



27 May 2019

██████████
BY EMAIL: ██████████

In reply please quote:

FOI Request: FA 16/08/000942

File Number: OBJ2019/26732

Dear ██████████

Freedom of Information (FOI) access request – Revised decision under s. 55G of FOI Act

The purpose of this letter is to provide you with a revised decision on your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

The Department of Home Affairs received your request for access to documents on 16 August 2016. On 4 August 2017, the Department made a decision on your request, granting access to five (5) documents in full while exempting five (5) documents in full and three (3) in part.

On 8 September 2017 you requested an internal review of the Department's access refusal decision.

On 24 October 2017, the Office of the Australian Information Commissioner (OAIC) advised the Department that you had requested an Information Commissioner review of the Department's decision under section 54L of the FOI Act.

On 13 November 2017, the Department made a decision on the internal review request, affirming the original access refusal decision.

The Department has now made a revised decision on your request under section 55G of the FOI Act. The purpose of this letter is to provide you with the Department's revised decision.

1 Scope of request

On 16 August 2016 you requested access to the following documents:

1. *Memos, emails or other communications in which any DIBP employee, contractor or subcontractor commented on (a) the conditions at Nauru Regional Processing Centre and/or (b) the treatment of asylum seekers there.*
2. *Memos, emails or other communications from, to or within the DIBP Media and Executive Coordination Branch related to the Nauru Regional Processing Centre between 8 August 2016 and the date of search and retrieval for this request.*

On 27 October 2016, you agreed to revise the scope of your request to:

Briefings to DIBP Secretary since 13 October 2014 and to the ABF Commissioner since 1 July 2015 relating to the conditions at Nauru Regional Processing Centre and/or the treatment of asylum seekers there.

2 Internal review decision

On 8 September 2017, you requested an internal review of the Department's access refusal decision of 4 August 2017. You sought a review of the Department's decision that the absolute and conditional exemptions applied to the documents within the scope of the request.

On 13 November 2017, the Department made a decision on your request to uphold the original decision and applied additional exemptions:

- section 33(b) [information communicated in confidence]
- section 47F [personal privacy].

3 Revocation or variation of access refusal decision

Section 55G of the FOI Act provides for the revocation or variation of an access refusal decision during a review by the Information Commissioner:

55G Procedure in IC review—revocation or variation of access refusal decision

- (1) *An agency or Minister may vary (or set aside and substitute) an access refusal decision (the **original** decision) in relation to a request or an application under section 48 at any time during an IC review of the access refusal decision if the variation or substitution (the **revised** decision) would have an effect of:*
- (a) giving access to a document in accordance with the request; or*
 - (b) relieving the IC review applicant from liability to pay a charge; or*
 - (c) requiring a record of personal information to be amended or annotated in accordance with the application.*

Note: When making the revised decision, a consultation requirement under section 26A (documents affecting Commonwealth-State relations etc.), 26AA (documents affecting Norfolk Island intergovernmental relations), 27 (business documents) or 27A (documents affecting personal privacy) may apply.

(2) *If an agency or Minister varies (or sets aside and substitutes) an access refusal decision under subsection (1):*

(a) *the agency or Minister must, in writing, notify the Information Commissioner as soon as practicable after the agency or Minister makes the variation or substitution; and*

(b) *the Information Commissioner must deal with the IC review application for review of the original decision as if it were an IC review application for the review of the varied or substituted decision, subject otherwise to this Part.*

4 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.

5 Relevant material

In reaching my decision I referred to the following:

- the terms of your 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
- Preliminary views by the Office of the Australian Information Commissioner

6 Revised decision on request

My decision on the documents within the scope of your request is to:

- release nine documents in part, with exempt and irrelevant material deleted
- release three documents in full, with irrelevant material deleted
- release one document in full without deletions.

7 Reasons for decision: irrelevant material

7.1 Section 22(1)(a)(ii) of the FOI Act – material irrelevant to request

Section 22(1)(a)(ii) of the FOI Act applies if an agency or Minister decides that giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.

I have decided that information marked with the section 22(1)(a)(ii) redaction, and indicated in the schedule of documents, is material that could reasonably be regarded as irrelevant to your request.

