



19 March 2021

Mr E Ross

BY EMAIL: foi+request-6753-f058822e@righttoknow.org.au

In reply please quote:

FOI Request: FA 20/09/01170

File Number: OBJ2020/30645

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 all communications between the Department and the following organisations that were consulted for the purposes of producing the procedural instruction Individualised Assessments (document ID: VM-5272):

- *Refugee and International Law Section, Legal Advice and Operational Support Branch*
 - *Temporary Protection Visa Assessment Branch*
 - *Secrecy and Disclosure Section*
 - *Status Resolution Framework Return & Removal Policy Section, Community Protection and Border Policy Branch*
 - *Child Welfare Policy Section, Child Protection and Wellbeing Branch*
 - *Onshore Protection Policy Section, Humanitarian, Family and Citizenship Policy Branch*
- *Joint Agency Taskforce, Operation Sovereign Borders*
- *Counter People Smuggling Section, Pacific and Transnational Issues Branch*
- *Records Management Section, FOI Privacy and Records Management Branch.*

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 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 35 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.

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 35 documents in full from disclosure

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 25 September 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 also decided that parts of documents would disclose information that could reasonably be regarded as irrelevant to your request under section 22(1)(a)(ii) of the FOI Act.

The remainder of the documents have been considered as 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 three main lines of effort:

- Disruption and Deterrence—led by the Australian Federal Police;
- Response and Returns—led by this Department, which includes the Australian Border Force (ABF) and MBC; and
- Regional Processing and Resettlement—led by this Department.

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 documents 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:

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 in the documents is exempt from disclosure under section 33(a)(i) of the FOI Act.

6.3 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"³ 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.'*⁴

The document 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, being policy settings relating to, and the development of the Procedural Instruction for Individualised Assessments. 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.⁵

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 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 6.5 below.

6.4 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 parts of documents under 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 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 that could prejudice 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 undermining their future effectiveness.

Some information under s47E(d) also consists of operational email addresses used by this Department. These email addresses are not otherwise publicly available, and disclosure of this information could reasonably be expected to result in potential vexatious

³ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA962 [18]

⁴ *JE Waterford and Department of Treasury (No 2)* [1984] AATA 67

⁵ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA962

communication and public inquiries which these operational areas are not resourced to manage. The Department has established channels of communication for members of the public into the Department, and I consider there is no public interest in disclosing these operational contact details. Given the operational focus of those business areas, such a diversion of the resources of that business area could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of this Department and its partner agencies.

I have decided that parts of the documents are 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 6.5 below.

6.5 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 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 parts of the documents 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;
- no insights into public expenditure will 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 Department to manage future deliberations of a similar nature. 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 disclosure would be contrary to the public interest and that this factor weighs strongly against disclosure.
- Disclosure of the operational email addresses which are conditionally exempt under section 47E(d) of the FOI Act would have a substantial adverse effect on the ability of the relevant operational areas to conduct their business as usual. The Department has established avenues in place for members of the public to contact when they have queries, complaints or comments. I consider that there is a strong public interest in ensuring public feedback is filtered through these available channels so that operational areas within the Department are able to carry out their functions in an effective matter. I consider that disclosure would be contrary to the public interest and that this factor weighs strongly against disclosure of the exempt information.

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

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 No. 7402

**Authorised Decision Maker
Department of Home Affairs**