



2 July 2024

Oliver Smith

BY EMAIL: foi+request-11492-0ab9ad75@righttoknow.org.au

In reply please quote:

FOI Request: FA 24/06/00292

File Number: FA24/06/00292

Dear Oliver Smith

Freedom of Information (FOI) request – Access Decision

On 5 June 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).

1 Scope of request

You have requested access to the following document:

Accepted scope 12 June 2024:

The formal advice provided to Minister Giles, sent after 8 November 2023, that indicated that the NZYQ High Court decision applied to other people in the same circumstances.

Revised scope 11 June 2024:

To clarify I am seeking the advice provide to the Minister for Immigration sent after 8 November 2023 that indicates the course of action required in relation to the cohort of NZYQ detainees.

I draw your attention to the Senate Estimates Question on Notice AE24-038, which was published online in May 2024, which says: "There is no record of advice being provided to the Government, following the making of orders by the High Court on 8 November 2023 in NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37, that the only response necessary was to release the plaintiff". Because this document demonstrates the department is prepared to say what is not in the advice, it reduces your credibility in citing legal privilege if you were minded to deny this request.

Original scope 5 June 2024:

Under the FOI, I would like the advice provided to government referenced in Senate Estimates Question on Notice AE24-038, which was published online in May 2024, which says: "There is no record of advice being provided to the Government, following the making of orders by the High Court on 8 November 2023 in NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37, that the only response necessary was to release the plaintiff". Give the department has already indicated what is not in the advice, what is in the advice.

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 document as falling within the scope of your request. This document was in the possession of the Department on 5 June 2024 when your request was received.

5 Decision

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

- Exempt one document in full from disclosure

6 Reasons for Decision

Detailed reasons for my decision are set out below.

6.1 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 document comprises 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 this document is not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The document does not fall within the definition of operational information, and remains subject to legal professional privilege.

I have decided that the document is exempt from disclosure under section 42 of 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

If you disagree with this decision, you have the right to apply for either an internal review or an Information Commissioner review of the decision.

Internal review

If you want the Department to review this decision, you must make your internal review request within 30 days of being notified of this decision.

When making your internal review request, please provide the Department with the reasons why you consider this decision should be changed.

You can send your internal review request to:

Or **Email:** foi.reviews@homeaffairs.gov.au

Postal mail:
Freedom of Information
Department of Home Affairs
GPO Box 241 MELBOURNE VIC 3001

The internal review will be carried out by an officer who is more senior than the original decision maker. The Department must make its decision on the review within 30 days of receiving your request for internal review.

Information Commissioner review

If you want the Australian Information Commissioner to review this decision, 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 using the [Information Commissioner review application form on the OAIC website](#).

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

9 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](#).

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,

Electronically signed

Peter Frank

Position number: 00003356

Assistant Secretary

Migration & Citizenship Litigation Branch

Legal Group

Department of Home Affairs