



ATTACHMENT A

DECISION RECORD

1 Request Details

FOI Request: FA 16/05/00587
File Number: ADF2016/19645

2 Scope of Request

You have requested access to the following documents:

'all submissions to the Joint Review Board into the incursions into Indonesian waters in 2013/2014.'

3 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions to in respect of requests to access documents or to amend or annotate Departmental records.

4 Relevant material

In reaching my decision, I have considered the following:

- the terms of your request;
- the documents relevant to your request;
- the FOI Act;
- Guidelines published by the Office of the Australian Information Commissioner under s 93A of the FOI Act, and
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access;
- my experience as a senior officer in Maritime Border Command (MBC) and involvement in the conduct and management of civil maritime security operations; and
- opinion sought from the Department of Defence and the Operation Sovereign Borders Joint Agency Taskforce concerning material contained in the documents which relates to their operations.

5 Documents within scope of request

The documents that fall within the scope of this request are formal submissions made to the Joint Review of Operation Sovereign Borders Vessel Positioning between December 2013 and January 2014. The scope of this Joint Review was to independently investigate the facts and circumstances surrounding the entry of Australian vessels into Indonesian waters in connection with Operation Sovereign Borders during the period 1 December 2013 to 20 January 2014.

That review was supported by officials from the Department of Defence (Defence) and the then Australian Customs and Border Protection Service. As of 1 July 2015, the Australian Customs and Border Protection Service consolidated with the Department of Immigration and Border Protection.

The documents that are relevant to the scope of your request consist of formal submissions made to the Review Board, and contain detailed information relating to:

- The incidents in which Australian vessels entered Indonesian waters; and
- The tasks assigned to the vessels identified as entering Indonesian waters.

The submissions contain:

- Details of the incidents themselves, including the assets involved;
- Details of the circumstances in which those assets were operating at the time of the incursions;
- Details describing the location of the vessels, including GPS pinpoints; and
- Details of the incursions that occurred.

Vessel tasks

The vessels referred to in the documents are engaged in a range of operations on behalf of the Australian Government, patrolling waters off the Australian coast. In undertaking that work the vessels are under the direction of MBC (formerly Border Protection Command (BPC)) within the Australian Border Force (ABF). MBC is Australia's lead civil maritime law enforcement authority. MBC, within the ABF, brings together officers from both the ABF and Defence as a multi-agency taskforce to identify and respond to illegal activity in Australia's Maritime Jurisdiction (AMJ). The vessels include Royal Australian Navy vessels, Departmental vessels and civilian vessels contracted to the Department.

The vessels are responsible for a number of functions, including in relation to:

- illegal exploitation of natural resources;
- illegal activity in protected areas;
- illegal maritime arrivals;
- prohibited imports and exports;
- maritime terrorism;
- piracy, robbery or violence at sea;
- compromise to biosecurity; and
- marine pollution.

In respect of these areas of responsibility, the vessels and their crew have a range of functions and powers including:

- patrolling the AMJ;
- surveillance and intelligence gathering;
- detaining and inspecting vessels suspected of illegal activity within the AMJ;
- taking control of vessels or directing them to take particular action, including leaving the AMJ or sailing under the Australian vessel's watch to a designated destination; and
- where necessary, destroying craft which pose a risk to Australia (such as craft which are infected with bio-hazardous organisms, or craft engaged in maritime terrorism).

Operation Sovereign Borders

To ensure a whole-of-government response to border protection issues, the Australian Government established the Operation Sovereign Borders Joint Agency Task Force (JATF). Operation Sovereign Borders is the name given to a military-led, border security operation supported and assisted by a wide range of federal government agencies. Operation Sovereign Borders has a particular focus on coordinating the whole of government response to persons attempting to arrive illegally by boat and dealing with illegal maritime arrivals. It aims to ensure that Australia has effective control of the circumstances in which people enter Australia.

