



Attachment A

DECISION RECORD

Request Details

FOI Request: FA 15/07/00493
File Number: ADF2015/31683

Scope of request

- *value for money assessment*
- *evaluation report and recommended decision*
- *probity report*
- *decisions (including relevant approvals/or authorisations) and their basis corresponding to each of the following contracts: CN1575041, CN310849, CN441176, CN1704811 and CN1704821.*

Documents in scope

1. The Department identified 51 documents as being within the scope of your request. The documents are listed at Attachment B – Schedule of Documents.

Authority to make decision

2. 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

3. 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

4. Section 22(2) of the FOI 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.
5. 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 reasons(s) for each of the deletions in the document (s.22(3) of the FOI Act).
6. 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 FOI Act.

Deletion of exempt material under s.22(1)(a)(i) of the FOI Act

7. The Schedule of Documents (Attachment B) and the documents released (Attachment D) detail the exemptions that have been applied. Exemptions were applied on the following grounds:

Section 24A(1) – document lost or non-existent

8. Five documents (12, 21, 30, 31 and 32) were identified as being within the scope of the request but could not be located. The documents are attachments to Minutes, as detailed in the Schedule of Documents.
9. The relevant business area (Onshore Infrastructure Section, Detention Estate Management Branch) as well as the Freedom of Information Section undertook multiple searches of files (paper and electronic) without success.
10. I am therefore satisfied that the documents are lost and therefore exempt the documents under s.24A(1) of the FOI Act.

Section 42 – documents subject to legal professional privilege

11. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the ground of legal professional privilege.
12. A document is exempt from production on the ground of legal professional privilege if all of the following apply:
- i) there exists a lawyer-client relationship;
 - ii) there have been confidential communications which are recorded in the document;
 - iii) the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
 - iv) the privilege has not been waived.
13. I find that disclosure of the parts of documents 8, 16, 19, 27 and 43 exempted under section 42(1) would involve disclosure of material that would be exempt from production in legal proceedings on the ground of legal professional privilege.
14. The exempted information comprises legal advice provided by in-house and contracted lawyers. It is clear that a lawyer-client relationship existed in respect of the communications.
15. There is no evidence to indicate that the substance of the communications has been disclosed more broadly, or used in any way that would be inconsistent with the maintaining the confidentiality of the communications. Accordingly, I am satisfied that the documents are exempt under section 42.

Section 47C(1) – deliberative processes

16. A document is conditionally exempt under s.47C(1) of the FOI Act if its release would disclose deliberative matter including opinion, advice or recommendation that has been obtained, prepared or recorded, or the consultation/deliberation during a deliberative process.

17. I am satisfied that documents 44 and 45 contain deliberative matter. The relevant material in the documents comprises discussion of options being considered in relation to broader detention infrastructure management and the ongoing and future management of detention facilities, including within the budgetary context. The information includes the exercise of judgment in developing ongoing and future options for detention infrastructure management.

Application of the 'public interest' test

18. While I have found that the conditional exemption in section 47C(1) of the FOI Act applies to the information outlined in paragraph 17 above, section 11A(5) of the FOI Act requires me to disclose the information unless access at this time would, on balance, be contrary to the public interest. I will now consider whether disclosure would be contrary to the public interest.
19. In determining whether disclosure would be contrary to the public interest, section 11B(3) sets out a number of relevant factors which point in favour of release. These factors are:
- a) whether release would promote the objects of the FOI Act;
 - b) whether release would inform debate on a matter of public importance;
 - c) whether release would promote effective oversight of public expenditure; and
 - d) whether release would allow a person to access his or her own personal information.
20. While I acknowledge that release of the documents would promote the objects of facilitating and promoting public access to information, I am satisfied that the content being released from the documents which is not deliberative matter will inform public debate regarding the matters described in the documents. In the circumstances, I consider that the release of the deliberative matter which has been exempted under section 47C(1) would make a negligible further contribution to public debate.
21. In contrast, I consider that the ability of the Department to provide frank and clear advice internally and to the Minister, about matters of operational and planning sensitivity, to be necessary for maintaining effective administration of government programmes. Should such deliberative matter be disclosed it would undermine the provision of such advice and discussion in future briefing.
22. I have decided, on balance, that the public interest lies in not disclosing the material assessed as deliberative matter. Accordingly, I have decided that the documents are exempt in part under section 47C(1) of the FOI Act.

Section 47F – personal privacy

23. Section 47F(1) of the Act provides:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The relevant documents contain 'personal information'

24. I am satisfied that documents 8, 20 and 44 contain 'personal information'. The relevant material in the documents includes identifying information about:

- the lawyers at Clayton Utz law firm who authored the legal advice provided to the Department;
- a non-executive employee at the Darwin Airport Lodge; and
- a non-executive employee within the Office of the Minister for Immigration and Border Protection.

