



22 April 2024

Mr Oliver Smith

**BY EMAIL: [foi+request-11122-645fba2e@righttoknow.org.au](mailto:foi+request-11122-645fba2e@righttoknow.org.au)**

**In reply please quote:**

FOI Request: FA 24/02/01068

File Number: FA24/02/01068

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 documents 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.

**1 Scope of request**

You have requested access to the following documents:

*A copy of the email from acting First Assistant Secretary Immigration Policy, Integrity and Assurance to Minister O’Neil and Minister Giles’ offices sent on 3 October 2023 and described as "Update on lines of effort in relation to NZYQ, attaches AGS advice on options to mitigate implications of a loss" 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 documents or to amend or annotate records.

**3 Relevant material**

In reaching my decision I referred to the following:

- the terms of your request
- the documents 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 documents to which you sought access.

## 4 Documents in scope of request

The Department has identified four documents as falling within the scope of your request. These documents were in the possession of the Department on 16 February 2024 when your request was received.

**Attachment A** is a schedule which describes the relevant documents and sets out my decision in relation to each of them.

## 5 Decision

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

- Release one document, the attachment 'Respondent's Submissions', in full by providing a link to the publicly available document on the High Court of Australia's website: <https://www.hcourt.gov.au/assets/cases/08-Sydney/s28-2023/NZYQ-MICMA-Def.pdf>
- Release two documents in part with deletions; and
- Exempt one document, the attachment 'AGS advice' in full from disclosure.

## 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 parts of documents 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 documents, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The remainder of the documents have been considered for release to you as they are relevant to your request.

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

Section 33(a)(i) 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 security of the Commonwealth.

For the reasons set out below, I consider that there are real and substantial grounds for expecting that the disclosure of the information exempted under section 33(a)(i) would cause damage to the security of the Commonwealth.

### **Security**

'Security' is a concept which can depend upon the circumstances as they exist from time to time. 'Security of the Commonwealth' is defined in section 4(5) of the FOI Act as follows:

- (5) *Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:*
- (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and ...*

I also consider that the definition of 'security' in the *Australian Security and Intelligence Organisation Act 1979* is relevant. That Act defines 'security' as:

- (a) *The protection of, and of the people of, the Commonwealth and the several States and Territories from:*
- (i) *Espionage*
  - (ii) *Sabotage*
  - (iii) *Politically motivated violence*
  - (iv) *Promotion of communal violence*
  - (v) *Attacks on Australia's defence system; or*
  - (vi) *Acts of foreign interference;*
- Whether directed from, or committed within, Australia or not; and*
- (aa) *the protection of Australia's territorial and border integrity from serious threats; and*
- (b) *The carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).*

I consider that the disclosure of the information redacted and marked "s33(a)(i)" could cause damage to the security of the Commonwealth by compromising security functions. As such I have decided that the information marked and redacted "s33(a)(i)" in the documents is exempt from disclosure under section 33(a)(i) of the FOI Act.

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:

*5.36 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 exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

You have requested access to documents that reveal 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)" in the documents 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 the parts of the documents redacted and marked "s42(1)" comprise confidential communications passing between the Department and its legal advisers, for the dominant purpose of giving or receiving legal advice. The material marked "s42(1)" either contains privileged legal advice or confidential communications created for the dominant purpose of seeking or giving instructions in legal proceedings.

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.

I have therefore decided that the parts of the documents redacted and marked "s42(1)" are 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"<sup>1</sup> 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.'<sup>2</sup>

Parts of the documents 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.

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 redacted and marked "s47C(1)" 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 below.

### **6.5 Section 47E of the FOI Act – Operations of Agencies**

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

I consider that the disclosure of the parts of Document 9.1 marked "s47E(d)" would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department, by compromising its law enforcement functions.

Any prejudice to the effectiveness of the operational methods and procedures used in undertaking the Department's law enforcement role would result in a substantial adverse effect on the operations of the Department.

Any disclosure resulting in the prejudice of the effectiveness of the Department's operational methods and procedures would result in the need for this Department, and potentially its law enforcement partners, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

I have decided that parts of the documents are conditionally exempt under section 47E(d) 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 below.

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

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

## 6.6 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 or other identifiers, which collectively could reveal the person's identity.

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:

- *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 are 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, as you are not seeking information that wholly relates to other individuals.

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 below.

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

As I have decided that parts of the documents 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:

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

Having regard to the above I am satisfied that:

- Access to the documents would promote the objects of the FOI Act.
- The subject matter of the documents does have the character of public importance and that there may be broad public interest in the documents.
- Insights into public expenditure will not be provided through examination of the documents.
- You do not require access to the documents 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 documents:

- Disclosure of the deliberative material that is conditionally exempt under section 47C of the FOI Act could hinder the future provision of open and honest advice from the Department to its Minister, which may then hinder future deliberations and decision making processes for the Department and the Government as a whole.
- I consider that the public interest in protecting the process of the provision of free and honest 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 the parts of the documents that are conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to prejudice law enforcement functions and, as a result, the operations of the Department. I consider there to be a strong public interest in ensuring that the ability of the Department to conduct its law enforcement functions is not compromised or prejudiced in any way. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.
- Disclosure of personal information which is conditionally exempt under section 47F of the FOI Act could reasonably be expected to prejudice the protection of third parties' 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.

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](mailto: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](mailto:foi@homeaffairs.gov.au).

Yours sincerely



**Clare Sharp**

**Position number 60006163**

Authorised Decision Maker

Department of Home Affairs

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

FOI request: FA 24/02/01068

No.	Date of document	Description	Pages	Decision on release	
9	03/10/2023	Email correspondence	2	s22(1)(a)(ii) s33(a)(iii) s42 s47F(1)	Exempt in Part
9.1	03/10/2023	Attachment - Lines of Effort	2	s22(1)(a)(ii) s33(a)(i) s47C s47E(d) s47F(1)	Exempt in Part
9.2	03/10/2023	Respondent's Submissions	24		Release in Full
9.3	25/09/2023	AGS Advice	26	s42	Exempt in Full