



4 August 2017

In reply please quote:

FOI Request FA 16/08/000942
File Number ADF2016/42218

By Email: [REDACTED]

Dear [REDACTED]

Freedom of Information request – decision on request

This letter refers to your request received on 16 August 2016 seeking access under the *Freedom of Information Act 1982* (the FOI Act).

In your request you sought access to the following documents:

1. *Memos, emails or other communications in which any DIBP employee, contractor or subcontractor commented on (a) the conditions at Nauru Regional Processing Centre and/or (b) the treatment of asylum seekers there.*
2. *Memos, emails or other communications from, to or within the DIBP Media and Executive Coordination Branch related to the Nauru Regional Processing Centre between 8 August 2016 and the date of search and retrieval for this request.*

On 27 October 2016, the scope of your request was clarified and redefined as:

- *Briefings to DIBP Secretary since 13 October 2014 and to the ABF Commissioner since 1 July 2015 relating to the conditions at Nauru Regional Processing Centre and/or the treatment of asylum seekers there.*

Authority to make decision

I am an officer authorised under section 23 of the *Freedom of Information Act 1982* (FOI Act) to make decisions with respect to 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 Schedule of Documents
- Consultation with relevant business areas in the Department

Legislation

A copy of the FOI Act is available for your reference from www.legislation.gov.au/Browse/ByTitle/Acts/InForce/0/0/Principal

Documents in scope

The Department has identified 13 documents that fall within the scope of your request. A Schedule of Documents is at **Attachment A**.

Decision

My decision is to release five documents in full, and to exempt five documents in full and three in part from disclosure under the FOI Act. The reasons for the decision are set out below.

Reasons for decision

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 (section 22(3) of the FOI Act).

Exempt material has been deleted pursuant to section 22(1)(a)(i), and irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The 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.

Deletion of irrelevant material

On 15 November 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 all staff, contained in the documents that fall within scope of a FOI request. I am satisfied that to give access to this information would reasonably be regarded as irrelevant to your request.

Exemptions

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.

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

Section 33(a)(iii) of the FOI Act exempts a document from release where its disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.¹ Damage may also consist of loss of confidence by an overseas government.

¹ Re *McKnight and Australian Archives* [1992] AATA 225

The documents include information about a foreign government and provides an insight into the Australian Government's relationship and deliberations regarding the political, medical, operational and economic conditions in the context of regional processing. It is important for Australia to maintain good working relationships with coalition partners.

I consider that the disclosure of parts of the document would disclose information that is expected to adversely impact upon Australia's relations with that foreign government, subsequently rendering the foreign government and its agencies less willing to cooperate with the Australian government in the future. In reaching this assessment I have had consideration to the government's previous advice about the handling of material concerning it.

I am satisfied that material identified in the documents as subject to section 33(a)(iii) is exempt.

Section 42(1): Documents subject to legal professional privilege

A document is exempt under section 42(1) of the FOI Act if it contains information that would be privileged from production in legal proceedings on the grounds of legal professional privilege.

The Australian Information Commissioner's Guidelines provide that I must consider the following factors when considering whether information would be subject to legal professional privilege:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice is confidential.

The Department has a legal branch staffed by lawyers admitted to practice and who hold practising certificates. The lawyers in this branch provide independent legal advice.

I have had regard to the above factors and I am satisfied the documents contain information that would reveal legal advice. The legal advice was provided by the Department's legal branch to the business area in a legal adviser-client relationship, and in confidence.

There is no evidence that legal privilege has been waived. There is nothing to indicate that the Department wishes to disclose the privileged information or that the Department has disclosed the substance of the communications contained in the documents more broadly, or used it in a way that would be inconsistent with maintaining the confidentiality of those communications.

I am therefore satisfied that the relevant information identified in the documents is exempt under section 42(1) of the FOI Act.

Section 47C(1): Deliberative Processes

Section 47C of the FOI Act permits conditional exemption of a document if its disclosure would disclose 'deliberative matter'. Deliberative matter includes opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the deliberative processes of an agency. 'Deliberative processes' have previously been described as 'the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.²

The information exempted under section 47C(1) of the FOI Act consists of discussion regarding the handling of the independent review that was carried out by the former Integrity Commissioner and former Head of the Australian Commission for Law Enforcement Integrity, Mr Philip Moss. While I note that the information contains some purely factual material, that factual material is an integral part of the deliberative content and related to discussion around the Department's approach to the Moss Review.³ Release of such material would go towards revealing those matters.

I have taken into account the Australian Information Commissioner's Guidelines at paragraph 6.66 and am satisfied that the document does not contain 'operational material' as defined by section 8A [information to be published – what is operational information?] of the FOI Act. I am also satisfied that the material relates to the functions of the agency as described in paragraph 6.60 of the Guidelines.

I am therefore satisfied that the relevant information identified in the documents is exempt under section 47C(1) 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. As such, I have also considered whether disclosure of the information I have deleted under this exemption would be contrary to the public interest, and have included my reasoning below.

Section 47E: Certain Operations of Agencies

Section 47E(d) of the FOI Act conditionally exempts a document from release where 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 note that for this conditional exemption to apply, I must be satisfied that the disclosure of the information would have a *substantial adverse effect* on the proper and efficient conduct of the operations of the Department (emphasis added).

The information exempted under section 47E(d) of the FOI Act relates to operational matters at a Regional Processing Centre. Disclosure of the information would reveal transfer and medical treatment procedures, methodologies, and operational details of a Regional Processing Centre. Disclosure of this information would substantially compromise integrity and security, effectively jeopardising the effectiveness of the methods and procedures Departmental officers and contracted service providers undertake in their lawful duties. Release of such material would substantially and adversely impact the Department's operations.

