



29 September 2021

Ms Eleanor Davey
BY EMAIL: foi+request-7171-e6228b47@righttoknow.org.au

In reply please quote:
FOI Request: FA 21/03/01196-R1
File Number: OBJ2021/9882

Dear Ms Davey

Decision on Internal Review – Freedom of Information Act 1982

I refer to your correspondence dated 21 June 2021 in which you requested that the Department of Home Affairs (the Department) review its decision on access to documents dated 9 June 2021 under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of original request

The scope of your original request for access to documents under the FOI Act was as follows:

I would like to access a copy of the risk assessment developed for the performance management of Save the Children Australia as part of that organisation's work associated with the Regional Processing Centre on Nauru. According to ANAO report no 32 of 2016-17, p.13, this risk assessment was agreed in December 2014.

If this document is already publicly available or can be released administratively I would be pleased to have notification of its availability.

2 Original decision on access dated 9 June 2021

Documents within scope

The Department identified one document as falling within the scope of your original request.

This document was in the possession of Department on 23 March 2021 when your FOI request was received.

Decision on access

The original decision maker decided to:

- refuse access to the document, on the basis it was considered exempt from disclosure.

In finding that the document was exempt, the Department relied on sections 33(a)(iii) and 47E(d) of the FOI Act.

3 Request for internal review

On 21 June 2021, you requested the Department to review its decision dated 9 June 2021. The terms of your review request were as follows:

I am writing to request an internal review of Department of Home Affairs's handling of my FOI request 'Risk assessment for Save the Children on Nauru' (FA 21/03/01196). I would like to request internal review on the following grounds related to the sections of the FOI Act cited in the decision letter:

1. Section 33(a)(iii) [part 6.1 of the decision letter] - this '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 decision letter also notes that 'There must be real and substantial grounds for the conclusion that are supported by evidence.'

However, I believe that the refusal is on the basis of assertion rather than evidence, and that the refusal on this grounds should be re-evaluated for the following reasons:

- *The document I have requested pertains to the relationship between the Commonwealth of Australia and a service provider, Save the Children Australia. The document is for performance management of the contract between these two parties. No evidence has been given to prove that the terms of performance management pertain to any relationship other than that between the contractor and service provider.*

- *The contract itself, as well as contracts between the Commonwealth of Australia and other contractors working in the Nauru Regional Processing Centre, have previously been released following FOI requests. This suggests that contractual arrangements, which could reasonably be taken to include arrangements for the management of those contracts, do not fall under Section 33(a)(iii).*

- *The involvement of service providers on Nauru and certain elements of the handling of their contracts are well established and widely known. See ANAO reports no. 16 and 32 of 2016-17 in the first instance.*

- *See also the contextual information in my next point below.*

2. Section 47E [part 6.2 of the decision letter] - this states 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 believe that the idea that the release of this document could have a 'substantial adverse effect' on Department of Home Affairs operations should be re-evaluated

due to the following considerations:

- *The organisation in question (Save the Children Australia, SCA) is no longer a service provider in offshore detention and has not been since 2015, approximately 6 years ago.*

- *The primary caseload for which SCA was contracted to provide services, families with children in detention on Nauru, is no longer present. The last 3 children and their families were brought to Australia in February 2019.*

- *The Nauru Regional Processing Centre has ceased to operate in the form that it did at the time the document was produced and in the manner to which the contract pertains.*

The relevant operations have thus changed significantly since the time of the contract and how the release of this contract management document could affect them is very unclear.

3. Section 11A of the Act [part 6.3 of the decision letter] governs the public interest assessment test.

I address the assertions from the decision letter below:

- *Finding: 'Access to the document would promote the objects of the FOI Act.'*

Response: Agreed.

- *Finding: 'The subject matter of the document does not seem to have a general characteristic of public importance. The matter has a limited scope and, in my view, would be of interest to a very narrow section of the public.'*

Response: Scrutiny, review, and discussion of government activities are of high public importance; immigration policy and the management of immigration detention are of high public importance; as evidenced by parliamentary inquiries, academic research, third-sector work, mass protests, and press coverage, there is strong interest in these issues and this interest cannot be set aside by unsubstantiated claims about an undefined 'very narrow section of the public'.

