



## Attachment A

### DECISION RECORD

#### Request Details

FOI Request FA 15/10/01143  
File Number ADF2015/58225

#### Scope of request

*copies of all documents, briefs and correspondence to and from Immigration Minister Peter Dutton in relation to the case of Abyan, the 23-year old Somali refugee who came to Australia for an abortion and who was subsequently deported.*

#### Clarification of scope

1. On 8 January 2016 you confirmed with the case officer for your request your understanding that the documents in scope would include correspondence to/from the Department to/from the Minister, members of the Minister's staff and Departmental Liaison Officers, who are located at Parliament House within the Minister's Office. You also confirmed your understanding that you would not be re-provided any documents already provided to you on 22 December 2015, being documents released under a separate FOI request from another party regarding decision making around 'Abyan'.
2. On 11 January 2016 you agreed to the Department's proposal to exempt entirely from release, as irrelevant material, any correspondence (draft and actual) between the Department and two external parties ('Abyan's' lawyer and a Non-Governmental Organisation), although emails conveying or commenting on such material would be subject to release, with exemptions applied if/as required.

#### Documents in scope

3. The Department identified 12 documents totalling 53 pages as being within the scope of your request. The documents are listed at Attachment B – Schedule of Documents.

#### Authority to make decision

4. 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.

#### Information considered

5. In reaching my decision, I have considered the following:
  - The *Freedom of Information Act 1982*;
  - Departmental files and/or documents (identified above); and
  - The Australian Information Commissioner's guidelines relating to access to documents held by government.

### **Reasons for decision**

6. Section 22(2) of the FOI Act provides that, where an agency reaches the view that a document contains exempt information or material that is irrelevant to the request **and** it is possible for the agency to prepare an edited copy of the document with the irrelevant or exempt material deleted, then the agency must prepare such a copy.
7. This edited copy must be provided to the applicant. Further, the decision maker must advise the applicant in writing that the edited copy of the document has been prepared and of the reasons(s) for each of the deletions in the document (s.22(3) of the FOI Act).
8. Exempt material is deleted pursuant to s.22(1)(a)(i) and irrelevant material is deleted pursuant to s.22(1)(a)(ii) of the FOI Act. Where the only information removed has been deleted under s.22(1)(a)(ii), the document is considered to have been released in full.

### **Deletion of exempt material under s.22(1)(a)(i) of the FOI Act**

9. The Schedule of Documents (Attachment B) and the documents released (Attachment D) detail the exemptions that have been applied. Exemptions were applied on the following grounds:

### **Section 33 - documents affecting national security, defence or international relations**

10. Section 33(a) 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, defence or international relations of the Commonwealth.
11. I find that there are real and substantial grounds for expecting that the disclosure of the parts of document 9 exempted under 33(a)(iii) would cause damage to the international relations of the Commonwealth.
12. The material exempted under section 33(a)(iii) would cause damage to the bilateral relationship which the Department and the Australian Border Force enjoy with colleagues from a foreign government.
13. I consider that disclosure of the exempt information would also reasonably be expected to diminish the trust and confidence which the other country has in Australia as a reliable recipient of confidential information and may make the foreign country less willing to cooperate with the Department and the Australian Border Force in the future.
14. Accordingly, I have decided to exempt parts of Document 9 under section 33(a)(iii) of the FOI Act.

### **Section 42 – documents subject to legal professional privilege**

15. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the ground of legal professional privilege.
16. A document is exempt from production on the ground of legal professional privilege if all of the following apply:
  - i) there exists a lawyer-client relationship;
  - ii) there have been confidential communications which are recorded in the document;
  - iii) the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
  - iv) the privilege has not been waived.
17. I find that disclosure of the parts of documents 7 and 12 exempted under section 42(1) would involve disclosure of material that would be exempt from production in legal proceedings on the ground of legal professional privilege.

