



15 November 2024

Oliver Smith (Right to Know)

BY EMAIL: foi+request-11887-9212e9b9@righttoknow.org.au

In reply please quote:

FOI Request: FA 24/08/00875

File Number: FA24/08/00875

Dear Oliver Smith,

Freedom of Information (FOI) request – Decision

On 14 August 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:

Revised scope dated 26/08/2024:

Under the FOI Act, please provide the signed version of the brief titled “Consideration of possible revocation of cancellation of <redacted> visa under subsection 501c of the Migration Act 1958 - <redacted> - Location: Villawood Immigration Detention Centre” with the PDR number: MS23-001623

Original scope dated 14/08/2024:

Under the FOI Act, please provide a copy of the brief titled “Consideration of possible revocation of cancellation of <redacted> visa under subsection 501c of the Migration Act 1958 - <redacted> - Location: Villawood Immigration Detention Centre” sent to the Minister for Immigration’s office on 08/09/2023 with the PDR number: MS23-001623.

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 previous decision to defer access to the document under section 21 of the FOI Act
- 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 with eight attachments as falling within the scope of your request. This document was in the possession of the Department on 14 August 2024 when your request was received.

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

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:

- Release one document in full by providing access to the version of the published document
- Release two documents in part with deletions
- Exempt six documents 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 4(1) of the FOI Act – material maintained for reference purposes

Section 4(1)(d) of the FOI Act provides that a document for the purpose of the FOI Act does not include material that is otherwise publicly available.

Part of the information you have requested, being the Tabling of Ministerial Submission MS23-001623, is now publicly available on the Parliament of Australia website. The document can be accessed using the following link - (Document number 2024-003023 refers).

- https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/7610

For your convenience, I have also attached the Notice for Tabling (Document 1.5), in the event the above link does not work.

6.2 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 15 August 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 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.

6.3 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 Documents 1.2, 1.4, 1.6, 1.7 and 1.8 and parts of Document 1 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.

I have decided that Documents 1.2, 1.4, 1.6, 1.7 and 1.8 and parts of Document 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"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

The document contains advice, opinions and recommendations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of Department, being the consideration for revocation of the Minister's decision on 12 April 2021 to cancel a visa under section 501(3) of the Act. 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.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 revocation of the Minister's decision to cancel a visa under section 501(3) of the Act.

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 am further satisfied that the factors set out in subsection (3) do not apply in this instance.

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 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 the document 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.

Managing the integrity of Australia's visa programs and the security of the Australian community is integral to the operations of the Department. Any prejudice to the effectiveness of the operational methods and procedures used in undertaking these roles 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.

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

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.

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, 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 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 individual(s) concerned is/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 consideration of possible revocation of cancellation of <redacted> visa under subsection 501c of the Migration Act 1958” rather than information which wholly relates to and identifies the affected individual.

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 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 may have a general characteristic of public importance.
- 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 could reasonably be expected to prejudice the ability of the Department to manage future review processes, inquiries and investigations. I consider that the disclosure of this type of deliberative material may hinder the future cooperation or participation in those processes, and that there is a real public interest in this agency being able to undertake effective reviews, investigations and inquiries in the future. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.
- 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 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 ability of the Department to assist in protecting the Australian community. 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

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](#).

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

Gemma

Position number: 60045916

Authorised Decision Maker

Department of Home Affairs

ATTACHMENT A

SCHEDULE OF DOCUMENTS REQUEST UNDER FREEDOM OF INFORMATION ACT 1982

FOI request: FA 24/08/00875

File Number: FA24/08/00875

No.	Date of document	No. of pages	Description	Decision on release	
1.	21 September 2023	14	Ministerial Submission – [Redacted 47F(1)] - s501C(4) of the Migration Act 1958 (the Act) - Consideration for revocation of the Minister's decision on 12 April 2021 to cancel [Redacted 47F(1)]'s visa under s501(3) of the Act (without natural justice) - MS23-001623	Release in part	s. 22(1)(a)(ii) s. 42(1) s. 47C(1) s. 47E(d) s. 47F(1)
1.1	21 September 2023	1	Decision Page	Release in part	s. 47F(1)
1.2	-	2	Document	Exempt in full	s. 42(1)
1.3	-	21	Document	Exempt in full	s. 47C(1)
1.4	-	382	Documents	Exempt in full	s. 42(1)
1.5	8 October 2024	1	Notice for Tabling https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/7610	Release in full	s. 4(1)(d)
1.6	-	3	Document	Exempt in full	s. 42(1)
1.7	25 August 2023	27	Document	Exempt in full	s. 42(1)
1.8	29 August 2023	7	Document	Exempt in full	s. 42(1)