The JATF is supported by three operational task groups:

- Disruption and Deterrence Task Group—led by the Australian Federal Police;
- Detection, Interception and Transfer Task Group—led by the Department of Immigration and Border Protection, which includes MBC; and
- Offshore Detention and Returns Task Group—led by the Department of Immigration and Border Protection.

The vessels referred to in the submissions are part of MBC's assets in contributing to the work of the Detection, Interception and Transfer Task Group within Operation Sovereign Borders. That task group deals in particular with:

- detecting and intercepting vessels attempting to enter Australia by sea with the intention of offloading passengers without the authority of the Australian Government (illegal maritime arrivals); and
- taking steps to maintain Australia's borders when such vessels are intercepted, either by preventing those vessels from approaching Australian controlled land or by transferring those people on board those vessels to a facility where their entry into Australia can be dealt with via regular (lawful) channels under Australian law.

6 Reasons for Decision

I am satisfied that I have been provided with all the documents that are relevant to your request. The schedule of the four documents that fall within the scope of your request at **ATTACHMENT B** sets out the decision on access and, where appropriate, refers to various sections of the FOI Act. My reasoning in relation to the application of each section to particular documents is set out below.

6.1 Section 22 of the FOI Act – irrelevant to request

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

On 9 May 2016, the Department advised you that its policy is to exclude the personal details of officers not in the Senior Executive Service (SES), as well as the mobile and work telephone numbers of SES staff, contained in documents that fall within scope of an FOI request.

I am also of the view that the initial part of document 1, being an email, was created for administrative purposes only, including the retrieval of the document for the purposes of processing your FOI request, and does not relate to the scope of your request.

I have therefore decided that parts of documents would disclose information that could reasonably be regarded as irrelevant to your request, and have therefore prepared an edited copy of the documents, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The remainder of the documents have been considered for release to you as they are relevant to your request.

6.2 Section 33 of the FOI Act – Documents affecting National Security, Defence or International Relations

Section 33(a)(i) of the FOI Act permits exemption of a document from disclosure if disclosure of the document would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

I consider that there are real and substantial grounds for expecting that the disclosure of parts of the documents exempted under section 33(a)(i) would cause damage to the security of the Commonwealth.

'Security of the Commonwealth' is defined in section 4(5) of the FOI Act as follows

- (5) *Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:*
- (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and ...*

The submissions make reference to the Australian Government response to illegal immigrants seeking to enter Australia by boat from Indonesia. This is a matter pertaining to the national security of Australia.¹

The operations of the vessels referred to in the documents form part of maintaining the security of the Commonwealth. Maintaining the integrity of Australia's physical borders is an Operation Sovereign Borders activity and is a part of national security. Australia's national interests are threatened by any unauthorised arrival of people and the Australian Government has responsibility for the lawful and orderly entry of people into Australia, along with ensuring that only those foreign nationals who are appropriately authorised are allowed to enter and remain. If Australia cannot effectively manage who enters the country, and the circumstances and conditions of such entry, then the security of the Commonwealth is compromised.

The parts of the document that have been redacted include details concerning:-

- the manner in which on-water operations were undertaken – including details of the specific and actual capacity of border protection assets; and
- information revealing or alluding to strategic and tactical decisions made during the course of on-water operations.

¹ See part (aa) of the definition of 'security' in s 4 of the *Australian Security Intelligence Organisation Act 1979* and the Explanatory Memorandum accompanying the *Anti-People Smuggling and Other Measures Bill 2010*.

