



18 April 2024

Oliver Smith

BY EMAIL: foi+request-11117-73811a29@righttoknow.org.au

In reply please quote:

FOI Request: FA 24/02/01036

File Number: FA24/02/01036

Dear Mr Smith

Freedom of Information (FOI) request – Access Decision

On 16 February 2024, the Department of Home Affairs (the Department) received a request for access to document under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

1 Scope of request

You have requested access to the following document:

Under the FOI Act, can I please obtain a copy of the ministerial submission sent to the office of Minister Giles' on 28 August, 2023, in regards to the NZYQ High Court case and described as "the submission was signed by Minister Giles on 18 September 2023" in the document tabled at the Legal and Constitutional Affairs Legislation Committee Senate Estimates on 12 February 2024.

2 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 document or to amend or annotate records.

3 Relevant material

In reaching my decision I referred to the following:

- the terms of your request
- the document relevant to the request
- the FOI Act
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)

- advice from Departmental officers with responsibility for matters relating to the document to which you sought access

4 Document in scope of request

The Department has identified one (1) document as falling within the scope of your request. This document was in the possession of the Department on 16 February 2024 when your request was received.

Attachment A is a schedule which describes the relevant document and sets out my decision in relation to the document.

5 Decision

The decision in relation to the document in the possession of the Department which fall within the scope of your request is as follows:

- To release one document in part with deletions

6 Reasons for Decision

Detailed reasons for my decision are set out below.

Where the schedule of documents indicates an exemption claim has been applied to a document or part of document, my findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

6.1 Section 22 of the FOI Act – irrelevant to request

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

On 20 February 2024, the Department advised you that its policy is to exclude the personal details of officers not in the Senior Executive Service (SES), as well as the mobile and work telephone numbers of SES staff, contained in documents that fall within scope of an FOI request.

I have decided that the parts of the document marked 's22(1)(a)(ii)' would disclose information that could reasonably be regarded as irrelevant to your request. I have prepared an edited copy of the document, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act. The remainder of the document has been considered for release to you as it is relevant to your request.

6.2 Section 33 of the FOI Act – Documents affecting National Security, Defence or International Relations

Section 33(a)(iii) of the FOI Act permits exemption of a document if disclosure of the document would, or could reasonably be expected to cause damage to the international relations of the Commonwealth. The FOI Guidelines [at 5.36] advise that:

The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international

organisations and to protect the flow of confidential information between them. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence.

You have requested access to material that reveals the Department's communications with foreign governments regarding the possible third country resettlement of a person who was detained in Immigration Detention. I am satisfied that revealing these details could reasonably be expected to inhibit the good working relations between the governments of Australia and our international partners.

Maintaining strong bilateral and multilateral relationship with foreign governments requires trust. Integral to maintaining trusted relationships is the capacity for the Australian Government to protect its communications with foreign governments, including by maintaining confidentiality over the flow of information. Officials of the respective countries, including those based at embassies in Australia, need to be able to negotiate and share information with the assurance that the details of their discussions or correspondence will not be inappropriately or unlawfully disclosed.

As such I have decided that the information redacted and marked 's33(a)(iii)' is exempt from disclosure under section 33(a)(iii) of the FOI Act.

6.3 Section 42 of the FOI Act – Legal Professional Privilege

Section 42 of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

I am satisfied that parts of the document released to you comprise confidential communications passing between the Department and its legal advisers, for the dominant purpose of giving or receiving legal advice.

In determining that the communication is privileged, I have taken into the consideration the following:

- there is a legal adviser-client relationship
- the communication was for the purpose of giving and/or receiving legal advice;
- the advice given was independent and
- the advice was given on a legal-in-confidence basis and was therefore confidential.

The content of these documents are not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The documents do not fall within the definition of operational information and remain subject to legal professional privilege.

Therefore I have decided that the information redacted and marked "s42(1)" is exempt from disclosure under section 42 of the FOI Act.

6.4 Section 47C of the FOI Act – Deliberative Processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose deliberative matter relating to the deliberative processes involved in the functions of the Department.

'*Deliberative matter*' includes opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the deliberative processes of an agency.

'*Deliberative processes*' generally involves "*the process of weighing up or evaluating competing arguments or considerations*"¹ and the '*thinking processes –the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*'²

Parts of the document released to you contain advice, opinions and recommendations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of the Department. I am satisfied that this deliberative matter relates to a process that was undertaken within government to consider whether and how to make or implement a decision or review a program.³

Disclosure of this deliberative information could reasonably be expected to inhibit full and frank advice from the Department to its Minister, and, as a result, full consideration by the Government on any potential future consideration of amendments to policy making or program management. Section 47C(2) provides that "deliberative matter" does not include purely factual material. I am satisfied that the deliberative material is not purely factual in nature.

I have decided that the information is conditionally exempt under section 47C of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard at paragraph 6.6 below.

6.5 Section 47F of the FOI Act – Personal Privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information of any person. 'Personal information' means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not (see section 4 of the FOI Act and section 6 of the *Privacy Act 1988*).

