



Attachment A

DECISION RECORD

Request Details

FOI Request FA 15/07/00140
File Number ADF2015/30514

Scope of request

- *Any correspondence relating to the making of IMMI 15/074;*
- *And any advice provided by the Department to the Minister which led to the creation of such instrument;*
- *Finally, the number of special purpose visas that have been issued by the Assistant Minister/Department, since the Assistant Minister made the said declaration.*

Documents in scope

I have interpreted the scope to include correspondence relating to the making of legislative instrument IMMI 15/074, the final submission provided by the Department to the Minister, which led to the creation of this instrument, and the latest available statistics regarding the number of special purpose visas granted since the declaration was made.

1. Departmental file – Part 1 – containing 72 folios.
2. Departmental file – Part 2 – containing 51 folios.
3. Departmental file – Part 3 – containing 90 folios.
4. Departmental file – Part 4 – containing 18 folios.
5. Departmental file – Part 5 – containing 9 folios.

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 Departmental records.

Information considered

In reaching my decision, I have considered the following:

- the *Freedom of Information Act 1982*;
- departmental files and/or documents (identified above); and
- the Australian Information Commissioner's guidelines relating to access to documents held by government.

Reasons for decision

I have considered the files within the scope of your request and applied exemptions in part or in full to documents as detailed in the Schedule of Documents. You should read the schedule in conjunction with the exemptions below.

Deletion of exempt or irrelevant material under s.22 of the Act

Section 22(2) of the Act provides that, where an agency reaches the view that a document contains exempt information or material that is irrelevant to the request **and** it is possible for

the agency to prepare an edited copy of the document with the irrelevant or exempt material deleted, then the agency must prepare such a copy.

This edited copy must be provided to the applicant. Further, the decision maker must advise the applicant in writing that the edited copy of the document has been prepared and of the reason(s) for each of the deletions in the document (s.22(3) of the Act).

Exempt material is deleted pursuant to s.22(1)(a)(i) and irrelevant material is deleted pursuant to s.22(1)(a)(ii) of the Act.

Deletion of irrelevant material as applied to your FOI request

The documents contain information which is considered irrelevant to your request. Irrelevant information includes the names and direct contact details of Departmental staff below senior executive level.

Conditionally exempt documents

The documents I have considered fall under two 'conditional' exemptions in the Act. Therefore, I will explain what a 'conditionally exempt' document is before discussing the individual exemptions I have applied.

The Act was amended in November 2010 to impose a new public interest test on all 'conditionally exempt' information, including personal information. The Act now provides that 'conditionally exempt' information must be released unless the decision maker reaches the view that release of the information would be 'contrary' to the public interest.

The public interest test

Factors weighing in favour of release

In weighing up the public interest test, s.11B(3) of the Act states that a decision maker **must** consider whether disclosure of the information would:

- (a) *promote the objects of the Act; or*
- (b) *inform debate on a matter of public importance; or*
- (c) *promote effective oversight of public expenditure; or*
- (d) *allow a person to access his or her personal information.*

The objects of the Act, set out in s.3(1) are to give the Australian community access to information held by the Government of the Commonwealth by providing, amongst other things, for a right of access to documents. The intention of Parliament is to promote Australia's representative democracy by increasing public participation in Government processes, with a view to promoting better-informed decision-making and increasing scrutiny, discussion, comment and review of the Government's activities

Factors weighing against release

The Act does not contain any factors 'against' disclosure. However, the Act states that, if the Australian Information Commissioner has issued Guidelines (IC Guidelines) that set out factors weighing against disclosure, then the decision maker must also consider those factors when weighing the public interest (s.11B(5) of the Act).

The Information Commissioner has since issued Guidelines that contain a **non-exhaustive** list of factors that a decision maker **must** consider when weighing whether it is contrary to the public interest to release 'conditionally exempt' information (paragraph 6.29 of the IC Guidelines).

The elements that weigh against disclosure are:

Whether disclosure of the personal information could reasonably be expected to:

- (a) *prejudice the protection of an individual's right to privacy, including where:*
 - i. *the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests*
 - ii. *the personal information is that of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive.*
- (b) *prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct*
- (c) *prejudice security, law enforcement, public health or public safety*
- (d) *impede the administration of justice generally, including procedural fairness*
- (e) *impede the administration of justice for an individual*
- (f) *impede the protection of the environment*
- (g) *impede the flow of information to the police or another law enforcement or regulatory agency*
- (h) *prejudice an agency's ability to obtain confidential information*
- (i) *prejudice an agency's ability to obtain similar information in the future*
- (j) *prejudice the competitive commercial activities of an agency*
- (k) *harm the interests of an individual or group of individuals*
- (l) *prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General*
- (m) *prejudice the management function of an agency*
- (n) *prejudice the effectiveness of testing or auditing procedures*

I will now consider the conditional exemption that I have applied in my decision.