The material I consider to be irrelevant to your request contains personal details of officers not in the Senior Executive Service (SES), as well as the contact details of SES staff. On 15 November 2016, in acknowledging your FOI request, the Department advised you that its policy is to exclude these details from documents that fall within the scope of an FOI request and requested you inform the Department should you require access to this information.

You did not advise the Department that you required access to the names and contact details of non-SES officers or direct telephone numbers of SES staff. Accordingly, I am satisfied that you agreed to this information being excluded from the scope of your request

I therefore consider this material to be irrelevant to the scope of your request. I consider the remaining parts of the documents to be relevant to your request

8 Reasons for decision: exemptions

8.1 Section 33(a)(iii) – documents affecting international relations

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.

In making this revised decision, I have re-assessed the documents within the scope of the request. I now consider that the release of certain material contained in the documents would not be expected to cause damage to the international relations of the Commonwealth. The material that I no longer consider exempt is material that is now publicly available or that has been publicly discussed.

I consider, however, that the remaining material to which the Department applied the section 33(a)(iii) exemption in the internal review decision remains exempt under this provision. The material in question contains:

- details of communications between the Department and the International Committee of the Red Cross (ICRC)
- details of communications between the governments of Australia and Nauru and between the governments of Australia and Papua New Guinea
- details of proposals for aspects of regional processing operations that were subject to negotiation with the government of Nauru
- information that could be considered as providing a commentary on the standard of medical facilities in Nauru
- other information that would compromise the Australian government's capacity to maintain relations between countries in the region if it were disclosed.

8.1.1 Information relating to communications between the Department and the ICRC

I consider that disclosure of the material containing details of communications between the Department and the ICRC would or could reasonably be expected to cause damage to the relationship between the government of Australia and the ICRC.

As stated in paragraph 5.36 of the Information Commissioner guidelines, the phrase 'international relations' refers to the ability of the Australian government to maintain good working relations with international organisations, as well as with other governments. The ICRC is an international organisation to which the *International Organisations (Privileges and Immunities) Act 1963* applies.

The Department has received advice from the ICRC that it does not agree to the release of the material, including the reason that some of the material has been provided in confidence. I consider that the relationship between the Department and the ICRC would be compromised if the information were released in contravention of the wishes of the ICRC. I have therefore determined that the section 33(a)(iii) exemption applies to the material in question.

8.1.2 Information relating to communications between the government of Australia and other governments

Further information that I consider exempt under section 33(a)(iii) relates to discussions and correspondence between the governments of Australia and other governments in the region, including the governments of Nauru and Papua New Guinea. The information is either not publicly available or contains information that is more specific or detailed than information currently in the public domain. Other information relates to discussions that were preliminary in nature.

It is important for Australia to maintain good working relationships with foreign governments. I consider that the capacity of the government of Australia to maintain positive relationships with the countries in question would be severely compromised if details of communications between the governments of Australia and the governments of the other countries were disclosed. Maintaining such bilateral relationships depends on the maintenance of an atmosphere of trust between the two countries, in which officials of the respective countries are able to negotiate and share information, including by engaging in preliminary discussions, with the assurance that the details of their discussions will not be inappropriately or unlawfully disclosed.

Additionally, I have consulted with the business areas of the Department concerning the information regarded as exempt under section 33(a)(iii) of the FOI Act. Our agency advisers with close working responsibility for those relationships, consider that disclosure of the material in the document could reasonably be expected to damage Australia's relationship with the government of those foreign governments.

I find that if the information were to be released under FOI it would diminish the confidence of the foreign governments in the Australian government, making them less willing to cooperate with Australian agencies in the future. I am therefore satisfied that the material remains exempt under section 33(a)(iii) of the FOI Act.

8.1.3 Information relating to Nauru

I also consider to be exempt under section 33(a)(iii) information relating to the operations of the government of Nauru, including information about regional processing operations in that country. As the Department stated in its internal review decision, Nauru is a sovereign nation over which the Australian Government does not have extraterritorial control, governance or jurisdiction.

The material relating to Nauru that I consider exempt under section 33(a)(iii) contains information about regional processing operations in Nauru, details of proposals for aspects of regional processing operations that were subject to discussion with the government of Nauru and information that could be considered as providing a commentary on the standard of medical facilities in Nauru if it were disclosed.

