



13 December 2019

BY EMAIL: [REDACTED]

**In reply please quote:**

FOI Request: FA 19/09/01576

File Number: OBJ2019/51291

Dear [REDACTED]

**Freedom of Information (FOI) request - Access Decision**

On 24 September 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 requested access to the following documents:

*I am seeking any meeting minutes from immigration officials, legal advice, or briefing documents regarding the processing times of spouse visas for people who are married or de facto to Australian citizens or Permanent Residents.*

*I am, in particular, looking for any advice, briefing documents, meeting minutes, internal policies, regarding section 86 and section 87 of the Migration Act, regarding the capping powers for spouse visas*

*<[http://www5.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/s87.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s87.html)>. I would like any documents regarding the conflict between the requirements of section 87, and the fact that spouse visas are currently capped at 39,799 :*

*<<https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels>>.*

*I know documents such as this exist:*

*<<https://twitter.com/RizviAbul/status/1176115064736075782>>.*

*In general, I am looking for all documents, spanning the time frame from 1995 to present, that mention section 87 of the Migration Act.*

On 18 November 2019 the Department issued you a notice under section 24AB of the FOI Act. On 19 November 2019 you revised your request to:

*All documents, from 7th of September 2013 to the 19th of November 2019 containing the following terms "section 87", "s87", "s.87", "Section 87", "s. 87".*

On 20 November 2019 you clarified that your request referred to:

*Capping of spouse visas: policy documents, discussions and policy-level legal advice.*

## **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 document *GenGuideA* is relevant to your request. This can be accessed through LEGEND.com, which is an electronic database of all migration and citizenship legislation and policy documents. This is available to the public on a subscription basis, at: <https://immi.homeaffairs.gov.au/help-support/tools/legendcom>.

It is also available to the public for free at a number of libraries that subscribe to LEGEND.com through the Library Deposit and Free Issue Scheme (LDS).

Further information about the LDS, including a list of participating libraries, is available at: <https://www.dta.gov.au/help-and-advice/guides-and-tools/commonwealth-library-deposit-and-free-issue-schemes>.

Section 12(1)(c) of the FOI Act provides that a person is not entitled to obtain access to a document if a document is available for purchase by the public in accordance with arrangements made by the agency.

Moreover, section 4(1)(d) of the FOI Act provides that a document for the purpose of the FOI Act does not include material maintained for reference purposes that is otherwise publically available.

I have therefore decided that *GenGuideA* will not be considered in this FOI request.

The Department has identified another 14 documents as falling within the scope of your request. These documents were in the possession of the Department when your request was received on 24 September 2019.

**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 five documents in full (two of which have irrelevant material redacted)
- Exempt nine 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 5 November 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.

I have therefore decided that the parts of documents marked 's22(1)(a)(ii)' 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.

### **6.2 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 the documents numbered 3, 6, 8, 9 and 13 contain information produced in or details about confidential communications passing between the Department and its legal advisers for the dominant purpose of 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 therefore decided that these documents are exempt from disclosure under section 42 of the FOI Act.

### **6.3 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*”<sup>1</sup> 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.'*<sup>2</sup>

The document contains 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, being the discussion of administrative changes and policy objectives in regard to certain visa categories and migration programs, as well as proposed amendments to legislation. 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.<sup>3</sup>

Disclosure of this deliberative information could reasonably be expected to inhibit full and frank advice from the Department to its Minister, and, as a result, full consideration by the Government on any potential future consideration of amendments to legislation.

