



14 September 2022

BE

BY EMAIL: [foi+request-9282-222a9569@righttoknow.org.au](mailto:foi+request-9282-222a9569@righttoknow.org.au)

**In reply please quote:**

FOI Request: FA 22/08/01044

File Number: OBJ2022/22565

Dear BE

**Freedom of Information (FOI) request – Access Decision**

On 17 August 2022, the Department of Home Affairs (the Department) received a request for access to a document 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 document:

*I seek access under the FOI Act to MS22-000833. I note that part of this document is available on the Home Affairs FOI disclosure log (FA 22/06/00085 published 14 July 2022) however parts of this document were redacted on the basis that the information was irrelevant to that particular request.*

*Given that my request is for access to this specific document (and without knowing the precise scope of the previous request), no aspect of this document is irrelevant to my request for the purposes of s.22(1)(a)(ii) of the FOI Act other than names or contact details of departmental staff.*

*I also confirm that I do not seek access to any of the information which has been redacted under section 47F(1) of the Act in the version of this document that is publicly available on the department's disclosure log.*

*In relation to the information that was redacted on the basis of deliberative process (47C) I confirm that I would like this information included within my request, noting that over a month has elapsed since the date of the previous FOI decision and that further final decisions in the form of the grant of permanent residency to this family have occurred which would require a fresh assessment of the basis of any deliberative process claim.*

## **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 Document in scope of request**

The Department has identified one document as falling within the scope of your request. This document was in the possession of the Department on 17 August 2022 when your request was received.

## **5 Decision**

The decision in relation to the document in the possession of the Department which fall within the scope of your request is as follows:

- Release one document in part with deletions

## **6 Reasons for Decision**

Detailed reasons for my decision 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 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 23 August 2022, the Department advised you that its practice 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 note that your request explicitly states that you do not seek access to the names or contact details of departmental staff.

I have decided that parts of document 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 document, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The remainder of the document has been considered for release to you as it is relevant to your request.

## **6.2 Section 22 of the FOI Act – deletion of exempt material**

I have decided to prepare an edited copy of the document. The grounds upon which the edited copy of this document are explained below.

## **6.3 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 part of the document comprises confidential communication 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 the document 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 remain subject to legal professional privilege.

I have decided that part of the document is exempt from disclosure under section 42 of the FOI Act.

## **6.4 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>

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<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

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 possible consequences of the Minister's decision. 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 or some similar activity.<sup>3</sup>

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 certain related matters.

Section 47C(2) provides that "deliberative matter" does not include purely factual material. I have had regard to the fact that "purely factual material" does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.<sup>4</sup> A factual summary prepared to aid a complex issue may be classed as purely factual material, but may also be of a character as to disclose a process of section involving opinion, advice or recommendation. As such, a conclusion which involves a deliberative process may well prevent material from being purely factual.<sup>5</sup>

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 6.6 below.

### **6.5 Section 47F of the FOI Act – Personal Privacy**

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information of any person. 'Personal information' means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not (see s 4 of the FOI Act and s 6 of the *Privacy Act 1988*).

I note that your request explicitly states that you do not seek access to the information contained in this document that was previously exempted under section 47F. I have nevertheless considered this information on its merits.

I consider that disclosure of the information marked 's47F' in the document would disclose personal information relating to third parties. The information within the document would reasonably identify a person or persons, either through names, family relationships or immigration status.

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

<sup>4</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

<sup>5</sup> *Harris v Australian Broadcasting Corporation and Others* (1984) 1 FCR 150

The FOI Act states that, when deciding whether the disclosure of the personal information would be 'unreasonable', I must have regard to four factors set out in s.47F(2) of the FOI Act. I have therefore considered each of these factors below:

- *the extent to which the information is well known;*
- *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- *the availability of the information from publicly available resources;*
- *any other matters that I consider relevant.*

The information relating to the third parties is not well known and would only be known to a limited group of people with a business need to know. As this information is only known to a limited group of people, the individual or individuals concerned are not generally known to be associated with the matters discussed in the document. The information is not available from publicly accessible sources.

I do not consider that the information relating specifically to the third parties would be relevant to the broader scope of your request, as you are seeking access to the Minister's decision-making process rather than information which wholly relates to other individuals.

I am satisfied that the disclosure of the information within the document would involve an unreasonable disclosure of personal information about one or more individuals.

I have decided that the information referred to above is conditionally exempt under section 47F 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 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 document 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 document would promote the objects of the FOI Act.
- While the subject matter of the document does have the character of some public importance and that there may be some public interest in the document, the information exempted, however, is specific and limited.
- 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 factors that weigh against the release of the conditionally exempt information in the document:

- 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 the Minister with honest advice confidentially would be contrary to the public interest. I do not consider that the relative weight of these considerations has been affected by the passage of time, either in this specific instance or in general terms.
- Disclosure of the personal information which is conditionally exempt under section 47F of the FOI Act could reasonably be expected to prejudice the protection of those individuals' right to privacy.
- The information conditionally exempt under section 47F of the FOI Act is not well known to the public generally and is not readily available from public sources. I have had regard to the fact that disclosure of information under the FOI Act must be considered to be a disclosure to the world at large and not just to you as the applicant.
- The Department is committed to complying with its obligations under the *Privacy Act 1988*, which sets out standards and obligations that regulate how the Department must handle and manage personal information. It is firmly in the public interest that the Department uphold the rights of individuals to their own privacy and meets its obligations under the Privacy Act. I consider that non-compliance with the Department's statutory obligations concerning the protection of personal information 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 document 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](mailto: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 <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.



## 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](mailto: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](mailto:foi@homeaffairs.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Ann-Clare', with a stylized, cursive script.

**Ann-Clare**  
**Position no. 60040814**  
**Authorised Decision Maker**  
**Department of Home Affairs**