



27 November 2017

BY EMAIL: [REDACTED]

In reply please quote:

FOI Request: FA 16/10/00284

File Number: ADF2016/57400

Dear [REDACTED]

Freedom of Information – Decision on Access

I refer to your email dated 4 October 2016 in which you requested access to documents held by the Department of Immigration and Border Protection (the Department) under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of Request

You have requested access to the following documents held by the Department:

a copy of the minutes from the Minister's Council on Asylum Seekers and Detention meetings.

This request is limited to copies of minutes of all meetings held since September 2013.

On 16 November 2016, you agreed to modify the scope of your request as follows:

a copy of the minutes from the Minister's Council on Asylum Seekers and Detention meetings. This request is limited to copies of minutes of all meetings held since September 2013 and excludes all documents released on the FOI Disclosure Log for the Department of Immigration and Border Protection.

This letter is to notify you of the Department's decision on access to the documents subject to your request.

2 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions to in respect of requests to access documents or to amend or annotate Departmental records.

3 Relevant material

In reaching my decision, I have considered the following:

- the terms of your request
- the documents relevant to your request
- the FOI Act
- Guidelines published by the Office of the Australian Information Commissioner under s 93A of the FOI Act
- advice from the Chair of the Minister's Council on Asylum Seekers and Detention (MCASD)
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access.

4 Documents in scope of request

The Department has identified 9 documents that fall within the scope of your request. These documents were in the possession of Department on 4 October 2016 when your FOI request was received.

5 Decision on access

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

- Release 9 documents in part with deletions.

The reasons for the decision are set out below.

6 Reasons for Decision

I am satisfied that I have been provided with all the documents that are relevant to your request. The schedule of the 9 documents that fall within the scope of your request at **Attachment A**. The schedule sets out the decision on access and where appropriate, refers to various sections of the FOI Act. My reasoning in relation to the application of each section to particular documents is set out below.

6.1 Section 7 of the FOI Act – Exemption of certain persons and bodies

I note that certain information in Documents 2, 3, 4, 5 and 7 have been redacted in accordance with subsection 7(2A) of the FOI Act. The Department is exempt from the operation of the FOI Act in relation to this information, as it is information that originated with, or has been received from an intelligence agency or contains a summary of, or an extract or information from, an intelligence agency document.

6.2 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 10 October 2016, the Department advised you that its policy is to exclude the personal details of officers not in the Senior Executive Service (SES), as well as the mobile and work telephone numbers of SES staff, contained in documents that fall within scope of an FOI request.

I have therefore decided that parts of documents would disclose information that could reasonably be regarded as irrelevant to your request, and have therefore prepared an edited copy of the documents, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The remainder of the documents have been considered for release to you as they are relevant to your request.

7 Section 33 of the FOI Act – Documents affecting National Security, Defence or International Relations

Section 33(a)(iii) of the FOI Act permits exemption of a document if disclosure of the document would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.

I consider that parts of Documents 1 and 4 contain information concerning international relations of the Commonwealth.

The phrase *international relations* has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence.

The information detailed in the documents relates to information about the Nauru and Manus Island Regional Processing Centres and asylum seeker operations. These are matters for which the Governments of Nauru and Papua New Guinea have overall responsibility. I consider that the information relates to a foreign government and provides an insight into diplomatic and operational relationships in the context of detention services.

I have consulted with the relevant business areas of the Department concerning the information regarded as exempt under section 33(a)(iii). I consider that releasing the information marked s33(a)(iii) would adversely impact on the ability of the Department to maintain good working relations with the Governments of Nauru and Papua New Guinea respectively.

I consider that the disclosure of parts of the document would disclose information that may adversely impact upon Australia's relations with foreign states by inhibiting future negotiations between the Australian Government and a foreign government relating to the use of certain detention facilities.

As such, I have decided that the information redacted and marked s33(a)(iii) is exempt from disclosure under section 33(a)(iii) of the FOI Act.

7.1 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 parts of Documents 4, 6 and 8 comprise of confidential communications 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
- the advice was given on a legal-in-confidence basis and was therefore confidential.

The content of these documents are not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of the Department. The documents do not fall within the definition of operational information and remain subject to legal professional privilege.

I have therefore decided that parts of Documents 4, 6 and 8 are exempt from disclosure under section 42 of the FOI Act.

