



## Attachment A

### DECISION RECORD

#### Request Details

FOI Request: FA 16/03/01791  
File Number: ADF2016/13196

#### Scope of request

1. On 18 March 2016 you requested:

*documents containing information relating to concerns about illegally imported building products which contain asbestos.*

*I note a Senate Inquiry is currently investigating non-conforming building products, including imports of asbestos tainted cement fibre board.*

*I specifically seek access to:*

1. *All summary documents, and/or reports, and/or notes and/or emails between January 2011 and March 2016 relating to building products imported by the Chinese company Feicheng Lutai.*
  2. *All communications and/or memos and/or notes and/or emails between January 2011 and March 2016 relating to concerns raised about imported building products containing asbestos.*
  3. *All documents between March 2015 and March 2016 relating to seized imported products containing asbestos.*
2. On 25 May 2016 you agreed to revise the scope of your request to the following:
    1. *All summary documents, and/or reports, and/or notes and/or emails between January 2011 and March 2016 relating to building products imported by the Chinese company Feicheng Lutai.*
    2. *All summary documents between March 2015 and March 2016 relating to seized imported products containing asbestos.*

### Documents in scope

3. There are four documents within the scope of your request. These documents are detailed at the Schedule of Documents (Attachment B).

### 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*;
  - The Departmental documents as listed in the Schedule of Documents;
  - Consultations with relevant business areas; and
  - The Australian Information Commissioner's guidelines relating to access to documents held by government; and consultations with relevant Departmental business areas.

### 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 reason(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.

### Exemptions applied to the document under s.22(1)(a)(i)

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 37(2)(a)- prejudice the fair trial of a person or the impartial adjudication of a particular case**

10. Document 1 contains details of building products sourced from the Chinese-based company Feicheng Lutai Science and Technology Co Ltd and imported into Australia between January 2011 and March 2016.
11. The Department consulted with the Australian businesses which imported the building products (as detailed in Document 1) and learned that the importations are currently the subject of investigations by SafeWork SA.
12. Document 4 contains details of detection by the Australian Border Force of asbestos in imports. Some of these incidents continue to be subject to investigation by the Australian Border Force.

13. Risks around asbestos exposure are of considerable public interest. As incidences of the importation of asbestos-tainted products, as detailed in Documents 1 and 4, are currently the subject of investigation/s, I consider that release of the information in these documents could reasonably be expected to prejudice the impartial adjudication of the matters under investigation.
14. I have therefore exempted all of Document 1 and parts of Document 4 under s.37(2)(a) of the FOI Act.

***Section 37(2)(b)- disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.***

15. Document 4 contains detail of the Australian Border Force's actions in response to the detection of asbestos in imported goods. It includes detail of the investigations undertaken and the sanctions considered and/or applied against the importing businesses in each instance.
16. Release of this information would reveal details of the Australian Border Force's methods for investigating and managing breaches of the law. If this information were to be released it would be reasonably likely to lessen the effectiveness of the Australian Border Force's law enforcement processes by making it easier for offending parties to predict and manage the investigation process and sanctions likely to occur.
17. I have therefore exempted relevant parts of Document 4 under s.37(2)(b) of the Act.

***Section 45 – documents containing material obtained in confidence***

18. Document 1 was produced from the Department's Integrated Cargo System (ICS). The document contains the following information regarding a number of imports of building products from Feicheng Lutai Science and Technology Co Ltd between January 2011 and March 2016:
- *Estimated arrival date*
  - *Voyage Vessel ID*
  - *Voyage number*
  - *Sea Bill Ocean Bill Lading Number*
  - *Sea Bill House Bill Lading Number*
  - *Consignor Full Name*
  - *Consignee Full Name*
  - *Sea Bill Line Cargo Type Code*
  - *Container Number*
  - *Cargo Volume*
  - *Cargo Volume Unit*
  - *Gross Weight*
  - *Gross Weight Unit*
  - *Net Weight*
  - *Net Weight Unit*
  - *Package Count*
  - *Xray Send Requirement Ind*
  - *Goods Description*
  - *Discharge Port Code*
  - *Cargo Status Type Code*

