



In reply please quote:

FOI Request: FA 17/12/00289
File Number: ADF2017/131160

Dear [REDACTED]

Freedom of Information (FOI) request - Access Decision

On 7 December 2017, the Department of Immigration and Border Protection received a request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

On 20 December 2017 the Home Affairs Portfolio, including the Department of Immigration and Border Protection, was formally established. As such a decision has now been made on your request by the Department of Home Affairs (the Department).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

1 Scope of request

You have requested access to the following documents:

'Any briefing notes, issues notes or reports prepared by the Department between July 1, 2017 and the present regarding:

- 1. the health debt and health insurance arrangements introduced in the Migration Legislation Amendment (2017 Measures No.4), which took effect on November 18;*
- 2. any proposal to implement the health debt and health insurance arrangements by another means if the Migration Legislation Amendment (2017 Measures No.4) were repealed.'*

2 Authority to make decision

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

3 Relevant material

In reaching my decision I referred to the following:

- the terms of your request
- the documents relevant to the request
- the FOI Act
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- 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 10 documents as falling within the scope of your request. These documents were in the possession of the Department on 7 December 2017 when your request was received.

Attachment A is a schedule which describes the relevant documents and sets out my decision in relation to each of them.

5 Decision

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

- Release four documents in full
- Release three documents in part with deletions
- Exempt three documents in full from disclosure

6 Reasons for Decision

Detailed reasons for my decision are set out below.

Where the schedule of documents indicates an exemption claim has been applied to a document or part of document, my findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

6.1 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 7 December 2017, 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 consider that certain sections of the documents consist of information relating to amendments to Migration Legislation other than the health debt and health insurance arrangements. I do not consider that this information is relevant to your request, which is specifically about the health debt and health insurance arrangements.

I have therefore decided that parts of documents marked 's22(1)(a)(ii)' would disclose information that could reasonably be regarded as irrelevant to your request, and have 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.

6.2 Section 47 of the FOI Act – Documents disclosing commercially valuable information

Section 47 of the FOI Act provides that a document is an exempt document if its disclosure under this Act would disclose any information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

In determining whether the information within the documents is commercially valuable, I have had regard to the following factors:

- whether the information is known only to the person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
- whether the information confers a competitive advantage on the person to whom it relates – for example, if it lowers the cost of production or allows access to markets not available to competitors
- whether a genuine "arm's-length" buyer would be prepared to pay to obtain that information
- whether the information is still current or out of date (noting that out of date information may no longer have any value)
- whether disclosing the information would reduce the value of a business operation or commercial activity, reflected perhaps in a lower share price.

I consider that document number 2 contains information of a commercial value and that there is a reasonable likelihood that value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

The information contained within the document is valuable for the purpose of carrying on the commercial activities in which the entity is engaged. The information is relevant to the profitability or viability of a continuing business operation. If the information were to be released, it could enable a competitor to obtain a commercial advantage over the entity.

I have therefore decided that part of document numbered 2 is exempt from disclosure under section 47 of the FOI Act.

6.3 Section 47B(a) of the FOI Act – Commonwealth-State relations

Section 47B of the FOI Act provides that a document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth

The disclosure of part of document number 2 would or could reasonably be expected to cause damage to relations between the Commonwealth and a State.

The information relates to state and territory health authorities the disclosure of which would adversely affect the continued level of trust and cooperation between the Department its state and territory partner agencies. The release of the information would impair or prejudice the flow of information between the Department and its state and territory partners and damage the working relationship between the respective agencies.

I have decided that part of document number 2 is conditionally exempt under section 47B(a) 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 in that regard is below.

6.4 Section 47C of the FOI Act – Deliberative Processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose '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

The documents contain advice, opinions and recommendations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of the Department, being the health debt and health insurance framework and proposed amendments to legislation. This advice, opinion and recommendations were provided as part of the functions of both the Department and the Australian government.

Disclosure of this deliberative information could reasonably be expected to inhibit full and frank advice from the Department and, as a result, full consideration by Government on any potential future consideration of amendments to legislation. Disclosure of some deliberative information, on which a decision has not yet been taken, could also reasonably be expected to prejudice consultations with relevant stakeholders.

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

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 in that regard below.

6.5 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 not seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.
- 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 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 deliberations as neutral.

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

- disclosure of the parts of the documents that are conditionally exempt under section 47B(a) of the FOI Act could reasonably be expected to prejudice the Department's ability to obtain confidential information and to obtain similar information in the future. I consider that this factor weighs heavily against disclosure.
- disclosure of the conditionally exempt information under section 47C of the FOI Act could reasonably be expected to prejudice the ability of the Department to provide full and frank advice to stakeholders in future proposals to legislative amendments. I consider that there is a strong public interest in there being no hindering of that process. I am of the view that a precedent of public disclosure of advice given as a part of those deliberative processes would result in such concerns existing, which may then hinder future deliberations and decision making processes for the Department and the Government as a whole. I consider that the public interest in protecting the process of providing free and frank advice and recommendations in relation to discussions concerning proposed legislative amendments has, on balance, more weight, than the public interest that might exist in disclosing the actual deliberations.

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.

7 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Details/C2017C00251>. If you are unable to access the legislation through this website, please contact our office for a copy.

8 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:

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

OR

By mail to:
Freedom of Information Section
Department of Home Affairs
PO Box 25
BELCONNEN ACT 2617

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>.

9 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 Home Affairs as the relevant agency.

10 Contacting the FOI Section

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



Authorised Decision Maker
Department of Home Affairs

ATTACHMENT A

SCHEDULE OF DOCUMENTS REQUEST UNDER *FREEDOM OF INFORMATION ACT 1982*

FOI request: FA 17/12/00289

File Number: ADF2017/131160

Doc. No.	Date of document	No. of pages	Description	Decision on release	
1.	09.08.2017	2	Temporary Sponsored Parent Visa Update	Release in part	s.47C(1) s.22(1)(a)(ii)
2.	01.09.2017	2	Temporary Sponsored Parent Visa Update	Release in part	s.47C(1) s.47(1)(b) s.47B(a) s.22(1)(a)(ii)
3.	19.09.2017	5	Legislative Instrument Instruction Form	Exempt in full	s.47C(1)
4.	19.10.2017	6	Ministerial Submission MS17-003433 – Migration Legislation Amendment	Exempt in full	s.47C(1)
5.	27.11.2017	5	Senate Order of Business	Release in full	
6.	-	27	Attachment A – Migration Legislation Amendment (2017 Measure No. 4) Regulations 2017	Release in full	
7.	-	4	Attachment B – Explanatory Memorandum	Exempt in full	s.47C(1)
8.	-	1	Attachment C – Minute Paper	Release in full	
9.	-	48	Attachment D – Explanatory Statement	Release in full	
10.	-	5	Talking Points for possible disallowance debate: Migration Legislation Amendment (2017 Measures No.4) Regulations 20	Release in part	s.22(1)(a)(ii)