



23 October 2017



**In reply please quote:**

FOI Request: FA 17/02/00406

File Number: ADF2017/20110

Dear 

**Freedom of Information (FOI) request - Access Decision**

On 9 February 2017, the Department of Immigration and Border Protection (the Department) received a request for access to document under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

**1 Scope of request**

You have requested access to the following document:

*'I request copies of all documents, briefs and correspondence in relation to the current refugee swap deal between Australia (refugees at Australian offshore detention facilities on Nauru and Manus Island) and the United States, including but not limited to those sent to and from Immigration Minister Peter Dutton and/or his office.'*

On 17 February 2017, the Department issued you a notice under section 24AB of the FOI Act. Your request was then revised to seeking access to the following:

*'First item of correspondence sent and the first item of correspondence received by the Department with respect to the refugee swap.'*

**2 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 document or to amend or annotate records.

**3 Relevant material**

In reaching my decision I referred to the following:

- the terms of your request
- the document relevant to the request
- the FOI Act

- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- advice from the relevant business areas
- the Department's guidance material on the FOI Act

#### **4 Document in scope of request**

The Department has identified one document, as per the attached schedule of documents, as falling within the scope of your request. This document was in the possession of the Department on 9 February 2017 when your request was received.

#### **5 Decision**

The decision in relation to the document in the possession of the Department which fall within the scope of your request is as follows:

- Release one document in part with exemptions applied

#### **6 Reasons for Decision**

For the reasons set out below, I have exempted certain information within the document.

##### **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 10 February 2017, 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 have therefore decided that parts of document marked 's22(1)(a)(ii)' would disclose information that could reasonably be regarded as irrelevant to your request, and have therefore prepared an edited copy of the document, with the irrelevant material deleted pursuant to s.22(1)(a)(ii) of the FOI Act.

The remainder of the document has been considered for release to you as it is relevant to your request.

#### **7 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 if disclosure of the document would, or could reasonably be expected to cause damage to the security of the Commonwealth.***

For the reasons set out below, I consider that there are real and substantial grounds for expecting that the disclosure of the documents exempted under s.33(a)(i) would cause damage to the security of the Commonwealth.

## **Security**

'Security' is a concept with a fluctuating content which can depend upon the circumstances as they exist from time to time.<sup>1</sup> '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 ...*

For a document (or part of a document) to be exempt under s.33(a)(i), I must be satisfied that, on the balance of probabilities, disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

I consider that the disclosure of the information contained within the document that I regard as exempt under s.33(a)(i) could cause damage to the security of the Commonwealth by releasing the classification terminology used to mark highly sensitive classified documents, that have been prepared for limited circulation.

As such I have decided that the information marked 's.33(a)(i)' in the document(s) is exempt from disclosure under s.33(a)(i) of the FOI Act.

### ***Section 33(a)(iii) of the FOI Act permits exemption of a document if disclosure of the document 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. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence.

I consider that the information detailed in the documents relates to a foreign government and provides an insight into diplomatic and operational relationships in the context of humanitarian matters.

I have consulted with the relevant business areas of the Department concerning the information regarded as exempt under s.33(a)(iii). I consider that releasing the documents marked 's.33(a)(iii)' would adversely impact on the ability of the Department to maintain good working relations with the Government of the United States of America.

The business area within the Department that is responsible for managing relationships with international partners has advised that releasing the documents marked 's.33(a)(iii)' would

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<sup>1</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25 at [19].

adversely impact the ability of the Department, and as result, the Australian Government, to maintain good working relations with the U.S Government.

This assessment is made considering the nature of the information contained within the document and the current nature and extent of the Australian Government's relationship with the U.S. Government.

I consider that the disclosure of the exempted information contained within the documents would disclose information that may adversely impact upon Australia's relations with foreign states by inhibiting future negotiations between the Australian Government and a foreign government relating to humanitarian matters.

As such, information within the document is exempted 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.

***Section 33(b) provides that a document is an exempt document if disclosure would divulge information or matter communicated in confidence by a foreign government, an authority of a foreign government or an international organization to the Commonwealth.***

The Information Commissioner Guidelines state that information is communicated in confidence by or on behalf of another government if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Where the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.

The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access to that communication.

An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communications.

Having considered these factors, I am satisfied that the exempted information contained within the documents subject to this request was communicated in confidence under an understanding of confidentiality. There was clear understanding between the relevant parties that the communication would be treated in confidence.

The documents to which you have sought access have had a very limited circulation and are only available to a select number of people on a strict needs-to-know basis. The documents have a national security classification which indicates the harm that may arise from disclosure would be acute and could be expected to cause serious damage to the national interest.

As such, I have decided that the release of the exempted information within the documents would divulge information communicated in confidence by or on behalf of a foreign government to the Commonwealth of Australia and I have decided that the documents are exempt in part from disclosure under section 33(b) of the FOI Act.

## **8 Legislation**

A copy of the FOI Act is available at <https://www.legislation.gov.au/Details/C2017C00251>. If you are unable to access the legislation through this website, please contact our office for a copy.

## **9 Your Review Rights**

### Internal Review

If you disagree with this decision, you have the right to apply for an internal review by the Department of this 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 a 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:

By email to: [foi.reviews@border.gov.au](mailto:foi.reviews@border.gov.au)

OR

By mail to:  
Freedom of Information Section  
Department of Immigration and Border Protection  
PO Box 25  
BELCONNEN ACT 2617

### 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 this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

## **10 Making a Complaint**

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

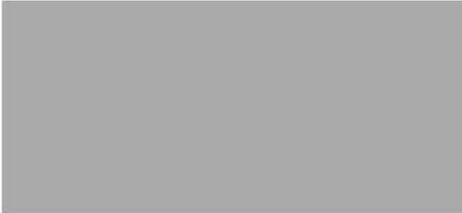
Phone 1300 363 992 (local call charge)

Email [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Immigration and Border Protection as the relevant agency.

## 11 Contacting the FOI Section

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at [foi@border.gov.au](mailto:foi@border.gov.au).



Authorised Decision Maker  
FOI, Privacy and Records Management Branch  
Corporate Services Division  
Department of Immigration and Border Protection



**Attachment B**

**SCHEDULE OF DOCUMENTS TO DECISION RECORD**

FOI Request: FA 17/02/00406  
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No.	Date of document	Folio	Description	Relevant legislation (FOI Act)	
1.	4 Feb 16	1-3	Emails and attachment	Exempt in part	s.22(1)(a)(ii) s.33(a)(i) s.33(a)(iii) s.33(b)