

**ATTACHMENT A****SCHEDULE OF DOCUMENTS****REQUEST UNDER FREEDOM OF INFORMATION ACT 1982**

<b>No.</b>	<b>Date of document</b>	<b>Pages</b>	<b>Description</b>	<b>Decision on release</b>	
1.	02/10/2015	1-3	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
2.	06/10/2015	4-7	Email correspondence plus attachment	Released in part	s22(1)(a)(ii) s33(a)(iii) s47E(d) s47F(1)
3.	06/10/2015	8	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
4.	06/10/2015	9-10	Email correspondence	Released in part	s22(1)(a)(ii) s33(a)(iii) s47F(1)
5.	07/10/2015	11-15	Email correspondence plus attachment	Released in part	s22(1)(a)(ii) s33(a)(iii) s47E(d) s47F(1)
6.	07/10/2015	16-20	Email correspondence plus attachments	Released in part	s22(1)(a)(ii) s47F(1)
7.	08/10/2015	21-24	Email correspondence plus attachment	Released in part	s22(1)(a)(ii) s47F(1)
8.	14/10/2015	25-28	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
9.	14/10/2015	29-31	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
10.	14/10/2015	32-34	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
11.	14/10/2015	35-38	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)

No.	Date of document	Pages	Description	Decision on release	
12.	14/10/2015	39-41	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
13.	14/10/2015	42-48	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
14.	14/10/2015	49-50	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
15.	14/10/2015	51-52	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
16.	14/10/2015	53	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
17.	15/10/2015	54-66	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
18.	15/10/2015	67-75	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
19.	15/10/2015	76-79	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
20.	15/10/2015	80-89	Email correspondence	Released in part	s22(1)(a)(ii) s42(1) s47F(1)
21.	19/10/2015	90-92	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)
22.	19/10/2015	93-96	Email correspondence	Released in part	s22(1)(a)(ii) s47F(1)

### Reasons for decision

1. Any reference to 'documents' should be read as including parts of documents relevant to the particular exemption which is discussed.
2. For the reasons set out below I have exempted certain documents in part under sections 33(a)(iii), 42(1), 47E(d) and 47F(1) of the FOI Act.
3. A schedule of the documents released and the sections of the FOI Act applied in undertaking redactions on each document is provided at **Attachment A**. Details of the precise parts of the documents exempted are set out in the released documents.

### Findings of fact and reasons for decision

4. Where the schedule of documents indicates an exemption claim has been applied to part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document or part of document are set out below.

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

5. 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.
6. I find that there are real and substantial grounds for expecting that the disclosure of the part of documents 2, 4 and 5 exempted under section 33(a)(iii) would cause damage to the international relations of the Commonwealth. In particular, 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. The exemption in s 33(a)(iii) of the FOI Act has previously been found to cover relations between government agencies and is not confined to relations at the formal diplomatic or ministerial level.<sup>1</sup> 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.
7. Accordingly I have decided to exempt parts of the email correspondence and Minute which appear at documents 2, 4 and 5 under section 33(a)(iii) of the FOI Act.

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

8. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the ground of legal professional privilege.
9. 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.

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<sup>1</sup> *Re Haneef and Australian Federal Police* [2009] AATA 51.

10. I find that disclosure of the documents exempted under section 42(1) would involve disclosure of documents that would be exempt from production in legal proceedings on the ground of legal professional privilege.

***Lawyer-client relationship***

11. 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.

***Confidential communications***

12. 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***

13. 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' or 'Abeya'. They comprise emails to and from an in-house Departmental lawyer providing advice regarding the case.

***No waiver***

14. 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.

15. 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.

16. 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.

17. 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**

18. 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.
19. If the material over which a section 47E(d) claim is maintained in documents 2 and 5 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.
20. The Minute to the decision maker in documents 2 and 5 contains historical background information regarding the Department's transfer of other refugees and transferees to Australia from Nauru for medical treatment. This information was offered to the decision maker to provide broader context regarding the transfer of refugees and transferees for medical treatment, however, it was not directly related to Abyan's case. I am concerned that disclosure of the information in paragraphs 16-18 of the Minute could reasonably result in the Department needing to change its processes in briefing decision makers on broader contextual information regarding the transfer of refugees and transferees to Australia for medical treatment.
21. I consider that disclosure could reasonably be expected to adversely effect the Department's operations for these reasons. I find this adverse effect to be serious and not insubstantial. I find that parts of documents 2 and 5 are conditionally exempt under section 47E(d) of the FOI Act. Nonetheless I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest.

