



## DECISION RECORD

### Request Details

#### In reply please quote

FOI Request FA 16/03/01791  
File Number ADF2016/13196

### Scope of request

On 25 May 2016, you agreed to narrow the scope of your request in the following terms:

1. *All summary documents, and/or reports, and/or notes and/or emails between January 2011 and March 2016 relating to building products imported by the*  
[REDACTED]
2. *All summary documents between March 2015 and March 2016 relating to seized imported products containing asbestos.*

### Documents in scope

I am satisfied that the four documents identified in the original decision of 7 July 2016 are the documents relevant to your request.

### Authority to make decision

I am an authorised officer of the Department under section 23 of the *Freedom of Information Act 1982* (FOI Act) to make decisions on requests for access to documents.

### Relevant material

In reaching my decision I referred to the following:

- the terms of your original FOI request (as revised on 25 May 2016)
- the documents relevant to your request and your contentions outlined in your internal review application
- the FOI Act
- the Guidelines published by the Office of the Information Commissioner (OAIC) under section 93A of the FOI Act (the Guidelines) relating to access to documents held by government
- advice from Departmental officials with responsibility for matters relating to the documents.

## Reasons for decision

I have decided to vary the original decision of 7 July 2016 by partially releasing further information contained within the documents falling within the scope of your request. However I have decided to withhold certain parts of the documents on the basis that those parts are exempt in accordance with the following sections of the FOI Act:

- Section 37 [enforcement of law]
- Section 45 [material obtained in confidence]
- Section 47E(d) [operations of agencies]
- Section 47G [business affairs]

I have also removed certain irrelevant material in accordance with section 22(1)(a)(ii)

Details of the precise parts of the documents which are exempt are set out in the schedule at Attachment B.

## Contentions forming part of your review

I note in your application for internal review you contended that '*...all documents should be released in full. I do not understand why "irrelevant" information in documents 2 and 3 has been redacted. I believe the information should be released and if not, a more thorough explanation why it has been deleted. I believe the scope of my request (seized imported products containing asbestos) was broad enough for the information to be disclosed. I am happy for employee names to remain deleted.*'

I will address this element of your contentions below in the paragraph titled section 47E(d).

## Section 37(2)(a)- prejudice the fair trial of a person or the impartial adjudication of a particular case

Documents One and Four contain details of detections by the Australian Border Force of asbestos in imports. Some of these incidents continue to be the subject of investigation by the Australian Border Force.

I note that the risks around asbestos exposure have a considerable public interest. However, as mentioned, the incidences of the importation of asbestos-tainted products are also the subject of a current investigation and I consider that release of the information in the documents could reasonably be expected to prejudice the impartial adjudication of those matters under investigation.

I have therefore decided to uphold the original FOI decision in relation to Document One and Document Four, and to maintain the exempted material in Documents One and Four under s.37(2)(a) of the FOI Act.

## Section 37(2)(b) - disclose lawful method of investigation

Section 37(2)(b) provides that a document is exempt if its disclosure would, or could reasonably be expected to:

- disclose lawful methods or procedures for detecting, investigating or dealing with matters arising out of breaches or evasions of the law, and
- prejudice the effectiveness of those methods or procedures.

The requirement that disclosure 'would, or could reasonably be expected to' have this impact requires more than a mere risk or possibility.



Documents Two, Three and Four contain information about the Department's lawful investigative methods and procedures, relating to the intervention and enforcement management of cargo profiles and alerts nationally. In addition the documents detail the asbestos profiles and match acquittals. These results include detection data and seizures for non-asbestos profiles which are not available publicly and non-compliance such as incorrect tariff classifications. The documents also describe the process following the seizure of goods and details of consignments.

The documents also contain information about various investigations into breaches of the migration law and the Customs Act, which are not commonplace or well-known to the public. Some of the methods and procedures may be the subject of speculation, but disclosure would confirm the methods and procedures and the order in which such an investigation is carried out. This, in turn, would provide persons with an advantage to modify their behaviour to better avoid detection in the future.

I have also considered the Mosaic Theory as outlined in the Guidelines at paragraphs 5.33 - 5.34, in connection with the information contained within the documents. While, I note that this theory applies to section 33 of the FOI Act in relation to documents affecting national security, defence or international relations, I also consider this theory to be relevant to these documents.