Conditional exemption - deliberative documents - s.47C

A document is 'conditionally exempt' under s.47C(1) of the Act if:

'...its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of...an agency...'

The documents I have exempted under s.47C contain matter in the nature of or relating to 'opinion, advice or recommendation' (termed 'deliberative matter') that relates to the 'deliberative processes' of the Department and the Minister.

The accepted definition of 'deliberative process' is that it refers to an agency's 'thinking processes' or 'decision-making processes' - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

The Department of the Prime Minister and Cabinet (PM&C) Guidelines, which were in effect before the 2010 reforms to the Act (at paragraph 7.2.1) note that *'the deliberative processes of an agency, a Minister or the Government are the thinking, reflecting, deliberating, consultation and recommendation that occur prior to a decision, or before or while undertaking a course of action'*. Further, (at paragraph 7.2.2.)

'... deliberation suggests not only collective discussion but collective acquisition and exchange of facts preliminary to an ultimate decision'.

I am satisfied that the information contained in the documents is not operational information or purely factual material. Therefore, I am satisfied that the information I have identified as exempt under s.47C(1) meets the description of 'deliberative matter'. As such, the information is 'conditionally exempt' under s.47C of the Act.

A conditionally exempt document must be released under the Act unless the release would be 'contrary to the public interest'. Therefore I must now consider whether its release would be contrary to the public interest.

Is the release contrary to the public interest?

I have considered the factors set out in the public interest test in s.11B(3) and s.11B(5) of the Act.

Factors in favour of disclosure

I am satisfied that the release of the documents would promote the objects of the Act as it would provide access to information held by Government and this factor weighs in favour of the release not being 'contrary to the public interest'.

I am also satisfied that the release of the deliberative documents would inform debate on a matter of public importance and this factor weighs in favour of the release not being 'contrary to the public interest'.

However, I am not satisfied that the release of the deliberative matter is relevant to the effective oversight of public expenditure and further, release would not facilitate you accessing your own personal information.

I am therefore of the view that only the first two public interest criteria weigh in favour of release.

Factors against disclosure

As discussed above, the IC Guidelines contain a list of 'non-exhaustive' factors that must be considered when determining if release of a document is against the public interest (s.11B(5) of the Act). The factors focus on the 'prejudice' caused by the release of the information. I note that the Department may also consider other relevant factors not listed in the IC's Guidelines.

The PM&C Guidelines (para 7.3.4), when discussing the public interest test relating to 'deliberative documents' in the pre-2010 reform version of s.47C (then s.36) noted:

'... Underlying all the relevant public interest factors that could be invoked against disclosure under this exemption provision is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the official administration of the agency concerned...'

In this case I have considered the following:

- whether disclosure of the information could reasonably be expected to harm the interests of the Department;
- whether disclosure of the information could reasonably be expected to prejudice the deliberative processes of the Department;

- whether disclosure of the information could reasonably be expected to prejudice the function of the Department to manage its portfolio; and
- the degree to which release would contribute to a public purpose being achieved and/or shed light on the working of government.

I am satisfied that each of the factors listed above weigh in favour of not releasing the information. In particular, I consider that release of the information could reasonably be expected to prejudice the deliberative processes of the Department.

On balance, I am satisfied that the release of the deliberative material in the documents would be 'contrary to the public interest'.

Therefore, I am satisfied that the deliberative material in the documents is exempt from release under s.47C(1) of the Act.

Conditional exemption- personal information- s.47F(1)

A document is 'conditionally exempt' under s.47F(1) of the Act if its release would involve the '*unreasonable disclosure of personal information about any person, including a deceased person*'.

For information or documents to be exempt under this provision, the information in the documents must meet the definition of 'personal information' in s.4(1) of the FOI Act and I must be satisfied that the release of the information is 'unreasonable'. The test of unreasonableness implies a need to balance the public interest in disclosure of government-held information and private interests of individuals.

Personal Information

I am satisfied that the information contained in the documents which I am exempting is the 'personal information' of the individuals concerned. The 'personal information' includes the names and contact details of third parties.