While I have decided that certain material in the documents relating to Nauru government operations is not exempt on the basis that the information is publicly available, the material that I consider remains exempt under section 33(a)(iii) is either not publicly available or is of a nature described in paragraph 8.1.4 below.

Furthermore, some of the material is deliberative in nature, relating to proposals for infrastructure or other aspects of regional processing operations that were not implemented, or details of costings that were estimations only. This material also attracted the section 47C conditional exemption, as discussed in paragraph 9.1 below.

In forming my decision I have taken into consideration the views of the government of Nauru, which has expressed concern about the release of sensitive information relating to regional processing arrangements and requested that this information not be disclosed by the Department. Any action such as disclosure of sensitive documents would cause offence to the government of Nauru and harm our bilateral relationship. I therefore consider that the capacity of the Department and the government of Australia to maintain a productive and healthy bilateral relationship with the government of Nauru would be damaged by the release of the information.

In making this decision I have also consulted with officers of the Department with specific knowledge of the bilateral relationship between the Department and the government of Nauru, who agreed that the disclosure of the material would adversely impact on the ability of the Department, and as a result, the Australian government, to maintain good working relations with the government of Nauru. This assessment was made in consideration of the nature of the information contained within the documents and the current nature and extent of the Australian government's relationship with the government of Nauru.

Having regard to the factors set out above I am satisfied that specific material identified in the documents remains exempt under section 33(a)(iii) of the FOI Act.

8.1.4 Information contained in documents D, E and H

I also consider that the disclosure of the information marked "s. 33(a)(iii)" in documents D, E and H would damage Australia's relationship with governments in the region, including Nauru.

Documents D, E and H include internal research reports produced by the Department and correspondence relating to the reports. While sections of these documents are publicly available, and the Department considers that some of the material contained in them may not be exempt, the reports in question have not been published by the Department or otherwise made publicly available in their entirety.

Documents D, E and H also contain information that the documents' authors have extrapolated from several sources, including public sources, as well as the opinions formed and conclusions drawn separately by the reports' authors. When considered together, the inclusion of the particular publicly available material and author conclusions in the reports could be construed as providing a commentary on the safety and security of people in other countries, particularly in our region.

Finally, pages 133 and 201 of the documents (contained in documents E and H respectively) contain notes from a senior departmental official about the contents of one of the reports. These reports and any notes by senior officials on these reports consist of analysis or commentary which is deliberative in nature, and if disclosed, could result in damage to Australia's international relationships with regional partners.

I therefore consider that disclosure would severely impact on Australia's ability to maintain productive relations with many countries both in the region and further afield, and that consequently the material is exempt under section 33(a)(iii).

8.2 Section 33(b) – documents affecting national security, defence or international relations – information communicated in confidence

Section 33(b) provides that a document is an exempt document if disclosure would divulge information or matter communicated in confidence by a foreign government, an authority of a foreign government or an international organisation to the Commonwealth.

The Information Commissioner Guidelines state that information is communicated in confidence by or on behalf of another government or organisation, if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Where the information is, in fact confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.

The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access to that communication.

An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communications.

In making the original decision on the request, the Department sought the views of the ICRC, which advised that material contained in documents L and K contained information the ICRC had provided to the Department in confidence. The ICRC advised that disclosure of confidential information would negatively affect the ICRC's ability around the globe to carry out its humanitarian mandate in accordance with its fundamental principles and working modalities.

I further note that document K in particular contains an attachment authored by the ICRC in Papua New Guinea, headed with the caveat CONFIDENTIAL. That caveat indicated that harm may arise from unauthorised disclosure, which would be extreme and could be expected to cause serious damage to the national interest. The Department applies strict document handling protocols to documents of this type, with a very limited number of officers having access to the document, and access being limited to a strictly need-to-know basis.

As such, I am satisfied that the information contained within documents K and L were communicated in confidence by the ICRC and was received by the Australian Government under an understanding of confidentiality. The disclosure of the information would severely damage Australia's relationship with the ICRC and severely disadvantage Australia in major international negotiations or strategy, raise international tension, or cause severe damage or disruption, to diplomatic relations.