The Mosaic Theory holds that individual pieces of information when combined with other pieces can generate a harmful composite – a mosaic. As such, it would be reasonable to expect that a member of the public may be able to piece together other details about the investigations methods and procedures, and if combined with other pieces of information, generate an overall picture of a particular method of investigation.

Accordingly, I have decided that Documents Two, Three and Four, are partially exempt under section 37(2)(b) of the FOI Act.

#### **Section 45 of the FOI Act - Documents containing material obtained in confidence**

As detailed in the original FOI Decision of 8 July 2016, Document One contains details of building products sourced from the [REDACTED]

[REDACTED] Australia between January 2011 and March 2016.

The Department consulted twice with the Australian businesses that imported the building products (as detailed in Document One) and learned that the importations are the subject of a current investigation being carried out by SafeWork SA.

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.

The documents that fall within the scope of your request include data extracted from the Department's Integrated Cargo System (ICS).

The ICS is the Department's electronic clearance and reporting system for imports and exports and links the Department with owners of goods or their agents and automates procedures for the reporting of imports and exports.

The role of the Department in the importing and exporting of goods is to:

- ensure that all goods being imported and exported from Australia are reported as required;
- administer controls on behalf of permit issuing agencies on the import and export of restricted or prohibited goods; and



- gather information regarding the nature and volume of imports and exports to assist government and industry in policy and decision-making.

The information entered into the ICS system is a mandatory legislative requirement completed by owners to ensure compliance with the *Customs Act 1901*. The majority of declarations are submitted electronically in the ICS and the authentication process associated with that procedure makes the data being transferred as part of that transaction, implicitly secure and confidential.

I further note that the data within the document specifically outlines particular importation data that is:

- commercially sensitive including the importers' details, volume and value of commodities;
- sufficiently secret in that only the importer itself (or those acting on their behalf) would be aware of the data relating to their importation activities. The information is not common knowledge nor is the information in the public domain;
- viewed by the importer as valuable commercial information that has been given to the Department in confidence, for the limited purposes of assessing Customs duties and clearing import/export processes.

In addition, an importer/exporter would not be aware at the time of providing that information to the Department, and is certainly not advised, that the Department may disclose the sensitive commercial information to applicants under the FOI Act.

As a result of the consultation, an importer has provided consent for some limited information to be disclosed, but has expressly not consented to the remainder of their importation data being disclosed. Release of the exempt information could reasonably be expected to prejudice the competitive commercial activities of the importer. Any release of this information would lead to a commercial disadvantage or impairment for the importer referred to within the data.

I am satisfied that the nature of the information is inherently confidential as:

- the information is specifically identified by the importer as being confidential;
- the information has the necessary quality of confidentiality as it contains information that is not common knowledge nor in the public domain;
- the information was provided to the Department and received on the basis of a mutual understanding of confidence;
- if the information was disclosed, it would be contrary to the expressly stated requirements of the importer; and
- disclosure of the information will likely cause detriment to the importer.

I have considered the decision made by the *Privacy Commissioner in Fairfax Media Limited and Australian Customs and Border Protection Service [2015] AICmr 7* (19 January 2015). This decision supported the submissions made by the then Australian Customs and Border Protection Service (ACBPS) in that information held by the Department in the Integrated Cargo System (ICS) is material held in-confidence, and that any unauthorised release of that information would found an action for breach of confidence. In relation to this matter, the Department consulted with the reporting parties, being the importers, with regard to potential release of that information to the FOI Applicant.



One third party responded advising that they only consented to the release of some limited information. In addition, the third party expressly advised the Department did not have consent to release the material which was marked as exempt. As a result, any release of that information would found an action for breach of confidence.

I am of the view that the disclosure of the exempt material would found an action by the importers for breach of confidence and as such I have decided that Document One is exempt in part from disclosure under section 45 of the FOI Act.

**Section 47E(d) of the FOI Act [Operations of agencies]**

Section 47E(d) of provides that:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;*
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
- (d) **have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*** (bold is my emphasis)

In the original FOI decision of 8 July 2016, the Department determined that several elements of the documents were not relevant to the scope of your FOI request, and were removed in accordance with section 22(1)(a)(ii) [irrelevant matter deleted] of the FOI Act.