- *Finding: 'No insights into public expenditure will be provided through examination of the document.'*

Response: the document requested pertains to the management of a significant category of public expenditure. The high costs of offshore detention have been well established. Scrutiny of the contracting process and the management of contracts once established has been shown to be important by the work of the ANAO in successive investigations. These have revealed shortcomings in the processes used by the Department of Home Affairs and its predecessor departments, knowledge of which is strongly in the public interest. Indeed, rather than having potentially adverse effects as claimed in the refusal letter, transparency and accountability (of the kind facilitated by investigations and FOI requests) are likely to improve operations in the future.

• *Finding: 'You do not require access to the document in order to access your own personal information.'*

Response: agreed.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.righttoknow.org.au/request/risk_assessment_for_save_the_chi

4 Scope of internal review

Based on the terms of your internal review in paragraph 3 above, I consider you are seeking review of:

- the Department's decision to apply exemptions to documents within the scope of the request

I consider you have not sought review of the searches undertaken by the Department in its original decision. Accordingly, the Department has not conducted further searches for documents as part of this decision.

5 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 departmental records.

In accordance with section 54C(3) of the FOI Act, I have made a fresh decision on your FOI request.

6 Information considered

In reaching my decision, I have considered the following:

- the scope of your request
- the Department's original decision of 9 June 2021 and the evidence gathered for that decision
- your submissions in relation to your reasons for requesting an internal review
- the documents falling within the scope of your original request
- the searches undertaken in the original decision
- advice from departmental officers with responsibility for matters relating to the information to which you sought access
- the FOI Act, and
- the Australian Information Commissioner's guidelines relating to the interpretation, operation and administration of the FOI Act (the FOI guidelines).

7 Internal review decision

I have decided to vary the original decision of the Department dated 9 June 2019 and replace it with a decision:

- that, in relation to the documents found to be exempt in the original decision:
 - certain material found to be exempt under section 33(a)(iii) and 47E(d) is not exempt
 - certain material found to be exempt under section 33(a)(iii) and 47E(d) is not exempt under section 47E(d), but is exempt under sections 33(a)(iii) and 47G
 - certain material found to be exempt under section 33(a)(iii) and 47E(d) is not exempt under both these provisions, but is exempt under section 33(a)(iii) or 47G
 - certain material found to be exempt under section 33(a)(iii) and 47E(d) relating to another contracted service provider is not exempt, but it is irrelevant to your request under section 22(1)(a)(ii) of the FOI Act
 - three pages of the documents found to be exempt in the original decision are duplicates of other pages, and are accordingly outside the scope of your request
 - to release the document in part, by granting access to an edited copy from which exempt and irrelevant material has been deleted.

The Department has affirmed the remainder of its decision to apply the section 33(a)(iii) exemption.

The schedule included at **Attachment A** sets out my decision on each of the documents within the scope of the internal review request.

I have provided the reasons for my decision below.

8 Reasons for internal review decision: irrelevant material

8.1 Section 22(1)(a)(ii) of the FOI Act – irrelevant to request

Section 22(1)(a)(ii) of the FOI Act applies if an agency or Minister decides that giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.

I have decided that parts of the documents contain information that could reasonably be regarded as irrelevant to your request.

The material in question relates to another contracted service provider, information about which is included with information about Save the Children Australia in the document within the scope of the request.

As the scope of your request is for “a copy of the risk assessment developed for the performance management of Save the Children Australia”, I consider that material that wholly relates to services provided by the other service provider, and the risk assessment of those services, to be irrelevant to your request.

I consider the remaining material in the documents to be relevant to your request.

9 Reasons for internal review decision: exemptions

9.1 Section 33(a)(iii) of the FOI Act – Documents affecting international relations

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 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.

The document within the scope of the request relates to the risk management of services performed by contracted services providers operating in Nauru. The Republic of Nauru is a sovereign nation and the Government of Nauru is responsible for regional processing in Nauru.

