kindly request the following information relating to Airservices Australia activities that are regulated by CASA:*

- Details of all surveillance activity for Sydney Tower and Sydney TCU between the dates 1st January 2022 and 17th February 2023, including any results (including safety observations, alerts, and findings).*
- Details of all enforcement activity related to the abovementioned surveillance.*
- A summary of any actions required by Airservices including whether they have been addressed or are outstanding.*

Your request also stated you do not require the names of any CASA staff, or third parties contained in the documents. On 16 March 2023, you revised the scope of your request for access to only seek access to a surveillance report relating to the above.

#### **Decision under review**

On 28 April 2023, CASA officer Keeley Phengrasmy made a decision not to release the one document within the scope of your request for access, namely a CASA document entitled *Surveillance Report - Airservices Australia – Level 2 Site Inspection – SDY TCY Surveillance dated 14/6/2022 to 11/07/2022*, dated 8 August 2022 (**the surveillance report**). Ms Phengrasmy's decision relevantly stated:

##### **Consultation with a third party**

In accordance with and as required by sections 27 of the Act, consultation with a third-party took place regarding Document 1. The third-party objected to the release of the document under section 47E(d) and section 47C.

Regardless of third-party consultation, I am required to make an impartial decision regarding disclosure. I have decided to apply to Document 1 section 37(1)(a) and consistent with the third-party's objection, I have decided that the section 47E(d) exemption also applies, I have however decided section 47C does not apply.

##### **Exemption – Documents affecting enforcement of law and protection of public safety**

Section 37(1)(a) of the Act provides that a document is exempt if its disclosure would or could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.

Document 1 is relevant to a current CASA enforcement review that is still under consideration. Disclosure of the document whilst a current review is occurring has the potential to prejudice the conduct of the review by releasing information and evidence that has been obtained direct from the operator, prior to the conclusion of the review. Additionally, during a time of which new information is still coming to light disclosure of the existing information could adversely affect CASA's ability to obtain new information from the operator and therefore delay any subsequent actions.

I am therefore satisfied that the document is relevant to a current CASA enforcement review and release of the document would, or could reasonably be expected to, prejudice the enforcement or proper administration of the law in a particular instance.

For this reason, I have decided that the document is exempt under s.37(1)(a).

### **Conditional exemption – substantial adverse effect on CASA's operations**

Section 47E(d) of the Act provides that material is conditionally exempt if its disclosure under the Act would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

CASA surveillance relies on the compliance and assistance of operators in disclosing the information contained in the surveillance report. If operators were made aware that the investigation findings could be disclosed to others whilst the investigation is still occurring this has the potential to diminish the cooperation and assistance operators may provide to CASA surveillance, and therefore the information obtained in compiling future reports of this nature may be compromised.

On this basis I consider that Document 1 is conditionally exempt under section 47E(d) on the grounds that disclosure would or could reasonably be expected to impede CASA's ability to effectively obtain information and evidence from third parties.

### The Public Interest

Even though I have decided that Document 1 is conditionally exempt under section 47E(d), I am also required to consider whether disclosing this information would on balance be contrary to the public interest. If I am not satisfied of that, access must be given.

Section 31B of the Act provides that a document is exempt if it is conditionally exempt under Division 3, and access to the document would also, on balance, be contrary to the public interest for the purposes of section 11A(5) of the Act.

In applying this test, I have weighed the factors in favour of disclosure against those against it.

I have identified the following factors for disclosure:

- it would promote the objects of the Act, as described in section 3

I have identified the following factors against disclosure:

- it could reasonably be expected to impede the flow of information to CASA as a law enforcement and regulatory agency; and
- it could reasonably be expected to prejudice CASA's ability to obtain confidential information; and
- it could reasonably be expected to prejudice CASA's ability to obtain similar information in the future.

In weighing the public interest factors for the purposes of this exemption, I have determined that access to this information would not be characterised as a matter of public importance telling in favour of disclosure.

On balance, I consider that the public interest favours the protection of this information. I am satisfied that disclosure of the abovementioned document would be contrary to the public interest.

### **Internal review**

By email of 5 May 2023, you sought internal review of CASA officer Phengrasmy's decision. Your email stated:

Thank you for following up. I now request internal review of this decision.

