



## Attachment A

### DECISION RECORD

#### Request Details

FOI Request FA 16/05/01387  
File Number ADF2016/21290

#### Scope of request

*All review and investigation files from the company commissioned by Wilson Security to examine the handling of staff misconduct claims*

The Department has understood that you seek access to review and investigation reports that Wilson Security commissioned from third party companies in relation to *examine the handling of staff misconduct claims*.

#### Authority to make decision

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

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;
- consultation with the third party contractors; and
- consultation with relevant business areas.

#### Reasons for decision

I have considered the documents within the scope of your request and applied exemptions in part or in full to documents as detailed in the Schedule of Documents. You should read the schedule in conjunction with the exemptions below.

#### Deletion of exempt or irrelevant material under s.22 of the FOI Act

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.

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).

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.

I have decided that parts of the documents would disclose information that could reasonably be regarded as irrelevant to your request. This information consists of names and telephone numbers of staff, which you have agreed do not fall within the scope of your request.

The attached Schedule of Documents identifies documents where material has either been deleted as exempt information under the FOI Act or deleted as irrelevant to the scope of the request.

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

Section 42(1) of the FOI Act exempts a document if it would be exempt from production in legal proceedings on the ground of legal professional privilege. A document is exempt from production on the ground of legal professional privilege if all of the following apply:

- there exists a lawyer-client relationship
- there have been confidential communications which are recorded in the document
- the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings, and
- the privilege has not been waived.

I find that disclosure of the document 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

A professional lawyer-client relationship existed between the Department's contractor Wilson Security and the third party organisation. I am satisfied that the third party organisation was employed in its capacity to provide legal assistance as a legal advisor to Wilson Security in relation to this matter and that a lawyer-client relationship was established.

#### Confidential communications

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

#### Dominant purpose

The communications were made for the dominant purpose of providing legal advice. They comprise a final report where Wilson Security received legal advice from an officer of the third party organisation.

No waiver

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.

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.

There is no evidence to indicate that the substance of the communications 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.

**Section 47E(c) - substantial adverse effect on the management or assessment of personnel**

Section 47E(c) of the FOI Act permits the conditional exemption of documents containing information the disclosure of which would, or could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

The documents you have sought to access are in relation to the review and examination of the *handling of staff misconduct claims* and I have considered whether the information is conditionally exempt on the basis that disclosure would result in a substantial adverse effect on the management and assessment of Departmental contractors and their staff under section 47E(c) of the FOI Act.

I believe that the disclosure of the information:

- would damage the relationship of trust that the Department has with its contractors in relation to how they manage their staff
- would damage the relationship of trust between the contractor and their staff
- have an adverse effect on the Department and its contracted service providers as an employer of choice
- would mean that employees would be less likely to provide information in the future (for example, create a reluctance in staff to provide statements in future claims of misconduct)
- could prejudice the ability of the Department and its contractor to investigate future claims of misconduct by revealing methodology of investigation processes

Therefore disclosure could reasonably be expected to adversely impact on the effectiveness of the management and assessment of staff. I find this adverse effect to be serious and not insubstantial.

I find that these documents are conditionally exempt in part under section 47E(c) 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 (subsection 11A(5) of the FOI Act). I have considered the public interest below.

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

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.

I have considered whether the information is conditionally exempt on the basis that disclosure would result in a substantial adverse effect on the proper and efficient conduct on the operations of the Department and its contracted service providers under section 47E(d) of the FOI Act.

While the documents you have sought to access are in relation to the *handling of staff misconduct claims* they also contain information regarding systems, policy and procedure. I consider that this information is about the operations of the agency.

The "conduct of the operations of the agency" extends to the way in which the agency discharges any of its functions. In this context the Department considers the following functions relevant:

- facilitating the lawful passage of people
- onshore detention, removals and offshore processing arrangements
- enforcing and maintaining the integrity of Australia's visa programme

I believe that the disclosure of the information:

- would damage the relationship of trust that the Department has with its contractors
- could prejudice the ability of the Department and its contractor to investigate systems, policy and procedures by revealing the methodology on how these matters are investigated

Therefore disclosure could reasonably be expected to adversely effect the Department's operations. I find this adverse effect to be serious and not insubstantial. I find that these documents are conditionally exempt in part 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. I have considered the public interest below.

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

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

#### Personal information

Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988* (Privacy Act). Personal information is defined in section 6 of the Privacy Act as:

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

The elements of 'personal information' are:

- it relates only to a natural person (not, for example, a company)
- it says something about the individual
- it may be in the form of an opinion, it may be true or untrue, and it may form part of a database
- the individual's identity is known or is reasonably ascertainable using the information in the document.

The documents contain information about a member of the public, including that person's name, signature and contact details. I am satisfied that parts of the documents for which an exemption under section 47F is claimed, contains personal information.

