



06 June 2017

Josh Taylor
BY EMAIL: jtaylor@crikey.com.au

In reply please quote:

FOI Request: FA 16/04/01349
File Number: ADF2016/16583

Dear Mr Taylor

I refer to your email dated 18 April 2016 in which you request access to documents held by the Department of Immigration and Border Protection (the Department) under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of Request

You have requested access to the following documents held by the Department:

'any footage recorded by Border Force during its trial of GoPro cameras.'

This letter is to notify you of the Department's decision on access to the documents subject to your request.

2 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions to in respect of requests to access documents or to amend or annotate Departmental records.

3 Relevant material

In reaching my decision, I have considered the following:

- the terms of your request;
- the documents relevant to your request;
- the FOI Act;
- Guidelines published by the Office of the Australian Information Commissioner under s 93A of the FOI Act, and
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access.

4 Documents in scope of request

The former Australian Customs and Border Protection Service (ACBPS) issued a small number of Go Pro camera units, referred to as Body Worn Video (BWV) units, for specific situations relating to boarding vessels at sea. Additionally, a small number of Go Pro camera units were acquired to evaluate the capability and to examine associated legislative, technical, training and other issues.

The Department has identified the following documents as being relevant to the scope of your request:

- five documents, being video footage recorded by ACBPS officers during a Safety of Life at Sea (SOLAS) incident in 2013 (*vessel footage*), and
- four documents, being video footage recorded by ABF Officers during a training exercise at the Brisbane Immigration Transit Accommodation in December 2015 (*ITA footage*).

5 Decision on access

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

- Release one document in full, and
- Exempt eight documents in full from disclosure.

The release of one piece of footage of ACBPS officers during a SOLAS incident clearly shows the challenging environment that officers encounter during maritime operations.

The reasons for the decision refuse access to some of the footage are set out below.

6 Reasons for Decision

I am satisfied that I have been provided with all the documents that are relevant to your request. My reasoning in relation to the application of each section to particular documents is set out below.

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

Section 33(a)(i) of the FOI Act provides that a document is an exempt document if disclosure of the document 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 ...*

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

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).*

Paragraph (aa) is particularly on point. It 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' (at 2-3).

This Department is part of a whole-of-government response to border protection issues that was established on 18 September 2013 through the Operation Sovereign Borders Joint Agency Task Force. Operation Sovereign Borders (OSB) is the name given to the military-led, border security operation supported and assisted by a wide range of federal government agencies.

The Administrative Appeals Tribunal³ has found that the definition of '*security of the Commonwealth*' contained in the FOI Act is sufficiently comprehensive to include border patrol operations where those operations are designed to protect the integrity of Australia's borders. Those operations include the activities of OSB.

Four pieces of the vessel footage contain images of activities undertaken during border patrol operations. Whilst this footage was recorded prior to the commencement of OSB, the tactics and operational procedures disclosed in this footage are relevant to maritime operations today. This pertains to the national security of Australia. The operations of the assets captured on the video footage form part of the maintenance of the security of the Commonwealth. Maintaining the integrity of Australia's physical borders is an OSB activity. Should OSB operations be compromised, a real threat to Australia's national security would result.

Australia's national interests are threatened by any unauthorised arrival of people and the Australian Government has responsibility for the lawful and orderly entry of people into Australia, along with ensuring that only those foreign nationals who are appropriately authorised are allowed to enter and remain. If Australia cannot effectively manage who enters the country, and the circumstances and conditions of such entry, the security of the Commonwealth is compromised.

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

³ Farrell; Secretary, Department of Immigration and Border Protection (Freedom of information) [2017] AATA 409 (31 March 2017)

I consider the particular damage to the security of the Commonwealth to be as follows:

- (a) This video footage was recorded as part of a SOLAS operational activity and would disclose operational details that would provide insight into the manner in which vessels involved in national security operations undertake those functions, including tactics and operational procedures.
- (b) In the event that the operational information contained within this footage were disclosed, border protection authorities, including this Department, would be forced to revise operational methodology to minimise the harm caused by those disclosed.
- (c) Even if the insight afforded is considered to be slight, any reduction in the efficiency or effectiveness of current operational methods is likely to have significant consequences given the ever-present challenge of managing such an enormous jurisdiction with finite resources. Current tactics and operational procedures are set with a view to achieving maximum security outcomes with available resources. Any changes required by a need to counter the advantage afforded to vessels or persons engaged in illegal maritime activities necessarily represents a compromise to the operational effectiveness of those tactics and procedures.