7.2 Section 47C of the FOI Act – Deliberative Processes

Section 47C of the FOI Act permits conditional exemption of a document if its disclosure would divulge *deliberative matter*. 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' have previously been described as 'the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.'¹

I consider that parts of Documents 1 to 9 include minutes of information discussed at Minister's Council on Asylum Seekers and Detention (MCASD) meetings. These documents contain discussions and recommendations regarding the following detention and detainee issues:

- Child detention
- Provision of services by contractors
- Detainee health
- Migration agents' roles
- Detainee transfers
- Detainee Code of Behaviour sign-up
- Detainee status resolution
- Counselling arrangements
- Detention visits
- Investigation methods
- Strategies for employing people in detention centres
- Security
- Other issues.

The documents contain opinion and deliberations prepared or recorded in the course of, or for the purposes of, the deliberative processes regarding management of the Department's detention services.

The information does not fall within any of the exclusions in subsections 47C(2) and (3) of the FOI Act.

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 at paragraph 9.2 – *The public interest test*.

¹ See *JE Waterford and Department of Treasury (No 2)* [1984] AATA 67.

8 Section 47E of the FOI Act – Operations of Agencies

Section 47E(d) of the FOI Act provides that documents are conditionally exempt if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

I consider that the disclosure of parts of Documents 1 to 9 would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

The material exempted under s.47E(d) in documents 1 to 9 consist of detention compliance strategy and risk priority targeting information. Release of this information would allow parties to circumvent the Department's risk mitigation strategies, subsequently reducing the effectiveness of compliance activities within its detention centres.

In addition, there is information in the documents that would disclose direct contact details for operational areas within this Department that are not otherwise publicly available. I consider that the disclosure of this information could reasonably be expected to result in potential vexatious communications and general public inquiries being directed to these contact points, which these operational areas are not resourced to manage. The Department has established channels of communication for members of the public and I consider there is no public interest in disclosing these operational contact details. Given the operational focus of these business areas, I am of the view that such a diversion of their resources to manage potentially vexatious communications and general inquiries into the Department could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

Accordingly, I have decided that the documents are conditionally exempt under section 47E(d) of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning at paragraph 9.2 – *The public interest test*.

8.1 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 consider that disclosure of the information marked s47F in Document 1 would disclose personal information relating to third parties. The information within the documents would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance.

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 individuals concerned are not generally known to be associated with the matters discussed in the document. This 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, "*a copy of the minutes from the Minister's Council on Asylum Seekers and Detention meetings.*" rather than information which wholly relates to other individuals.

I am satisfied that the disclosure of the information within the documents would involve an unreasonable disclosure of personal information about a number of 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 have included my reasoning at paragraph 9.2 – *The public interest test.*

9 Section 47G(1)(a) of the FOI Act – Business Affairs

Section 47G(1)(a) of the FOI Act permits conditional exemption of documents containing business information where disclosure of that information would, or could reasonably be expected to, unreasonably affect the organisation adversely in respect of its lawful business, commercial or financial affairs.

I have considered that parts of Documents 1, 2, 4, 5, 7 and 9 contain information concerning the business, commercial or financial affairs of an organisation.

In determining whether disclosure of the information within the documents would or could reasonably be expected to adversely affect the lawful business, commercial or financial affairs of an organisation, I have had regard to the following factors:

- (a) The extent to which the information is well known;
- (b) Whether the organisation or undertaking is known to be associated with the matters dealt with in the documents;
- (c) The availability of the information from publicly accessible sources; and
- (d) Any other matters that the Department considers relevant.

The information contained within these documents is not in the public domain, the organisation concerned is not generally known to be associated with the matters referred to in these documents, and the information is not available from publicly accessible sources, such as the organisation's website. I am therefore satisfied that the disclosure of the information would, or could reasonably be expected to, unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

I have decided that parts of Documents 1, 2, 4, 5, 7 and 9 are conditionally exempt under section 47G 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 at paragraph 9.2 – *The public interest test.*

9.2 The public interest – section 11A of the FOI Act

As I have decided that parts of the documents are conditionally exempt, I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest (section 11A of the FOI Act).