*Lawyer-client relationship*

18. The Department has a legal branch which is staffed by lawyers admitted to practice and who hold practising certificates. The lawyers in this branch provide independent legal advice. I am satisfied that the Department's in-house lawyers provided legal assistance in relation to the matters relevant to your FOI request and that a lawyer-client relationship existed between the Department and its in-house lawyers in relation to these matters. It is clear from the documents themselves that a lawyer-client relationship existed in respect of the communications. I am also satisfied that a lawyer-client relationship existed between the Department and the Australian Government Solicitor in respect of communications regarding the management of this case.

*Confidential communications*

19. The documents to which the exemption has been applied contain communications made in the context of the solicitor-client relationship. They were made on the understanding that the usual and well-established relationship of confidence between a solicitor and a client governed the communication. The communication was not provided outside of that context at the time of communication. I consider that the communications were confidential at the time they were made and remain confidential.

*Dominant purpose*

20. The communications were made for the dominant purpose of giving and receiving legal advice in connection with the transfer of the refugee referred to in your FOI request as 'Abyan'. They comprise emails to and from an in-house Departmental lawyer and an Australian Government Solicitor lawyer providing advice regarding the case.

*No waiver*

21. Section 42(2) of the FOI Act provides that:

A document is not exempt because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

22. A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. This will depend on the circumstances of the case, including whether the disclosure was for any advantage.

23. There is no evidence to indicate that the substance of the communications contained in the documents captured by your request has been disclosed more broadly, or used in any way that would be inconsistent with the maintaining the confidentiality of the communications. Accordingly, I am satisfied that the documents are exempt under section 42.

24. I have considered whether any of the documents consist of *operational information* referred to in section 8A, containing material used or to be used for the purpose of making decisions or recommendations of the kind referred to in section 8A(1) of the FOI Act. To the extent that they are, no claim for exemption is made under section 42.

**Section 47E(d) - substantial adverse effect on the proper and efficient conduct of the operations of an agency**

25. Section 47E(d) 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.

26. If the material over which a section 47E(d) claim is maintained in documents 3, 4 and 9 were released, I consider the Department and the Australian Border Force's operations in managing the transfer of refugees and transferees to Australia for a variety of purposes would be substantially adversely affected.
27. The information exempted under section 47E(d) in documents 3 and 4 is operationally sensitive and was provided to inform the email's recipients of likely developments which could influence the management of 'Abyan'.
28. The information exempted in document 9 under section 47E(d) is not directly related to Abyan's case and provides broader contextual background regarding sensitive medical transfers from Nauru to Australia.
29. I am concerned that disclosure of the information exempted under section 47E(d) could reasonably result in the Department needing to change its processes in communicating sensitive operational detail, and providing relevant officers sensitive broader contextual information, regarding the transfer of refugees and transferees to Australia for medical treatment. I find this adverse effect to be serious and not insubstantial. I find that parts of documents 3, 4 and 9 are conditionally exempt under section 47E(d) of the FOI Act.

***Application of the 'public interest' test***

30. Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act).
31. The Australian Information Commissioner's Guidelines states at paragraphs 6.8 and 6.9:

*...The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered...*

*To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies, based on the particular facts of the matter at the time the decision is made.*

32. I have considered the factors favouring access and factors that are irrelevant in subsections 11B(3) and (4). In balancing the public interest in this case, I have considered the following factors for and against disclosure:

*Factors in favour of disclosure:*

- i) promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act);
- ii) informing debate on a matter of public importance, namely the transfer of refugees to Australia for a variety of reasons; and
- iii) facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

*Factors against disclosure:*

- iv) protecting individuals from unreasonable interferences with their privacy;
- v) preserving reasonably held expectations of confidentiality; and
- vi) inhibiting the Department's ability to provide comprehensive but confidential advice to relevant staff and decision makers regarding inherently sensitive operational matters, including:
  - a) factors which could influence the management of individual transferees; and
  - b) sensitive background and contextual information, to properly inform relevant officers and decision makers.