I have decided that the disclosure of the information contained within the four pieces of vessel footage would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

As such I have decided that those four pieces of vessel footage are exempt under section 33(a)(i) of the FOI Act.

8 Section 37 of the FOI Act - Documents Affecting Enforcement of Law and Protection of Public Safety

Section 37(2)(b) of the FOI Act provides that documents are exempt from disclosure if its disclosure would, or could reasonably be expected to disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law the disclosure of which would or could reasonably likely to, prejudice the effectiveness of those methods or procedures.

I consider that four pieces of ITA footage would, or could reasonably be expected to disclose lawful methods or procedures for preventing or detecting breaches or evasions of the law and that disclosure would, or would reasonably likely to, prejudice the effectiveness of those methods or procedures.

It is noted that the Department's role includes managing the security and integrity of Australia's borders. The Department leads the management of risks to Australia's border in close collaboration with other government agencies, including State and Federal law enforcement agencies. As such, the Department's role includes law enforcement functions.

The disclosure of information within the ITA footage would be reasonably likely to impact on ongoing law enforcement methodology. The release of this information would prejudice the effectiveness of those methods or procedures, assisting endeavours to evade them and thereby reducing the ability of the Department and other law enforcement agencies to protect the borders of Australia.

I have decided that this information is exempt from disclosure under Section 37(2)(b) of the FOI Act.

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

Substantial adverse effect on the management or assessment of personnel

Section 47E(c) of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Department.

The information contained in both the vessel footage and the ITA footage includes clear identifiable images of then ACPBS officers and current Border Force officers, including, in some instances, clearly visible name badges. I note that this information is not otherwise publicly available, no public purpose would be achieved through the release of their images, the release of this information would cause stress to the officers concerned and there would be a real risk of harassment to those officers if their information were to be released.

The Department has a primary duty of care to ensure, so far as is reasonably practical, the health and safety of its officers under the *Work Health and Safety Act 2011* (WHS Act). The Department must ensure, as far as is reasonably practicable, that the health and safety of other persons is also not put at risk from work carried out as part of the conduct of the Department.

The officers captured in the video footage work on the front-line in maintaining the security of Australia's borders. It is well known that some areas of the Department's work is controversial and divisive, and in some circles, an unpopular aspect of government policy. I consider that the work undertaken by these officers is unique and that the risk of harassment of these officers following any disclosure of their identifiable information is high.

Departmental officers working in these environments have received real threats to the security of themselves and their families following the disclosure of their personal information. I am satisfied that there is a very real prospect of individuals being subjected to harassment, threats or other adverse action if their images and/or names were publicly disclosed in connection with the subject matter contained within the video footage.

I am of the view that the disclosure of the images and names of officers could impact on the ability of the Department to comply with its health and safety obligations in regard to its officers. This this would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Department,

As such, I consider that the disclosure of eight pieces of video footage are conditionally exempt under section 47E(c) 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.

Substantial adverse effect on the proper and efficient conduct of the operations of the Department

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.

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

Any disclosure resulting in the prejudice of the effectiveness of the operations 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.

The disclosure of the vessel footage may be reasonably expected to undermine the tactical advantage that the Department and partner border protection agencies, surveillance and

response assets have over people smuggling ventures by providing operational information about assets engaged in counter-people smuggling operations.

Assets concerned in these operational activities are not only engaged in operations concerning illegal maritime arrivals, but also respond to other maritime security threats such as illegal fishing and resource exploitation, prohibited imports/exports, piracy, violence at sea, as well as the prevention of marine pollution and environmental crime.

