



29 January 2024

Oliver Smith

**BY EMAIL: [foi+request-10864-b9e5dfd4@righttoknow.org.au](mailto:foi+request-10864-b9e5dfd4@righttoknow.org.au)**

**In reply please quote:**

FOI Request: FA 23/11/00733

File Number: FA23/11/00733

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:

*I am seeking the document with PDR Number: MS22-002716 with the title: Ministerial Direction on character related visa decision making - new primary consideration.*

**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
- advice from other Commonwealth Departments.

## 4 Documents in scope of request

The Department has identified six 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 one document in full; and
- Release five documents in part with deletions.

## 6 Reasons for Decision

Detailed reasons for my decision 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 15 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(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 FOI Guidelines [at 5.36] advise that:

*5.36 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 exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

You have requested access to documents that reveal the Department's confidential communications with the New Zealand government. I am satisfied that revealing these details could reasonably be expected to inhibit the good working relations between the governments of Australia and our international partners.

Maintaining strong bilateral and multilateral relationship with foreign governments requires trust. Integral to maintaining trusted relationships is the capacity for the Australian Government to protect its communications with foreign governments, including by maintaining confidentiality over the flow of information. Officials of the respective countries, including those based at embassies in Australia, need to be able to negotiate and share information with the assurance that the details of their discussions or correspondence will not be inappropriately or unlawfully disclosed.

As such I have decided that the information redacted and marked "s33(a)(iii)" is exempt from disclosure under section 33(a)(iii) of the FOI Act.

### **6.3 Section 34 – Cabinet documents**

Section 34(2) of the FOI Act exempts a document that is a copy or part of or an extract of a document that is itself exempt from disclosure under section 34(1) of the Act.

The material in the documents redacted and marked "s34(2)" consists of a part of, or an extract of, a document an official record of the Cabinet. Accordingly, I am satisfied that the documents are exempt under section 34(2).

Section 34(3) exempts documents to the extent that disclosure would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed. Deliberation has been interpreted as active debate in Parliament or its weighing up of alternatives, with a view to reaching a decision on a matter.

A strong Cabinet system is fundamental to well-informed decision-making and policy development by the Government. Cabinet is a forum in which Ministers, while working towards a collective position, are able to discuss proposals, options and views with complete freedom. The maintenance of frank and collegiate discussion is dependent upon Cabinet deliberations being treated confidentially.

I have sought advice from the Department of Prime Minister and Cabinet, and on the basis of this advice, find that the material redacted and marked 's34(3)' in the documents would, if disclosed, involve the disclosure of deliberations of the Cabinet, and is therefore exempted under section 34(3) of the Act.

### **6.4 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 the parts of Document 1 redacted and marked "s42(1)" 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 this material is not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The document does not fall within the definition of operational information, and remains subject to legal professional privilege.

I have therefore decided that the parts of Document 1 redacted and marked “s42(1)” are exempt from disclosure under section 42 of the FOI Act.

### **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>

Parts of the documents in scope of your request contain advice, opinions and recommendations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of government. I am satisfied that this deliberative matter relates to a process that was undertaken within government to consider whether and how to make or implement a decision, revise or prepare a policy, administer or review a program, or some similar activity,<sup>3</sup> and that the material would disclose the Department’s or Minister’s deliberative process in connection with Cabinet.

Disclosure of this deliberative information could reasonably be expected to inhibit full and frank advice from the Department to its Minister, and, as a result, full consideration by the Government on any potential future consideration of amendments to legislation. Disclosure of some deliberative information, on which a decision has not yet been taken, could also reasonably be expected to prejudice consultations with relevant stakeholders.

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.

---

<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

<sup>3</sup> *Dreyfus and Secretary Attorney-General’s Department (Freedom of information)* [2015] AATA 962

I have decided that the material redacted and marked 's47C(1)' in the documents 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 6.6 below.

## **6.6 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.
- The subject matter of the documents does have the character of public importance and that there may be broad public interest in the documents.
- Insight into public expenditure may be provided through examination of the documents.
- You do not require access to the documents 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 documents:

- Disclosure of the conditionally exempt information under section 47C could reasonably be expected to prejudice the ability of the Government to manage future review processes, inquiries and proposals to legislative amendments. 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 deliberation in the future. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.
- A Ministerial Submission plays an important role in the relationship between a Department and its Minister. Its purpose is to provide frank and honest advice. It is inherently confidential between the Department and its Minister, and the preparation of a Ministerial Submission is essentially intended for the audience of that Minister alone. A precedent of public disclosure of advice given as a part of a Ministerial Submission would result in:

- concerns existing in the open and honest nature of advice being provided which may then hinder future deliberations and decision making processes for the Department and the Government as a whole; and
- future Ministerial Submissions being prepared with a different audience in mind, which would compromise the quality of the advice being prepared for the Minister.
- I consider that the public interest in protecting the process of the provision of free and honest confidential advice by a Department to its Minister has, on balance, more weight than the public interest that might exist in disclosing the deliberative matter. Endangering the proper working relationship that a Department has with its Minister and its ability to provide its Minister with honest advice confidentially would be contrary to the public interest.

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**

### *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).

Yours sincerely

*[Electronically signed]*

Kirrily Cunningham  
Position No. 60001672  
Authorised Decision Maker  
Department of Home Affairs

**ATTACHMENT A**

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

FOI request: FA 23/11/00733

Document #	Date	Description	Pages	Decision on release	
1	22/12/2022	MS22-002716	8	s22(1)(a)(ii) s33(a)(iii) s34(2) s34(3) s42(1)	Exempt in part
2	23/01/2023	MS22-002716 – Attachment A	24		Released in full
3	08/08/2022	MS22-002716 – Attachment B	6	s22(1)(a)(ii) s33(a)(iii) s34(3)	Exempt in part
4	-	MS22-002716 – Attachment C	4	s22(1)(a)(ii) s34(2) s34(3) s47C(1)	Exempt in part
5	08/08/2022	MS22-002716 – Attachment D	4	s.22(1)(a)(ii)	Exempt in part
6	02/02/2023	MS22-002716 – Tabling document	1	s.22(1)(a)(ii)	Exempt in part
<b>Total pages</b>			<b>47</b>		