



3 November 2020

Mr E Ross
BY EMAIL: foi+request-6752-21a2a525@righttoknow.org.au

In reply please quote:

FOI Request: FA 20/09/01168
File Number: OBJ2020/30643

Dear Mr Ross

Freedom of Information (FOI) request - Access Decision

On 24 September 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:

- Please provide procedural instructions or other operational policy instruction documents for maritime interceptions that require the removal of persons detained under the Maritime Powers Act 2013.*
- Please also provide procedural documents for logistical arrangements relating to individualised assessments of unauthorised maritime arrivals intercepted at sea. The later is mentioned in the document with ID number VM-5272 (Procedural Instructions for Individualised Assessments).*

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 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 departmental officers with responsibility for matters relating to the document 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 24 September 2020 when your request was received.

In relation to Part 1 of your request, the document identified as falling within the scope of your request is *Response to a Suspected Illegal Entry Vessel and Unauthorised Maritime Arrivals in Australia's Migration Zone* (BE-6309).

In relation to Part 2 of your request, the document *Individualised Assessments - Procedural Instruction* (VM-5272) was released in part under the FOI Act on 1 November 2018 in response to FOI request FA 18/06/01374. It is available on the Department's Disclosure Log at: <https://www.homeaffairs.gov.au/foi/Pages/2018.aspx>.

5 Decision

In relation to Part 1 of your request, my decision regarding the document in the possession of the Department is as follows:

- Exempt one document in full from disclosure.

In relation to Part 2 of your request, I note that section 4(1)(d) of the FOI Act provides that a document for the purpose of the FOI Act does not include material maintained for reference purposes that is otherwise publically available. As the document is publicly available, at the website address provided above, I consider that you are not entitled to access to the document under the FOI Act.

Section 24A of the FOI Act provides that the Department may refuse a request for access to a document if all reasonable steps have been taken to find the document and the Department is satisfied that the document does not exist. As the document to which you have requested access is not considered to be a document under section 4(1)(d), I am refusing your request, based on the application of section 24A of the FOI Act.

6 Reasons for Decision

Detailed reasons for my decision regarding the document relating to Part 1 of your request are set out below.

My findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

6.1 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 document 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; ...*

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).*

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].

Paragraph (aa) is particularly relevant. 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).

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 Maritime Border Command (MBC).

Vessel tasks

The vessels referred to in the document 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 MBC. MBC is Australia’s lead maritime law enforcement agency. It brings together officers from the Department and the Department of 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 the 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 continuously to 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) 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 elude more successfully border protection patrol vessels.
- (d) 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.

I also consider that while some of information contained in the document, if disclosed in isolation, may not be harmful, there is nevertheless a reasonable expectation that it could, were it to be disclosed in this context, enable insights into and inferences to be made about matters that would be exempt in consideration of a reasonable expectation that disclosure would cause damage to the security of the Commonwealth.

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

6.2 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.

I consider that the disclosure of the document 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 the security and integrity of Australia's borders 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.

Any disclosure resulting in the prejudice of the effectiveness of the Department's operational methods and procedures would result in the need for this Department, and potentially its law enforcement partners, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

I consider that the disclosure of the document 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 the security and integrity of Australia's borders is integral to the operations of the Department. Any prejudice to the effectiveness of law enforcement methods and procedures used in undertaking that role would result in a substantial adverse effect on the operations of the Department.

The disclosure of the conditionally exempt information could reasonably be expected to prejudice of the effectiveness of those lawful methods and procedures, which would result in the need for the Department, and potentially other law enforcements agencies, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

Access to the conditionally exempt information may be reasonably expected to undermine the tactical advantage that the Department, and partner border protection agencies, surveillance and response assets have over people-smuggling ventures by providing operational information about assets engaged in counter-people smuggling operations.

It should be noted that the assets concerned are not only engaged in operations concerning illegal maritime arrivals but also respond to other maritime security threats such as illegal fishing and resource exploitation, prohibited imports/exports, piracy, violence at sea, as well as the prevention of marine pollution and environmental crime.

I am also of the opinion that disclosing this information, and the resulting change to asset use and assessment methods that would have to occur, would cause those border protection activities to be less efficient.

I also consider that while some of information contained in the document, if disclosed in isolation, may not be harmful, there is nevertheless a reasonable expectation that it could, were it to be disclosed in this context, enable insights into and inferences to be made about matters that would be exempt in consideration of a reasonable expectation that disclosure would have a substantial adverse effect on departmental operations.

I have decided that the document 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 6.3 below.

6.3 The public interest – section 11A of the FOI Act

As I have decided that the document is 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 that 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 some 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 factor that weighs against the release of the conditionally exempt information in the document:

- Disclosure of the parts of the document 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)

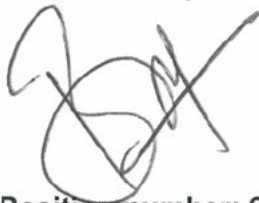
Email enquiries@oaic.gov.au

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.

Yours sincerely



Position number: 60089279
Authorised Decision Maker
Department of Home Affairs