- *Destination Port Code*
  - *Destination Region*
19. The document was consulted with the Australian businesses which are listed in the document as importing the building products from Feicheng Lutai Science and Technology Co Ltd. One of the businesses responded to the Department, raising a range of concerns about release of the document, including that release would harm its business operations.
20. In assessing the document, I have also had regard to the Australian Information Commissioner's decision of 19 January 2015 (Fairfax Media Limited and Australian Customs and Border Protection Service, Application Number MR12/00387, Decision reference AICmr7) which deals with the nature of the information held within the ICS database. A copy of the decision is available at:
- <http://www.austlii.edu.au/au/cases/cth/AICmr/2015/7.html>
21. Section 45 of the FOI Act provided that a document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
22. I have decided that Document 1 contains material that, if disclosed, would found an action by a person for breach of confidence. The document consists of data extracted from the Department's ICS database.
23. The ICS is the Department's electronic clearance and reporting system for imports and exports and links the Australian Border Force with owners of goods or their agents and automates procedures for the reporting of imports and exports.
24. The role of the Australian Border Force in the import and export of goods is to:
- ensure that all goods being imported and exported from Australia are reported as required;
  - administer controls on behalf of permit issuing agencies on the import and export of restricted or prohibited goods; and
  - gather information regarding the nature and volume of imports and exports to assist government and industry in policy and decision-making.
25. Therefore, the information entered into the ICS system is a mandatory legislative requirement completed by owners to ensure compliance with the *Customs Act*.
26. The majority of declarations are submitted electronically in the ICS and the authentication process associated with that procedure makes the data being transferred as part of that transaction implicitly secure and confidential.
27. I further note that:
- the data within the document specifically outlines particular importation data that is commercially sensitive including the importers' details, volume and value of commodities;
  - the data within the document is sufficiently confidential in that only the importer itself (or those acting on their behalf) would be aware of the data relating to their importation activities. The detailed information is not common knowledge or in the public domain;

- the importer views their data as valuable commercial information that has been given to the Department in confidence for the limited purposes of assessing Customs duties and clearing import/export processes;
- an importer/exporter would not be aware, and is certainly not advised, that the Department may disclose the sensitive commercial information they provide to the Department to applicants under the FOI Act. Further, the importer has not consented to the Department providing their importation data to the FOI applicant, and
- release of information could reasonably be expected to prejudice the competitive commercial activities of the importer. Any public release of this information would lead to a commercial disadvantage or impairment for the importer referred to within the data.

28. I am satisfied that the nature of the information is inherently confidential as:

- the information is specifically identified by the importer as being confidential;
- the information has the necessary quality of confidentiality as it contains detailed information that is not common knowledge or in the public domain;
- the information was provided to the Department and received on the basis of a mutual understanding of confidence;
- if the information was disclosed, it would be without the authority of the importer; and
- disclosure of the information will likely cause detriment to the importer.

29. As such, I am of the view that the disclosure of the information within Document 1 would found an action by the importer/s for breach of confidence and as such I have decided that the document is exempt in entirety from disclosure under s.45 of the FOI Act.

***Section 47G(1)(a) – business information which would or could adversely impact a person’s business affairs***

30. The exempted information in Document 4 consists of the names of businesses/companies involved in importing goods which the Australian Border Force has identified to contain asbestos.
31. Release of the document would place into the public domain the identity of these businesses/companies.
32. Due to the number of businesses named in the document, it was not reasonably practicable for the Department to consult each of them in relation to the assessment of the document.
33. I am nonetheless satisfied that release of this information would adversely impact the commercial and financial affairs of the businesses/business owners to which the information relates. The release of such material could reasonably be expected to impact sales, or trust placed in, the businesses’ products or services.
34. I am therefore satisfied that parts of Document 4 are conditionally exempt under s.47(G)(1)(a) of the FOI Act.