I consider that the disclosure of the information contained within the documents that I regard as exempt under s 33(a)(i) could cause damage to the security of the Commonwealth by compromising operational functions, increasing the risk to Australian vessels and personnel and encouraging illegal activity. I consider the particular damage to the security of the Commonwealth to be as follows:

- (a) Information within the documents would provide insight into the manner in which vessels involved in national security operations undertake those functions, including tactics, training and procedures.
- (b) Australia's maritime borders are vast. Australia's maritime domain comprises some 12 million square nautical miles – about 11.5% of the world's oceans. Australia has insufficient resources to continuously patrol every possible point of maritime entry into Australia. Even if the insight afforded is considered to be slight, any reduction in the efficiency or effectiveness of current operational methods is likely to have significant consequences given the ever-present challenge of managing such an enormous jurisdiction with finite resources.
- (c) If the exempt information contained within the documents were released, border protection authorities would be forced to revise current operational methodology to minimise the harm caused by those disclosures. This is, by definition, damage to security operations. Current procedures and activities are set with a view to achieving maximum security outcomes with the available resources. Any changes required by a need to counter the advantage afforded to vessels or persons engaging in illegal maritime activities necessarily represents a compromise to operational effectiveness.
- (d) Increasing the risk to Australian vessels and personnel undertaking border protection work. Patrolling and protecting Australia's AMJ is an inherently dangerous task. By releasing information that would make the activities of Australian vessels more predictable, the risk that a person would be willing to, and successful in, causing harm or damage to Australian vessels or people is increased.
- (e) A significant component of Australia's border protection strategy is the deterrent effect of routine patrolling of the AMJ. Persons with an interest in undertaking illegal activities in the AMJ - and compromising Australia's border security in the process - run the risk that they will be detected and intercepted by Australian vessels. By disclosing information which has the potential, or even creates a perceived potential, to assist in circumventing those patrol operations, encouragement is given to those persons that they may be able to more successfully elude border protection patrol vessels.
- (f) In some cases a people smuggling voyage sets out with the intention of intersecting with border protection vessels at an early stage. The release of vessel positioning information is likely to be used by people smugglers to good effect to increase the confidence of potential passengers in the likelihood of the success of the people smuggling venture, thereby encouraging more passengers on more voyages. Given the finite resources available for detecting and dealing with such activities, this increases the risk that such activities will be successful. This increased risk of success itself is reasonably expected to damage the security of the Commonwealth.

- (g) The disclosure of the exempt information would likely provide people smuggling operators with official government information which they could use to manipulate and convince any potential illegal immigrants to embark on voyages to Australia. This would be an improper use of the information which may also cause a risk to human life. To disclose information that indicates the success or otherwise of ventures may also encourage others to engage in people smuggling activities. I consider that there is a strong public interest in preventing the potential risk to human life associated with people smuggling.

The release of these details would, in my view, impact upon the conduct of on-water operations by providing information to those seeking to evade detection and/or interception by Australian Government authorities. Although the redacted information may not, when reviewed in isolation, provide the level of specificity to evade Australian Government authorities I do consider that providing the redacted information could allow for a mosaic analysis to be conducted.²

In particular, I consider that information concerning the specific and actual capacity of border protection assets (including both Departmental and Defence assets) to have particular weight in considering whether the release of this information would, or would be likely to, cause damage to the national security of Australia. This is because such assets may in the future be engaged in other matters relating to Australia's national security including, but not limited to, maritime terrorism and the illegal exploitation of natural resources by foreign nationals.

As a result of these considerations, I have decided that parts of the documents redacted and marked 's 33(a)(i)' are exempt pursuant to s 33(a)(i) of the FOI Act.

6.3 Section 47E of the FOI Act – Operations of Agencies

Section 47E(d) of the FOI Act 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.

I consider that the disclosure of parts of the documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

The information contained within the document that has been redacted and marked 's47E(d)' consists of:

- matters described in relation the application of section 33(a)(i) at paragraph 6.2 above;
- information which indicates tactics and procedures for the conduct of various operational activities;
- tactical/operation level reporting and approval processes for various operational activities, including Executive Summaries;
- location of interceptions of various suspected illegal entry vessels (SIEVs); and
- limitations of Commonwealth resources and capabilities.

² Which is a recognised ground upon which s 33(a)(i) may be claimed (see Guidelines, paragraphs [5.33] to [5.34].)

