



4 January 2024

Oliver Smith

**BY EMAIL:** [foi+request-10862-5521f535@righttoknow.org.au](mailto:foi+request-10862-5521f535@righttoknow.org.au)

**In reply please quote:**

FOI Request: FA 23/11/00750

File Number: FA23/11/00750

Dear Oliver Smith,

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

On 14 November 2023, the Department of Home Affairs (the Department) received a request for access to documents 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 documents:

*Under the FOI Act, I am seeking the document with PDR Number: MS22-001397  
Alternatives to Held Detention Program.*

**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 documents or to amend or annotate records.

**3 Relevant material**

In reaching my decision I referred to the following:

- the terms of your request
- the documents 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 Departmental officers with responsibility for matters relating to the documents to which you sought access

**4 Documents in scope of request**

The Department has identified five documents as falling within the scope of your request. These documents were in the possession of the Department on 14 November 2023 when your request was received.

**Attachment A** is a schedule which describes the relevant documents and sets out my decision in relation to each of them.

## **5 Decision**

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

- Release two documents in full
- Release three documents in part with deletions

## **6 Reasons for Decision**

Detailed reasons for my decision are set out below.

Where the schedule of documents indicates an exemption claim has been applied to a document or part of document, my findings of fact and reasons for deciding that the exemption provision applies to that information are 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 16 November 2023, 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 decided that parts of documents marked 's22(1)(a)(ii)' would disclose information that could reasonably be regarded as irrelevant to your request. I have 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(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 information contained within the document subject to this request was communicated in confidence by or on behalf of another government, and was received by the Australian Government under an understanding of confidentiality. There was clear general understanding between the relevant parties that the communication would be treated in confidence.

As such, I have decided that the release of the document 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 document is exempt from disclosure under section 33(b) of the FOI Act.

### **6.3 Section 42 of the FOI Act – Legal Professional Privilege**

Section 42 of the FOI Act provides that 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.

I am satisfied that documents MS22-001397 Attachment A-Alternatives to held detention - Phase 1 Report and parts of documents MS22-001397 - Minister signed comprise confidential communications passing between the Department and its legal advisers, for the dominant purpose of giving or receiving legal advice.

In determining that the communication is privileged, I have taken into the consideration the following:

- there is a legal adviser-client relationship
- the communication was for the purpose of giving and/or receiving legal advice;
- the advice given was independent and
- the advice was given on a legal-in-confidence basis and was therefore confidential.

The content of these documents are not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The documents do not fall within the definition of operational information and remain subject to legal professional privilege.

I have decided that parts of document MS22-001397 Attachment A-Alternatives to held detention - Phase 1 Report and document MS22-001397 - Minister signed are exempt from disclosure under section 42 of the FOI Act.

### **6.4 Section 47B of the FOI Act – Commonwealth-State relations**

Section 47B of the FOI Act provides that a document is conditionally exempt if disclosure:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) Would divulge information or matter communication in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth

The disclosure of the material in the document marked 's47B(a)' would or could reasonably be expected to cause damage to relations between the Commonwealth and a State.

I consider that disclosure of information obtained by the Department from partner agencies would adversely affect the continued level of trust and cooperation between these agencies and would impair or prejudice the flow of information between the Department and its State and Territory partners.

I have therefore decided that the parts of the document marked 's47B(a)' are conditionally exempt under section 47B(a) 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 6.8 below.

### **6.5 Section 47C of the FOI Act – Deliberative Processes**

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose deliberative matter relating to the deliberative processes involved in the functions of the Department.

'*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*' generally involves "*the process of weighing up or evaluating competing arguments or considerations*"<sup>1</sup> and the "*thinking processes –the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*"<sup>2</sup>

The document you have requested contains advice, opinions and recommendations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of Department. This deliberative matter relates to a process that was undertaken within government to consider whether and how to make and implement decisions around reviewing a program.

Section 47C(2) provides that "deliberative matter" does not include purely factual material. I am satisfied that the deliberative material is not purely factual in nature. I am further satisfied that the factors set out in subsection (3) do not apply in this instance.

I have decided that the information in the document marked 's47C(1)' is conditionally exempt under section 47C 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 6.8 below.

### **6.6 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.

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<sup>1</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

<sup>2</sup> *JE Waterford and Department of Treasury (No 2)* [1984] AATA 67

I consider that the disclosure of the parts of document marked 's47E(d)' would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

Managing status resolution outcomes for people in immigration detention is integral to the operations of the Department. Any prejudice to the effectiveness of the operational methods and procedures used in undertaking that role would result in a substantial adverse effect on the operations of the Department.

