



5 August 2024

Oliver Smith

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In reply please quote:

FOI Request: FA 24/04/00601

File Number: FA24/04/00601

Dear Oliver Smith

Freedom of Information (FOI) request – Revised decision under section 55G of FOI Act Access

On 8 April 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).

On 24 June 2024, the Office of the Australian Information Commissioner (OAIC) issued a notice under section 54z of the FOI Act in which it notified the Department that the Information Commissioner would review the deemed access refusal decision of the Department.

Following the commencement of the Information Commissioner review, the Department has now made a revised decision on your request under section 55G of the FOI Act. The purpose of this letter is to provide you with the Department's revised decision.

1 Scope of request

You have requested access to the following document:

Under the FOI Act, please provide a list of Ministerial Submissions sent by Home Affairs to the office of Andrew Giles in his capacity as the Minister for Immigration and Citizenship from the date of 22 June 2023 to present. Please include: the PDR number, subject of brief, and date sent to the office.

2 Revocation or variation of access refusal decision

Under section 15AC of the FOI Act, the Department was deemed to have refused your request for access to documents when it did not make a decision on your request within the statutory timeframes prescribed by the FOI Act.

Section 55G of the FOI Act provides for the revocation or variation of an access refusal decision, including a deemed refusal decision, during a review by the Information Commissioner.

Specifically, section 55G(1)(a) of the FOI Act provides that an agency may vary (or set aside and substitute) an access refusal decision if the variation or substitution would have the effect of giving access to a document in accordance with the request.

As a substantive decision on this request would have the effect of the Department giving access to one or more documents, either in full or in part, the Department has now revised its original deemed access refusal decision under section 55G(1)(a) of the FOI Act.

3 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.

4 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
- advice from other Commonwealth Departments

5 Document in scope of request

In accordance with section 17 of the FOI Act, the Department has used its computer system to produce one document that contains information that falls within the scope of your request. The data produced in the document existed in the possession of the Department on 8 April 2024 when your FOI request was received.

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

6 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:

- Release one document in part with deletions

7 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.

7.1 Section 22 of the FOI Act – deletion of exempt material

I have decided to prepare an edited copy of the document. The grounds upon which the edited copy of this document has been prepared is set out in the Schedule of Documents.

7.1 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 information if disclosure of the material would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.

The FOI Guidelines [at 5.29] advise that:

5.29 The term ‘security of the Commonwealth’ broadly refers to: (a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth’s interests.

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 information that reveals the Department’s consultation with foreign governments. I am satisfied that revealing the title of the submissions alone 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 material redacted and marked “s33(a)(iii)” is exempt from disclosure under section 33(a)(iii) of the FOI Act.

7.2 Section 34 – Cabinet documents

Section 34(1)(a) of the FOI Act permits exemption of material if both of the following are satisfied:

- (i) the document has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted, and
- (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet

Section 34(2) of the FOI Act exempts material that is a copy or part of or an extract of a document that is itself exempt from disclosure under section 34(1) of the Act.

The list of ministerial submissions contains extracts of official records of the Cabinet. Accordingly, I am satisfied that the parts of the document redacted and marked 's34(2)' are exempt under section 34(2).

Section 34(3) exempts material to the extent that disclosure would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed. Deliberation has been interpreted as active debate in Parliament or its weighing up of alternatives, with a view to reaching a decision on a matter.

I find that the parts of the list of submissions redacted and marked 's34(3)' are exempted under section 34(3) of the FOI Act, as disclosure of the relevant material would reveal Cabinet deliberations which have not yet been officially disclosed or are available in the public domain.

7.3 Section 42 of the FOI Act – Legal Professional Privilege

Section 42 of the FOI Act provides the material is exempt 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 list of ministerial submissions 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 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 this material is not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The material contained within the document does not fall within the definition of operational information and remains subject to legal professional privilege.

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

7.4 Section 47C of the FOI Act – Deliberative Processes

Section 47C of the FOI Act provides that the material 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 material released to you within the list of submissions 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.

Disclosure of this deliberative material 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 material redacted and marked 's47C(1)' is conditionally exempt under section 47C of the FOI Act. Access to a conditionally exempt material 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 material would be contrary to the public interest, and have included my reasoning in that regard below.