Managing the security and integrity of Australia's borders is integral to the operations of both Defence and the Department. Disclosure of the information in the documents and marked as exempt under 's47E(d)' has the potential to prejudice the effectiveness of the Department's operational activities and the law enforcement methods and procedures used in undertaking its role in managing the security and integrity of Australia's borders. Any prejudice to that role would result in a substantial adverse effect on the operations of both Defence and the Department.

The disclosure of the conditionally exempt information could reasonably be expected to undermine the tactical advantage that Defence, the Department and other partner border protection agencies, surveillance and response assets have over people smuggling ventures, illegal foreign fishing and other threats in the maritime domain by providing operational information about assets engaged in those operational activities.

Any disclosure resulting in the prejudice of the effectiveness of those operational activities would, or could reasonably be expected to cause Defence and the Department to change or divert the conduct of border protection activities, which may prejudice current targets and on-water operations. In addition, should the effectiveness and efficiency of on-water operations be compromised, I consider that there would be a substantial adverse effect to operations whilst operational directives are reformulated and suitably disseminated.

I note that the documents that fall within the scope of your request consist of submissions used to inform the Joint Review Board in the preparation of the Joint Review Report. I further note that the Joint Review Report has been subject to a request for access under the FOI Act, and that the Department decided to exempt parts of the Report under section 47E(d). That decision was subject to review by the Information Commissioner³. The Information Commissioner found that the information referred to above was conditionally exempt under section 47E(d) and that disclosure would be contrary to the public interest.

As such, I have decided that parts of the documents which have been redacted and marked 's47E(d)' are conditionally exempt under section 47E(d) of the FOI Act.

Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard at paragraph 6.5 below.

6.4 Section 47F of the FOI Act – Personal Privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under FOI would involve the unreasonable disclosure of personal information of any person. 'Personal information' means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not (see s 4 of the FOI Act and s 6 of the *Privacy Act* 1988).

In considering the application of s47F to the documents I have consulted with the relevant individuals and have taken into account their respective views in making my

³ Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2016] AICmr 25 (22 April 2016)

decision as well as other considerations that I have withheld from this decision record pursuant to s 26(2) of the FOI Act.

I consider that disclosure of parts of the documents would disclose personal information relating to officers of the ACBPS (as it then was) as well as Defence members. The information within the documents would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance. I also consider the release of signatures of Defence members in documents 1 and 4 to be unreasonable as this information is not otherwise well known or publicly available.

The FOI Act states that, when deciding whether the disclosure of the personal information would be 'unreasonable', I must have regard to four factors set out in s 47F(2) of the FOI Act. I have considered each of these factors below:

- 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 available resources; and*
- d) *any other matters that I consider relevant.*

I am satisfied that the disclosure of information as described above within the documents would involve an unreasonable disclosure of personal information about these individuals. As such I have decided that the information referred to above is conditionally exempt under section 47F of the FOI Act.

Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard at paragraph 6.5 below.

6.5 The public interest – section 11A of the FOI Act

As I have decided that parts of the documents are conditionally exempt, I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest (section 11A of the FOI Act).

A part of a document which is conditionally exempt must also meet the public interest test in section 11A(5) before an exemption may be claimed in respect of that part.

In summary, the test is whether access to the conditionally exempt part of the document would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- (a) *promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) *inform debate on a matter of public importance;*
- (c) *promote effective oversight of public expenditure;*

(d) *allow a person to access his or her own personal information.*

Having regard to the above:

- I am satisfied that access to the documents would promote the objects of the FOI Act.
- I consider that the subject matter of the documents does not, in itself, seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.
- I consider that no insights into public expenditure will be provided through examination of the documents.
- I am satisfied that you do not require access to the documents in order to access your own personal information.