I am therefore satisfied that the relevant information identified in the documents is 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. As such, I have also considered whether disclosure of the information I have deleted under this exemption would be contrary to the public interest, and have included my reasoning below.

² See *JE Waterford and Department of Treasury (No 2)* [1984] AATA 67.

³ See *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

Section 11A: Public Interest Test

While I have found that the above conditional exemptions apply to the information outlined above, I am required under section 11A(5) of the FOI Act to consider whether access to the conditionally exempt information would be contrary to the public interest. In considering this, I must be satisfied that access to the conditionally exempt document would be, *on balance*, contrary to the public interest (emphasis added).

In my application of the public interest test, I note the objects of the FOI Act and the importance of the other factors outlined under section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- Promote the objects of the FOI Act
- Inform debate on a matter of public importance
- Promote effective oversight of public expenditure
- Allow a person to access his or her own personal information

In favour of disclosure, I acknowledge that there is:

- A general public interest in making information held by the Government accessible to the public, particularly in increasing scrutiny, discussion, comment and review of the Government's activities
- The need for openness and accountability of the Department's operations
- The need to facilitate access to information to members of the public to allow them to be satisfied that proper processes have been followed by the Department

I have also considered the factors that weigh against the release of the conditionally exempt information in the document. In favour of non-disclosure, the exempted information, if disclosed, would:

- Undermine the way the Department manages Regional Processing Centres
- Affect the ability of the Department to perform as efficiently if certain existing operational processes and procedures are made known to the public
- Incur unnecessary costs to change current operational procedure

Having regard to the above factors, I have provided you with access to documents where disclosure would promote the fundamental objects of the FOI Act. However, I do not consider that disclosure of the exempt material would facilitate any of these objects. In contrast, disclosure of the conditionally exempt material would require the Department to significantly alter its processes and management of Regional Processing Centres to ensure the integrity and management of transfer procedures and ongoing operations.

I have also had regard to the provisions under section 11B(4) outlining the factors that are irrelevant to my decision. These are as follows:

- Access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- Access to the document could result in any person misinterpreting or misunderstanding the document
- 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
- Access to the document could result in confusion or unnecessary debate

I have not taken into account any of these factors in my decision.

Taking into account the above matters, on balance, I consider that disclosure of the information in the documents is contrary to the public interest. Accordingly, I have decided the conditionally exempt material is not in the public interest and therefore is exempt from disclosure under the FOI Act.

Review rights

Internal review

If you disagree with my decision, you have the right to apply for an internal review by the Department of my decision. Any request for internal review must be provided to the Department within 30 days of you being notified of the decision. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by an officer other than the original decision-maker and the Department must make a review decision within 30 days.

Applications for review should be sent to:

Freedom of Information
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

Or by email to: foi.reviews@border.gov.au

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of my decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a review request to the OAIC, please see FOI fact sheet 12 '*Freedom of information – Your review rights*', available online at www.oaic.gov.au.

How to make a complaint about the handling of your FOI request

You may complain to the Australian Information Commissioner if you have concerns about how the department has handled your request under the FOI Act. Information about how to submit a complaint is available at www.oaic.gov.au.

Contacting the FOI Section

If you wish to discuss this matter, I can be contacted using the details provided below.

Yours sincerely



Authorised Decision Maker
International Division
Department of Immigration and Border Protection
Email: foi@border.gov.au

Attachments

- Attachment A - Schedule of Documents
- Attachment B - Documents released



Attachment A

SCHEDULE OF DOCUMENTS TO DECISION RECORD

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File Number ADF2016/42218

No.	Date of document	No. of pages	Description	Decision on release	
A	20-Nov-14	66	Departmental Minute	Exempt in part Irrelevant material removed	s 22(1)(a)(ii) s 33(a)(iii) s 42(1) s 47C(1) s 47E(d)
B	19-Jun-15	35	Ministerial Submission	Exempt in part Irrelevant material removed	s 22(1)(a)(ii) s 33(a)(iii) s 42(1) s 47E(d)
C	19-Jun-15	31	Secretary Correspondence	Exempt in full	s 33(a)(iii) s 42(1) s 47E(d)
D	31-Jul-15	16	Departmental Minute	Exempt in full	s 33(a)(iii)
E	6-Oct-15	35	Departmental Minute	Exempt in full	s 33(a)(iii)
F	24-Sep-15	2	Departmental Minute	Release in full Irrelevant material removed	s 22(1)(a)(ii)
G	24-Sep-15	13	Departmental Minute	Release in full Irrelevant material removed	s 22(1)(a)(ii)
H	2-Oct-15	35	Departmental Minute (copy of E)	Exempt in full	s 33(a)(iii)
I	24-Sep-15	3	Departmental Minute	Release in full Irrelevant material removed	s 22(1)(a)(ii)
J	12-Nov-15	2	Secretary Correspondence	Release in full	

No.	Date of document	No. of pages	Description	Decision on release	
K	26-Nov-15	31	Departmental Minute	Exempt in part Irrelevant material removed	s 22(1)(a)(ii) s 33(a)(iii)
L	4-Dec-15	8	Correspondence	Exempt in part Irrelevant material removed	s 22(1)(a)(ii) s 33(a)(iii)
M	12-Aug-16	23	Departmental Minute	Exempt in part Irrelevant material removed	s 22(1)(a)(ii) s 33(a)(iii) s 47E(d)