25. The information above clearly represents information which would identify relevant individuals and is personal information.

Disclosure would involve the 'unreasonable disclosure of personal information'

26. In assessing whether a particular disclosure would be 'unreasonable', section 47F(2) sets out a number of factors which the Department must consider. These factors are:

- a) the extent to which the information is well known;
- b) 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;
- c) the availability of the information from publicly accessible sources; and
- d) any other matters that the agency or Minister considers relevant.

27. I am satisfied that the release of the identifying information would be 'unreasonable' within the meaning of section 47F(1). This is because releasing the identity of the individuals could open those individuals to harassment in relation to their involvement with a controversial government programme (immigration detention).

Application of the 'public interest' test

28. While I acknowledge that release of the documents will promote the objects of facilitating and promoting public access to information, I am satisfied that the content being released from the documents which is not personal information will inform public debate regarding the matters described in the documents.

29. In the circumstances, I consider that the release of individual identifying information of those persons whose identity has been exempted under section 47F(1), would make a negligible further contribution to public debate.

30. In contrast, I consider that the protection of the individual's right to privacy should be given the upmost importance.

31. On balance, I have decided that the interest in the privacy of the individuals whose identifying information has been exempted outweighs the public interest factors in favour of disclosure. Accordingly, I have decided that the documents are exempt in part under section 47F of the FOI Act.

Section 47G(1)(a) – business information which would or could adversely impact a person's business affairs

32. The information exempted under section 47G(1)(a) in documents 1, 4, 5, 9-11, 13-15, 17-18, 20, 25-26, 28-29, 37, 40-42, 44-45 and 47-51 consists of:

- detailed pricing information for various proposals from, and contracts with, a business (Trepang Services) in relation to providing detention accommodation and facility management services; and
- other commercially sensitive information about the terms and costs of the services being offered by the business.

33. This detailed information is not in the public domain. I am satisfied that the release of this information could have an unreasonable effect on the commercial and financial affairs of the businesses/business owners to which the information relates. The release of such material could allow competitors an unfair advantage during any future tendering processes in which the businesses/business owners may wish to engage.

34. I am satisfied the information specifically identified in the relevant documents is conditionally exempt under s.47(G)(1)(a) of the FOI Act.

Application of the 'public interest' test

35. I do not consider that the detailed costs, or other commercially sensitive information in the documents, need be released in order to promote effective oversight of public expenditure. Information about the total contract values and processes undertaken to determine value for money in obtaining those services is being, or has previously been, released.

36. I note also the following factors against disclosure of the information:

- preserving a competitive business environment, including in relation to businesses seeking to gain Australian Government business;
- preserving reasonably held expectations of confidentiality held by businesses and business owners; and
- preserving the ability of the Australian Government to procure services from the business community.

37. In summary, I consider that release of the information exempted under s.47(G)(1)(a) in the relevant documents would be contrary to the public interest. As such, I have exempted the information from release.

Deletion of irrelevant material under s.22(1)(a)(ii) of the FOI Act

38. I find that some of the documents relevant to your request contain some material which is irrelevant to your FOI request. I have withheld or deleted that material accordingly. These deletions are detailed in the documents released.

39. The material deleted under section 22(1)(a)(ii) comprises the direct contact details of staff and the names of non-Senior Executive Service staff (although position titles have been released). Document 46 has been exempted entirely as irrelevant information.



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

15 February 2016



Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD

FOI Request FA 15/07/00493
File Number ADF2015/31683

No.	Date of document	Pages	Description	Decision on release	
1.	21/09/2010	1-2	Minute	Released in part	s.47G(1)(a)
2.	31/01/2011	n/a	Preliminary Project Assessment – Remote Location Detention Centre	Available on DIBP FOI Disclosure Log – 20/07/2015 – FA 15/01/01292 'Internal Review Decision'	n/a
3.	03/2011	n/a	Service Fee Forecast and Comparison for Wickham Point Immigration Detention Centre	Available on DIBP FOI Disclosure Log – 20/07/2015 – FA 15/01/01292 'Decision Record'	n/a
4.	18/05/2011	3-6	Coversheet and Minute	Released in part	s.47G(1)(a)
5.	1/06/2011	7-12	Coversheets and Minute	Released in part	s.47G(1)(a)
6.	27/05/2011	13-23	Attachment A to Document 5	Released in full	n/a
7.	26/05/2011	24	Attachment B to Document 5	Released in full	n/a
8.	24/05/2011	25-31	Attachment C to Document 5	Released in part	s.42(1) s.47F(1)
9.	31/05/2011	32-33	Minute	Released in part	s.47G(1)(a)
10.	29/06/2011	34-37	Minute	Released in part	s.47G(1)(a)
11.	21/09/2011	38-41	Minute	Released in part	s.47G(1)(a)
12.		n/a	Attachment to Document 11	Not released as document not located	s.24A(1)