A 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 documents would promote the objects of the FOI Act.
- I consider that the subject matter of the documents does have the character of public importance and that there may be broad public interest in the documents.
- I consider that no insights into public expenditure will be provided through examination of the documents.
- I am satisfied that you do not require access to the documents in order to access your own personal information.

Disclosure of all aspects of the documents would not provide a person with sufficient information to assess the rigour or efficiencies of internal decision making processes within the Department, promote scrutiny of government decision making or reveal the reasoning for a government decision. I consider these considerations as neutral.

I have also considered the factors that weigh against the release of the conditionally exempt information in the documents:

- Disclosure of the conditionally exempt information under section 47C regarding MCASD detention management discussions – could reasonably be expected to prejudice the ability of the Department to manage future deliberations in relation to the management of its detention facilities and detainees. This is a factor which I consider strongly weighs against disclosure.
- I consider that the ability of the Department to maintain effective detention compliance activities and prevention strategies to be in the public interest. This is a factor which I consider strongly weighs against disclosure.
- The 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.
- It is my view that it is firmly in the public interest to uphold the rights of individuals to their own privacy. I consider that this factor weighs heavily against disclosure.

- I consider that the disclosure of the parts of the documents that are conditionally exempt under section 47G of the FOI Act could reasonably be expected to prejudice the competitive commercial activities of third party organisations. I consider that this factor weighs heavily 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 documents is not in the public interest and therefore exempt from disclosure under the FOI Act.

10 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.

11 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:

Freedom of Information Section
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

OR

By email to: foi.reviews@border.gov.au

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

12 Making a Complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Immigration and Border Protection as the relevant agency.

13 Contact

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@border.gov.au.



Narelle Dodd
Acting Assistant Secretary, Detention Assurance
Authorised decision maker
Department of Immigration and Border Protection
Email foi@border.gov.au

ATTACHMENT A

Schedule of Documents

FOI request: FA 16/07/01442

File Number: ADF2016/36830

	Date of document	No. of pages	Description	Decision on release	
1.	12-13 February 2014	10	Summary of Discussions and Action Items for the 10 th Minister's Council on Asylum Seekers and Detention (MCASD) General Meeting – 12-13 February 2014	Exempt in part	s.22(1)(a)(ii) s.33(a)(iii) s.47C(1) s.47E(d) s.47F s.47G(1)(a)
2.	29-30 April 2014	9	Summary of Discussions and Action Items for the 11 th MCASD General Meeting – 29-30 April 2014	Exempt in part	s.7(2)(a) s.22(1)(a)(ii) s.47C(1) s.47E(d) s.47G(1)(a)
3.	16-17 June 2014	3	Summary of Discussions and Action Items for the 12 th MCASD General Meeting – 16-17 June 2014	Exempt in part	s.7(2)(a) s.47C(1) s.47E(d)
4.	18-19 May 2015	14	MCASD Meeting minutes – 15 th General Meeting 18-19 May 2015	Exempt in part	s.7(2)(a) s.22(1)(a)(ii) s.33(a)(iii) s.42(1) s.47C(1) s.47E(d) s.47G(1)(a)
5.	29-30 July 2015	12	Summary of Discussions and Action Items for the 16 th MCASD General Meeting – 29-30 July 2015	Exempt in part	s.22(1)(a)(ii) s.47C(1) s.47E(d) s.47G(1)(a)
6.	22-23 September 2015	10	Summary of Discussions and Action Items for the 17 th MCASD General Meeting – 22-23 September 2015	Exempt in part	s.22(1)(a)(ii) s.42(1) s.47C(1) s.47E(d)
7.	7-8 December 2015	9	MCASD Meeting minutes – 18 th General Meeting – 7-8 December 2015	Exempt in part	s.7(2)(a) s.22(1)(a)(ii) s.47C(1)

	Date of document	No. of pages	Description	Decision on release	
					s.47E(d) s.47G(1)(a)
8.	18-19 February 2016	11	MCASD Meeting minutes – 19 th General Meeting – 18-19 February 2016	Exempt in part	s.22(1)(a)(ii) s.42(1) s.47C(1) s.47E(d)
9.	18 May 2016	8	DRAFT Members' Special Meeting – 18 May 2016	Exempt in part	s.22(1)(a)(ii) s.47C(1) s.47E(d) s.47G(1)(a)