I have further considered your contentions as outlined in your application for internal review, and note that some components of the documents would essentially fall within the scope of the request. I have therefore reassessed the documents and find that components of that material initially marked as irrelevant, can be released. However, in conducting my internal review I find that some components do contain information which I consider would have an adverse impact on the operations of the agency if released. As such I have decided to release further information to you with partial exemptions, in accordance with section 47E(d) of the FOI Act.

The documents contain information relating to active investigations and specific details upon goods being seized and testing capabilities. I consider that the release of this information would likely result in individuals circumventing the established processes designed to manage the Department's investigations and the tactics, techniques and procedures in how the Department carries out such investigations. If such information were to be made known to the wider public it would cause considerable damage to the way in which such investigations are managed, and would result in necessary changes being made to the processes relating to how goods are seized, testing capabilities, and the management of future investigations.

The Department is committed to best practice in the management of its investigations methods and procedures.



I consider that release of the exempt material under section 47E(d) would be grounds that could reasonably be expected to have a substantial adverse effect on the proper and efficient conducts of the operations of the agency and for this reason, the material is conditionally exempt under section 47E(d) of the FOI Act. I will address the public interest test later in this decision.

#### **Section 47G(1) - affect business affairs and/or prejudice the future supply of information**

Section 47G(1) of the FOI Act permits conditional exemption of documents containing information concerning business or professional affairs of the business, commercial or financial affairs of an organisation if disclosure:

- would or could reasonably be expected to unreasonably affect a business in respect of its lawful business, commercial or financial affairs; or
- could reasonably be expected to prejudice the future supply of information to the Department.

I have considered whether the documents are conditionally exempt on the basis that the disclosure of the information would have an unreasonable adverse effect on the business affairs of an organisation under section 47G(1)(a) of the FOI Act.

I have also considered the consultation conducted with the relevant third parties who provided substantial submissions about the information being disclosed, and the considerable adverse effect that would be experienced.

#### ***Business affairs information***

I find that some material in Document Four is exempt under section 47G(1)(a) as the document contains information concerning the business affairs of several third parties. Document Four provides the details of the names of individual businesses who have imported products from various countries, and in which those products have ultimately been seized. It should be noted, however, that these businesses are distinct and separate from the third parties who were consulted as part of the formal third party consultation process.

#### ***Adverse effect***

I find that disclosure of this information would, or could reasonably be expected to, adversely affect those third parties in respect to their lawful business affairs. I consider it would be unreasonable to release this information as disclosure would give the competitors of the third party businesses a competitive edge over their rivals in the marketplace; which would result in loss of business and loss of profit and cause an unreasonable amount of damage to the reputation of those businesses.

#### ***The adverse effect is unreasonable***

I find that this adverse effect would be unreasonable in all the circumstances. In finding that the adverse effect would be unreasonable, I have considered that the information is not publicly known, and if those additional third party businesses were consulted, it would be very reasonable to assume that they would object to the disclosure of their sensitive business information which would reveal unsubstantiated allegations in relation to those businesses.

I have further considered that while these businesses may have imported goods containing asbestos, I further note that these businesses had no knowledge that the imported goods contained asbestos, until such times as the goods were tested. I have considered that the businesses have therefore not acted with deliberate intent to deceive nor with any malice.



I have also considered whether any of the documents contain information about your own business or professional affairs; however I have found that this is not the case and the material which I have exempted relates purely to the business affairs of the third parties named in the documents.

I find that the material marked as exempt in Document Four in accordance with section 47G(1) of the FOI Act, is conditionally exempt in part. As this information is conditionally exempt based upon public interest considerations, I will now address the public interest factors.

**Public interest considerations – factors –sections 47E(d) and 47G(1)**

Subsection 11A(5) of the FOI Act requires me to allow access to conditionally exempt documents unless, in the circumstances, access to the documents would, on balance, be contrary to the public interest. My public interest considerations are set out below.

In assessing whether disclosure of conditionally exempt material is, on balance, contrary to the public interest, I have taken into account the Information Commissioner Guidelines, together with a range of factors that favour access to a document, as set out in section 11B(3) of the FOI Act. That section states that relevant factors favouring access are that if access to the document would:

- promote the objects of the FOI Act, (including all the matters set out in sections 3 and 3A);
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure or
- allow a person to access his or her own personal information.

