



‘AV’ and Department of Foreign Affairs and Trade [2013] AICmr 91 (20 December 2013)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant:	‘AV’
Respondent:	Department of Foreign Affairs and Trade
Decision date:	20 December 2013
Application number:	MR11/00357
Catchwords:	Freedom of information — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of an agency — Whether documents conditionally exempt from release — Whether disclosure is contrary to the public interest — (CTH) <i>Freedom of Information Act 1982</i> ss 22, 47E(d)

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Summary

1. I set aside the access refusal decision of the Department of Foreign Affairs and Trade (the **Department**) of 25 August 2011 and substitute my decision, under ss 11A(5) and 22 of the *Freedom of Information Act 1982* (the **FOI Act**), refusing access to one of the documents sought and granting access to another, modified by deletions.

Background

2. The applicant is an Iranian Citizen. In 2010, she was offered a scholarship to research and study for the degree of Doctor of Philosophy in Engineering at an Australian university.
3. On 17 April 2010, the applicant applied for a student visa in order to take up the scholarship offer and undertake her doctoral research. In order to be granted the student visa, the applicant was required to satisfy Public Interest Criterion (**PIC**) 4003(b) in Part 1 of Schedule 4 to the *Migration Regulations 1994*. At the time, PIC 4003(b) provided:

The applicant is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia:

...

(b) may be directly or indirectly associated with the proliferation of weapons of mass destruction.
4. On 12 November 2010, Mr Allan McKinnon, First Assistant Secretary, International Security Division in the Department, determined, in accordance with PIC 4003(b), that the applicant was a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction (**WMDs**).¹
5. On 18 November 2010, the applicant was advised by the Department of Immigration and Citizenship² (**DIAC**) that her student visa application had been refused because she had failed to satisfy PIC 4003(b).
6. On 1 April 2011, the applicant wrote to the then Minister for Foreign Affairs, the Hon Kevin Rudd MP, seeking a copy of Mr McKinnon's determination and the reasons for the determination and requesting that Mr Rudd review the determination. Mr Rudd referred the matter to Mr McKinnon for his reconsideration.

¹ On 24 October 2010, the then Minister for Foreign Affairs had authorised the person holding, occupying or performing the duties of First Assistant Secretary, International Security Division in the Department, to exercise the powers and functions specified in PIC 4003(b). Mr McKinnon made the determination in accordance with that authorisation.

² On 18 September 2013, the Department of Immigration and Citizenship was renamed the Department of Immigration and Border Protection.

7. Also on 1 April, the applicant applied to the Department for access under the FOI Act to:

All documents relating to the refusal of [the applicant's] student visa application on 18 November 2010 as she failed to meet the Public Interest Criteria 4003(b) under the Migration Regulations. These documents are to include communications between [the Department] and any other agency or Department of Australia, including interdepartmental committees or groups and DIAC or any agency of another country held on [the Department's] files.

8. On 6 September 2011, Mr McKinnon affirmed his previous determination that the applicant was a person whose presence in Australia may be directly or indirectly associated with the proliferation of WMDs. On the same day, DIAC affirmed its decision to refuse the applicant's student visa.
9. As a result of these determinations, the applicant lost her PhD scholarship.
10. On 7 July 2011, the Department wrote to the applicant providing a schedule of seven documents that it said fell within the scope of her FOI request. The Department decided to release two documents in full (documents 1 and 6) and provided the applicant with edited copies of five documents (documents 2, 3, 4, 5 and 7). In making its decision, the Department relied upon the operations of agencies exemption (s 47E) and the personal privacy exemption (s 47F).
11. On 3 August 2011, the applicant sought internal review of the Department's decision. On 25 August 2011, the Department affirmed its original decision.
12. On 17 October 2011, the applicant sought IC review of the Department's decision under s 54L of the FOI Act.³

Decision under review

13. The decision under review is the internal review decision of the Department on 25 August 2011 to refuse the applicant's request.

Documents 3, 4 and 7

14. In submissions to the Office of the Australian Information Commissioner (the **OAIC**), the applicant advised that she was not seeking information about the name or location of offices of the Department, DIAC or any other agency; email, telephone, postal or other contact details; or information about other visa applicants.

³ The applicant also sought IC review of a decision of DIAC dated 23 August 2011 in relation to an FOI request made to that department in relation to the same matters. That IC review will be dealt with separately.

15. I have examined unedited copies of documents 3, 4, and 7. The information that the Department deleted from the copies of those documents that it provided to the applicant is:

- personal information of other visa applicants, and
- departmental email addresses.

As the applicant is not seeking this information, it is not relevant to her (revised) request. I do not need to further consider these documents in this IC review.

Certain operations of agencies exemption (s 47E)

16. The key issue in this review is whether—as the Department contends—the disclosure of the two remaining documents (documents 2 and 5) would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department; and, if so, whether disclosure would be contrary to the public interest.

17. Section 47E of the FOI Act relevantly provides:

Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

18. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that:

An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect and the reasons behind the identification of those particulars should be articulated during the decision making process. Those particulars should also indicate whether the effect could reasonably be expected to occur.⁴

19. Document 2 is a minute from the Department to the then Minister for Foreign Affairs seeking the Minister's agreement to delegate his authority under the Migration Regulations in relation to determinations under PIC 4003(b). Document 5 is an internal Departmental minute about the determination that the applicant's presence in Australia would pose a significant proliferation risk.