I have also considered the factors that weigh against the release of the conditionally exempt information in the documents:

- I consider that the disclosure of the parts of the documents that are conditionally exempt under section **47E(d)** of the FOI Act could reasonably be expected to:
 - Prejudice national security and the ability of the Department and its partner agencies to protect Australia's borders by undermining the effectiveness of maritime border security operations and law enforcement functions;
 - Increase the risk of harm or damage to Australian vessels and personnel;
 - Encourage illegal activity within the AMD; and
 - Increase the risk to human life associated with people smuggling.

I consider that these factors weigh heavily against disclosure of that particular information.

- I consider that the following factors weigh against the release of the personal information which is conditionally exempt under **s 47F** of the FOI Act:
 - The disclosure could reasonably be expected to prejudice the protection of those individuals' right to privacy and the right to work free from harassment. It is my view that it is firmly in the public interest to uphold the rights of individuals to their own privacy. I consider that this factor weighs heavily against disclosure.
 - The individuals' involvement in the review process is not available from publicly accessible sources and those individuals were not conducting their usual duties when involved in the review.
 - I also consider that it is in the public interest for Commonwealth employee's to engage in their work without fear of their personal safety. Both ACBPS officers identified in the documents have raised concerns regarding their personal safety after they were consulted. Subjecting those individuals to risk of personal harm is, in my view, strongly against the public interest.
 - It is also in the public interest for the Australian Government to protect the exposure of any individual to the risk of identity fraud. To this end,

I consider that the disclosure of the signatures in document 1 and 4, which would expose those individuals to such risk, is strongly against the public interest.

- o There is virtually no public interest in disclosing the personal information about personnel because the information is not material to the broader governmental issues relating to border and maritime security, and therefore does little to promote accountability or transparency of the Government.

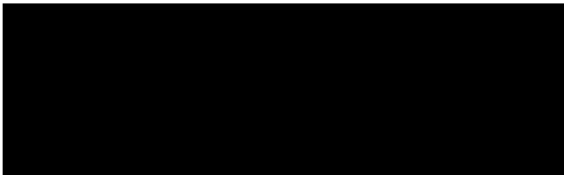
I consider that these factors weigh heavily against disclosure of that particular information.

I have also had regard to section 11B(4) which sets out the factors which are irrelevant to my decision, which are:

- (a) *access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;*
- (b) *access to the document could result in any person misinterpreting or misunderstanding the document;*
- (c) *the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;*
- (d) *access to the document could result in confusion or unnecessary debate.*

I have not taken into account any of those factors in this decision.

Upon balancing all of the above relevant public interest considerations, I have concluded that the disclosure of the conditionally exempt information in the documents is not in the public interest and therefore exempt from disclosure under the FOI Act.



**Authorised Decision Maker
Department of Immigration and Border Protection**

7 September 2016

ATTACHMENT B

Schedule of Documents

FOI request: FA 16/05/00587

File Number: ADF2016/19645

No	Date of document	No. of pages	Description	Decision on release	
1.	3/2/2014 1505	15	Email from Defence Submission to Joint Review Board	Release in part	22(1)(a)(ii) 33(a)(i) 47E(d) 47F
2.	4/2/2014	8	Internal Brief from Border Force Capability Division – Submission to Joint Review Board	Release in part	22(1)(a)(ii) 47E(d)
3.	5/2/2014 0845	12	Response from JTF 639 to supplementary request for assistance in support of the Joint Review	Release in part	22(1)(a)(ii) 33(a)(i) 47E(d)
4.	6/2/2014	29	Minute from Joint Operations Command HQ JTF639 - Submission to Joint Review Board	Release in part	22(1)(a)(ii) 33(a)(i) 47E(d) 47F

ATTACHMENT C

Relevant Legislation

Section 22 - Access to edited copies with exempt or irrelevant matter deleted

- (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.

...

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

...

Section 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:

...

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Section 47F - Public interest conditional exemptions—personal privacy

- (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.

11B - Public interest exemptions—factors

- (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.