



FOI Requests: FA 18/08/01356
FA 18/08/01631
FA 18/09/00530

Freedom of Information (FOI) request - Access Decision

1 Scope of request

The Department has received three separate requests for access to the Brief provided to the incoming Minister for Immigration Citizenship and Multicultural Affairs, David Coleman, in August 2018.

The Department has identified one document as falling within the scope of these requests.

2 Decision

The decision in relation to the document in the possession of the Department which falls within the scope of these requests is to release one document in part with deletions.

3 Reasons for Decision

Detailed reasons for my decision are set out below. My findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

3.1 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.

The Department notified each of the FOI applicant's 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 parts of document 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 document, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act.

The remainder of the document has been considered for release to you as it is relevant to your request.

3.2 Section 33 of the FOI Act – Documents affecting National Security, Defence or International Relations

Section 33(a)(i) 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 security of the Commonwealth.

For the reasons set out below, I consider that there are real and substantial grounds for expecting that the disclosure of parts of the document marked '33(a)(i)' would cause damage to the security of the Commonwealth.

Security

'Security' is a concept with a fluctuating content which can depend upon the circumstances as they exist from time to time.¹ 'Security of the Commonwealth' is defined in section 4(5) of the FOI Act as follows

- (5) *Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:*
 - (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and ...*

I also consider that the definition of 'security' in the *Australian Security and Intelligence Organisation Act 1979* is relevant.² That Act defines 'security' as:

- (a) *The protection of, and of the people of, the Commonwealth and the several States and Territories from:*
 - (i) *Espionage*
 - (ii) *Sabotage*
 - (iii) *Politically motivated violence*
 - (iv) *Promotion of communal violence*
 - (v) *Attacks on Australia's defence system; or*
 - (vi) *Acts of foreign interference;**Whether directed from, or committed within, Australia or not; and*
- (aa) *the protection of Australia's territorial and border integrity from serious threats; and*
- (b) *The carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).*

Having regard to the above and the content marked as 's33(a)(i)' in the document, I am satisfied that this content has the quality of being information that goes to the 'Security of the Commonwealth'. As such I have decided that the information marked 's33(a)(i)' in the document(s) is exempt from disclosure under section 33(a)(i) of the FOI Act.

¹ *Church of Scientology v Woodward* (1982) 154 CLR 25 at [19].

² See *Staats and National Archives of Australia* [2010] AATA 531 at [99].

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 am satisfied that the information marked 's33(a)(iii)' in the document would, or could reasonably be expected to cause damage to the Australian Government's international relations.

As such I have decided that the information marked 's33(a)(iii)' is exempt from disclosure under section 33(a)(iii) of the FOI Act.

3.3 Section 34 – Cabinet documents

Section 34(3) provides that a document is exempt from disclosure to the extent that disclosure would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed. Deliberation has been interpreted as active debate in Parliament or its weighing up of alternatives, with a view to reaching a decision on a matter.

The Department of the Prime Minister has been consulted in this regard, and has confirmed that the information marked 's34' in the document would, if disclosed, involve the disclosure of deliberations of the Cabinet.

As such, I have decided that the parts of the document marked 's34' are exempt from disclosure under section 34(3) of the FOI Act.

3.4 Section 47C of the FOI Act – Deliberative Processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose 'deliberative matter'. Deliberative matter includes opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the deliberative processes of an agency. 'Deliberative processes' have previously been described as 'the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.'

The document, being an Incoming Minister Brief (IMB) 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 and the Home Affairs Portfolio. The IMB includes:

- advice on the Minister's role and responsibilities, the Department's support to the Minister and key challenges and priorities in the portfolio
- advice on policy commitments of the Government, the issues to be considered and the steps to be taken in implementing those policy commitments

- advice on particular topics and themes in the Home Affairs Portfolio, including strategic directions, budget implications and risks and sensitivities; and
- advice on urgent and priority matters in the Home Affairs Portfolio.

In *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 (14 December 2015) (**Dreyfus**), the purpose of an Incoming Government Brief (IGB) was described as follows:

- *Once the result of an election is known, the Minister takes almost immediate responsibility for his or her portfolios.*
- *A department's contribution to continuity of government is particularly important when there is a change of government or a change of Minister.*
- *Trust and confidence by the Minister in the agency is essential. An IGB is critical in developing the necessary relationship and must be comprehensive and considered in providing analysis and understanding of the newly elected government's objectives, and advice on how these objectives might best be implemented, or giving candid advice about obstacles inhibiting those proposals.*
- *An IGB performs an essential and time critical task of comprehensively informing the incoming government, through the Minister, of the issues facing the portfolio and the key questions of the day, as well providing a foundation for forming views about the strategic direction of the portfolio's responsibilities. It is in this way that the department or agency assists the Minister to transition quickly into the role and ensures that public administration continues smoothly after a change of government or Minister.*
- *Incoming Ministers will often need to rely heavily on the advice in an IGB in the early days of their ministry, so the advice needs to be absolutely frank about the issues.*
- *The understanding that the content of an IGB is confidential is important in the ongoing relationship of trust between the Minister and the department.*

The nature and purpose of any IMB or IGB forms an essential task of assisting in bringing a new Minister "up to speed" quickly³. An incoming Minister would rely heavily on the advice provided by a Department in the early days of their ministry. As a result, the advice provided to that incoming Minister needs to be honest and frank, about the functions, key challenges and issues, that the new Minister is required to be aware of.

