

# Airport Joint Use Agreement Open Records Requests Response

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Over the past few weeks, many inconsistent statements from staff have added to the uncertainty around the content and impact of the AJUA. These inconsistencies relate to the ability to obtain PFAS-free foam, the costs of replacing airport firefighting services, the ongoing use of PFAs foam for testing and crash response, and the threat of shutting the airport down entirely.

As Dane County staff and the Air National Guard developed this AJUA behind the scenes and only brought it to the County Board in recent weeks, contradictory comments and a lack of transparent information generated further concerns from supervisors and constituents alike.

The results of an open records request related to AJUA coordination between Dane County staff and the Air National Guard provided additional insights into the development process and expected impact of the AJUA. Several questions that were addressed in the responsive records are outlined below.

## **1. Was the County Board consulted about AJUA negotiations and offered an opportunity to provide critical feedback?**

No. The contract was [routed for signatures on July 31, 2023](#). In an email from Airport Director Jones to Col. Dunlap and other Air Force recipients, the following was stated:

*“Thank you for your assistance with this matter. When we have the documents in hand we will start the County approval process. Please note that can be a very lengthy process, particularly with limited summer meetings. Mike, at some point are you willing to attend any meetings if requested to answer any questions. We will try to avoid the necessity of your participation however, some may ask for your comments.”*

This process essentially treated the Board as a rubber stamp and sought no meaningful input from Supervisors. It is also clear that there was no effort to consider or address the many community concerns around public health and safety of the drinking water.

## **2. Why don't the indemnification clauses in the contract match the understanding of the indemnification clauses in the departments internal emails?**

As per Lt Col Michael J. Dunlap in an email on [Wednesday, November 8, 2023 12:14 PM](#):

*“Hold harmless within AJUA is meant for non-military crashes where AFFF is used. DCRA (as landowner) would be responsible for clean-up or pursuing responsible party (commercial or GA owner of aircraft)”*

Assistant Corporation Counsel Amy Tutwiler in an email [Wednesday, November 8, 2023 1:20 PM](#):

*“It’s great to see a Guard written description limiting the scope of the hold harmless clause. I’m saving this email in LF Airport file in Agreements folder. Hopefully we’ll never need it, certainly not before Lt Col Dunlap retires.”*

This clarification came on November 8th well after the final draft was approved on July 20th, 2023 and [routed for signatures on July 31, 2023](#). This separation of liability and responsibilities should explicitly be written into the contract rather than saved in an email. This email does not match the [broad indemnification clause in 8b](#).

Furthermore, it is not a good practice to have this agreement in an email that will be saved in a folder rather than explicitly written into the signed contract. Staff will change over the years and relying on handshake agreements that are not specified in a contract may leave Dane County without legal recourse. Paragraph 12(e) states in relevant part “Entire Agreement. It is expressly agreed that this written instrument embodies the entire financial arrangement and agreement of the Parties regarding the use of the Jointly Used Flying Facilities by the Government, and there are no understandings or agreements, verbal or otherwise, among the Parties in regard to it except as expressly set forth herein.”

**3. Did the Corporation Counsel’s office, County Lobbyist, Airport Director seek any contract modifications following the [letter submitted from County Board Supervisors](#)?**

No. Despite the fact that there were major milestones in PFAS-free foam regulations including approval by the FAA in September and availability by approved contractors, a commitment to using PFAS-free foam was not considered.

The airport, corporation counsel’s office, and Air National Guard closely worked together to craft talking points and joint responses rather than take any steps to address any of the requested contract modifications. In [this email from Adam Ussher](#)

[Assistant Corporation Counsel – Airport Services to Lt Col Dunlap](#) on Friday, November 10, 2023 4:18 PM, he states:

*“Below are our latest bullet points to share with the County Board. We wanted to make sure you agreed with everything before we send them out.”*

County Board attorneys are conferring with an opposing party in negotiations to formulate talking points to lobby the County Board. The email referenced above was the basis for the FAQ the County Board received from the County lobbyist.

Taking a collaborative approach to negotiations rather than being adversarial is important to mutually beneficial results. But it is clear that County staff did not make firm requests of the Air National Guard since the letter was submitted. No negotiations occurred.

**4. Is a negotiated AJUA required?**

Yes. Since there is substantial use there must be a negotiated AJUA. From Lt Col Dunlap in an email on [Monday, November 13, 2023 3:58 PM](#):

*“Perhaps the one item that I hadn’t thought of is that we’ll negotiate an AJUA regardless due to 49 USC 47107(11) since we’re substantial use. Not doing an AJUA I guess would be an option if the airport chose to ignore the substantial use?”*

The County Board can not ‘strike down’ or nullify the existence of an AJUA. We are currently in the process of negotiating an AJUA and the County Board is expediting this process as we were not included in any initial discussions. The AJUA presented to the board for approval does not match the informal email discussions referenced in this FAQ between the Airport and the Guard and that must be corrected.