As such, I have decided that the release of the document would divulge information communicated in confidence by or on behalf of an international organisation to the Commonwealth of Australia and I have decided that Document K is exempt from disclosure under section 33(b) of the FOI Act.

8.3 Section 42 – 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.

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 Department's Legal Division has confirmed that the material in the documents marked "s. 42(1)" was prepared for the dominant purpose of giving or receiving legal advice and communicating that legal advice to the Minister. The legal advice was provided either internally by the Department's Legal Division or by AGS Special Counsel. All legal officers within the Legal Division have the necessary degree of independence and provide professional legal advice on a confidential basis.

The legal officers, in response to requests for legal advice, prepared the documents. The Department, as the client, claims legal professional privilege (LPP) over the documents and is not waiving privilege because of the detrimental effect this could have on the conduct of its legal affairs.

Based on the above, it is my decision that parts of the documents remain exempt under section 42(1) of the Act.

8.4 Section 47 – documents disclosing commercially valuable information

Section 47 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 have determined that parts of document B contain commercially valuable information, the value of which could reasonably be expected to be destroyed or diminished if the information were disclosed. The information relates to preliminary costings of items proposed by International Health and Medical Services (IHMS), the Department's contracted service provider, for purchase and installation in Nauru.

The information contained within the document is valuable for the purpose of carrying on the commercial activities in which IHMS is engaged. The information is relevant to the profitability or viability of IHMS as a continuing business operation. If the information were to be released, it would enable potential competitors to enter the market by ascertaining the commercial value IHMS places on the provision of particular items, which in turn would give these potential competitors to obtain a commercial advantage over IHMS. I consider that an 'arms-length' competitor would be prepared to pay for such information, given the total commercial value of the services provided by IHMS under the terms of its contract with the Department.

Allowing competitors to enter the market would diminish the capacity for IHMS to carry out the activity on a profitable or viable basis in future, since – once the information was publicly disclosed – potential competitors would be able to propose ways in which to provide the same services at a reduced cost, which in turn would force IHMS to compete with any reduced terms.

The information is also likely only to be known to a small number of individuals who are employed by IHMS, the Department and the government of Nauru. I consider that the fact that staff employed by organisations other than IHMS are already aware of the terms of the schedule does not reduce the intrinsic commercial value of the information, since only a limited number of people within the governments of Australia and Nauru would have access to the information, and both governments would allow access to the information on a 'needs to know' basis only.

I have therefore decided that certain information contained in document B is exempt from disclosure under section 47(1)(b) of the FOI Act.

9 Reasons for decision: conditional exemptions

9.1 Section 47C – public interest conditional exemption – deliberative processes

A document is 'conditionally exempt' under section 47C(1) of the Act if '...its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of...an agency...'

The accepted definition of 'deliberative process' is that it refers to an agency's 'thinking processes' or 'decision-making processes' - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

The Prime Minister and Cabinet Guidelines, specifically note (at paragraph 7.2.1) that '*the deliberative processes of an agency, a Minister or the Government are the thinking, reflecting, deliberating, consultation and recommendations that occur prior to a decision, or before or while undertaking a course of action*'. Further, (at paragraph 7.2.2.) '*... deliberation suggests not only collective discussion but collective acquisition and exchange of facts preliminary to an ultimate decision*'.

The material marked with the 's. 47C' redaction relates to:

- departmental deliberations, recommendations and proposals for aspects of regional processing operations
- details of preliminary costings for proposed services, including those provided by the Department's contracted service provider IHMS.

I am satisfied that the above material is in the nature of or relating to 'opinion, advice or recommendation' (termed 'deliberative matter') relating to the 'deliberative processes' of the Department and the Minister. This advice, opinion and recommendations were provided by departmental officers as part of the functions of both the Department and the Australian government. Departmental officers formed the advice based on preliminary information received from departmental contractors including IHMS, and from information obtained during negotiations between the Australian government and foreign governments (in particular Nauru and Papua New Guinea).

I am further satisfied that the information contained in the documents is not operational information nor is it purely factual material. Therefore, I am satisfied that the information which has been exempted under section 47C (1) meets the description of 'deliberative matter'. As such, the information remains 'conditionally exempt' under section 47C of the Act.

9.2 Section 47E(d) – public interest conditional exemption – deliberative processes

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.

