



17 April 2019



In reply please quote:

FOI Request: FA 19/01/00145 and FA 19/01/00417
File Number: OBJ2019/3116

Dear 

Freedom of Information (FOI) request - Access Decision

On 4 January 2019 and 11 January 2019 respectively, the Department of Home Affairs (the Department) received two requests for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of requests

On 4 January 2019, you requested access to the following documents:

Questions asked at interviews conducted with 17 Vietnamese nationals, who were returned to Vietnam in August or September after arriving in North Queensland by boat, to determine whether Australia's non-refoulement obligations were engaged.

On 11 January 2019, you requested access to the following documents:

Transcripts of interviews conducted with 17 Vietnamese nationals, who were returned to Vietnam in August or September after arriving in North Queensland by boat, to determine whether Australia's non-refoulement obligations were engaged.

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

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)

4 Documents in scope of request

The Department has identified 15 documents as falling within the scope of both of your requests. These documents were in the possession of the Department on 4 January 2019 when your request was received.

I note that the transcripts of the interviews conducted also include the questions asked at the interviews, and as such, the same set of documents is captured by each of your requests.

5 Decision

The decision in relation to the documents in the possession of the Department which fall within the scope of both of your requests is to release 15 documents in part with deletions.

6 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.

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 8 January 2019, the Department advised you that its policy is to exclude the personal details of officers not in the Senior Executive Service (SES), as well as the mobile and work telephone numbers of SES staff, contained in documents that fall within scope of an FOI request.

When submitting your second request on 11 January 2019, you indicated that you were happy for personal information to be redacted. As such, I have regarded any personally identifying information within the documents as not relevant to your request.

I have therefore prepared an edited copy of the documents, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act. The remainder of the documents have been considered for release to you as they are relevant to your request.

6.2 Section 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 a document or part of a document to be exempt under s 33(a)(i), I must be satisfied that, on the balance of probabilities, disclosure would, or could reasonably be expected to, 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 consider that the definition of 'security' in the *Australian Security and Intelligence Organisation Act 1979* is also relevant. That Act includes in its definition of 'security':

- (aa) *the protection of Australia's territorial and border integrity from serious threats; ...*

This paragraph was inserted by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) (Schedule 2). The Explanatory Memorandum for the *Anti-People Smuggling and Other Measures Bill 2010* (Cth), states that '*serious threats to Australia's territorial and border integrity*' include those posed by people smuggling activities.

Operation Sovereign Borders

Operation Sovereign Borders (OSB) is a military-led, border security initiative aimed at combating maritime people smuggling and protecting Australia's borders. The Joint Agency Task Force (JATF) was established to implement the policy and has ongoing responsibility for the coordination of counter people smuggling efforts under OSB. OSB brought together 16 agencies under the JATF covering operational, law enforcement, intelligence and policy functions, which includes the Department of Home Affairs.

OSB was established on 18 September 2013 and has successfully reduced the number of illegal maritime ventures to Australia and prevented loss of life at sea. Australia remains committed to ending the criminal activity of people smuggling. It aims to ensure that Australia has effective control of the circumstances in which people enter Australia.

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

I consider that the disclosure of the information that I regard as exempt under section 33(a)(i) could cause damage to the security of the Commonwealth by compromising operational functions of the Department and as a consequence, increasing the risk to contemporary national security.

I consider that there is a strong public interest in preventing the potential risk to human life associated with people smuggling and in maintaining robust border protection measures to protect against threats to Australia's national security.

I consider that there are real and substantial grounds for expecting that the disclosure of parts of the documents would cause damage to the security of the Commonwealth.

As such I have decided that parts of the documents are exempt from disclosure under section 33(a)(i) of the FOI Act.

6.3 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.

As outlined above, 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 in border protection measures would result in the need for this Department, and potentially its border protection partners, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

Accordingly, I have decided that parts of 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.

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

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

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

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

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

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

Having regard to the above:

- I am satisfied that access to the documents would promote the objects of the FOI Act.
- I consider that the subject matter of the documents does not seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.
- I consider that no insights into public expenditure will be provided through examination of the documents.
- I am satisfied that you do not require access to the documents in order to access your own personal information.

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

- 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 border security functions and, as a result, the ability of the Department to protect Australia's national security. I consider there to be a strong public interest in ensuring that the ability of the Department to conduct its border security operations 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.

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

OR

By mail to:
Freedom of Information Section
Department of Home Affairs
PO Box 25
BELCONNEN ACT 2617

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

9 Making a Complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Home Affairs as the relevant agency.

10 Contacting the FOI Section

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@homeaffairs.gov.au.



Authorised Decision Maker
Department of Home Affairs