⁴ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [6.94].

20. In its decision, the Department said that the material it had exempted under s 47E(d) describes the procedures and analyses undertaken by the Department and other Commonwealth agencies to make a determination under PIC 4003(b). The Department advised that the disclosure of this information could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of those operations because it would:
- reveal material used by the Department to ensure the effective implementation of Australia's counter proliferation policy, thereby diminishing the ability of the Department to implement Australia's non-proliferation obligations, and
 - open the visa screening program and the determination of whether an applicant presents a proliferation risk to evasion by detailing the assessment process.
21. In submissions to the OAIC, the applicant contended that disclosure of material about the process for determining whether an applicant is a proliferation risk would not have a substantial adverse effect on the Department, and, indeed, would increase the public's confidence in WMD determinations.
22. I have examined unedited copies of documents 2 and 5. I am satisfied that much of the information exempted by the Department would reveal the processes and procedures undertaken by Department and other Commonwealth agencies, and the factors considered, in assessing whether an applicant poses a proliferation risk. I consider that the disclosure of this information could reasonably be expected to have a substantial adverse effect on the ability of the Department and other agencies to undertake an assessment of the proliferation risk posed by an individual, and to implement Australia's non-proliferation obligations.
23. However, I am not satisfied that disclosure of types of WMD technologies, the number of individuals assessed under PIC 4003(b), or the number of adverse determinations made would, or could reasonably be expected to, have that substantial adverse effect.
24. The types of technologies used in WMDs, for example chemical weapons, are generally well known and the disclosure of this information could not reasonably be expected to have the adverse effects claimed by the Department.
25. Further, whilst I consider the nationalities of those individuals who have been the subject of an adverse determination to be conditionally exempt under s 47E, I do not think that the number of assessments and adverse determinations on its own could reasonably be expected to have a substantial adverse effect on the Department's ability to undertake an assessment of an individual's proliferation risk.

Findings

26. Document 2 is conditionally exempt under s 47E(d) in relation to the following information:

- page 2:
 - paragraph 3—the second and third sentences, and the words within parentheses in the fifth sentence
 - paragraph 5—the last four words within parentheses in the fourth sentence, and
 - the information that the Department redacted from the ‘Consultation’ footnote
- page 4: the third sentence in paragraph 6, and
- page 6.

For completeness, this means that the following information that the Department redacted from document 2 is not conditionally exempt under s 47E(d):

- page 2:
 - paragraph 3—the fourth and fifth sentences, excluding the information within parentheses
 - paragraph 7—the second sentence
- page 4
 - paragraph 6—the second sentence.

27. Document 5 is conditionally exempt under s 47E(d) in relation to the same information that the Department deleted from the copy that it provided to the applicant.

The public interest test (s 11A(5))

28. I have found that documents 2 and 5 are conditionally exempt under s 47E of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’. As the Guidelines explain, ‘[t]he pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure’.⁵

⁵ *Guidelines* [6.12].

29. Of the factors favouring disclosure set out in s 11B(3), one is relevant to this IC review: promoting the objects of the FOI Act. The Guidelines also include a non-exhaustive list of further factors that favour disclosure.⁶ Two of those factors favour disclosure in this IC review: informing the community of the Government's operations and revealing contextual information that informed a government decision.
30. The Guidelines also contain a non-exhaustive list of factors against disclosure.⁷ One of those factors is relevant to this review: disclosure could reasonably be expected to prejudice national security by impeding the Department's ability to assess the proliferation risk posed by an individual and meet its non-proliferation obligations. Furthermore, disclosure could assist individuals to frustrate the purpose of PIC 4003(b) by evading assessment.
31. In balancing these factors—for and against disclosure—I give the greatest weight in this IC review to the factors against disclosure. I consider that the risk to national security and the risk of frustrating the purpose of PIC 4003(b) significantly outweigh the public interest in the disclosure of the information.

Findings

32. Giving the applicant access to the documents the subject of this IC review would, on balance, be contrary to the public interest.

Decision

33. Under s 55K of the FOI Act, I set aside the Department's decision of 25 August 2011 and decide, in substitution for that decision, that:
 - document 2 is exempt under s 47E(d), however a copy should be provided to the applicant, edited under s 22 by deleting:
 - from page 2:
 - paragraph 3—the second and third sentences, and the words within parentheses in the fifth sentence
 - paragraph 5—the last four words within parentheses in the fourth sentence, and
 - the information that the Department redacted from the 'Consultation' footnote
 - from page 4: the third sentence in paragraph 6, and
 - page 6

⁶ *Guidelines* [6.25].

⁷ *Guidelines* [6.29].

- document 5 is exempt under s 47E(d), however a copy should be provided to the applicant, edited under s 22 by deleting the same material as the Department deleted from it, and
- the information that the Department edited from documents 3, 4 and 7 is irrelevant to the applicant's request (as revised during this IC review); copies should be provided to the applicant, edited under s 22 by deleting the same material as the Department deleted from them.

James Popple
Freedom of Information Commissioner
20 December 2013

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.