I consider that disclosure of the information marked 's47F' in the documents would disclose personal information relating to third parties. The information within the documents would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance.

The FOI Act states that, when deciding whether the disclosure of the personal information would be 'unreasonable', I must have regard to the following four factors set out in s.47F(2) of the FOI Act:

¹ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

² *JE Waterford and Department of Treasury (No 2)* [1984] AATA 67

³ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962

- *the extent to which the information is well known;*
- *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- *the availability of the information from publicly available resources;*
- *any other matters that I consider relevant.*

I have considered each of these factors below.

The information relating to the third parties is not well known and would only be known to a limited group of people with a business need to know. As this information is only known to a limited group of people, the individuals concerned is not generally known to be associated with the matters discussed in the document. This information is not available from publicly accessible sources.

I do not consider that the information relating specifically to the third parties would be relevant to the broader scope of your request. I am satisfied that the disclosure of the information within the documents would involve an unreasonable disclosure of personal information about a number of individuals.

I have decided that the information referred to above is conditionally exempt under section 47F of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard at paragraph 6.6 below.

6.6 *The public interest – section 11A of the FOI Act*

As I have decided that parts of the document are conditionally exempt, I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest (section 11A of the FOI Act).

A part of a document which is conditionally exempt must also meet the public interest test in section 11A(5) before an exemption may be claimed in respect of that part.

In summary, the test is whether access to the conditionally exempt part of the document would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- promote the objects of this Act (including all the matters set out in sections 3 and 3A)*
- inform debate on a matter of public importance*
- promote effective oversight of public expenditure*
- allow a person to access his or her own personal information.*

Having regard to the above I am satisfied that:

- Access to the document would promote the objects of the FOI Act.

- The subject matter of the document does not have the character of public importance and that there may be broad public interest in the documents.
- Insights into public expenditure will be provided through examination of the document.
- You do not require access to the document in order to access your own personal information.

I have also considered the following factors that weigh against the release of the conditionally exempt information in the document:

- A Ministerial Submission plays an important role in the relationship between a Department and its Minister. Its purpose is to provide frank and honest advice. It is inherently confidential between the Department and its Minister and the preparation of a Ministerial Submission is essentially intended for the audience of that Minister alone. A precedent of public disclosure of advice given as a part of a Ministerial Submission would result in:
 - concerns existing in the open and honest nature of advice being provided which may then hinder future deliberations and decision making processes for the Department and the Government as a whole and
 - future Ministerial Submissions being prepared with a different audience in mind, which would compromise the quality of the advice being prepared for the Minister.
- I consider that the public interest in protecting the process of the provision of free and honest confidential advice by a Department to its Minister has, on balance, more weight, than the public interest that might exist in disclosing the deliberative matter. Endangering the proper working relationship that a Department has with its Minister and its ability to provide its Minister with honest advice confidentially would be contrary to the public interest.
- Disclosure of personal information which is conditionally exempt under **section 47F** of the FOI Act could reasonably be expected to prejudice the protection of those individuals' right to privacy. It is firmly in the public interest that the Department uphold the rights of individuals to their own privacy, and this factor weighs strongly against disclosure.
- I am satisfied that if the Department were to release personal information without that person's express consent to do so, it would seriously undermine public confidence in the Department's ability to receive, retain and manage personal information. I consider such a loss of confidence to be against the public interest, and this factor weighs strongly against disclosure.
- The Department is committed to complying with its obligations under the *Privacy Act 1988*, which sets out standards and obligations that regulate how the Department must handle and manage personal information. It is firmly in the public interest that the Department uphold the rights of individuals to their own privacy and meets its obligations under the Privacy Act. I consider that non-compliance with the Department's statutory obligations concerning the protection of personal information would be contrary to the public interest and that this factor weighs strongly against disclosure.

I have also had regard to section 11B(4) which sets out the factors which are irrelevant to my decision, which are:

- a) *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government*
- 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.*

I have not taken into account any of those factors in this decision.

Upon balancing all of the above relevant public interest considerations, I have concluded that the disclosure of the conditionally exempt information in the documents would be contrary to the public interest and it is therefore exempt from disclosure under the FOI Act.

7 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

8 Your Review Rights

Information Commissioner Review

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for an Information Commissioner review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>.

9 Making a complaint

You may complain to the Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Home Affairs as the relevant agency.

10 Contacting the FOI Section

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@homeaffairs.gov.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Clare Sharp', is centered on the page.

Clare Sharp
Position no. 60006163

ATTACHMENT A

**SCHEDULE OF DOCUMENTS
REQUEST UNDER *FREEDOM OF INFORMATION ACT 1982***

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No.	Date of document	No. of pages	Description	Decision on release	
1.	27 August 2023	14	Ministerial Submission – MS23-001295	Release in Part	s.22(1)(a)(ii) s.33(a)(iii) s.42(1) s.47C(1) s.47F(1)