



5 December 2019



In reply please quote:

FOI Request: FA 19/06/00172

File Number: OBJ2019/35277

Dear 

Freedom of Information (FOI) request - Access Decision

On 30 May 2019, the Department of Home Affairs (the Department) received a request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

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:

- 1) *Any emails exchanged between John Brayley and Mandy Newton in August and September 2017 and*
- 2) *Notes or minutes from the meeting with John Brayley and Michael Pezzullo and Michael Outram on 24 August 2017.*

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)

4 Documents in scope of request

In relation to part 1 of your request, the Department has identified 21 documents as falling within the scope of this part of your request. These documents were in the possession of the Department on 30 May 2019 when your request was received.

In relation to part 2 of your request, the Department has undertaken reasonable searches in relation to the documents you have requested access to. I am satisfied that the searches conducted were extremely thorough and all reasonable steps have been taken to locate any document relevant to your request.

5 Decision

In relation to the documents relevant to part 1 of your request, the decision is as follows:

- Release one document in full
- Release 18 documents in part with deletions
- Exempt two documents in full from disclosure

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

In relation to part 2 of your request, section 24A of the FOI Act provides that the Department may refuse a request for access to a document if all reasonable steps have been taken to find the documents and the Department is satisfied that the document does not exist.

I am satisfied that the Department has undertaken reasonable searches in relation to your request and that no documents were in the possession of the Department on 30 May 2019 when your FOI request was received. As such I am refusing access to part 2 of your request based on the application of section 24A of the FOI Act.

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.

You have requested access to emails exchanged between Dr Brayley and Deputy Commissioner Newton. By the nature of extended email chain correspondence, some emails contain details of other officers. I have regarded these officers' details as not relevant to your request as they do not indicate "*emails exchanged between John Brayley and Mandy Newton*". However, I have formed the view that the content of the earlier emails included in email chains is relevant to your request, as it was information shared between later emails between Dr Brayley and Deputy Commissioner Newton.

On 5 June 2019, 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.

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

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.

I consider that the release of the information marked 's33(a)(iii)' in the documents would, or could reasonably be expected to cause damage to the Australian Government's international relations.

This information relates to the Regional Processing. The Republic of Nauru and Papua New Guinea (PNG) are sovereign nations and the governments of Nauru and PNG are each responsible for regional processing in their respective countries.

I consider 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 PNG. This assessment is made considering the nature of the information contained within the document and the current nature and extent of the Australia Government's relationship with these nations.

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.

6.3 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 document 12 and parts of documents 10, 13, 14, 16 and 21 comprise 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 and
- 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 decided that document 12 and parts of documents 10, 13, 14, 16 and 21 are exempt from disclosure under section 42 of the FOI Act.

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 relating to the deliberative processes involved in the functions of the Department.

'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' generally involves *"the process of weighing up or evaluating competing arguments or considerations"*¹ and the *'thinking processes –the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.'*²

I am satisfied that 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 Department. I am satisfied that this deliberative matter relates to a process that was undertaken within government to consider whether and how to make or implement a decision, revise or prepare a policy, administer or review a program, or some similar activity.

Section 47C(2) provides that "deliberative matter" does not include purely factual material. I am satisfied that the deliberative material is not purely factual in nature.

I am further satisfied that the factors set out in subsection (3) do not apply in this instance.

I have decided that parts of documents 1, 3, 6, 8, 13, 14, 15, 17, 18 and 20 are 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 at paragraph 6.6 below.

¹ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

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

6.5 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*).

Personal information

I am satisfied that disclosure of the information marked 's47F' in the documents would disclose personal information relating to third parties. The personal information contained in documents 1, 5, 7, 10, 12, 13, 14, 16 and 20 relates to private individuals who are not public servants, and includes sensitive personal information, being medical information. The personal information contained in documents 4, 11 and 21 relates to the personal circumstances of staff members within the Department.

Unreasonable disclosure

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 section 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.*

Paragraph 6.138 of the FOI Guidelines states:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.

Documents 4, 11 and 21 specifically relate to the private interests of individuals. Documents 4 and 11 have been marked by the authors as "PRIVATE AND CONFIDENTIAL", providing a clear indication that the information was not intended to be disseminated any further than on a need to know basis connected with the matters raised in the correspondence. Document 21, whilst not marked in the same way, relates wholly to a matter concerning the personal circumstances of a staff member.

I am satisfied that the content of these documents relates to the private interests of the individuals, and the need to protect the personal privacy of those individuals outweighs any public interest in the disclosure of government-held information.