The disclosure of deliberative material contained within the document would affect the capacity for the Department to build a relationship of trust and confidence with an incoming Minister. Whilst the passage of time means that the Department may now have developed such a relationship with its Minister, I am satisfied that disclosure of the deliberative content in the document would affect the Department's ability to build a similar relationship with an incoming Minister in the future.

³ *Dreyfus* – paragraph 102

A likely consequence of disclosure of the conditionally exempt information would be that future Incoming Minister's Briefs would be less comprehensive. A precedent of disclosure of the information intended to be confidential between a Department and its Minister would result in a more cautious approach to the level of detail and frankness included in an IMB or IGB. This would inhibit the purpose of the IMB or IGB and would be to the detriment of the capacity of such a Brief fulfilling its intended function.

Any IMB or IGB is a unique form of document, as they are prepared as a confidential document intended only for the audience of the incoming Minister.

I note that in *Dreyfus*, it was held that:

*"it is not a question of simply inhibiting frankness and candour but of limiting the input to an IGB. ... It is important that those preparing the deliberative content of IGBs continue to understand that it may be not only frankly but also fully and in the knowledge that it is confidential to the intended recipient."*⁴

*"These factors were relevant when the IGB was being prepared and remain relevant today"*⁵

I am satisfied that there is a need to maintain confidentiality over deliberative material contained in the IMB to ensure that the content of any future Incoming Ministerial or Government Brief is prepared with the necessary frankness, candour and completeness of opinion, advice or recommendation required for such a brief. The disclosure of such material would have an impact on the preparation of future IMBs and IGBs, if access to the IMB subject to this request were to be granted.

I am satisfied that the purely factual material, so far as it can be distinguished from the deliberative material, has been considered for release to you. The information does not otherwise fall within any of the exclusions in subsections 47C(2) and (3) of the FOI Act.

I have decided that the information is conditionally exempt under section 47C of the FOI Act. Access to a conditionally exempt document must generally be given unless it would be contrary to the public interest to do so. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in that regard below

3.5 Section 47E of the FOI Act – Operations of Agencies

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.

I am satisfied that the disclosure of parts of document marked 's47E(d)' would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

⁴ *Dreyfus* - Paragraph 103

⁵ *Dreyfus* - Paragraph 107

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 law enforcement partners, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

Accordingly, I have decided that the documents are conditionally exempt under section 47E(d) 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.

3.6 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*).

I consider that disclosure of the information marked 's47F' in the documents would disclose personal information that related to and has the potential of identifying third parties.

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 s.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.*

The information relating to the third parties is not well known and would only be known to a limited group of people with a business need to know. 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. This information is not available from publicly accessible sources.

I do not consider that the information relating specifically to the third parties would be relevant to the broader scope of your request, as you are seeking access to the Incoming Minister's Brief, rather than information which wholly relates to other individuals.

I am satisfied that the disclosure of the information within the documents 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.

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

As I have decided that parts of the document are conditionally exempt, I am now required to consider whether access to the conditionally exempt information would be contrary to the public interest (section 11A of the FOI Act).

A part of a document which is conditionally exempt must also meet the public interest test in section 11A(5) before an exemption may be claimed in respect of that part.

In summary, the test is whether access to the conditionally exempt part of the document would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
- (b) inform debate on a matter of public importance;
- (c) promote effective oversight of public expenditure;
- (d) allow a person to access his or her own personal information.

Having regard to the above:

- I am satisfied that access to the document would promote the objects of the FOI Act.
- I consider that the subject matter of the document does not seem to have the character of 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 limited insights into public expenditure will be provided through examination of the document.
- I am satisfied that you do not require access to the document 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 document:

Section 47C

- Disclosure of material identified as deliberative could reasonably be expected to prejudice the ability of Departments to provide full and frank advice to incoming Ministers.

- I consider that there is a public interest that the briefing process between agency Department and its incoming Minister is not hindered. I am of the view that a precedent of public disclosure of advice given as a part of those confidential briefing processes would result in such concerns existing, which may then hinder future deliberations and decision making processes for the Department and the Government as a whole.
- I consider that the public interest in protecting the process of providing free and frank advice, opinions and recommendations in relation to the functions of the Department and the Portfolio more broadly to an incoming Minister would, on balance, carry more weight, than the public interest that might exist in disclosing the those actual deliberations.
- I am satisfied that disclosure of the conditionally exempt information would be contrary to the public interest, in that it would disclose deliberative matter, noting that the purpose of an Incoming Minister's Brief is to provide frank and complete advice to a new Minister "*at a critical juncture in the system of responsible parliamentary government*"⁶.
- I consider that any perceived benefit to the public from the disclosure of the information would be outweighed by the benefit to the public of maintaining the confidentiality of that information, and refusing access to it.

Section 47E(d)

- Disclosure of the material identified as operationally sensitive could reasonably be expected to prejudice operational activities of the Department and, as a result, 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 operational activities 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.

Section 47F

- Disclosure of the personal information contained in the IMB 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.

⁶ *Dreyfus* - paragraph 117

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.

4 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.

5 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>.

6 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.

7 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