



16 January 2025

Oliver Smith

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In reply please quote:

FOI Request: FA 24/10/01740

File Number: FA24/10/01740

Dear Oliver Smith

Freedom of Information (FOI) request – Decision

On 28 October 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 for access under the FOI Act.

1 Scope of request

You have requested access to the following documents:

Under the FOI Act, I seek a copy of the Ministerial Brief provided to the office of Home Affairs Minister Tony Burke on 9/8/24 with the PDR No. MS24-001464.

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
- advice from other Commonwealth Departments

4 Documents in scope of request

The Department has identified five documents as falling within the scope of your request. These documents were in the possession of the Department on 28 October 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:

- Exempt five documents in full from disclosure

6 Reasons for Decision

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 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 documents exempted under section 33(a)(i) would cause damage to the security of the Commonwealth.

Security

'Security' is a concept with a fluctuating content which can depend upon the circumstances as they exist from time to time.¹ '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 ...*

¹ *Church of Scientology v Woodward* (1982) 154 CLR 25 at [19].

I also consider that the definition of 'security' in the *Australian Security and Intelligence Organisation Act 1979* (the ASIO Act) is relevant. This view is in accordance with the guidance provided by *Staats and National Archives of Australia*,² in which Deputy President Forgie found that it would be 'consistent with the scheme of regulation established by Parliament to interpret the word "security" in both the Archives Act and the FOI Act in a way that mirrors its definition in the ASIO Act'.

The ASIO 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).*

Paragraph (aa) is particularly on point. It was inserted by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) (Schedule 2). The Explanatory Memorandum for the *Anti-People Smuggling and Other Measures Bill 2010* (Cth), states that '*serious threats to Australia's territorial and border integrity*' include '*those posed by people smuggling activities*' (at 2-3).

For a document to be exempt under s 33(a)(i), I must be satisfied that, on the balance of probabilities, disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

I consider that the disclosure of the information contained within the document that I regard as exempt under s 33(a)(i) could cause damage to the security of the Commonwealth by compromising operational functions, increasing the risk to Australian vessels and personnel and encouraging illegal activity.

As such I have decided that the information marked 's33(a)(i)' in the document(s) 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 5.30] advise that:

- 5.30 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.*

² [Staats and National Archives of Australia \[2010\] AATA 531 \(16 July 2010\) \(austlii.edu.au\)](http://www.austlii.edu.au/au/other/dfat/special/naaa/2010/531.html), at [99]

The FOI Guidelines [at 5.39] advise that:

5.39 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.

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.

I consider that the release of the information marked 's33(a)(iii)' in the document(s) would, or could reasonably be expected to cause damage to the Australian Government's international relations.

Maintaining strong bilateral and multilateral relationships 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.

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,



Commander Neil Horne
49009545
Authorised Decision Maker
Department of Home Affairs

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.	8 August 2024	5	Ministerial Submission - MS24-001464	Exempt in full	s. 33(a)(i) s. 33(a)(iii)
2.	-	1	Attachment A	Exempt in full	s. 33(a)(i) s. 33(a)(iii)
3.	-	10	Attachment B	Exempt in full	s. 33(a)(i) s. 33(a)(iii)
4.	-	7	Attachment C	Exempt in full	s. 33(a)(i) s. 33(a)(iii)
5.	-	14	Attachment D	Exempt in full	s. 33(a)(i) s. 33(a)(iii)