33. While I acknowledge that there is a public interest in the documents of the Department being made available to the public for the purpose of encouraging public debate and to promote oversight of the Department and the Australian Border Force's activities, I consider that release of the information would make a negligible contribution to those factors in favour of disclosure.
34. I consider that the factors against the disclosure of the information to be significant. The Department needs to be able to freely provide to relevant officers sensitive operational and contextual information regarding the transfer of refugees and transferees to Australia and the management of returns to Nauru. Restriction of the communication of that information, for fear that it could be released to the broader public, would inhibit the Department's ability to communicate sensitive and relevant operational information which could negatively impact effective management of such cases.
35. Taking into account the above matters, on balance, I consider that disclosure of the information in the documents is contrary to the public interest. Accordingly, I have decided that the documents are exempt in part under section 47E(d) of the FOI Act.

#### **Section 47F – personal privacy**

36. Section 47F(1) of the Act provides:

*A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

*The relevant documents contain 'personal information'*

37. I am satisfied that the documents to which you have sought access contain 'personal information'. The relevant material in the documents includes:
- the name and other identifying information of the individual referred to in your request as 'Abyan';
  - private/sensitive personal and medical information about 'Abyan' which is not in the public domain;
  - the name and contact details of a non-SES employee of the Department of Prime Minister and Cabinet; and
  - the names of third parties who have lobbied against immigration detention and regional processing.

38. The information above clearly represents information about identified individuals or individuals who are reasonably identifiable and is personal information.

*Disclosure would involve the 'unreasonable disclosure of personal information'*

39. In assessing whether a particular disclosure would be 'unreasonable', section 47F(2) sets out a number of factors which the Department *must* consider.

40. These factors are:

- a) the extent to which the information is well known;
- b) 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;
- c) the availability of the information from publicly accessible sources; and
- d) any other matters that the agency or Minister considers relevant.

*Medical and other information - 'Abyan'*

41. I have considered the sensitive nature of the information regarding the refugee identified in the documents as having sought access to termination of pregnancy services. Release of the personal information in the documents about this individual would cause significant stress to them, and no public purpose would be achieved in identifying them. I have also had regard to the fact that disclosure of this personal information could have serious consequences for the individual and I do not consider that disclosure of their identifying information would shed light on the workings of government. There is a strong interest in protecting the personal privacy of this third party. For these reasons, in the circumstances, I consider disclosure of information beyond that already in the public domain to be unreasonable.

*Other personal information*

42. I am satisfied that the release of the names of the non-SES officer at the Department of Prime Minister and Cabinet and the advocates against immigration detention and regional processing arrangements, would be 'unreasonable' within the meaning of section 47F(1). This is because their identity would make a negligible contribution to public debate regarding the Government's handling of the matters described in the documents.

***Application of the 'public interest' test***

43. While I have found that the conditional exemption in section 47F(1) of the FOI Act applies to the information outlined in paragraph 37 above, section 11A(5) of the FOI Act requires me to disclose the information unless access at this time would, on balance, be contrary to the public interest. I will now consider whether disclosure would be contrary to the public interest.

44. In determining whether disclosure would be contrary to the public interest, section 11B(3) sets out a number of relevant factors which point in favour of release. These factors are:

- a) whether release would promote the objects of the FOI Act;
- b) whether release would inform debate on a matter of public importance;
- c) whether release would promote effective oversight of public expenditure; and
- d) whether release would allow a person to access his or her own personal information.

45. While I acknowledge that release of the documents will promote the objects of facilitating and promoting public access to information, I am satisfied that the content being released from the documents which is not personal information will inform public debate regarding the matters described in the documents. In the circumstances, I consider that the release of individual identifying information of the refugee known as 'Abyan', or the others whose identity has been exempted under section 47F(1), would make a negligible further contribution to public debate.

46. In contrast, I consider that the protection of the individual's right to privacy should be given the upmost importance.

47. On balance, I have decided that the interest in the refugee's privacy and the privacy of the non-SES Prime Minister and Cabinet officer and the advocates against immigration detention and regional processing outweighs the public factors in favour of disclosure listed above.


48. Taking into account the above matters, on balance, I consider that disclosure of the information in the documents is contrary to the public interest. Accordingly, I have decided that the documents are exempt in part under section 47F of the FOI Act. I confirm that I have not considered the irrelevant factors listed in section 11B(4) of the FOI Act.