*Application of the 'public interest' test*

35. While I have found that the conditional exemption in s.47G(1)(a) of the FOI Act applies to the information outlined in paragraph 30 above, s.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.
36. In determining whether disclosure would be contrary to the public interest, s.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.
37. I acknowledge that release of the information subject to conditional exemption under s.47G(1)(a) would promote the objects of facilitating and promoting public access to information.
38. I consider that release of the information would inform to a minor degree debate on a matter of public importance. I note that although the import of products containing asbestos has been reported in the media recently, the reporting has focused on the importation of building products into South Australia. None of the entries in Document 4 relate to such imports.
39. I am not satisfied that the information would promote effective oversight of public expenditure or would allow a person to access his or her own personal information.
40. In contrast to the factors favouring release, I note that not all of the businesses listed in the document were aware they were importing asbestos-tainted materials or were sanctioned, and that potential damage to the commercial activities of the businesses could be unreasonable given the circumstances surrounding each incident.
41. On balance, I have decided that the public interest lies in not disclosing the material. The document is therefore exempted in part under s.47G(1)(a) of the FOI Act.

**Deletion of irrelevant material under s.22(1)(a)(ii) of the FOI Act**

42. I find that 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.

43. The material deleted under s.22(1)(a)(ii) comprises:

- information not relevant to the scope of your request (in Documents 2 and 3); and
- the direct contact details of Departmental Senior Executive Service staff (in Document 3). The intended deletion of this information was advised to you on 24 March 2016 and you did not raise any objections.



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

07 July 2016



Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD

FOI Request FA 16/03/01791  
File Number ADF2016/13196

No.	Date of document	Folios	Description	Decision on release	Applicable part/s of the FOI Act
1.	undated	n/a	<b>Departmental Document</b> Spreadsheet report produced from Departmental systems providing list of building products imported into Australia from Feicheng Lutai Science and Technology Co Ltd: 2011-2016	Exempted in full	s.37(2)(a) s.45
2.	18/08/2015	1-3	<b>Attachment to Departmental Document</b> ( <i>the document to which this attachment belonged has been omitted as it did not contain any information relevant to the request</i> ).	Released with irrelevant information removed	s. 22(1)(a)(ii)
3.	10/2015	4-6	<b>Departmental Document</b> Supplementary Estimates Brief – Checking for imported goods containing asbestos	Released with irrelevant information removed	s. 22(1)(a)(ii)
4.	Undated	7-8	<b>Departmental Document</b> Spreadsheet listing incidences of asbestos detection in imports	Exempted in part	s.37(2)(a) s.37(2)(b) s.47G(1)(a)





## **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).

## **11B Public interest exemptions—factors**

### *Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

### *Factors favouring access*

- (3) Factors favouring access to the document in the public interest include 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.

### *Irrelevant factors*

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
  - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
  - (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.

### *Guidelines*

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

## 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.

## 37 Documents affecting enforcement of law and protection of public safety

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
  - (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
  - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential

source of information, in relation to the enforcement or administration of the law; or

- (c) endanger the life or physical safety of any person.
- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
- (a) prejudice the fair trial of a person or the impartial adjudication of a particular case;
  - (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
  - (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.
- (2A) For the purposes of paragraph (1)(b), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:
- (a) witnesses; or
  - (b) people who, because of their relationship to, or association with, a witness need, or may need, such protection; or
  - (c) any other people who, for any other reason, need or may need, such protection.

(3) In this section, **law** means law of the Commonwealth or of a State or Territory.

#### **45 Documents containing material obtained in confidence**

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
  - (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or

(b) an agency, the Commonwealth or Norfolk Island.

#### **47G Public interest conditional exemptions—business**

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
  - (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
  - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.
- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
  - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
  - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
  - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

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