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Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2024/313

To Tyler

By email: foi+request-11926-9a06ae05@righttoknow.org.au

Dear Tyler,

I refer to your request of 10 September 2024 to the Department of Foreign Affairs and Trade seeking access to documents under the *Freedom of Information Act 1982* (the FOI Act). The Department of the Prime Minister and Cabinet accepted transfer of the request on 24 September 2024.¹

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

Scope of request

You set out your request in the following terms:

'...copy of document recording the Governor-General's approval of the Articles of Agreement for the Asian Infrastructure Investment Bank, which Australia signed and ratified in 2015; and copy of accompanying documents submitted to the Governor-General in seeking the Governor-General's approval of the Articles'

Request decided out of time

A decision on this request was not made within the statutory timeframe. Accordingly, the Secretary of the Department was deemed to have refused your request on 24 October 2024 under section 15AC(3) of the FOI Act (deemed refusal). The Department continued to progress your matter in accordance with the Guidelines issued by the Information Commissioner under section 93A of the FOI Act (the Guidelines) which states:

¹ The transfer was accepted under section 16 of the FOI Act.

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request.¹

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- the FOI Act
- the Guidelines issued by the Information Commissioner under section 93A of the FOI Act (the Guidelines)

Document in scope of request

The Department has identified one document that falls within the scope of your request.

Decision

I have decided to grant access in part to the document, with irrelevant material deleted, on the basis that the document contains information exempt under:

- section 34 (Cabinet documents) of the FOI Act; and
- section 47E (Certain operations of agencies) of the FOI Act.

Reasons for decision

My findings of fact and reasons for deciding that certain information is irrelevant are set out below.

1. Section 34 – Cabinet documents

Section 34 of the FOI Act provides:

(1) A document is an exempt document if:

(a) both of the following are satisfied:

- it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
- it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or*

- (b) it is an official record of the Cabinet; or*
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*
 - (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.*
- (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.*
- (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.*

The purpose of the Cabinet exemption is to protect the confidentiality of Cabinet process and applies to the Cabinet and Cabinet committees.

Having regard to advice provided by the Department's Cabinet Division, I understand that parts of the document contain material which, if disclosed, would reveal deliberations of the Cabinet. I am satisfied that parts of the document are exempt under section 34(3) of the FOI Act.

I have had regard to the exception within section 34(3) and at section 34(5) of the FOI Act and am satisfied that these deliberations have not been officially disclosed.²

I am satisfied that exempt parts of the requested document do not contain 'purely factual material' for the purposes of section 34(6) of the FOI Act. Even if any of the information contained in the exempt parts of the requested document was considered to be factual material, I consider it is so embedded in or intertwined with the surrounding information to make it impractical to excise it.³

Accordingly, I am satisfied that parts of the documents are exempt under section 34(3) of the FOI Act.

2. Section 47E of the FOI Act (Certain operations of agencies)

Section 47E of the FOI Act provides:

- (1) A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to do any of the following:*
- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
 - (b) prejudice the attainment of the objects of particular tests, examinations, or audits conducted or to be conducted by an agency;*
 - (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*

² FOI Guidelines [5.70]

³ Section 34(6) of the FOI Act

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

The application of section 47E must have bearing on the 'proper and efficient' operations of the agency, namely that the agency is undertaking its usual operations in its expected manner.⁴ The Department's operations are aimed at providing support to the Prime Minister and portfolio ministers, and providing clear and persuasive advice to the Australian Government on significant issues facing Australia.⁵

Parts of the document contain material that would disclose material prepared in a decision-making process in connection with the Cabinet.

I have had regard to paragraph 6.92 of the FOI Guidelines which requires a decision maker to assess whether 'the predicted effect needs to be reasonably expected to occur.'⁶

I am satisfied that parts of the document is conditionally exempt under section 47E of the FOI Act.

I have considered the public interest factors below at section 3.

3. Public interest

The FOI Act provides that a conditionally exempt document must nevertheless be disclosed unless its disclosure would, on balance, be contrary to the public interest. In determining whether its disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors.

As I have decided that parts of the documents are conditionally exempt, I am now required to consider the public interest factors, in doing so I have not taken into account the irrelevant factors as set out in s 11B(4) of the FOI Act, this includes:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in 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 documents 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*

In applying the public interest, I have noted the objects of the FOI Act and the factors favouring access as listed in s 11B(3) of the FOI Act. Having regard to the material before me and the circumstances of the documents found to be conditionally exempt I am satisfied of the following:

- access would promote the objects of the FOI Act

4 Paragraph 6.115 of the FOI Guidelines

5 <https://www.pmc.gov.au/what-we-do>

6 Paragraph 6.92 of the FOI Guidelines

- access may inform debate on a matter of public importance
- the subject matter within the conditionally exempt documents does not offer any insights into public expenditure

The FOI Act does not set out any public interest factors against disclosure and requires that agencies are to have regard to the FOI Guidelines in order to work out if disclosure would, on balance, be contrary to the public interest. The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the documents found to be conditionally exempt, may weigh against disclosure.

The main factor against disclosure in this case is that disclosure would, or could reasonably be expected to reduce the quality, clarity and frankness of advice provided to a portfolio minister in connection with the Cabinet.

After careful consideration of all relevant factors, I have decided that, on balance, the factors against disclosure outweigh those favouring disclosure. Accordingly, I am of the view that disclosure of the requested document would be contrary to the public interest.

4. Deletion of irrelevant matter

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

On 26 September 2024, the Department advised you of its policy to exclude any signatures which are contained in documents that fall within the terms of an FOI request. This category of information is identified as irrelevant.

Accordingly, I am satisfied that parts of the document are irrelevant under section 22(1)(a)(ii) of the FOI Act. The remainder of the document have been released to you.

Review rights

If you disagree with my decision, you may apply for an Information Commissioner review of the decision.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days after the date of this letter.

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More information about Information Commissioner review is available [here](#).⁷

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. More information about complaints is available [here](#).⁸

If you wish to discuss any aspect of your requests, you can contact the FOI Section by email at foi@pmc.gov.au.

Yours sincerely,



Branko Ananijevski
Assistant Secretary
Cabinet Information and Governance Branch
Department of the Prime Minister and Cabinet
17 January 2025

⁷ <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>

⁸ <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints/make-an-foi-complaint>

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