



5 August 2020

Mr E Ross

BY EMAIL: foi+request-6376-03f30526@righttoknow.org.au

In reply please quote:

FOI Request: FA 20/06/00253

File Number: OBJ2020/18661

Dear Mr Ross,

Freedom of Information (FOI) request - Access Decision

On 4 June 2020, 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:

All 'Individualised Assessment Obligations File Notes', 'Individualised Assessment Protection File Notes' and other documents that have been written for the individualised assessments undertaken when persons travelling by boat from Sri Lanka in an attempt to reach Australia have been intercepted and interviewed at sea.

On 25 June 2020 the Department issued you a notice under section 24AB of the FOI Act.

On 25 June 2020, you provided a response and amended the scope of your request to:

During the Operations Sovereign Borders reporting period 1 August 2019 to 31 August 2019, 13 Sri Lankan nationals were intercepted by the Australian Government at sea. Please provide the Individualised Assessment Obligations File Notes and Individualised Assessment Protection File Notes which were conducted for the purposes of individualised assessment of Australia's non-refoulement obligations. Please also provide interview transcripts and screening outcomes for those 13 people assessed.

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 4 June 2020 when your request was received.

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 part with deletions

6 Reasons for Decision

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 5 June 2020, 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)(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 section 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.¹ '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 ...*

I also consider that the definition of 'security' in the *Australian Security and Intelligence Organisation Act 1979* is relevant.² That Act defines 'security' as:

- (a) *The protection of, and of the people of, the Commonwealth and the several States and Territories from:*
- (i) *Espionage*
(ii) *Sabotage*
(iii) *Politically motivated violence*
(iv) *Promotion of communal violence*
(v) *Attacks on Australia's defence system; or*
(vi) *Acts of foreign interference;*
- Whether directed from, or committed within, Australia or not; and*
- (aa) *the protection of Australia's territorial and border integrity from serious threats; and*
- (b) *The carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).*

Paragraph (aa) is particularly on point. It was inserted by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) (Schedule 2). The Explanatory Memorandum for the *Anti-People Smuggling and Other Measures Bill 2010* (Cth), states that '*serious threats to Australia's territorial and border integrity*' include '*those posed by people smuggling activities*' (at 2-3).

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

² See *Staats and National Archives of Australia* [2010] AATA 531 at [99].

Operation Sovereign Borders

The Department is part of a whole-of-government response to border protection issues that has been established through Operation Sovereign Borders (OSB). OSB is a military-led, border security initiative supported and assisted by a wide range of federal government agencies. The OSB Joint Agency Task Force (JATF) has been established to ensure a whole-of-government effort aimed at combating maritime people smuggling and protecting Australia's borders.

OSB was established on 18 September 2013 and has successfully reduced the number of illegal maritime ventures to Australia and prevented loss of life at sea. Australia remains committed to ending the criminal activity of people smuggling. It aims to ensure that Australia has effective control of the circumstances in which people enter Australia.

The JATF is supported by two operational task groups:

- Disruption and Deterrence Task Group—led by the Australian Federal Police and
- Detection, Interception and Transfer Task Group—led by this Department, which includes the Australian Border Force (ABF) and MBC.

Vessel tasks

The vessels referred to in the documents are engaged in a range of operations on behalf of the Australian Government, patrolling waters off the Australian coast. In undertaking that work the vessels are under the direction of Maritime Border Command (MBC). MBC is Australia's lead maritime law enforcement agency. It brings together officers from the Department and the Department of Defence (Defence) as a joint multi-agency taskforce to identify and respond to illegal activity in Australia's Maritime Jurisdiction (the AMJ). The vessels include Australian Navy vessels, MBC vessels and civilian vessels contracted to the Department.

The vessels are responsible for a number of functions, including in relation to:

- illegal exploitation of natural resources;
- illegal activity in protected areas;
- illegal maritime arrivals;
- prohibited imports and exports;
- maritime terrorism;
- piracy, robbery or violence at sea;
- compromise to biosecurity; and
- marine pollution.