I am also of the opinion that disclosing this information, and the resulting change to asset use and assessment methods that would have to occur, would cause those border protection activities to be less efficient.

I am also satisfied that the disclosure of the ITA footage would disclose operational details pertaining to searches of such a facility. The disclosure of information captured by the footage could reasonably be expected to provide information to those who might wish to exploit any weaknesses that may exist within the operational activities of the Department, which would result in a substantial adverse effect on the operations of the Department in an operational environment. Any disclosure resulting in the prejudice of the effectiveness of operational matters such as this would result in the need for the Department, and potentially other partner agencies, to change the operational methods and/or procedures that would be disclosed in this video footage.

As such, I consider that the disclosure of eight pieces of the video footage 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 this footage is 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.

10 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 FOI 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 information contained within four pieces of vessel footage would disclose personal information relating to third parties. This footage contains images of third party private individuals. As such, I am satisfied that the footage would reasonably identify a number of private individuals.

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 third parties who appear within this footage are private individuals whose images have been captured during an operational activity. These members of the public are not generally

known to be associated with the events that occurred on the date in question. This information is not available from publicly accessible sources.

The information that has been captured is available to a limited number of officers within the Department on a strictly need to know basis. The information is held in a classified environment and has strict handling protocols in accordance with the Protected Security Policy Framework. As such, the personal information contained within these documents is not broadly disseminated within the Department.

The Department has a statutory obligation to maintain the personal privacy of individuals. I am of the view that all individuals captured by this footage might reasonably wish to contend that the disclosure of their personal information would be unreasonable. However, the number of individuals captured is extensive, and the ability to identify those individuals, with a view to undertaking a consultation with them, is not reasonably practicable.

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

11 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, in itself, 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.

Disclosure of all aspects of the documents would not provide a person with sufficient information to assess the rigour or efficiencies of internal decision making processes within the Department, promote scrutiny of government decision making or reveal the reasoning for a government decision. I consider these considerations as neutral.

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

- I consider that the disclosure of the parts of the documents that are conditionally exempt under **section 47E(c)** of the FOI Act could reasonably be expected to prejudice management functions relating to the Department's personnel 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 functions in protecting the borders of Australia is not compromised or prejudiced in any way. Any prejudice to the ability of the Department to protect Australia's borders would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.
- It may be regarded that is an arguable public interest in the disclosure of public servants names where those public servants are making decisions affecting members of the public, I consider that it is not in the public interest for the Department's functions to be prejudiced to the extent that it comprises the safety, integrity and well-being of its staff. The officers captured in the footage that falls within the scope of your request are working in the front-line of operational activities and are not making administrative decisions. I therefore consider that, on balance, the disclosure of this information would be contrary to the public interest, and this factor weighs heavily against disclosure.
- I consider that the 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 national security and the ability of the Department and its partner border protection agencies to protect Australia's borders by undermining the effectiveness of maritime border security operations and law enforcement functions;
 - increase the risk of harm or damage to Australian vessels and personnel;
 - encourage illegal activity within the broad Australian Maritime Domain;
 - increase the risk to human life associated with people smuggling;
 - prejudice the ability of the Department to provide its officers with a safe and healthy workplace.
- There is 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 factor weighs heavily against disclosure.
- I consider that the disclosure of the personal information which is conditionally exempt under **section 47F** of the FOI Act could reasonably be expected to prejudice the protection of the personal privacy of a number of private individuals.
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- It is my view that it is firmly in the public interest for the Department to comply with the requirements of the *Privacy Act 1988* and to uphold the rights of individuals to maintain their personal privacy. I consider that this factor weighs heavily 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 is not in the public interest and therefore exempt from disclosure under the FOI Act.

12 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.

13 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:

Freedom of Information Section
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

OR

By email to: foi.reviews@border.gov.au

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 <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

14 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 Immigration and Border Protection as the relevant agency.

15 Contact

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



Suzanne Duffy
Authorised Decision Maker
Department of Immigration and Border Protection