***Factors in favour of disclosure***

- promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act).

***Factors against disclosure***

- protecting individuals from unreasonable interferences with their business affairs
- preserving reasonably held expectations of confidentiality;
- release could reasonably be expected to prejudice the Department's operations in the management of its borders and the control and seizure of goods and asbestos related products, and investigations into such matters; and
- release could reasonably be expected to prejudice the competitive commercial activities of a business entity.

In considering the factors I have given the greatest weight to the ability of the Department, and specifically the Australian Border Force (ABF), to ensure the protection of Australia's border in partnership with a range of intelligence, law enforcement and other agencies. The Department's mission is to protect our borders and manage the movement of people and goods across it. In doing so, the Department aims to make Australia safer and more prosperous.to continue effective management of the detection and seizure of unlawful goods which may be brought into the country, specifically in relation to asbestos products and the subsequent investigations and associated operational procedures.

I acknowledge that there is a public interest in documents of the Department being made public. I acknowledge that release of the information subject to the conditional exemptions, would promote the objects of facilitating and promoting public access to information. I consider that release of the information would inform debate on a matter of public importance. I note that the import of products containing asbestos has been reported in the media recently, most notably on the importation of building products into South Australia and Western Australia.

With regard to the last two factors, I am not satisfied that the information would promote effective oversight of public expenditure or would allow a person to access his or her own personal information.

In contrast to the factors favouring release, I note specifically that not all of the businesses listed in the documents were aware that they were importing asbestos-tainted materials and not all of the businesses were sanctioned as a result of these imports. I consider that potential damage would result to the commercial activities of the businesses, and this would be unreasonable given the circumstances surrounding each incident.

I consider also that the disclosure of parts of documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department if that information was to be released into the public domain.

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

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

Accordingly, I consider, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the exempt material contained in the documents. Therefore I have decided that it would be contrary to the public interest to release the information considered exempt, and that the public interest ultimately lies in not disclosing the material.

**Subsection 22(1)(a)(ii)**

Having reached that view, section 22(2) of the FOI Act requires me to provide you with an edited copy of the documents, with the exempt and irrelevant information deleted. A copy of the documents are enclosed at Attachment D.



Authorised Decision Maker  
Department of Immigration and Border Protection  
Email [foi@border.gov.au](mailto:foi@border.gov.au)



**Attachment B**

**SCHEDULE OF DOCUMENTS**

FOI Request      FA 15/12/01761  
File Number      ADF2015/70043

<b>Document Number</b>	<b>Number of pages</b>	<b>Description</b>	<b>Original FOI decision</b>	<b>Decision on internal review</b>
One	2	Integrated Cargo System data	Exempt in full, s45, s47(1)(a)	Release in part, s37(2)(a) and s45
Two	3	Attachment A – Detection results and targeting activity	Release with deletions under s22(1)(a)(ii)	Release in part – s37(2)(b), s47E(d).
Three	3	Supplementary Estimates – October 2015	Release with deletions under s22(1)(a)(ii)	Release in part – s37(2)(b), s47E(d); s22
Four	2	Table of detections	S37(2)(a), s37(2)(B), s47G(1)(a)	Release in part – s37(2)(a), s37(2)(b), s47G(1)(a)

## Attachment C

### Extract of relevant legislation

#### 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.

#### 37 Documents affecting enforcement of law and protection of public safety

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
  - (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
  - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or
  - (c) endanger the life or physical safety of any person.
- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
  - (a) prejudice the fair trial of a person or the impartial adjudication of a particular case;



- (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

- (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

(2A) For the purposes of paragraph (1)(b), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:

- (a) witnesses; or
- (b) people who, because of their relationship to, or association with, a witness need, or may need, such protection; or
- (c) any other people who, for any other reason, need or may need, such protection.

(3) In this section, law means law of the Commonwealth or of a State or Territory.

#### **45 Documents containing material obtained in confidence**

(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

(2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:

- (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
- (b) an agency or the Commonwealth.

#### **47E Public interest conditional exemptions—certain operations of agencies**

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

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

**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:

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 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:

- (a) the Commonwealth or a State; or
- (b) an authority of the Commonwealth or of a State; or
- (c) a Norfolk Island authority; or
- (d) 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).