No.	Date of document	Pages	Description	Decision on release	No.
13.	01/03/2012	42-45	Coversheet and Minute	Released in full	s.47G(1)(a)
14.		46	Attachment A to Document 13	Released in part	s.47G(1)(a)
15.		47	Attachment B to Document 13	Released in part	s.47G(1)(a)
16.	24/02/2012	48-49	Attachment C to Document 13	Released in part	s.42(1)
17.	22/03/2012	50-53	Coversheets and Minute	Released in part	s.47G(1)(a)
18.	29/02/2012	54	Attachment A to Document 17	Released in part	s.47G(1)(a)
19.	24/02/2012	55-56	Attachment B to Document 17	Released in part	s.42(1)
20.	01/07/2011	57-78	Attachment C to Document 17	Released in part	s.47F(1) s.47G(1)(a)
21.		n/a	Attachment D to Document 17	Not released as document not located	s.24A(1)
22.	14/03/2013	79-81	Minute	Released in full	n/a
23.		82	Attachment A to Document 22	Released in full	n/a
24.	21/03/2013	83-87	Coversheet and Minute	Released in full	n/a
25.		88	Attachment A to Document 24	Released in part	s.47G(1)(a)
26.		89	Attachment B to Document 24	Released in part	s.47G(1)(a)
27.	24/02/2012	90-91	Attachment C to Document 24	Released in part	s.42(1)
28.	12/04/2013	92-95	Coversheet and Minute	Released in part	s.47G(1)(a)
29.		96-106	Attachment A to Document 28	Released in part	s.47G(1)(a)

No.	Date of document	Pages	Description	Decision on release	No.
30.		n/a	Attachment B to Document 28	Not released as document not located	s.24A(1)
31.		n/a	Attachment C to Document 28	Not released as document not located	s.24A(1)
32.		n/a	Attachment D to Document 28	Not released as document not located	s.24A(1)
33.	02/07/2013	107-108	Minute	Released in full	n/a
34.		109	Attachment to Document 33	Released in full	n/a
35.	02/07/2013	110	Coversheet	Released in full	n/a
36.	27/06/2013	111-113	Attachment to Document 35	Released in full	n/a
37.	02/07/2013	114-117	Attachment to Document 35	Released in part	s.47G(1)(a)
38.	09/10/2013	118-121	Coversheet and Minute	Released in full	n/a
39.	28/10/2013	122-123	Minute	Released in full	n/a
40.	28/10/2013	124-128	Attachment A to Document 39	Released in part	s.47G(1)(a)
41.	19/08/2013	129-131	Attachment B to Document 39	Released in part	s.47G(1)(a)
42.	19/08/2013	132-135	Attachment C to Document 39	Released in part	s.47G(1)(a)
43.	22/10/2013	136	Attachment D to Document 39	Released in part	s.42(1)
44.	31/10/2014	137-140	Submission	Released in part	s.47C(1) s.47F(1) s.47G(1)(a)
45.	18/11/2014	141-144	Coversheet and Minute	Released in part	s.47C(1) s.47G(1)(a)
46.	07/11/2014	145-147	Attachment A to Document 45	Entire document is irrelevant information	n/a

No.	Date of document	Pages	Description	Decision on release	No.
47.	18/11/2014	148-151	Attachment B to Document 45	Released in part	s.47G(1)(a)
48.	24/12/2014	152-156	Coversheets and Minute	Released in part	s.47G(1)(a)
49.		157-160	Attachment A to Document 48	Released in part	s.47G(1)(a)
50.		161-164	Attachment B to Document 48	Released in part	s.47G(1)(a)
51.	29/04/2015	165-168	Coversheet and Minute	Released in part	s.47G(1)(a)

Attachment C – Extract of relevant legislation (FOI Act)

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
 - (a) a conditionally exempt document; and
 - (b) an exempt document:

- (i) under Division 2 of Part IV (exemptions); or
- (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include 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.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (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.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or

- (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
- (b) it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document; and
 - (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency's or Minister's possession but cannot be found; or
 - (ii) does not exist.

42 Documents subject to legal professional privilege

- (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 is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

Note: For **operational information**, see section 8A.

47C Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt 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:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
 - (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47F Public interest conditional exemptions—personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) 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;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

- (4) Subsection (5) applies if:
 - (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
 - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
 - (a) carries on the same occupation, of a kind mentioned in the definition of **qualified person** in subsection (7), as the first-mentioned qualified person; and
 - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

47G Public interest conditional exemptions—business

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
 - (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.
- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).