The material that the Department has marked with the 's. 47E(d)' redaction relates to:

- details of planning processes to implement regional processing in Nauru, including details of the implementation and expansion of health services and open centre arrangements
- details of negotiations between the Department and contracted service providers IHMS and Aspen Medical
- information about the arrangements for the transfer of people from Australia to regional processing countries, the transfer of transferees and refugees from Nauru to Australia for medical treatment and for the return of transitory persons to Nauru following medical treatment.

9.2.1 Information about planning processes and negotiations

I consider that information about details of planning processes to implement and expand health services in Nauru and details of negotiations between the Department and contracted service providers are conditionally exempt under section 47E(d) on the basis that disclosure would compromise the relationship between the Department and its contracted service providers.

As indicated in paragraph 9.1 above, the Department received the information in question from service providers in the context of planning and implementing arrangements for providing medical services in Nauru and in the expectation that the Department would use the information for those purposes and treat it confidentially. The Department considers that while certain details of regional processing arrangements, including costings, are publicly available, the specific material to which it has applied this exemption contains information that is not publically available.

I also consider that information about details of the planning processes to implement open centre arrangements in Nauru are conditionally exempt under section 47E(d). Details of these planning arrangements were the subject of negotiations between the governments of Australia and Nauru. Given the concerns expressed by of the government of Nauru about the release of information about regional processing arrangements, as described in paragraph 8.1.3 above, I am satisfied that the Department's capacity to support the government of Nauru in implementing regional processing arrangements would be compromised if details of these negotiations were to be disclosed. Disclosure would therefore have a significant adverse effect on proper and efficient conduct of the Department's operations relating to regional processing arrangements.

9.2.2 Information about transfer arrangements

Further material marked "s. 47E(d)" contains information about transfer arrangements for individuals subject to regional processing – including transfer to regional processing countries, transfer from these countries for medical treatment and the return of transitory persons after medical treatment.

I consider that disclosure of the material would enable individuals potentially or currently subject to regional processing to circumvent the procedures of the Department and of contracted service providers enabling them to gain an understanding of the circumstances in which they will be transferred. Disclosure would therefore compromise the effectiveness of the methods used by the Department and its contracted service providers to determine whether individuals should be transferred.

Managing the security and integrity of Australia's borders is integral to the operations of the Department. Any prejudice to the effectiveness of the operational methods and procedures used in undertaking that role would result in a substantial adverse effect on the operations of the Department.

Any disclosure resulting in the prejudice of the effectiveness of the Department's operational methods and procedures would result in the need for this Department, and potentially its partner agencies, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

9.3 Section 47F – public interest conditional exemption – 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 section 4 of the FOI Act and section 6 of the *Privacy Act 1988*).

I consider that disclosure of the information marked 's. 47F' in the documents would disclose personal information relating to third parties. The personal information in question is information identifying transferees and refugees currently or previously subject to regional processing, including information that reveals the involvement of some of these individuals in incidents.

Some of the material in question includes the names and boat IDs of the individuals in question. Disclosure would therefore identify the individuals as transferees or refugees under regional processing arrangements.

Other material does not directly identify the individuals in question, but provides sufficient information about them, such as their nationality, gender or medical condition or status, that would enable other individuals, particularly in Nauru, to use already available information to identify the individuals in question and link them with the information in the documents.

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.*

I consider that some of the information relating to the transferees and refugees is available from publicly accessible sources and that the individuals in question are known to be associated with the matters dealt with in the document. The Department has a longstanding policy not to comment publicly on the details of individual cases, regardless of whether details are already in the public domain. Release by the Department would constitute official Government confirmation of an individual's personal information, as well as officially identifying the person as a transferee or refugee.

This approach would set a precedent for release of personal information, compromise privacy and potentially attract unsolicited media scrutiny on the individual. I therefore consider release of the identifying information to be unreasonable.

In relation to the other third party information throughout the documents in scope that is not available from publicly accessible sources, this information is not well known. The information would only be known to a limited group of people in the Department who have a business need to access the information. 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.

In addition, I have also taken into account the sensitivity of the information, and note in the case of transferees and refugees, the disclosure of the information would reveal:

- that the individuals in question reside at a RPC
- that the individuals in question have made protection claims, and in some cases the disclosure of the information would also reveal the basis for the individuals' protection claims
- the involvement of some of the individuals in incidents, including incidents involving assault and sexual assault
- medical information about transferees and refugees
- information about children.