**Section 22(1)(a)(ii) - material irrelevant to the request**

49. I find that some of the documents relevant to your request contain some material which is irrelevant to your FOI request. I have withheld or deleted that material accordingly. These deletions are detailed in the documents released.

50. The material deleted under section 22(1)(a)(ii) includes:

- the direct contact details of Departmental staff and the names of Departmental non-Senior Executive Service staff (although position titles have been released for these staff). The intended exclusion of this information was communicated to you on 21 October 2015 and you were provided with an opportunity to request that information should you require it. No such request was received;
- draft and final correspondence between the Department and two external parties (a lawyer and an NGO), as agreed by you in advance of the decision – refer 'Clarification of Scope' above;
- statistical information unrelated to 'Abyan'; and
- any information relating to the forwarding or printing of documents, where such action was taken by the Department for the purpose of processing this FOI request.



Authorised decision maker  
Department of Immigration and Border Protection  
Email: [foi@border.gov.au](mailto:foi@border.gov.au)

4 February 2016





Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD  
FOI Request FA 15/10/01143

No.	Date of document	Pages	Description	Decision on release	
1.	06/10/2015	1-4	Email and attachment (letter from external party to Minister)	Released in full	
2.	07/10/2015	5-7	Email	Released in part	s.47F(1)
3.	07/10/2015	8-11	Email	Released in part	s.47E(d) s.47F(1)
4.	07/10/2015	12-14	Email	Released in part	s.47E(d) s.47F(1)
5.	07/10/2015	15-18	Email	Released in part	s.47F(1)
6.	08/10/2015	19-23	Email and attachment (draft letter DIBP to external party)	Released in part	s.47F(1)
7.	08/10/2015	24-29	Email	Released in part	s.42(1) s.47F(1)
8.	08/10/2015	30-35	Email and attachment (letter DIBP to external party)	Released in part	s.47F(1)
9.	08/10/2015	36-44	Ministerial submission and attachments	Released in part	s.33(a)(iii) s.47E(d) s.47F(1)
10.	13/10/2015	45-46	Email	Released in part	s.47F(1)
11.	14/10/2015	47-48	Email	Released in part	s.47F(1)
12.	16/10/2015	49-53	Email	Exempted in full	s.42(1)



## Attachment C – Extract of relevant legislation (FOI Act)

### 11A Access to documents on request

#### Scope

- (1) This section applies if:
- (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

#### Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

#### Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

## 22 Access to edited copies with exempt or irrelevant matter deleted

### Scope

- (1) This section applies if:
- (a) an agency or Minister decides:
    - (i) to refuse to give access to an exempt document; or
    - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
  - (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:
    - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
    - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
  - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
    - (i) the nature and extent of the modification; and
    - (ii) the resources available to modify the document; and
  - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

### Access to edited copy

- (2) The agency or Minister must:
- (a) prepare the edited copy as mentioned in paragraph (1)(b); and
  - (b) give the applicant access to the edited copy.

## Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
- (a) that the edited copy has been prepared; and
  - (b) of the grounds for the deletions; and
  - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

## 33 Documents affecting national security, defence or international relations

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:
  - (i) the security of the Commonwealth;
  - (ii) the defence of the Commonwealth; or
  - (iii) the international relations of the Commonwealth; or
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Note: See also subsection 4(10).

## 42 Documents subject to legal professional privilege

- (1) 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.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
- (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
  - (b) the information is operational information of an agency.

Note: For *operational information*, see section 8A.

#### **47E Public interest conditional exemptions—certain operations of agencies**

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

#### **47F Public interest conditional exemptions—personal privacy**

##### General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
  - (a) the extent to which the information is well known;
  - (b) 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;
  - (c) the availability of the information from publicly accessible sources;
  - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

##### Access given to qualified person instead

- (4) Subsection (5) applies if:
  - (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and

- (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
  - (a) carries on the same occupation, of a kind mentioned in the definition of **qualified person** in subsection (7), as the first-mentioned qualified person; and
  - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:

**qualified person** means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).