I have decided that the material in the document marked 's47E(d)' is 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 6.8 below.

### **6.7 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 the FOI Act 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 section 4 of the FOI Act and section 6 of the *Privacy Act 1988*).

I consider that disclosure of the information marked 's47F' in the document would disclose personal information relating to third parties. The information within the document would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance.

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

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

I have considered each of these factors below.

The information relating to the third parties is not well known and would only be known to a limited group of people with a business need to know. As this information is only known to a limited group of people, the individual(s) concerned is/are not generally known to be associated with the matters discussed in the document. This information is not available from publicly accessible sources.

I do not consider that the information relating specifically to the third parties would be relevant to the broader scope of your request, as you are seeking access to a report related to immigration detention options, rather than specific information about individuals in detention.

I am satisfied that the disclosure of the information within the documents would involve an unreasonable disclosure of personal information about a number of individuals.

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 6.8 below.

### **6.8 The public interest – section 11A of the FOI Act**

As I have decided that parts of the document 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 document would promote the objects of the FOI Act.
- The subject matter of the document does have the character of public importance and that there may be broad public interest in the document.
- No insights into public expenditure will be provided through examination of the document.
- You do not require access to the document in order to access your own personal information.

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

- Disclosure of the parts of the documents that are conditionally exempt under section 47B(a) of the FOI Act could reasonably be expected to prejudice the Department's ability to obtain confidential information and to obtain similar information in the future. I consider that this would be contrary to the public interest and that this factor weighs heavily against disclosure.
- Disclosure of the conditionally exempt information under section 47C could reasonably be expected to prejudice the ability of the Department to manage future review processes, inquiries and investigations. I consider that the disclosure of this type of deliberative material may hinder the future cooperation or participation in those processes, and that there is a real public interest in this agency being able to undertake effective reviews, investigations and inquiries in the future. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.
- 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 law enforcement functions and, as a result, the ability of the Department to protect Australia's borders. I consider there to be a strong public interest in ensuring that the ability of the Department to conduct its law enforcement functions is not compromised or prejudiced in any way.

I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.

- Disclosure of the personal information which is conditionally exempt under section 47F of the FOI Act could reasonably be expected to prejudice the protection of those individuals' right to privacy.
- The Department is committed to complying with its obligations under the *Privacy Act 1988*, which sets out standards and obligations that regulate how the Department must handle and manage personal information. It is firmly in the public interest that the Department uphold the rights of individuals to their own privacy and meets its obligations under the Privacy Act. I consider that non-compliance with the Department's statutory obligations concerning the protection of personal information would be contrary to the public interest and that this factor weighs strongly against disclosure.

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 would be contrary to the public interest and it is therefore exempt from disclosure under the FOI Act.

## **7 Legislation**

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

## **8 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:

- OR
- By email to: [foi.reviews@homeaffairs.gov.au](mailto:foi.reviews@homeaffairs.gov.au)
  - By mail to:  
Freedom of Information Section  
Department of Home Affairs  
PO Box 25  
BELCONNEN ACT 2617

### Information Commissioner review

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for an Information Commissioner 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 <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>.

## **9 Making a complaint**

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

Your enquiries to the 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 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 Home Affairs as the relevant agency.

## **10 Contacting the FOI Section**

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

*Electronically signed*

### **Meredith Byron**

Position number 60022053

Authorised Decision Maker

Department of Home Affairs



**ATTACHMENT A**

**SCHEDULE OF DOCUMENTS  
REQUEST UNDER FREEDOM OF INFORMATION ACT 1982**

**FOI request:** FA 23/11/00750

**File Number:** FA23/11/00750

No.	Date of document	No. of pages	Description	Decision on release	
1.	14 July 2022	6	MS22-001397 - Minister signed	Exempt in part	s.42(1), s.22(1)(a)(ii)
2.	8 July 2022	3	MS22-001397 002 MS22-001397 Attachment B IDCR summary and recs	Released in full	
3.	30 November 2023	1	MS22-001397 003 Coversheet	Released in full	
4.	1 July 2022	35	MS22-001397 Attachment A- Alternatives to held detention - Phase 1 Report	Exempt in part	s.33(b), s.42(1), s.47B(a), s.47C, s.47E(d), s.47F(1)
5.	23 August 2023	2	Confirmation to shred marked	Exempt in part	s.22(1)(a)(ii)