#### Disclosure unreasonable

If information is personal information, it will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known
- 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
- the availability of the information from publicly accessible sources
- any other matter I consider relevant

I have taken into consideration the following factors:

- the nature of the information
- the circumstances in which the information was obtained
- the reasonable expectation of the document's confidentiality and therefore the confidentiality of the identity of the individuals concerned
- I am satisfied that the information in question is not well known or publicly available

- the consultation conducted with the relevant third party about the information being disclosed
- that the disclosure of the personal information would not shed light on the workings of the Department or enhance accountability or transparency
- that disclosure would disproportionately interfere with the privacy of a member of the public

On that basis, I have concluded that disclosure of the information would be unreasonable.

I find that the documents are conditionally exempt in part under section 47F 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. I have considered the public interest below.

#### **Section 47G(1) - affect business affairs**

Section 47G(1) of the FOI Act permits conditional exemption of documents containing information that concerns the business or professional affairs of an organisation, if disclosure amongst other things, would or could reasonably be expected to unreasonably affect a business in respect of its lawful business, commercial or financial affairs.

I have considered whether the documents are conditionally exempt on the basis that the disclosure of the information would have an unreasonable adverse affect on the business affairs of an organisation under section 47G(1)(a) of the FOI Act.

#### Business affairs information

The documents contain the business information of multiple third parties including the contracted service providers of the Department and third party organisations that were commissioned by the contractor. In making my decision I have considered the consultation conducted with the relevant third party about the information being disclosed.

#### Adverse effect

I find that disclosure of this information would, or could reasonably be expected to, adversely affect that third party in respect of his, her or its lawful business affairs.

#### The adverse effect is unreasonable

I find that this adverse effect would be unreasonable in all the circumstances. In finding that the adverse effect would be unreasonable, I have considered the information is not publicly known and the third party has objected to disclosure of their sensitive business information (for example, the management of their staff). The reports were prepared and provided in confidence. I have also considered the relationship between Wilson Security and the third party organisations, and the adverse effect that could occur should their business information be released.

I find that these documents are conditionally exempt in part under section 47G(1)(a) 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 (subsection 11A(5) of the FOI Act). I have considered the public interest below.

### **Public interest**

Conditionally exempt material 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). I have considered the factors favouring access and factors that are irrelevant in subsections 11B(3) and (4).

#### Factors in favour of disclosure

In balancing the public interest in this case, I have considered the following factors in favour of disclosure:

- disclosure would promote the objects of the FOI Act
- disclosure would promote effective oversight of public expenditure
- disclosure would allow a person to access his / her own personal information
- disclosure would inform debate on a matter of public importance

#### Factors against disclosure

I have considered the following factors against disclosure for the material identified as conditionally exempt under s.47E(c) and (d), s.47F(1) and s.47G(1)(a):

- disclosure would damage relationships between the Department and its contractors
- disclosure would unreasonably interfere with the privacy of third parties
- disclosure would unreasonably interfere with the private business affairs of third parties
- the need to preserve reasonably held expectations of confidentiality
- disclosure would prejudice the Departments and its contractors ability to conduct effective investigations where a possible breach of the Commonwealth law has occurred

#### Finding on the public interest

I acknowledge that there is a public interest in documents of this Department being made available to the public for the purpose of encouraging public debate and to promote oversight of the Department's activities. However, having regard to the nature of the documents in question, I consider that their release does not provide effective oversight of public expenditure, and the documents do not concern your personal information.

In this case, I have formed the view that the disclosure of the conditionally exempt material will make a negligible contribution to those factors in favour of disclosure. By contrast the interference with the privacy of individuals and third party's business affairs is in my view significant. In forming my view on the question of public interest, I have attributed the greatest weight to this factor.

Accordingly, I have concluded that disclosure of the material would, on balance, be contrary to the public interest and that parts of the document are exempt under the FOI Act.



Authorised decision maker  
Department of Immigration and Border Protection

Email [foi@border.gov.au](mailto:foi@border.gov.au)

22 September 2016

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**Attachment B**

**SCHEDULE OF DOCUMENTS TO DECISION RECORD**

FOI Request FA 16/05/01387  
File Number ADF2016/21290

| No. | Date of document | No. of pages | Description               | Decision on release  |
|-----|------------------|--------------|---------------------------|--|
| 1.  | 22 July 2015     | 17           | Final Report              | Exempt in full s.42(1)   |
| 2.  | 18 Feb 2016      | 6            | Media Leaks Investigation | Exempt in part s.22(1)(a)(ii)<br>s.47G(1)(a)<br>s.47F(1)<br>s.47E(c)<br>s.47E(d) |
| 3.  | 25 Feb 2016      | 12           | Media Leaks Investigation | Exempt in part s.22(1)(a)(ii)<br>s.47G(1)(a)<br>s.47F(1)<br>s.47E(c)<br>s.47E(d) |

## Attachment C – Extract of relevant legislation

### 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.

## **23 Decisions to be made by authorised persons**

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

## **42 Documents subject to legal professional privilege**

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:

- (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
- (b) the information is operational information of an agency.

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

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

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

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

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

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

##### *General rule*

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

##### *Access given to qualified person instead*

- (4) Subsection (5) applies if:
  - (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
  - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that

information, is not to be given to the applicant but is to be given instead to a qualified person who:

- (a) carries on the same occupation, of a kind mentioned in the definition of *qualified person* in subsection (7), as the first-mentioned qualified person; and
  - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:

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

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

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

#### **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).