#### ***The public interest***

22. 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). As the Guidelines state at paragraphs 6.8 - 6.9:
23. 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.
24. 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.
25. 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:**

26. I have considered the following factor against disclosure:
- i) protecting individuals from unreasonable interferences with their privacy;
  - ii) preserving reasonably held expectations of confidentiality; and
  - iii) inhibiting the Department's ability to provide comprehensive but confidential advice to decision makers regarding inherently sensitive matters, including offering detailed background and contextual information to properly inform the decision.
27. 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. However, I do not consider that disclosure of the exempt material would facilitate any of these objects. In contrast, the conditionally exempt material identifies, and relates to, the transfer of a number of other individuals to Australia for medical treatment.
28. In this case, I have formed the view that the disclosure of the information will make a negligible contribution to those factors in favour of disclosure. There is minimal public interest in this information being known. By contrast the interference with the privacy of the other individuals is in my view significant. The Department needs to be able to freely provide contextual information regarding the transfer of refugees and transferees to Australia for a variety of reasons, where that information may help inform a decision maker. Accordingly, I have concluded that disclosure would, on balance, be contrary to the public interest.
29. I am concerned with ensuring that members of the Department, in briefing decision makers on matters of great personal significance to individual detainees, are able to frame their advice freely rather than in more guarded or careful terms to ensure the decision maker is fully apprised of all relevant circumstances before reaching their decision. This includes briefing the decision maker on any contextual or analogous circumstances, and where those circumstances are in themselves also sensitive or personal to other clients of the Department, there must be an understanding that the advice will remain confidential.
30. 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 or in full under section 47E(d) of the FOI Act.

**Section 47F – personal privacy**

31. 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'***

32. One requirement in section 47F(1) of the FOI Act is that the documents contain 'personal information'. The FOI Act defines 'personal information' by reference to the *Privacy Act 1988* (Cth) (Privacy Act). Section 6 of the Privacy Act defines 'personal information' to be:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

33. I am satisfied that the documents to which you have sought access contain 'personal information'. The relevant material in the documents includes:

- the name, date of birth and other identifying information of the individual referred to in your request as 'Abyan' or 'Abeya';
- identifying information of other refugees and transferees who have been brought to Australia for medical treatment, such as their names, travel dates and family composition;
- the names, telephone numbers and email addresses of non-Senior Executive Service (**SES**) officers in the Department and the Australian Border Force;
- the telephone numbers of SES officers in the Department and the Australian Border Force; and
- the name and contact details of employees of a contracted service provider for the Department.

34. 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'***

35. The next issue to consider in applying section 47F(1) of the FOI Act is whether the disclosure of personal information would be 'unreasonable' in the circumstances. In assessing whether a particular disclosure would be 'unreasonable', section 47F(2) sets out a number of factors which the Department *must* consider.

36. 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.

37. Relevantly, the personal information to which you seek access takes two different forms:

- (a) *third party personal information* – including information about individual refugees and transferees and employees of a contracted service provider engaged by the Department; and
- (b) *the personal information of agency employees* – information about non-SES officers who work in the Department and the Australian Border Force and the telephone numbers of SES officers within the Department and the Australian Border Force.

*Third party personal information*

38. 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 on 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.<sup>2</sup> There is a strong interest in protecting the personal privacy of this third party. For these reasons, in the circumstances, I consider disclosure to be unreasonable.

39. I have also considered the sensitive nature of information which could identify other refugees or transferees who have been brought to Australia for medical treatment and determined that there is a strong interest in protecting the privacy of these third parties. For this reason I consider disclosure of the information relating to these individuals would be unreasonable.
40. I am satisfied that the employees of the Department's contracted service provider are not publicly known to be associated with the matters dealt with in the documents. I have taken into account the circumstances in which the employees of this contracted service provider interacted with the Department. Noting that these individuals are not public servants or employees of the Department, I consider that disclosure of the individual officers' names to also be unreasonable.

*Personal information of agency employees*

41. I am satisfied that the names of the relevant non-SES officers contained in the documents are not well known to be associated with the matters outlined in the documents. Similarly, I am satisfied that this personal information is not available from publicly accessible sources. The details about non-SES officers in some cases relate to relatively junior officers within the Department and the Australian Border Force, whose identity would make a negligible contribution to public debate regarding the Department's handling of the matters described in the documents. In my view, these factors point in favour of characterising the information's disclosure as 'unreasonable' within the meaning of section 47F(1).
42. I acknowledge that the Information Commissioner's *FOI Guidelines* (at [6.140]) provide:
- Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties. Such information may often also be publicly available, such as on an agency website.
43. However, in my view, in light of the sensitive subject matter of the documents and the high level of media attention the Department received arising from this matter, these documents ought to represent a 'special circumstance' of the kind envisaged by the *FOI Guidelines*. In particular, I consider that disclosure of the names of these relatively junior officers within the Department and Australian Border Force may cause these individuals to be subject to personal attack or public backlash as a result of their involvement in the matters discussed in the documents. I consider that disclosure of this personal information would be unreasonable in all of the circumstances. This is particularly the case given that the identities of all senior Departmental officers (namely, members of the SES), will be released to you in the documents.
44. I do not consider that disclosure of the names of relatively junior officers would shed light on the workings of the Department or enhance accountability or transparency of the Department or the Australian Border Force. Information about non-SES officers is not generally made publicly available on the Department's website. In light of the need for

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<sup>2</sup> *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at [259]; Information Commissioner's *FOI Guidelines* at [6.127]–[6.132].

heightened security in the wake of terrorism threats, I am concerned with protecting the personal safety of individual junior Departmental or Australian Border Force officers. Release of any personal information regarding these relatively junior officers could, in my view, reasonably result in them being targeted. This position is also consistent with the Department's current practice that staff ought not be publicly identified or associated as being Departmental employees, including by requiring the removal of security passes and covering uniforms outside Departmental premises.

