



29 April 2024

Oliver Smith

BY EMAIL: foi+request-11118-b56d004d@righttoknow.org.au

In reply please quote:

FOI Request: FA 24/02/01326

File Number: FA24/02/01326

Dear Oliver Smith

Freedom of Information (FOI) request – Access Decision

On 20 February 2024, 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.

1 Scope of request

You have requested access to the following documents:

Under the FOI Act, can I please obtain a copy of the email from Assistant Secretary Migration & Citizenship Litigation to Minister O’Neil and Minister Giles’ offices on 30 October 2023 described as "Provided litigation update following the directions hearing on that day." in the document tabled at the Legal and Constitutional Affairs Legislation Committee Senate Estimates on 12 February 2024 in relation to the NZYQ High Court case.

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 two documents as falling within the scope of your request. These documents were in the possession of the Department on 20 February 2024 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:

- Exempt two documents in full from disclosure.

6 Reasons for Decision

Detailed reasons for my decision are set out below.

6.1 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 documents comprise confidential communications passing between the Department and its legal advisers, for the dominant purpose of giving or receiving legal advice. The documents either contain privileged legal advice or confidential communications created for the dominant purpose of seeking or giving instructions in legal proceedings.

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 therefore decided that the documents are exempt from disclosure under section 42 of 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

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.

Yours sincerely



Clare

Position number 60006163

Authorised Decision Maker

Department of Home Affairs

ATTACHMENT A

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

FOI request: FA 24/02/01326

No.	Date of document	Description	Pages	Decision on release	
1	30/10/2023	Email correspondence	2	s42	Exempt in Full
1.1	30/10/2023	Attachment – Questions of Law	1	s42	Exempt in Full