**5. Is the Air National Guard threatening to shut down the Airport as leverage for expediting the AJUA?**

No. According to Deputy General Counsel Randy Chambers of the National Guard Bureau on [Monday, November 13, 2023 1:48 PM](#):

*“The Air Force/ANG would continue to provide these services in the interim while the airport is obtaining their own firefighting capacity to ensure that the airport does not have to shut down.”*

**6. Is the value to the county “tens of millions of dollars of Aircraft Rescue and Firefighting services that we don’t have to pay for over the years of this agreement” as stated in the email provided by the County Lobbyist.**

This is an incomplete answer when additional information is readily available. According to Lt Col Dunlap in an email on [Friday, November 10, 2023 2:51 PM](#):

*"In general, costs break out as follows: \$10,000,000 in an initial start-up cost of a fire department (facility and trucks). FY23 we spent \$2.9M in salaries, benefits, and recurring maintenance costs. Replacement cost of the Panther (P-23 UHP firetruck) is \$694K alone. So, if Dane County chose to open their own department it would be \$10M start-up, \$3M annual recurring costs and receive somewhere in"*

When the Board is making financial decisions, we should be presented with accurate information absent from hyperbole so we can make decisions based on facts.

- 7. The Airport and Air National Guard have said that [Truax Field became the first U.S. Air Force facility in the country to eliminate the use of PFAS in its firefighting foam](#). Is this the case for all fire fighting operations?**

According to Deputy General Counsel Randy Chambers of the National Guard Bureau in an email on [Monday, November 13, 2023 1:48 PM](#)

*"With the increase in awareness of potential environmental issues associated with polyfluoroalkyl substances (PFAS), which is a necessary component of Aqueous Film-Forming Foam (AFFF) utilized to fight fuel fires, the AF/ANG made the policy decision to specifically include an indemnification clause in AJUAs and Mutual Aid Agreements, to ensure that an airport was aware that the use of AFFF behalf of the airport would make the airport responsible."*

- 8. Why are the Airport Staff, Corporation Counsel's office, County Lobbyist and Air National Guard working together to craft talking points to lobby the County Board in favor of an agreement that the County Board was not consulted on?**

According to the Corporation Counsel's web site, their purpose states that:

*"The Dane County Corporation Counsel is the attorney charged with representing the interests of the county, its elected officials, agencies, boards, and commissions in all legal matters."*

It does not represent the interests of elected county supervisors and the county residents they represent to have our concerns about modifications to a major ten year contract dismissed in favor of crafting talking points with a party who we are negotiating with.

In an email from [Corporation Counsel to Lt Col Dunlap](#):

*"Thank you for the additional information and kind remarks. I wholeheartedly agree that*

*Kim and Amy handled the meeting expertly. Below are our latest bullet points to share with the County Board. We wanted to make sure you agreed with everything before we send them out."*

Lt Col Dunlap responded with:

*"Yes. All correct statements. Perhaps for the committees they should view AJUA as life moving forward."*

If this is how the process works, who is the legal counsel for the County Board? Who is representing the interests of the elected officials who were elected by the people of Dane County?

**9. Why does the cost calculation worksheet not include any of the costs of PFAS cleanup?**

According to Lt Col Dunlap in an email on [Wednesday, November 8, 2023 12:14 PM](#):

*"If DCRA had recurring costs for PFAS treatment (stormwater potentially), this would get added into AJUA calculation"*

If the Air National Guard explicitly affirms that the recurring costs for PFAS treatment would get added to the AJUA calculation, why are they not mentioned or added to the AJUA calculation provided to the board? These costs could be substantial over the lifetime of the agreement and should not be ignored.

**10. Are any of the AJUA modification requests an attempt to stop the F-35 mission at Truax field?**

No, the AJUA modifications are necessary to better protect county interests given the existing military use and Air National Guard mission which includes the F-35 flights. The primary goals of the requested AJUA modifications are to eliminate the use of PFAS chemicals in firefighting emergency response, recognize the military responsibilities for past and future military-related contamination of our soil and water, limit the scope of indemnification to civilian air crash responses as stated in the provided emails, and provide a fair opt-out clause for the county. While the county board does not have the authority to change the mission of the Air National Guard or stop the F-35 beddown, it is well within its authority to demand changes to this agreement which is subject to county board approval.

Sources:

Airport Joint Use Agreement Google Drive:

[https://drive.google.com/drive/folders/1psjJ8xnxz6coe2HhiwdTJBCSFc4ail-W3?usp=drive\\_link](https://drive.google.com/drive/folders/1psjJ8xnxz6coe2HhiwdTJBCSFc4ail-W3?usp=drive_link)

Open Records Request Response:

[https://drive.google.com/file/d/1yMbQfGKLDhC9PGKi18LhiPefilZDUO7N/view?usp=drive\\_link](https://drive.google.com/file/d/1yMbQfGKLDhC9PGKi18LhiPefilZDUO7N/view?usp=drive_link)