



August 2024

Right to Know

By email: foi+request-11800-84b0b51e@righttoknow.org.au

Dear Tyler,

Re: Freedom of Information Request

I refer to your request received by the Department of Foreign Affairs and Trade (the department) on 30 July 2024, for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

I am writing to provide you with a decision about your request.

I have identified documents relevant to your request. After careful consideration, I have decided to refuse access to the document because the document is exempt in full under the FOI Act.

Request

On 30 July 2024, you sought access under the Act:

Is it possible to provide a copy of this MOU between Australia and Nauru?

'Memorandum of Understanding For Cooperation in the Management of Asylum Seekers and Related Issues'

(This is mentioned in the preamble to the "AGREEMENT BETWEEN AUSTRALIA AND NAURU CONCERNING ADDITIONAL POLICE AND OTHER ASSISTANCE TO NAURU" ([2004] ATS 21), and paragraph 5.4 of this page- https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.aph.gov.au%2FParliamentary_Business%2FCommittees%2FJoint%2FCompleted_Inquiries%2Fjsct%2F12may2004%2Fchapter5%23%3A~%3Atext%3DThe%2520Committee%2520understands%2520that%2520Australia%2Cand%2520development%2520assistance%2520to%2520be&data=05%7C02%7Cfoi%40dfat.gov.au%7C3e45ce64bf634ad5cac708dcb05ab732%7C9b7f23b30e8347a58a40ffa8a6fea536%7C0%7C0%7C638579150872045804%7CUnknown%7CTWFpbGZsb3d8eyJWljojMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Iik1haWwiLCJXVCI6IjMnO%3D%7C0%7C%7C%7C&sdata=VO2%2FJrhZZtpJZiYg5r5gt%2FtBktrAbRtmlygC4RqrfT4%3D&reserved=0)

Reasons

I am an officer authorised under section 23 of the FOI Act to make decisions in relation to FOI requests.

In making my decision I have taken into account the terms of your request, the document found to be within the scope of your request, the FOI Act, and the Australian Information Commissioner's FOI Guidelines issued under section 93A of the FOI Act (FOI Guidelines).

The reasons for my decision and for the application of exemptions under the FOI Act to the document are set out below. Where I refer to sections of the FOI Act, these are available at www.legislation.gov.au. Where I refer to parts of the FOI Guidelines, these are available at www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines.

Damage to international relations (section 33(a)(iii) of the FOI Act)

Under section 33(a)(iii) of the FOI Act, a document is exempt if its disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

The phrase 'international relations' has been interpreted to mean 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 (FOI Guidelines, paragraph 5.39).

This applies to documents, the disclosure of which may diminish the confidence which another country has in Australia as a reliable recipient of confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future (FOI Guidelines, paragraph 5.42).

The expression 'damage' can include intangible damage, including inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency (FOI Guidelines, paragraph 5.25).

I consider the expectation of damage to international relations is reasonable in all the circumstances, having had regard to the nature of the information, the circumstances in which it was communicated, and the nature and extent of the relationship of the damage to international relations which could reasonably occur in the event of disclosure (FOI Guidelines, paragraph 5.40). I consider that the disclosure of the information marked up in the document would be reasonably likely to cause damage to the international relations of the Commonwealth, and that this information is exempt under section 33(a)(iii) of the FOI Act.

The exempt material includes material discussing Australia's engagement with the Republic of Nauru. I find that disclosure of this material would, or could reasonably be expected to, cause damage to Australia's international relations.

Material obtained in confidence (section 33(b) of the FOI Act)

Under section 33(b) of the FOI Act, a document is exempt if disclosure would divulge any matter communicated in confidence to the Australian Government by or on behalf of a foreign government, an authority of a foreign government or an international organisation.

Information is communicated in confidence by or on behalf of another government or international organisation if it was communicated under an express or implied understanding that the communication would be kept confidential (FOI Guidelines, paragraph 5.46).

Confidentiality need not be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communications occurred, including the relationship between the parties and the nature of the information communicated (FOI Guidelines, paragraph 5.48).

I consider that the disclosure of the information marked up in the document was communicated in confidence by a foreign government and is exempt under section 33(b) of the FOI Act.

Substantial adverse effect on an agency's proper and efficient conduct of operations (section 47E(d) of the FOI Act)

Under section 47E(d) of the FOI Act, a document is conditionally exempt if disclosure would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of an agency's operations. FOI Guidelines, paragraph 6.92 specifies that the 'substantial adverse effect' may be an indirect effect.

The documents in scope include content which involves the operation of Australia's immigration programs including its offshore processing centres. The department's functions include coordinating with foreign governments about the operation of Australia's offshore processing centres. In undertaking this role, the department works with other Commonwealth agencies including for security and law enforcement arrangements.

I am satisfied that disclosure of this material within the scope of your request would prejudice the flow of similar information to the department in the future and that the department's inability to obtain similar information in future would, or could reasonably be expected to, have a substantial adverse effect on the department's ability to effectively and efficiently undertake its operational activities.

I have therefore decided that this material is conditionally exempt under section 47E(d) of the FOI Act.

Conditional exemptions - public interest considerations (section 11A(5) of the FOI Act)

As section 47E(d) of the FOI Act is a conditional exemption, I must grant you access to this material unless providing access would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act).

In assessing the public interest, I have considered the FOI Guidelines referred to above and the public interest factors listed in section 11B of the FOI Act as favoring access, including whether granting access to the documents would:

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure.

I have also considered public interest factors against disclosure, including that disclosure may reasonably be expected to:

- prejudice security, law enforcement, public health or public safety;
- could reasonably be expected to prejudice the management function of an agency.

On balance, I am of the view that the public interest is weighted against the disclosure of this material. In forming this view, I have not taken into account any of the irrelevant factors specified in section 11B(4) of the FOI Act.

Review rights

Information about your review rights is set out in the **Attachment** for your reference.

Contact

Should you have any queries regarding this matter please contact the FOI and Privacy Law Section by email foi@dfat.gov.au.

Yours sincerely

Sarah Kirlew
Assistant Secretary
Department of Foreign Affairs and Trade