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9 July 2013

Your ref:
Our ref: C2013/11339

Mr Brendan Molloy
Secretary
Pirate Party Australia

BY EMAIL ONLY: foi+request-109-375c84fe@righttoknow.org.au

Dear Mr Molloy

**Notice of decision – Request under the Freedom of Information Act 1982
for access to documents**

I refer to your request received by IP Australia on 10 May 2013 requesting access to copies of the documents on the following files:

- 1) C2012/12282 Trans Pacific Partnership Free Trade Agreement - Pharmaceutical Provisions
- 2) C2012/12298 Trans Pacific Partnership 2012 Free Trade Agreement- Round 14 Negotiations - Leesburg (Washington DC) USA
- 3) C2012/12458 Trans Pacific Partnership Free Trade Agreement- International Exhaustion/Parallel Importation
- 4) C2012/12687 Trans Pacific Partnership Free Trade Agreement - Traditional Knowledge - Genetic Resources And Traditional Cultural Expressions
- 5) C2012/12966 Briefing And Ministerial Correspondence 20.12 - Gene Patenting - Domestic Policy
- 6) C2012/13878 Trans Pacific Partnership 2012 Free Trade Agreement - Round 15 Negotiations - Auckland NZ

On 17 May 2013, you were notified that IP Australia was consulting an affected third party under section 27A of the FOI Act regarding personal information contained in documents, and that the time for determining your request was extended by 30 days as permitted under section 15(6) of the FOI Act.

The search for documents relevant to your request located a large number of documents. Please refer to the schedule of documents, identifying documents containing material relevant to your request. The schedule also details where exempt or irrelevant material has been removed from the released documents.

Section 11 of the FOI Act establishes a general right of access to documents held by Government agencies, including IP Australia, however, the right of access does not extend to documents identified as exempt documents for the purposes of the Act. Where documents contain both exempt and non-exempt material the FOI Act allows for documents to be released in part after the exempt material has been deleted, where it is practical to do so.

In making my decision, I have taken into account:

- the scope of your request;
- the documents available within the scope of your request;
- the legislative requirements concerning exemptions;
- the views of third parties; and
- the views of other Commonwealth agencies.

Consultation

A number of third parties were consulted in accordance with section 27A of the FOI Act.

One third party objected to the release of their name and email address, on the grounds that they want their identity protected, and do not wish to be contacted by parties seeking to use their personal details for any purpose.

Another third party objected to the release of details that would identify their organisation and an individual within that organisation, citing sections 47F(1) and 47G(1) of the FOI Act as grounds for exemption.

A number of agencies within the Commonwealth public service were also consulted in relation to documents with which they were involved.

Decision

I declare that I have no conflict of interest in relation to this decision.

I advise that your request is granted in part, with exemptions and redactions applied to material affecting international relations and personal information and business information of affected third parties, in accordance with sections 33, 47F and 47G of the FOI Act, respectively. Please refer to the schedule of documents for details on where exemptions have been applied to material within the released documents.

Material affecting international relations

Section 33 of the FOI Act exempts documents that affect Australia's national security, defence or international relations. The exemption comprises two distinct categories of documents:

- (a) documents which, if disclosed, would, or could reasonably be expected to, cause damage to the Commonwealth's security, defence or international relations
- (b) documents that would divulge information communicated in confidence to the Commonwealth by a foreign government, an agency of a foreign government or an international organisation.

In claiming the exemption, decision makers must examine the content of each document that is relevant to a request and come to a conclusion about whether disclosure of that content would cause, or could reasonably be expected to cause, the harm which the provision seeks to prevent. The context of each document is also relevant because, while the information in the document may not itself cause harm, in combination with other known information it may contribute to a complete picture which results in harm (the 'mosaic theory').

At the start of the Trans-Pacific Partnership process it was agreed that ...all participants would maintain the confidentiality of ...*the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations* in order to facilitate candid and productive negotiations. Australia has signed a letter to this effect and this is consistent with normal negotiating practice. The release of this information would therefore divulge information communicated in confidence by foreign Governments.

On this basis, I consider that a number of documents falling within the scope of your request are wholly or partially exempt from disclosure under s33 of the FOI Act.

