



Attachment A

DECISION RECORD

Request Details

FOI Request FA 15/11/00301
File Number ADF2015/60633

Scope of request

1. On 28 October 2015 you requested:

I wish to request documents showing communications containing information about the transfer, and/or removal, and/or transportation of a) Women and b) Children from the Nauru Regional Processing Centre to the Australian mainland since September 2012 due to actual and/or alleged sexual assaults and/or harassment.

2. In an email on 11 June 2016 you agreed to change the scope of your request to:

I wish to request question time briefs and internal Departmental briefs that contain information about the transfer, and/or removal, and/or transportation, of women and/or children from the Nauru Regional Processing Centre to the Australian mainland due to actual and/or alleged sexual assaults and/or harassment. I only require the most recent version of each brief relating to each detainee dated between 1 January 2015 and 28 October 2015. I am not interested in identifying the women and/or children.

Authority to make decision

3. 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

4. In reaching my decision, I have considered the following:
 - the terms of your request
 - the *Freedom of Information Act 1982*;
 - the Australian Information Commissioner's guidelines relating to access to documents held by government
 - Departmental documents, identified in the Schedule of Documents
 - consultations with the relevant business area.

Reasons for decision

5. 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.
6. 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).
7. 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.

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

8. The following exemptions have been applied to the documents within the scope of your request.

Section 33 – Documents affecting national security, defence and international relations

9. I have decided that parts of the document are exempt under s.33(a)(iii) of the FOI Act, as disclosure of this information would, or could reasonably be expected to, cause damage to Australia's international relations.
10. The information exempted comprises:
 - details of investigations being undertaken by the Government of Nauru
 - opinions and advice from the Government of Nauru regarding the incidents
 - details of agreements between the Governments of Australia and Nauru.
11. Given the sensitivity and confidential nature of the material, I am satisfied that the information is exempt from release under s.33(a)(iii) of the FOI Act, as such release could reasonably be expected to cause damage to Australia's relationship with Nauru.

Section 42 – documents subject to legal professional privilege

12. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the ground of legal professional privilege.
13. 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.
14. I find that disclosure of the parts of document 3 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

15. 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 document itself that a lawyer-client relationship existed in respect of the communications.

Confidential communications

16. The document to which the exemption has been applied contains 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

17. The communications were made for the dominant purpose of giving and receiving legal advice in relation to a situation covered by the scope of your request.

No waiver

18. 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.

19. 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.
20. 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.
21. 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 47C – Deliberative processes

22. A document is conditionally exempt under s.47C(1) of the FOI Act if its release would disclose deliberative matter including opinion, advice or recommendation that has been obtained, prepared or recorded, or the consultation/deliberation during a deliberative process.
23. I am satisfied that the documents contain deliberative matter. The relevant material in the documents comprises opinions by Departmental officers on options to appropriately address the incidents.

Application of the 'public interest' test

24. Although I have found that the information contained in the document you requested is conditionally exempt from release under s.47C, 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.

25. The factors favouring access to information are provided at s.11B of the FOI Act:

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.*

26. I am satisfied that the release of the information would promote the objects of the FOI Act as it would provide access to information held by Government.

27. Noting previous media coverage regarding the management of women who have alleged being sexually assaulted on Nauru, I acknowledge that the information would be of some interest to the public.

28. I do not consider release of the exempted information would promote effective oversight of public expenditure, or allow a person to access his or her own personal information.

Factors weighing against release

29. The deliberate matter in the documents is detailed and relates to sensitive personal, operational and inter-governmental affairs.

30. I consider that it is in the broader public interest for Departmental officers to be able to provide opinions and discussion on such sensitive matters with a reasonable degree of confidentiality and without fear of reprisal. I further consider that releasing deliberative matter relating to these sensitive incidents would cause Departmental officers to become reticent in providing opinions in the future, leading to a Department which would not be operating at its full potential,

31. On balance, I consider that the public interest factors against release of the exempted information outweigh the public interest factors for release of the information. I therefore partially exempt the document from release under s.47C of the FOI Act.

Section 47F – Personal privacy

32. Section 47F 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 document contains 'personal information'

33. I am satisfied that the document to which you have sought access contains 'personal information', being the names and other identifying information of detainees, details of their personal circumstances and history.

Disclosure would involve the 'unreasonable disclosure of personal information'

34. In assessing whether a particular disclosure would be 'unreasonable', section 47F(2) sets out a number of factors which the Department *must* consider.
35. 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.
36. While some of the personal information in the document is well known, the majority of the details are not well known. As such, I consider that disclosure of the personal information in the document would be unreasonable.

Application of the 'public interest' test

Factors favouring access

37. I am satisfied that the release of the information would promote the objects of the FOI Act as it would provide access to information held by Government, as well as providing access to information about a subject which has been the subject of significant media attention.
38. I do not consider release of the exempted information would promote effective oversight of public expenditure, or allow a person to access his or her own personal information.

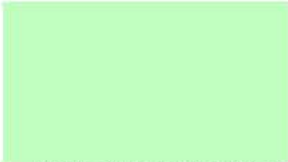
Factors weighing against release

39. I consider that it is in the broader public interest for individuals to be able to entrust the Department with their personal details, and that the Department has a responsibility to safeguard the personal details with which it has been entrusted.
40. On balance, I consider that the public interest factors against release of the exempted information outweigh the public interest factors for release of the information. I therefore partially exempt the documents from release under s.47F(1) of the FOI Act.

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

41. I find that the document relevant to your request contains some material which is irrelevant to your FOI request. I have withheld or deleted that material accordingly. These deletions are detailed in the Schedule of Documents and the document released.

42. The material deleted under section 22(1)(a)(ii) comprises the details of non-Senior Executive Service Departmental employees, contact details of Senior Executive Service Departmental employees, information generated in relation to the processing of your FOI request and information that was not covered by the scope of your FOI request.



Authorised decision maker
Department of Immigration and Border Protection
Email: foi@border.gov.au

5 July 2016



Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD

FOI Request FA 15/11/00301
File Number ADF2015/60633

No.	Date of document	Pages	Description	Decision on release	
1.	29 January 2015	1-3	Question Time Brief	Irrelevant to request Exempt in part	22(1)(a)(ii) 47C(1) 47F(1)
2.	29 January 2015	4-10	Question Time Brief	Irrelevant to request Exempt in part	22(1)(a)(ii) 47F(1)
3.	23 July 2015	11-16	Ministerial Submission	Irrelevant to request Exempt in part	22(1)(a)(ii) 42(1) 47F(1)
4.	25 August 2015	–	Weekly MIBP Meeting Brief	Exempt in full	33(a)(iii) 47F(1)
5.	9 September 2015	17-18	Ministerial brief	Irrelevant to request Exempt in part	22(1)(a)(ii) 47F(1)
6.	22 September 2015	19-24	Ministerial Submission	Irrelevant to request Exempt in part	22(1)(a)(ii) 33(a)(iii) 47C(1) 47F(1)
7.	8 October 2015	–	Weekly MIBP Meeting Brief	Exempt in full	33(a)(iii) 47F(1)
8.	14 October 2015	25-26	Question Time Brief	Irrelevant to request Exempt in part	22(1)(a)(ii) 47F(1)
9.	22 October 2015	–	Weekly MIBP Meeting Brief	Exempt in full	47F(1)
10.	23 October 2015	–	Executive Update	Exempt in full	47F(1)

Attachment C – Extract of relevant legislation

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.

47C Public interest conditional exemptions--deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see [section 8A](#));
 - (b) purely factual material.

Note: An agency must publish its operational information (see [section 8](#)).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

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.