For transparency; if the internal review does not find in my favour I will request the OAIC to review this. This is a document which CASA itself suggested I narrow my scope to, despite it being now clear that you do not wish to release the document. This has in effect meant CASA has deliberately extinguished my request. Further, I do not believe that exemptions on the basis of a future investigation, are warranted when my request is about a historical, point-in-time document which represents a snapshot of compliance.

### **Authority to make decision**

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access a document.

### **Decision**

I have made a different decision to that of Ms Phengrasmy in that I have decided to release parts of the surveillance report to you, a copy of which is **attached**.

### **Conditional exemption – substantial adverse effect on CASA's operations**

Section 47E of the Act states in part:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

In relation to the surveillance event relating to the surveillance report, the CASA audit team spoke to a number of employees of Airservices Australia. Those discussions were central in identifying areas for surveillance findings concerning Airservices Australia. If civil aviation authorisation holders are made aware that surveillance and compliance findings reliant on assistance provided by its employees could be disclosed to others this has the potential to remove or diminish the cooperation and assistance Airservices Australia may provide to CASA surveillance inspectors, and therefore the information obtained in compiling future surveillance reports of this nature may be compromised or affected in a negative manner.

In this regard I highlight that CASA does not have legislative powers to require persons during a surveillance event to answer questions. CASA only has powers to require authorisation holders to provide documents to CASA and to provide CASA with access to their premises. It is for this reason I have decided not to redact those parts of the surveillance report that refer to documentation of Airservices Australia as a basis to record a surveillance finding.

On these basis, I consider parts of the surveillance report are conditionally exempt under sections 47E (b) and (d) of the Act on the grounds that disclosure would or could reasonably be

expected to impede CASA's ability to effectively obtain information and evidence from third parties, and that would:

- (i) prejudice the attainment of the objects of audits conducted or to be conducted by CASA;
- (ii) have a substantial adverse effect on the proper and efficient conduct of the operations of CASA, namely its surveillance functions.

### **The Public Interest**

Even though I have decided that parts of the surveillance report are conditionally exempt under sections 47E (b) and (d), I am also required to consider whether disclosing those parts of the document would on balance be contrary to the public interest. If I am not satisfied of that, access must be given.

Section 31B of the Act provides that a document is exempt if it is conditionally exempt under Division 3, and access to the document would also, on balance, be contrary to the public interest for the purposes of section 11A(5) of the Act. In applying this test, I have weighed the factors in favour of disclosure against those against it.

I have identified the following factors for disclosure:

- it would promote the objects of the Act, as described in section 3.

I have identified the following factors against disclosure:

- it could reasonably be expected to impede the flow of information to CASA as a law enforcement and regulatory agency; and
- it could reasonably be expected to prejudice CASA's ability to obtain information during surveillance and audit events; and
- it could reasonably be expected to prejudice CASA's ability to obtain similar information in the future.

In weighing the public interest factors for the purposes of this exemption, I have determined that access to this information would not be characterised as a matter of public importance telling in favour of disclosure. I also note the unredacted parts of the surveillance report identify the surveillance findings of the audit team.

On balance, I consider that the public interest favours the protection of the redacted parts of the surveillance report. I am satisfied that disclosure of those parts of the surveillance report would be contrary to the public interest.

For completeness, I note that Airservices Australia has not accepted some of the surveillance findings. However, I have taken into account that section 11(4) of the FOI Act relevantly states:

The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

- ...
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
  - (d) access to the document could result in confusion or unnecessary debate.

## Section 22 redactions

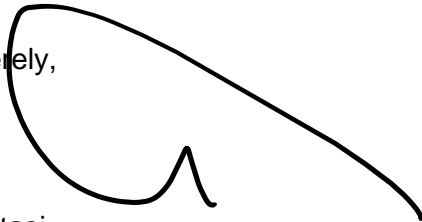
I also advise the text redacted on pages 2, 3, 13, 14, 16, 18, 20 and 22 of the surveillance report are the names of CASA officers or third parties. As that information is outside the scope of your request for access, it has been redacted pursuant to section 22 of the Act.

## Review by the Australian Information Commissioner

Under section 54L of the Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)  
email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)  
post: Director of FOI Dispute Resolution, OAIC, GPO Box 5218, SYDNEY NSW 2001  
phone: 02 9284 9666

Yours sincerely,

A handwritten signature in black ink, consisting of a large, sweeping loop that extends to the right, followed by a smaller, more defined loop at the bottom.

Adam Anastasi  
Manager  
Advisory and Drafting Branch  
Legal, International and Regulatory Affairs Division

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