I am satisfied that the release of this information 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 in that regard below.

9.4 Section 47G – public interest conditional exemption – 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 document B contains information concerning the business, commercial or financial affairs of an organisation.

The information is information about estimated costings for items proposed for installation in Nauru by the department's contracted service provider, IHMS.

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 or 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 the parts of document B referred to above 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 in that regard below.

9.5 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.

9.5.1 Factors in favour of disclosure

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 some of the documents does have the character of public importance and that there may be broad public interest in the documents. The subject matter of other documents is of a more limited scope and would, in my view, be of interest to a narrow section of the public.
- I consider that some insight into public expenditure would be provided through examination of the documents that contain information about costings for proposals for medical facilities and other regional processing arrangements in Nauru. However, given that the information is preliminary in nature, and given the context of the documents in which the material appears, I consider that the disclosure would not promote the effective oversight of public expenditure.
- 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.

9.5.2 Factors against disclosure

As discussed above, the Information Commissioner Guidelines contain a list of 'non-exhaustive' factors that must be considered when determining if release of a document is against the public interest (section 11B(5) of the Act). The factors focus on the 'prejudice' caused by the release of the information. I note that the Department may also consider other relevant factors not listed in the IC's Guidelines.

The PM&C Guidelines (para 7.3.4), when discussing the public interest test relating to 'deliberative documents' and section 47C (then s.36) noted:

... Underlying all the relevant public interest factors that could be invoked against disclosure under this exemption provision is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the official administration of the agency concerned...

In this case I have considered the following:

- Disclosure of the conditionally exempt information under **section 47C** of the FOI Act could reasonably be expected to prejudice the ability of officers of the Department to provide frank and candid advice and recommendations in relation to the Department's role in protecting Australia's borders.
- Much of the advice and recommendations is based on information that departmental officers received from contracted service providers (in particular IHMS) and other agencies, or that the Australian government obtained in the course of negotiations with foreign governments (in particular Nauru and Papua New Guinea). Other information was received in the context of legal advice obtained from the Department's counsel. The Department relies on the quality and accuracy of this advice to ensure the Minister and senior departmental officials are able to make decisions that are fully informed and supported by evidence.
- The Department received the information from IHMS and other agencies in the context of planning and assessing various options for the provision of services in Nauru and in the expectation that the Department would use the information for those purposes and treat it confidentially. I consider that if the Department were to routinely release information gained from IHMS while planning the provision of future contracted services, in particular before proposals or costings have been confirmed, such disclosure would compromise its working relationship with IHMS and its ability to receive the same information from IHMS in the future.
- I also consider that the Department's capacity to obtain full and accurate information from foreign governments would be compromised if information received during negotiations – and then subsequently used to inform the Department's own decision-making processes – were disclosed. The Department's capacity to negotiate with these governments would also be significantly compromised by disclosure, as supported by the Department's application of section 33(a)(iii) to the same material.
- While I note that some time has passed since the options were considered by the Department, I consider that much of the material conditionally exempt under section 47C relates to proposals or considerations that were not implemented or to more specific details of the proposals or negotiations that are not publicly available. I consider that the need for the Department to maintain ongoing productive relationships with its contracted service providers and with regional processing countries necessitates the protection of the information, and means that the damage from disclosure would not be diminished by the passing of time.

