



Australian Government

Department of Home Affairs

19 March 2018

BY EMAIL: [REDACTED]

In reply please quote:

FOI Request: FA 16/10/01727

Dear [REDACTED]

Freedom of Information (FOI) request – Access Decision – Tranche 2

The purpose of this letter is to provide you with a decision in relation to Tranche 3 of the documents identified as relevant to your 20 October 2016 request for access under the FOI Act.

These reasons are further to those issued to you on 5 January 2018 for Tranche 1, and on 31 January 2018 for Tranche 2. Tranche 3 constitutes the balance of the documents within the refined scope of your request, so is the final tranche.

Scope of request

The scope of your request as revised at that time was set out in detail in the Tranche 1 decision, along with further information about the background of this matter including the original Information Commissioner review. The revised scope of your request (following the 23 January 2018 mediation session) at the time of the Tranche 2 decision is set out in that decision.

Following the Tranche 2 decision being issued on 31 January 2018, you confirmed by email on 16 February 2018 which parts of the 'large spreadsheets' you sought access to.

I have made a decision to release further documents (both in part and in full) relevant to your request.

Authority to make decision

I am an officer authorised under section 23(1) of the *Freedom of Information Act 1982* (the **FOI Act**) to make decisions in respect of requests to access documents.

Tranche 3 Decision

I have considered and decided to release to you 65 documents, with redactions (or deletions in the case of the spreadsheets, as set out in more detail below) made pursuant to the exemptions in the FOI Act.

In reaching this decision, I have considered the same materials as set out at page 2 of the Tranche 1 decision.

Provision of access to documents in Tranches 2 and 3

As previously discussed, you requested we withhold access to the Tranche 2 documents until such time as the Tranche 3 documents were also finalised and ready to be released to you. Due to the

number and size of the Tranche 2 and 3 documents when combined, in order to grant you access to this material, we will be required to put a copy of the relevant documents on a disc. Consequently we are unable to grant you access to the Tranche 2 and 3 documents on the same date as this decision.

However, we will have this disc burnt and delivered to you as early as possible in the week commencing 19 March 2018. As previously discussed, the Department must publish details of these decisions on the Disclosure Log within 10 working days of you being granted access to the relevant documents. Those 10 working days will obviously commence from the date the disc is delivered to you, as this is the date you will actually have access to the documents.

REASONS FOR DECISION

In the schedule of documents at Annexure A to this decision I indicate the exemption provisions applied to each document.

My reasons for the application of these exemptions (section 47F being the personal privacy conditional exemption and section 47E(d) being the operations of agencies exemption) and consideration of the public interest test are the same as those set out in the Tranche 1 and 2 decisions. In this statement of reasons, I have however provided some additional information about the basis for applying these exemptions to information in the documents within Tranches 1-3.

As agreed, we have deleted from the 'large spreadsheets' any columns you confirmed you did not seek access to. For all spreadsheets within the scope of Tranches 2 and 3, where I consider cells within those documents contain exempt material, I have highlighted those cells in yellow and deleted that text.

As noted above, this is the final tranche of documents (3 of 3) to consider as part of this request. This tranche includes the 'archived attachments', attachments found in duplicate emails where those attachments had 'fallen off' the chain at some point in time, the 'large spreadsheets', and the 'NPF spreadsheet' attached to document 27 in Tranche 1.

Section 47F – *Personal privacy, public interest conditional exemption*

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

The information I consider exempt from disclosure on the basis of this conditional exemption, is as set out at Annexure A. Furthermore, in relation to the 'large spreadsheets' (document numbers 219-245), as stated above, the cells within this document containing yellow highlighting are those which contained exempt information. The cells within those which contain information exempt under section 47F, include the information within the columns titled 'Was Border Force & TSL notified', 'Actions Taken: (POMS)' and 'Actions Required: (POMS)'.

Personal information

Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988*. Personal information is defined in section 6 of the *Privacy Act* as:

..information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not

(b) whether the information or opinion is recorded in a material form or not.