7.5 Section 47E of the FOI Act – Operations of Agencies

Section 47E(d) of the FOI Act provides that material 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 the titles of the ministerial submissions 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 titles of the ministerial submission are conditionally exempt under section 47E(d) of the FOI Act. Access to a conditionally exempt material 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 material would be contrary to the public interest, and have included my reasoning in that regard below.

7.6 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 document would disclose personal information relating to third parties. The information within the titles of the ministerial submission 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:

- *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 material 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 seeking access to the list of Ministerial Submissions rather than information which wholly relates to other individuals.

I am satisfied that the disclosure of the information within the document 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.

7.7 Section 47G of the FOI Act – Business Affairs

Section 47G(1)(b) conditionally exempts material where disclosure would disclose information concerning a person in respect of his or her business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking (business information), where the disclosure of the material could reasonably be expected to prejudice the future supply of information to the Commonwealth.

The titles of the list of ministerial submissions marked 's47G(1)(b)' contain information concerning the business, commercial or financial affairs of an organisation, and there is a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government.

In determining whether disclosure of the information within the document would or could reasonably be expected to adversely affect the lawful business, commercial or financial affairs of an organisation, I have had regard to the following factors:

- (a) The extent to which the information is well known;
- (b) Whether the organisation or undertaking is known to be associated with the matters dealt with in the documents;
- (c) The availability of the information from publicly accessible sources; and
- (d) Any other matters that the Department considers relevant.

The information contained within this document is not in the public domain, the organisations concerned are generally known to be associated with the matters referred to in this document, but the information is not available from publicly accessible sources. I am therefore satisfied that the disclosure of the information would, or could reasonably be expected to, prejudice the future supply of information to the Commonwealth from those organisations.

I have decided that the parts of the document referred to above are conditionally exempt under section 47G 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.

7.8 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:

- (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 document would promote the objects of the FOI Act.
- The subject matter of the document does have the character of public importance and that there may be broad public interest in the document.
- No 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:

- Disclosure of the conditionally exempt information under section 47C of the FOI Act could reasonably be expected to prejudice the ability of Departments across government to provide full and honest advice to stakeholders in future proposals to legislative amendments.
- 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 the parts of the document 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.
- Disclosure of the parts of the document that are conditionally exempt under section 47G of the FOI Act could reasonably be expected to prejudice the future supply of information to the Commonwealth from third party organisations. I consider that this 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 document would be contrary to the public interest and it is therefore exempt from disclosure under the FOI Act.

8 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.

9 Your review rights

Internal review

You do not have the right to seek an internal review of this decision. This is because section 54E(b) of the FOI Act provides that, when an agency is deemed to have refused an FOI request under section 15AC of the FOI Act, the applicant does not have the right to seek an internal review of the deemed decision.

The Department was deemed to have refused your request under section 15AC of the FOI Act because it did not make this decision within the statutory timeframes for the request.

While the Department has now made a substantive decision on your request, section 15AC of the FOI Act continues to apply to your request, which means that any request you make for internal review will be invalid.

Information Commissioner review

You can instead request the Australian Information Commissioner to review this decision. If you want to request an Information Commissioner review, you must make your request to the Office of the Australian Information Commissioner (OAIC) within 60 days of being notified of this decision.

You can apply for an Information Commissioner review at: [Information Commissioner review application form on the OAIC website](#).

If you have already applied for an Information Commissioner review, there is no need to make a new review request. The OAIC will contact you shortly to give you an opportunity to advise whether you wish the review to continue, and to provide your reasons for continuing the review.

You can find more information about Information Commissioner reviews [on the OAIC website](#).

10 Making a complaint

You may make a complaint to the Australian Information Commissioner if you have concerns about how the Department has handled your request under the FOI Act. This is a separate process to the process of requesting a review of the decision as indicated above.

You can make an FOI complaint to the Office of the Australian Information Commissioner (OAIC) at: [FOI Complaint Form on the OAIC website](#).

11 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.

Electronically signed

Alice

Position number 49000706
Authorised Decision Maker
Department of Home Affairs

ATTACHMENT A

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

FOI request: FA 24/04/00601

File Number: FA24/04/00601

No	Date of document	No. of pages	Description	Decision on release	
1.	17 April 2024	20	List of Ministerial Submissions	Exempt in part	s.22(1)(a)(ii) s.33(a)(iii) s.34(2) s.34(3) s.42(1) s.47C(1) s.47E(d) s.47F(1) s.47G(1)(b)