- Given the need of the Department to make informed decisions and to maintain productive relationships with relevant stakeholders, we finally submit that disclosure of the material that the Department considers conditionally exempt under section 47C could reasonably be expected to have a substantial adverse effect on the operations of the Department, in particular in relation to its role in protecting Australia's borders.
- Disclosure of the parts of the documents that are conditionally exempt under **section 47E(d)** of the FOI Act could reasonably be expected to prejudice the ability of the Department to protect Australia's borders. I consider there to be a strong public interest in ensuring that the ability of the Department to conduct its border protection functions is not compromised or prejudiced in any way. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.
- Other material conditionally exempt under section 47E(d) relates to planning processes to implement and expand health services in Nauru and details of negotiations between the Department and contracted service providers. I consider that disclosure of this material could reasonably be expected to prejudice the function of the Department to manage those aspects of its portfolio associated with supporting the governments of Nauru and Papua New Guinea in implementing regional processing arrangements.
- As indicated above, disclosure would also prejudice the capacity of the Department to obtain confidential information from contracted service providers and obtain similar information in the future.
- The disclosure of material relating to the planning processes to implement the open centre arrangement in Nauru would prejudice the relationship between the governments of Nauru and Australia, which would in turn significantly compromise the capacity of the Department to support the government of Nauru in implementing regional processing arrangements. This would also prejudice the capacity of the Department to manage the aspects of its portfolio associated with regional processing arrangements.
- The disclosure of material relating to transfer procedures would enable individuals to circumvent these processes in the future. This would jeopardise the effectiveness of the methods and procedures used by the Department and its contracted service providers to undertake their lawful duties, resulting in the Department and its contracted service providers no longer being able to rely on the same procedures. This would prejudice the capacity of the Department to enforce migration law in relation to individuals who arrive illegally by boat.
- Disclosure of personal information which is conditionally exempt under **section 47F** of the FOI Act could reasonably be expected to prejudice the protection of these 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. Section 6 of the Privacy Act 1988 specifically defines *sensitive information* to include health information about an individual. 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.
- 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 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 they are therefore exempt from disclosure under the FOI Act.

10 Reasons for decision: access to edited copies

Section 22(2) of the FOI Act further provides that an agency must provide access to an edited copy of a document when:

- the agency has identified that a document contains exempt or irrelevant material, and
- it is possible for the agency to prepare an edited copy of the document from which it has deleted the exempt or irrelevant material.

As I have explained above, I have determined that documents within the scope of the request contain exempt material or material that is irrelevant to your request.

I have also determined that I am able to prepare edited copies of these documents by deleting the exempt and irrelevant material. I am therefore providing you with edited copies of these documents as is required under section 22(2) of the Act.

11 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.

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 Home Affairs as the relevant agency.

13 Contacting the FOI Section

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi.reviews@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 16/08/000942
File Number: OBJ2019/26732

	Page range	Date	Number of pages	Description	Decision	Material deleted	Legislation
A.	1-66	20/11/2014	66	Minute: Follow-up from Nauru Joint Ministerial Forum	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 42(1) s. 47C, s. 47E(d) s. 47F, s. 22(1)(a)(ii)
B.	67-101	15/05/2015	35	Ministerial submission MS15/009504	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 42(1) s. 47(1)(b), s. 47C s. 47E(d), s. 47F s. 47G(1)(a) s. 22(1)(a)(ii)
C.	102-132	Undated	31	Secretary Correspondence No 1434/2015	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 42(1) s. 47C, s. 47E(d) s. 47F, s. 22(1)(a)(ii)
D.	133-148	30/07/2015	16	Minute	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 47E(d) s. 22(1)(a)(ii)
E.	149-183	1/10/2015	35	Research brief	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 47E(d) s. 22(1)(a)(ii)
F.	184-185	24/09/2015	2	Minute	Released in full	Irrelevant material	s. 22(1)(a)(ii)
G.	186-198	23/09/2015	13	Minute	Released in full	Irrelevant material	s. 22(1)(a)(ii)
H.	199-234	1/10/2015	35	Research brief	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 47E(d) s. 22(1)(a)(ii)

	Page range	Date	Number of pages	Description	Decision	Material deleted	Legislation
I.	234-236	24/09/2015	3	Minute	Released in full	Irrelevant material	s. 22(1)(a)(ii)
J.	237	12/11/2015	1	Support Group: Secretary Correspondence No: 2635	Released in full	-	-
K.	238-269	30/11/2015	31	Minute: OSEC2415/2015	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 33(b) s. 47F, s. 47E(d) s. 22(1)(a)(ii)
L.	269-276	1/12/2015	8	Electronic correspondence to Executive Support Unit	Released in part	Exempt and irrelevant material	s. 33(a)(iii) s. 22(1)(a)(ii)
M.	277-299	11/08/2016	23	Minute	Released in part	Exempt and irrelevant material	s. 33(a)(iii), s. 47F s. 47E(d) s. 22(1)(a)(ii)