45. I consider that public scrutiny of more junior employees' personal involvement in the matters described in the documents captured by your request would be an unreasonable disclosure of their personal information, over and above that which would ordinarily be expected by a public servant. This is also the case in an electronic environment where the names of any individuals identified and their association with the matters described in the documents would be disclosed to the world at large.
46. Finally, I note that the telephone numbers of individual Departmental or Australian Border Force officers are not made publicly available on the Department's website or elsewhere. While Departmental officers are assigned individual telephone numbers and some are also assigned mobile telephones to ensure they are contactable as required, I consider that disclosure of these direct telephone contact numbers under the FOI Act would be unreasonable in the circumstances. Telephone numbers are sometimes listed in the email signature blocks of staff members when emailing specific internal and external contacts. However, making this direct contact information available more widely could expose the officers to harassing contact, especially out of hours in relation to mobile phone numbers. In circumstances where the Department has established particular points of contact to manage public enquiries, I consider that disclosure of officer telephone numbers would be unreasonable.

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

47. While I have found that the conditional exemption in section 47F(1) of the FOI Act applies to the information outlined in paragraph 21 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.
48. 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.
49. While I acknowledge that release of the documents will promote the objects of facilitating and promoting public access to information (see section 3(4)), 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 'Abeya', and any other refugees or transferees, would make a negligible further contribution to future debate.
50. In contrast, I consider that the protection of the individual's right to privacy should be given the upmost importance in relation to the refugee named in the documents (referred

in your FOI request as 'Abyan' or 'Abeya') and other refugees and transferees brought to Australia for medical treatment. The inherently sensitive nature of this personal information is such that it may cause harm to the individuals concerned.

51. Similarly, disclosure of the telephone numbers of SES officers could not be regarded as contributing any further to public debate, transparency or accountability in respect of the Department's or the Australian Border Force's operations, or to the officers' duties as public servants. This information would also not contribute to any of the public interest factors listed in favour of disclosure. To the extent that the documents contribute to the factors in favour of disclosure, the public interest is achieved by the material already being released. In my view, there is no tangible public benefit in releasing these Departmental officers' telephone numbers. In contrast, disclosure of this information would interfere with the personal privacy of these officers. I consider that disclosure of officers' telephone numbers would only serve to increase the potential accessibility of these officers in the event that harassing conduct, including outside of expected working hours, might be directed toward them. As noted above, the Department has already established channels of contact for members of the public to provide feedback (complaints, compliments and suggestions) via its Global Feedback Unit.
52. Finally, I consider the names of Departmental junior officers will also make a negligible contribution to the public interest factors in favour of disclosure. I acknowledge that there is a general public interest in documents of the Department being made available to the public. However, I do not consider that public debate requires relatively junior, non-SES officers who were not ultimately responsible for the final sign-off or approval of the matters described in the documents to be named for their association with the matters described in the documents. There is minimal public interest in this information being known, particularly when the identities of the relevant SES officers have already been released. I consider a similar argument applies in relation to the employees of the contracted service provider. There is minimal public interest in this identifying information being publicly known. By contrast, in my view, the interference with the privacy of these officers is significant.
53. On balance, I have decided that the interest in the officers' privacy outweighs the public factors in favour of disclosure listed above.
54. 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**

55. Section 22(1)(a)(ii) allows an agency to delete irrelevant material from a document which is only partially relevant to an applicant's FOI request. 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 document schedule at **Attachment A** and the documents released at **Attachment E**.
56. The material deleted under section 22(1)(a)(ii) includes correspondence received by the Department from third parties, including a legal representative regarding whether the individual referred to in your FOI request as 'Abeya' or 'Abyan' had given her consent to be transferred. You indicated in your email of 2 December 2015 that you were 'not interested in representations made by outsiders.' For this reason, I have decided this material is not relevant to the scope of your request. However, I have released the balance of these two documents to you on the basis that they reveal the extent of the Secretary's involvement in the matters in which you have expressed an interest.

57. I have also deleted some material from the documents on the basis that it relates to the logistical arrangements regarding the transfer (the itinerary and flight details), rather than the question of whether the individual would be allowed to come to Australia.

58. I have also deleted as irrelevant information email forwarding and printing details, where the email was forwarded between officers of the Department, or printed by officers of the Department, for the purpose of processing this FOI request.

  
Authorised decision maker  
Department of Immigration and Border Protection  
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18 December 2015