



9 April 2019

**In reply please quote:**

FOI Request: FA 18/11/00300

File Number: ADF2018/222715

Dear [REDACTED]

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

On 5 November 2018, the Department of Home Affairs (the Department) received a request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

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

**1 Scope of request**

You have requested access to the following documents:

*Briefings (emails, letters, advice, written correspondence) regarding the impact that sending refugees and asylum seekers on Nauru to New Zealand as part of a resettlement deal would have on the people smuggling trade and unauthorised maritime voyages to Australia.*

**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 FOI Act
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access

#### 4 Documents in scope of request

The Department has identified 13 documents as falling within the scope of your request. These documents were in the possession of the Department on 5 November 2018 when your request was received.

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

#### 5 Decision

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

- Release seven documents in part with deletions
- Exempt six documents in full from disclosure

#### 6 Reasons for Decision

Detailed reasons for my decision are set out below.

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

##### 6.1 Section 22 of the FOI Act

###### *- irrelevant to request*

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

On 7 November 2018, 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.

You have requested briefings regarding the impact that sending refugees and asylum seekers on Nauru to New Zealand as part of a resettlement deal would have on the people smuggling trade and unauthorised maritime voyages to Australia. The documents captured by your request contain commentary and advice regarding matters outside your request, and this broader information is not relevant to your request.

I have therefore decided that parts of documents marked 's22(1)(a)(ii)', both within the documents and in the schedule of documents, 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.

***– deletion of exempt material***

I have decided to prepare an edited copy of the documents removing information that is exempt from disclosure. The grounds upon which the edited copies of these documents have been prepared are set out in the Schedule of Documents.

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

Section 33(a)(iii) of the FOI Act permits exemption of a document if disclosure of the document would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.

The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence.

I consider that the release of the information marked 's33(a)(iii)' in the document(s) would, or could reasonably be expected to cause damage to the Australian Government's international relations and could reasonably be expected to inhibit future negotiations between the Australian Government and a foreign government.

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

**6.3 Section 34 – Cabinet documents**

Section 34(1)(c) of the FOI Act permits exemption of a document if it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies.

At the time documents 7, 8 and 9 were created, they were brought into existence for the dominant purpose of briefing the Minister for Home Affairs on a submission to Cabinet.

As discussed above, parts of documents 7, 8 and 9 are not relevant to your request. I consider that the parts of these documents that are relevant to your request are exempt in full under s34(1)(c) as they were created for the dominant purpose of briefing a Minister on a document to which s34(1)(a) applies.

I have sought advice from the Department of Prime Minister and Cabinet and note the advice contained within the Cabinet Handbook. The paragraphs below detail considerations to be taken into account when handling cabinet documents, with particular focus on the 'Confidentiality' aspect of all Cabinet proceedings and documentation.

*28. All attendees are responsible for ensuring that what is considered by the Cabinet, when and how it does so, and the decision Cabinet reaches on particular matters remains confidential. Ministers and officials should not disclose proposals likely to*



*be considered at forthcoming meetings outside Cabinet-approved consultation procedures. Nor should they disclose the nature or content of the discussions or the views of individual ministers expressed at the meeting itself.*

*29. Obviously general information about what has been decided by the Cabinet is, on occasions, released into the public domain by persons authorised to do so. But this does not detract from the importance of allowing the Prime Minister or the Cabinet itself to decide what is disclosed publicly about any decision they have reached.*

*30. Effective Cabinet confidentiality requires the protection of Cabinet deliberations not only at the time an issue was current but also in the future. Ministers in successive governments have relied on the convention that their views, either written or spoken will remain confidential well into the future. It is only with the confidence in this convention that ministers can enjoy freedom to explore all policy options without the need to temper their comments or views.*

A strong Cabinet system is fundamental to well-informed decision making and policy development by the Government. The convention of the collective responsibility of Ministers for government decisions is central to the Cabinet system of Government. Cabinet is a forum in which Ministers, while working towards a collective position, are able to discuss proposals, options and views with complete freedom. This requires that Cabinet deliberations are treated confidentially.

The documents contain information which, if disclosed, would reveal Cabinet deliberations and information that has not, to date, been officially disclosed.

Accordingly, I am satisfied that the documents are exempt under section 34(1)(c).

#### **6.4 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 consider that the disclosure of the parts of documents 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.

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.

## **6.5 The public interest – section 11A of the FOI Act**

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

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

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

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

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

Having regard to the above:

- I am satisfied that access to the documents would promote the objects of the FOI Act.
- I consider that the subject matter of the documents does have the character of public importance and that there may be broad public interest in the documents.
- 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 parts of the documents that are conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to prejudice law enforcement functions 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 methods and procedures are 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.



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).



**Authorised Decision Maker**  
**Department of Home Affairs**

# ATTACHMENT A

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

FOI request: FA 18/11/00300

File Number: ADF2018/222715

No.	Date of document	No. of pages	Description	Decision on release	
1.	-	2	First Assistant Secretary (FAS) Brief	Relevant information exempt in full	s.33(a)(iii)
2.	August 2018	38	Bilateral Meeting Briefs	Release in part	s.22(1)(a)(ii) s.33(a)(iii)
3.	August 2018	118	Secretary Briefing	Release in part	s.22(1)(a)(ii) s.33(a)(iii)
4.	September 2018	53	Secretary Briefing	Release in part	s.22(1)(a)(ii) s.33(a)(iii) s.47E(d)
5.	08.10.2018	3	Meeting Brief	Release in part	s.22(1)(a)(ii) s.33(a)(iii)
6.	16.10.2018	6	Ministerial Submission MS18-009286	Relevant information exempt in full	s.22(1)(a)(ii) s.47E(d)
7.	October 2018	4	NSC Talking Points	Relevant information exempt in full	s.22(1)(a)(ii) s.34(1)(c)
8.	October 2018	5	SCNS Talking Points	Relevant information exempt in full	s.22(1)(a)(ii) s.34(1)(c)
9.	30.10.2018	2	NSC Talking Points	Relevant information exempt in full	s.22(1)(a)(ii) s.34(1)(c)
10.	17.10.2018	2	Email Nauru Resettlements: Implications for OSB	Release in part	s.22(1)(a)(ii) s.47E(d)



No.	Date of document	No. of pages	Description	Decision on release	
11.	01.11.2018	7	Email Opposition Briefing; OSB briefing	Relevant information exempt in full	s.22(1)(a)(ii) s.47E(d)
12.	5.11.2018	4	Operation Sovereign Borders Briefing	Relevant information exempt in full	s.22(1)(a)(ii) s.47E(d)
13.	08.11.2018	6	Meeting Brief	Release in part	s.22(1)(a)(ii) s.33(a)(iii)