This exemption has been applied to the personal information consisting of the names of Departmental employees, and other third party individuals whose names and contact details are contained in the documents in issue. This exemption has also been applied to the personal information of people

referred to in these documents as having some connection with the incidents named therein, being the victims, the alleged perpetrators, and any family members or support people.

Disclosure unreasonable

If information is personal information, it will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- 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 matter I consider relevant.

In relation to the names and contact details of Departmental staff and contractors, the Department acknowledges that the Guidelines provide that it would not generally be unreasonable to disclose public servants' personal information included in a document because of their usual duties or responsibilities.¹ However, exceptional circumstances exist to warrant the exclusion of personal information of these staff and contractors.

The duties these employees and contractors undertake are not 'front facing' duties. The employees concerned would not generally be expected to engage with members of the public.² While disclosure of the names will reveal that Departmental agency employees or contractors were carrying out their usual duties, I consider that the additional concerns associated with the publication of their names amounts to special circumstances of the kind envisaged in [6.153] of the Guidelines. I also do not consider that the disclosure of this information would shed light on the workings of the Department or enhance transparency in relation to the subject matter of the request, being the carrying out of this particular review. Further, such disclosure would disproportionately interfere with the privacy of these individuals.

Other information I consider conditionally exempt under section 47F is information about individuals named in these documents as having a personal connection with the particular incidents, or further details regarding the incidents as outlined in the 'Nauru files'. Examples includes names of victims or alleged perpetrators of the particular incidents, names of family and other support people notified or consulted about the relevant incidents, and specific details about the particular incidents, or about the consequences and outcomes following the incidents. I have also considered relevant the circumstances in which this information came to be provided to the Department (ordinarily by compulsion), and the highly sensitive nature of a lot of this information.

On the bases set out above, I have concluded that disclosure of the information would be unreasonable.

I find that these parts of documents are conditionally exempt in part under section 47F of the FOI Act. Nonetheless I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest. My consideration of the public interest is set out at pages 6-7 below.

¹ FOI Guidelines [6.153].

² Cf staff in the media operations section of an agency: *The Australian and Department of Immigration and Border Protection* [2017] AICmr 62 at [27].

Section 47E(d) – Operations of agencies conditional exemption

Section 47E(d) of the FOI Act conditionally exempts from disclosure information where 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.

The information I consider exempt from disclosure on the basis of this conditional exemption, is as set out at Annexure A. Furthermore, in relation to the 'large spreadsheets' (document numbers 219-245), as stated above, the cells within this document containing yellow highlighting are those which contained exempt information. The cells within those which contain information exempt under section 47E(d), include the information within the columns titled 'NPF Outcome/actions' and 'Known to [REDACTED] Y/N'.

The information that I consider to be exempt under section 47E(d), is information provided by the Nauruan Police Force (NPF) concerning the relevant incidents referred to in the 'Nauru files'. This information includes actions which were taken by the NPF following complaints or allegations, information provided regarding why or why not an investigation did or didn't occur, and whether a prosecution had been or was to be instituted, as well as any further contextual information provided.

The functions of the Department include managing regional processing centres, and working to ensure the safety and welfare of people who are or were in those centres. There is a need to preserve a harmonious working relationship with the NPF in order to facilitate that function, and it is likely that disclosure of this information would prejudice the flow of information between the Department and NPF in future.

I find that these parts of documents are conditionally exempt in part under section 47E(d) of the FOI Act. Nonetheless I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest. My consideration of the public interest is set out at pages 6-7 below.

Section 47G – Business affairs conditional exemption

Section 47G(1)(a) of the FOI Act conditionally exempts from disclosure information concerning a person in respect of their business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, where disclosure would, or could reasonably be expected to unreasonably affect that person in respect of their lawful business or professional affairs, or affect that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

The information I consider exempt is information where an employee or contractor of a named business is named as having been involved somehow in the incidents referred to in the 'Nauru files'. Specifically, the information I consider exempt is where individuals noted as being from a particular business or undertaking were stated to have been an alleged perpetrator, a witness, a victim, or otherwise informed of one of the incidents in the Nauru files. I also consider relevant the fact that this involvement is in circumstances where the documents in issue involve unsubstantiated claims, or claims which are not proven or disproven at that particular point in time.