---

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

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

<sup>3</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962

Section 47C(2) provides that “deliberative matter” does not include purely factual material. I have had regard to the fact that “purely factual material” does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.<sup>4</sup> A factual summary prepared to aid a complex issue may be classed as purely factual material but may also be of a character as to disclose a process of section involving opinion, advice or recommendation. As such, a conclusion which involves a deliberative process may well prevent material from being purely factual.<sup>5</sup>

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

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

#### **6.4 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.

---

<sup>4</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18]

<sup>5</sup> *Harris v Australian Broadcasting Corporation and Others* (1984) 1 FCR 150

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 has limited public importance. The matter has a limited scope and, in my view, would be of interest to a 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:

- Disclosure of the conditionally exempt information under section 47C of the FOI Act could reasonably be expected to prejudice the ability of departments across government to provide full and honest advice to stakeholders in future proposals to legislative amendments.
- I consider that the public interest in protecting the Department's ability to develop and provide advice that is free and honest confidentially to the Minister has, on balance, more weight than the public interest that might exist in disclosing the deliberative matter. Endangering the proper working relationship that a department has with its Minister and its ability to provide its Minister with honest advice confidentially would be contrary to the public interest.

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.

## 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](mailto: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](mailto: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](mailto:foi@homeaffairs.gov.au).

Yours sincerely



**Authorised Decision Maker  
Department of Home Affairs**



## ATTACHMENT A

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

FOI request: FA 19/09/01576

File Number: OBJ2019/51291

No.	Date of document	No. of pages	Description	Proposed decision	
1.	17/10/2016	1	Partner and child visas – planning levels and capping [briefing paper by Family Policy Section for Assistant Secretary - version 1]	Release in full	
2.	17/10/2016	1	Visa capping in relation to Partner and Child visas for AS v2– planning levels and capping [briefing paper by Family Policy Section for Assistant Secretary – version 2]	Release in full	
3.	25/10/2016	3	Partner – Demand Driven paper for Assistant Secretary <i>[draft document]</i>	Exempt in full	42(1) 47C(1)
4.	14/12/2018 to 13/11/2019	3	Email: FW: Visa horizontals and strategic risk 9 - from Director Visa Framework Section	Exempt in full	47C(1)
5.	[14/12/ 2018]	26	Attachment to document 4: Horizontal Issues table	Exempt in full	47C(1)
6.	16/08/2019	2	Email: Inquiry on legal advice re Question on Notice 383 asked by Senator Kristina Keneally  <i>[2 attachments: Attachment A “A47395 – visa planning levels and partner visa applications” dates to 2009-10, therefore out of scope]</i>	Exempt in full	42(1)
7.	12/08/2019	4	Attachment B to document 6: PQ-000036 – PDMS template for response to Question on Notice 383 asked by Senator Kristina Keneally  <i>[Referenced Attachment A is not included]</i>	Release in full	
8.	20/08/2019	3	Email: RE: C45372 – Request for advice on the disclosure of legal advice  <i>[10 attachments: date between 2009 and 2012, therefore out of scope]</i>	Exempt in full	42(1)
9.	20/08/2019 to 5/11/2019	9	Email: FW: Urgent: FW: C45747: Request for advice on the disclosure of legal advice	Exempt in full	42(1)

No.	Date of document	No. of pages	Description	Proposed decision	
10.	21/12/2017 to 13/11/2019	2	Email: Capping and Suspension – from Director Visa Framework Section re possible amendments to Migration Act <i>[2 attachments: Attachment A “MS15-027919” is out of scope as it discusses sections of the Migration Act other than s87]</i>	Exempt in full	47C(1)
11.	[2016]	2	Attachment B to document 10: Capping and Suspension Framework diagram	Exempt in full	47C(1)
12.	21/12/2017 to 13/11/2019	2	Email: Fw: Capping and Suspension – from Assistant Director Visa Framework Section to Director <i>[2 attachments: Attachment B “Capping and Suspension Framework diagram” is the same as document 11]</i>	Release in full (irrelevant material excluded)	22(a)(1)(ii)
13.	[2016]	4	Attachment A to document 12: Preliminary FAQ document – Capping and suspension bill <i>[draft document]</i>	Exempt in full	42(1) 47C(1)
14.	12/09/2019	10	PQ19-000036 – Parliamentary Question on Notice 383 asked by Senator Kristina Keneally – response	Release in full (irrelevant material excluded)	22(a)(1)(ii)