The material relating to Nauru that I consider exempt under 33(a)(iii) contains information about regional processing operations in Nauru, including information about aspects of regional processing operations that could be considered as providing a commentary on conditions in Nauru if it were disclosed

I consider releasing certain information would adversely impact on the ability of the Department to maintain good working relations with the Government of Nauru. This assessment is made considering the nature of the information contained within the document and the current nature and extent of the Australia Government's relationship with the Government of Nauru.

In forming my decision I have taken into consideration the views of the Government of Nauru, which has expressed concern about the release of sensitive information relating to regional processing arrangements and requested that this information not be disclosed by the Department. Any action such as disclosure of sensitive documents or documents critical of Nauru would cause offence to Nauru and harm our bilateral relationship. I therefore consider that the capacity of the Department and the Government of Australia to maintain a productive and healthy bilateral relationship with the government of Nauru would be damaged by the release of the information.

In making this decision I have also consulted officers of the Department with specific knowledge of the bilateral relationship between the Department and Nauru, who agreed that the disclosure of the material would adversely impact on the ability of the Department, and as a result, the Australian Government, to maintain good working relations with Nauru.

I therefore consider that the release of the information marked with the 's. 33(a)(iii)' redaction in the document(s) would, or could reasonably be expected to cause damage to the Australian Government's international relations.

As such I have decided that the information is exempt from disclosure under section 33(a)(iii) of the FOI Act.

10 Reasons for internal review decision: public interest conditional exemptions

10.1 Section 47G of the FOI Act – Business affairs

Section 47G(1)(a) of the FOI Act permits conditional exemption of documents containing business information where disclosure of that information would, or could reasonably be expected to, unreasonably affect the organisation adversely in respect of its lawful business, commercial or financial affairs.

I have considered that part of document contains information concerning the business, commercial or financial affairs of an organisation, Save the Children Australia.

In determining whether disclosure of the information within the documents 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 these documents is not in the public domain, the organisation concerned is not generally known to be associated with the matters referred to in these documents, and the information is not available from publicly accessible sources, such as the organisation's website.

In addition, the Department consulted the third party organisation to whom the documents relate, and that organisation made submissions to the Department in support of exemption under section 47G(1)(a) of the FOI Act. I have taken these third party submissions into account when making this decision.

I am therefore satisfied that the disclosure of the information would, or could reasonably be expected to, unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

I have decided that parts of the documents 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 at paragraph 10.2 below.

10.2 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 has some public importance. However, the matter has a limited scope and, in my view, would be of interest to a narrow section of the public, including because of the passage of time.
- Some insights into public expenditure will be provided through examination of the document.
- The release of the document to you would not allow you access to 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 parts of the documents that are conditionally exempt under section 47G of the FOI Act could reasonably be expected to prejudice the competitive commercial activities of 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 documents would be contrary to the public interest and it is therefore exempt from disclosure under the FOI Act.

11 Reasons for decision: access to edited copies

11.1 Section 22(2) of the FOI Act – access to edited copies with exempt and irrelevant matter deleted

Section 22(2) of the FOI Act provides that an agency must provide access to an edited copy of a document when:

- the agency has identified that a document is exempt or contains irrelevant material, and
- it is possible for the agency to prepare an edited copy of the document from which it has deleted the exempt or irrelevant material.

As I have indicated above, the document identified within the scope of the request contains exempt and irrelevant material.

I have determined that it is reasonably practicable to prepare an edited copy of the document in question, and accordingly have issued you with an edited copy of this document pursuant to section 22(2) of the FOI Act.

12 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Details/C2017C00251>. If you are unable to access the legislation through this website, please contact our office for a copy.

13 Your review rights

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a 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/reviews-and-complaints/information-commissioner-review/>.

14 Making a complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian 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.

15 Contact

Should you wish to discuss my decision, please do not hesitate to contact via email at foi.reviews@homeaffairs.gov.au.

A small, rectangular image showing a handwritten signature in blue ink on a light-colored background. The signature appears to be 'Jacob Cannon'.

Jacob Cannon
Position number 60028140
Authorised Decision Maker
Department of Home Affairs