I consider that releasing this information regarding the involvement of these individuals, employees or contractors from the specific businesses would, or could reasonably be expected to unreasonably affect that organisation or undertaking in respect of its lawful business, commercial or financial affairs. I find that these parts of documents are conditionally exempt in part under section 47G of the FOI Act. Nonetheless I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest. My consideration of the public interest test is set out at pages 6-7 below.

The public interest

Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act). As the Guidelines state at paragraphs 6.27:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies, based on the particular facts of the matter at the time the decision is made.

I have considered the factors favouring access and have not considered factors that are irrelevant in subsections 11B(3) and (4) respectively. The factors applicable to the conditionally exempt documents include that disclosure would:

- Promote the objects of the FOI Act; and
- Inform debate on a matter of public importance;
- Promote effective oversight of public expenditure.³

Other factors favouring access which are set out in the FOI Guidelines and applicable to these conditionally exempt documents, includes that disclosure would:

- Inform the community of the Government's operations;
- Enhance the scrutiny of government decision-making; and
- Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.⁴

The Department is a large portfolio, whose functions include managing detention facilities and centres, including oversight of Australia's regional processing centres. In recent years, there has been significant media and general public interest in the Department and their policies, and particularly in the area of detention facilities and regional processing centres, and how they're being run, and the welfare of people housed at these centres. Management of these centres also involve a large amount of public expenditure. The Department takes very seriously its role to ensure the safety and wellbeing of people at regional processing centres, and it is in the public interest for there to be scrutiny of how well this functions is being undertaken. All of these factors weigh in favour of disclosure of the conditionally exempt information.

The FOI Act does not list any factors weighing against disclosure, but a non-exhaustive list set out in the FOI Guidelines, includes relevantly where disclosure:

- Could reasonably be expected to prejudice the protection of an individual's right to privacy;
- Could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct;
- Could reasonably be expected to prejudice security, law enforcement, public health or public safety;
- Could reasonably be expected to prejudice an agency's ability to obtain confidential information;
- Could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and

³ See FOI Act s 11B(3).

⁴ FOI Guidelines, [6.19].

- Could reasonably be expected to prejudice the management function of an agency.⁵

Taking into account the above matters, on balance, I consider that disclosure of the information in the documents is contrary to the public interest. Accordingly, I have decided that the documents are exempt in part under sections 47E(d), 47F and 47G of the FOI Act.

Section 33 – International relations exemption

Section 33(a)(iii) of the FOI Act provides, relevantly that a document is an exempt documents if disclosure of the document under this Act would, or could reasonably be expected to cause damage to the 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.⁶ The phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies.⁷

As set out at Annexure A, I consider that the exemption under FOI Act s 33(a)(iii) applies to a single document in Tranche 3. I consider that disclosure of the particular information would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

I find that this part of this document is exempt in part, under s 33(a)(iii) of the FOI Act.

The 'large spreadsheets'

As explained to you previously, I wish to reiterate that the 'large spreadsheets' within the scope of Tranche 3 reflects data pulled from various spreadsheets and datasets collected and assessed by the taskforce. This database was being updated on a daily basis as the review progressed, and the spreadsheets reflect working versions of this data, used to update management about the progress of the review. The data in these spreadsheets should not be taken as accurate or as the final view held by the Department in relation to any of the incidents or matters contained therein, given the review continued past the date range for the scope of this request (which is only until 20 October). They should be read only as the Department's interim views, held at one point of the review process.

Contacts and review rights

I understand the Department's legal representatives are again providing you with my decision for Tranche 3, and you should contact them if you wish to discuss any aspect of this Tranche 3 decision. I understand you are aware of your rights of review, and have already sought Information Commissioner review of the deemed access refusal decision for this matter.

Yours sincerely,



Offshore Operations Coordination Branch

⁵ FOI Guidelines, [6.22].

⁶ See *Re McKnight and Australian Archives* [1992] AATA 225.

⁷ See *Re Maher and Attorney-General's Department* [1985] AAT 180 as applied in *Maksimovic and Attorney-General's Department* [2008] AATA 1089.