In respect of these areas of responsibility, the vessels and their crew have a range of functions and powers including:

- patrolling Australia's Maritime Jurisdiction (AMJ);
- surveillance and intelligence gathering;
- detaining and inspecting vessels suspected of illegal activity within the AMJ;
- taking control of vessels or directing them to take particular action, including leaving the AMJ or sailing under the Australian vessel's watch to a designated destination; and
- where necessary, destroying craft which pose a risk to Australia (such as craft which are infected with biohazardous organisms, or craft engaged in maritime terrorism).

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 compromising operational functions, increasing the risk to Australian vessels and personnel and encouraging illegal activity. I consider the particular damage to the security of the Commonwealth to be as follows:

- (a) Information within the documents would provide insight into the manner in which vessels involved in national security operations undertake those functions, including tactics, training and procedures.
- (b) Australia's maritime borders are vast. Australia's maritime domain comprises some 12 million square nautical miles – about 11.5% of the world's oceans. Australia has insufficient resources to continuously patrol every possible point of maritime entry into Australia. Even if the insight afforded is considered to be slight, any reduction in the efficiency or effectiveness of current operational methods is likely to have significant consequences given the ever-present challenge of managing such an enormous jurisdiction with finite resources.
- (c) If the exempt information contained within this Joint Review Report were released, border protection authorities would be forced to revise current operational methodology to minimise the harm caused by those disclosures. This is, by definition, damage to security operations. Current procedures and activities are set with a view to achieving maximum security outcomes with the available resources. Any changes required by a need to counter the advantage afforded to vessels or persons engaging in illegal maritime activities necessarily represents a compromise to operational effectiveness.
- (d) Increasing the risk to Australian vessels and personnel undertaking border protection work. Patrolling and protecting Australia's AMJ is an inherently dangerous task. By releasing information that would make the activities of Australian vessels more predictable, the risk that a person would be willing to, and successful in, causing harm or damage to Australian vessels or people is increased.
- (e) A significant component of Australia's border protection strategy is the deterrent effect of routine patrolling of the AMJ. Persons with an interest in undertaking illegal activities in the AMJ - and compromising Australia's border security in the process - run the risk that they will be detected and intercepted by Australian vessels. By disclosing information which has the potential, or even creates a perceived potential, to assist in circumventing those patrol operations, encouragement is given to those persons that they may be able to more successfully elude border protection patrol vessels.

- (f) In some cases a people smuggling voyage sets out with the intention of intersecting with border protection vessels at an early stage. The release of vessel positioning information is likely to be used by people smugglers to good effect to increase the confidence of potential passengers in the likelihood of the success of the people smuggling venture, thereby encouraging more passengers on more voyages. Given the finite resources available for detecting and dealing with such activities, this increases the risk that such activities will be successful. This increased risk of success itself is reasonably expected to damage the security of the Commonwealth.
- (g) The disclosure of the exempt information would likely provide people smuggling operators with official government information which they could use to manipulate and convince any potential illegal immigrants to embark on voyages to Australia. This would be an improper use of the information which may also cause a risk to human life. To disclose information that indicates the success or otherwise of ventures may also encourage others to engage in people smuggling activities. I consider that there is a strong public interest in preventing the potential risk to human life associated with people smuggling.

As such I have decided that the information marked 's33(a)(i)' in the document(s) is exempt from disclosure under section 33(a)(i) of the FOI Act.

6.3 Section 47E of the FOI Act – Operations of Agencies

6.4 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.
- I consider that the subject matter of the documents does not seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.
- I consider that no insights into public expenditure will be provided through examination of the documents.
- I am satisfied that 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 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.

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:

By email to: foi.reviews@homeaffairs.gov.au
OR
By mail to:
Freedom of Information Section
Department of Home Affairs
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 <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

9 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

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 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.

[Signed electronically]

Position Number 60083089
Authorised Decision Maker
Department of Home Affairs