Unreasonable disclosure

Section 47F(2) of the FOI Act sets out the factors that may be considered when determining whether release is 'unreasonable'. They are:

- 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 within the document;
- the availability of the information from publically accessible sources; and
- any other matters that the Department considers relevant.

I have considered each of these factors below.

The extent to which the information is well known

The third parties' personal information is not well known and would only be known to a limited group of officers with a business need-to-know. The information would not necessarily be known outside the Department. On balance, I believe that this factor weighs against the release being reasonable.

Whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt within the document

The third parties' personal information, in the context of the documents, is only known to those with a business need-to-know. Therefore, the individuals concerned are not generally known to be associated with the matters discussed in the document. On balance, I believe that this factor weighs against the release being reasonable

The availability of the information from publically accessible sources

This personal information is not available from publically available sources and does not appear to be in the public forum. The information is contained in internal departmental documents, created for an administrative process. On balance, I believe that this factor weighs against the release being reasonable.

Any other matters that the department considers relevant

I have considered the following factors:

- The information is not your personal information. This weighs against the release being reasonable.
- Every person has the right to expect that their personal information will be securely maintained by the Department. This weighs against the release being reasonable.
- No purpose would be achieved by releasing the third party personal information. This weighs against the release being reasonable.
- The degree to which release of the personal information would contribute to a public purpose being achieved and/or shed light on the working of government. This weighs against the release being reasonable.
- The current relevance of the personal information. This weighs against the release being reasonable.

On balance I am satisfied that the release of the third party personal information would be 'unreasonable' in the context of the request.

Therefore, I am satisfied that the conditional exemption in s.47F(1) applies to the documents. I must now consider the application of the public interest test in s.11B of the FOI Act to determine whether the release of the information in the documents would be 'contrary to the public interest'.

Factors in favour of disclosure

Although release of the third parties' personal information would promote the objects of the Act, I do not consider that it would inform debate on a matter of public importance. In addition, the release of the information is irrelevant to the effective oversight of public expenditure and would not facilitate you accessing your own personal information. Therefore, only the first public interest factor weighs in favour of release.

Factors against disclosure

I consider that these factors are relevant to the personal information in the identified documents:

- disclosure of the personal information could reasonably be expected to prejudice the protection of an individual's right to privacy;

- it is a core Government concern to maintain the integrity of the information it holds and to maintain an individual's privacy;
- no purpose would be achieved/served by releasing the third parties' personal information;
- release would not contribute to a public purpose being achieved and/or shed light on the working of government; and
- the current relevance of the information.

On balance, I am satisfied that release of the third parties' personal information would be 'contrary to the public interest' and is therefore exempt under s.47F(1) of the Act. The factor against disclosure relating to the protection of an individual's right to privacy was given the most weight. The benefit to the public resulting from disclosure is outweighed by the benefit of withholding this information.

Exempt documents

The documents I have considered fall under an exemption of the Act. The exemptions in Division 2 of Part IV of the Act are not subject to an overriding public interest test. If a document meets the criteria to establish a particular exemption, it is exempt. There is no additional obligation to weigh competing public interests to determine if the document should be released.

I will now consider the exemption that I have applied in my decision.

Exemption - legal professional privilege - s.42

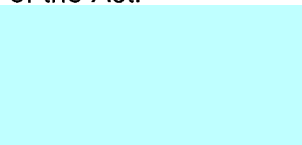
Section 42 of the Act relevantly provides:

- (1) 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.*
- (2) A document of the kind referred to in subsection 9(1) is not an exempt document by virtue of subsection (1) of this section by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in subsection 9(1)...*

The documents that are exempt under s.42 were created for the dominant purposes of giving or seeking legal advice. They are confidential communications between legal officers (both within and external to the Department) and the client areas within the Department, where information was conveyed or requested for the purpose of legal advice.

The legal officers, in response to requests for legal advice, prepared the documents. The Department, as the client, claims legal professional privilege over the documents and is not waiving privilege because of the detrimental effect this could have on the conduct of its legal affairs.

Based on the above, it is my decision that parts of the documents are exempt under s.42(1) of the Act.