I note that in *Colakovski v Australian Telecommunications Corp*, Heerey J considered that:

'...if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people

about the person whose personal affairs were disclosed ... disclosure would be unreasonable'.

Having regard to the above, I am satisfied that the disclosure of the personal information contained in documents 4, 11 and 21 would be unreasonable.

In relation to the personal information contained in documents 1, 5, 7, 10, 12, 13, 14, 16 and 20, this concerns private individuals who are not public servants, and includes health information regarding those individuals. I have had regard to the fact that the *Privacy Act 1988* contains specific reference to "health information" and that there are specific guidelines for the Australian Privacy Principles about health information.

The information relating to these private individuals would only be known to a limited group of people with a business need to know. This information is not available from publicly accessible sources.

I am also satisfied that the disclosure of the personal information contained within documents 1, 5, 7, 10, 12, 13, 14, 16 and 20 would involve an unreasonable disclosure of personal information about a number of private 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 in that regard at paragraph 6.6 below.

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

As I have decided that information within the documents is 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).

Information 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 information 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.

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

- The '*deliberative matter*' included in documents 1, 3, 6, 8, 13, 14, 15, 17, 18 and 20 contains opinion, advice or recommendation provided during deliberations within the Department. I consider that the disclosure of the opinions, advice and recommendations contained in these documents would do no more than excite or satisfy the curiosity of people about the person whose opinion, advice or recommendation was disclosed, rather than inform debate on deliberations relating to government business.
- 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.
- The Department is committed to complying with its obligations under the *Privacy Act 1988*, which sets out standards and obligations that regulate how the Department must handle and manage personal information. It is firmly in the public interest that the Department uphold the rights of individuals to their own privacy and meets its obligations under the Privacy Act. I consider that non-compliance with the Department's statutory obligations concerning the protection of personal information would be contrary to the public interest and that this factor weighs strongly 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 would be contrary to the public interest and it is therefore exempt from disclosure under the FOI Act.

6.7 Deletion of exempt material

I have decided to prepare an edited copy of the documents with exempt material deleted pursuant to section 22 of the FOI Act. The grounds upon which the edited copies of these documents have been prepared are set out above and in the schedule of documents.

7 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.

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 <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

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 19/06/00172

	Date of document	No. of pages	Description	Decision on release	
1.	09/08/2017 11:58	1	Email from John Brayley to Mandy Newton & another	Release in part	22(1)(a)(ii) 47C 47F
2.	13/08/2017 18:14	1	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 33(a)(iii)
3.	16/08/2017 07:49	3	Email from Mandy Newton to John Brayley	Release in part	22(1)(a)(ii) 33(a)(iii) 47C
4.	15/08/2017 22:07	2	Email from John Brayley to Mandy Newton	Exempt in full	22(1)(a)(ii) 47F
5.	22/08/2017 21:46	2	Email from Mandy Newton to John Brayley	Release in part	22(1)(a)(ii) 47F
6.	23/08/2017 21:59	1	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 47C
7.	24/08/2017 20:29	1	Email from Mandy Newton to John Brayley	Release in part	22(1)(a)(ii) 47F
8.	26/08/2017 23:06	1	Emails from Mandy Newton to John Brayley	Release in part	22(1)(a)(ii) 47C
9.	27/08/2017 19:15	3	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 33(a)(iii)
10.	29/08/2017 12:59	6	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 42 47F
11.	29/08/2017 21:23	2	Email from Mandy Newton to John Brayley	Release in part	22(1)(a)(ii) 47F
12.	30/08/2017 21:15	8	Email from Mandy Newton to John Brayley & others	Exempt in full	22(1)(a)(ii) 42 47F
13.	3/09/2017 01:05	9	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 42 47C 47F
14.	3/09/2017 09:46	8	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 33(a)(iii) 42 47C 47F

	Date of document	No. of pages	Description	Decision on release	
15.	3/09/2017 10:12	2	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 47C
16.	3/09/2017 19:18	6	Email from Mandy Newton to John Brayley and others	Release in part	22(1)(a)(ii) 42 47F
17.	4/09/2019 08:46	2	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 47C
18.	4/09/2019 11:48	3	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 47C
19.	5/09/2019 08:54	4	Email from Mandy Newton to John Brayley	Release relevant information in full	
20.	6/09/2017 23:43	2	Email from John Brayley to Mandy Newton	Release in part	22(1)(a)(ii) 47C 47F
21.	7/09/2019 05:09	5	Email from Mandy Newton to John Brayley	Release in part	22(1)(a)(ii) 42 47F