Authorised decision maker
Department of Immigration and Border Protection
Email foi@border.gov.au

3 December 2015



Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD

FOI Request FA 15/07/00140
File Number ADF2015/30514

1. Departmental File: part 1

Folio	Description	Decision	Legislation
1-5	Email trail	Exempt	s.42(1)
6	IMMI 15/074 – Statement to Parliament	Exempt	s.42(1)
7-8	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
9-10	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
11	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (signed) – 30 March 2015	Released in full	
12- 14	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.42(1) s.47C(1)
15	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
16	IMMI15/074– Statement to Parliament	Exempt	s.47C(1)
17-18	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
19-20	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.47F(1)
21	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (signed) – 30 March 2015	Released in full	
22	Email	Irrelevant to scope	s.22(1)(a)(ii)
22-24	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
25-30	Email trail	Exempt	s.42(1) s.47C(1)
31	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
32-39	Email trail	Exempt	s.42(1)
40-41	Email trail	Exempt	s.47C(1)
42	Explanatory Statement IMMI 15/073 – Determination 2015	Exempt	s.47C(1)
43	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
44	IMMI 15/073 – Determination 2015 (ss.9A(6) of the <i>Migration Act 1958</i>)	Exempt	s.47C(1)
45-52	Email trail	Exempt	s.42(1) s.47C(1)
53	Email	Irrelevant to scope	s.22(1)(a)(ii)
54-60	Ministerial Submission MS14-000129 (signed)	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.47C(1) s.42(1)

61	Email	Irrelevant to scope	s.22(1)(a)(ii)
62	IMMI 15/074 – Statement to Parliament	Exempt	s47C(1)
63-64	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
65	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s. 47C(1)
66	IMMI 15/074 – Statement to Parliament	Exempt	s. 47C(1)
67-68	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.47C(1)
69-70	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
71	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s47C(1)
72	IMMI 15/074 – Statement to Parliament	Exempt	s47C(1)

2. Departmental File: part 2

Folio	Description	Decision	Legislation
1-6	Email trail	Exempt	s.42(1)
7-9	Email trail	Exempt	s.42(1) s.47C(1)
10-12	Draft - IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
13-14	Email trail	Exempt	s.42(1)
15	Email	Irrelevant to scope	s.22(1)(a)(ii)
16-17	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
18-19	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
20-21	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s47C(1)
22-25	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s42(1)
26	Email	Irrelevant to scope	s.22(1)(a)(ii)
27	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
28	IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
29-30	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
31-32	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
33	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
34	IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
35-37	Email trail	Exempt	s.42(1)
38-41	Email trail	Exempt	s.42(1)
42	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
43-44	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s47F(1)
45-48	Email trail	Exempt	s42(1)
49-50	Email trail	Exempt	s.42(1) s.47C(1)

51	Email	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.42(1) s.47C(1)
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3. Departmental File: part 3

Folio	Description	Decision	Legislation
1	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
2-3	Email trail	Exempt	s.42(1)
4	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (signed) – 30 March 2015	Released in full	
5-6	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
7-10	Email trail	Exempt	s.42(1)
11	IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
12-15	Email trail	Exempt	s.42(1)
16-20	Email trail	Exempt	s.42(1)
21	IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
22-26	Email trail	Exempt	s.42(1)
27- 31	Email trail	Exempt	s.42(1)
32	IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
33-38	Email trail	Exempt	s.42(1)
39	Email	Irrelevant to scope	s.22(1)(a)(ii)
40	IMMI 15/074 – Statement to Parliament	Exempt	s.47C(1)
41	Schedule	Irrelevant to scope	s.22(1)(a)(ii) s.47F(1)
42-43	Email trail	Irrelevant to scope	s.22(1)(a)(ii)
44-45	Email trail	Exempt	s.42(1)
46-47	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.47C(1)
48-51	Email trail	Exempt	s.47F(1) s.42(1)
52-59	Email trail	Irrelevant to scope Exempt in part	s.22(1)(a)(ii) s.42(1)
60	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
61	Special Purpose Visa 2015 – ss.33(2) of the <i>Migration Act 1958</i> (unsigned)	Exempt	s.47C(1)
62-65	Email trail	Exempt	s.47F(1) s.42(1)
66-70	Email trail	Exempt	s.42(1)
71-76	Email trail	Exempt	s.42(1) s.47C(1)
77-79	Email trail	Exempt	s.42(1) s.47C(1)
82-90	Email trail	Exempt	s.42(1) s.47C(1)

4. Departmental File: part 4

Folio	Description	Decision	Legislation
1-18	Ministerial submission MS15-001430	Exempt in part	s.22(1)(a)(ii) s.42(1) s.47C(1)

5. Departmental File: part 5

Folio	Description	Decision	Legislation
1-9	Special Purpose visa grant statistics	Irrelevant to scope	s.22(1)(a)(ii)