Personal privacy

Section 47F provides a *conditional* exemption for documents that would involve the unreasonable disclosure of personal information considering:

- the extent to which the information is well known (paragraph 47F(2)(a));
- 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 (paragraph 47F(2)(b));
- the availability of the information from publicly accessible sources (paragraph 47F(2)(c)); and
- any other relevant matters (paragraph 47F(2)(d)).

Importantly, granting this exemption also requires application of a public interest test to determine whether, on balance, the disclosure of the personal information would be contrary to the public interest.

I consider that the disclosure of the following information would involve the unreasonable disclosure of personal information:

- the residential and email addresses of private individuals (including those of the third party mentioned above under 'Consultation', who stated that they wanted their identity protected);
- mobile telephone numbers of public service officers (although I consider that disclosure of their work telephone and email contact details is reasonable – with the exception described in the following paragraph); and
- details of the accommodation and travel dates of individual officers.

As mentioned above under 'Consultation', a number of agencies within the Commonwealth public service were also consulted in relation to documents with which they were involved. Some of them advised that, in their view, release of the names and contact details of junior officers in their agencies would involve the unreasonable disclosure of the individuals' personal information. I consider that those agencies are best able to judge the impact of releasing details of their junior officers to the public, as the nature of their work is different to that of IP Australia. As a result, I consider that the disclosure of the names and contact details of junior officers in those agencies would involve the unreasonable disclosure of personal information.

Under section 11A(5) of the FOI Act, access to a conditionally exempt document must be given unless it would be contrary to the public interest. Under the Australian Information Commissioner's Guidelines (Part 6), I have identified the following factors as relevant in determining whether the disclosure of this personal information would cause specific harm.

In favour of disclosure is the requirement to provide the Australian community with access to information held by the Commonwealth Government. A factor against disclosure is the requirement not to release information which could reasonably be expected to prejudice the protection of an individual's right to privacy.

As required by subsection 11B(4) of the FOI Act, I have ensured that no irrelevant factors have been considered in reaching this decision. In my view, the factors against disclosure, in particular the importance of maintaining an individual's right to privacy, outweigh any factors in favour of disclosure (such as the right to access Government-held information). I am therefore satisfied that the material noted above is conditionally exempt under subsection 47F (1) of the Act and that disclosure would be contrary to the public interest.

As mentioned above (under 'Consultation') a third party objected to the release of details that would identify their organisation and an individual within that organisation, citing sections 47F(1) and 47G(1) of the FOI Act as grounds for exemption. I consider that it would be reasonable to disclose the information identifying that organisation and an individual within that organisation. The organisation is well known, as is the association of the individual with the organisation, and the documents in question contain personal information that is publicly available. I therefore consider that the information is not conditionally exempt under section 47F(1) of the FOI Act and should be released in full to the FOI requester.

Business information

Section 47G provides that a document is *conditionally* exempt if it discloses information (business information) concerning a person in respect of his or her business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs (paragraph 47G(1)(a)); or
- could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency (paragraph 47G(1)(b)).

Importantly, granting this exemption also requires application of a public interest test to determine whether, on balance, the disclosure of the personal information would be contrary to the public interest.

I consider that some of the information disclosed in one document is conditionally exempt under section 47G(1)(b) of the FOI Act. This exemption concerns the effect of disclosure rather than the precise nature of the information, and is intended to protect the interests of third parties dealing with the government. The document in question contains information about the relationship between a key stakeholder (Medicines Australia) and the government, and identifies issues that are of particular concern to that stakeholder. In addition, the document contains information about individual businesses that are members of Medicines Australia. I consider that there is a reasonable likelihood that disclosure of some of the information in this document would result in a reduction in both the quality and quantity of business information flowing to the government, from both Medicines Australia and its members.

If I find that a document is *conditionally* exempt, then I must apply the *public interest test* in subsection 11A(5) of the FOI Act before I conclude that access *can be refused* to it. Subsection 11A(5) requires that access is *required* to be given, *unless* (in the circumstances) it would, on balance, be *contrary to the public interest*.

Section 11B of the FOI Act sets out the factors for working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5). The factors listed as *favouring* disclosure are that it would:

- promote the objects of the FOI Act, by
 - allowing or assisting inquiry into possible deficiencies in the conduct or administration of an agency or official
 - revealing or substantiating that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
 - revealing the reason for a government decision and any background or contextual information that informed the decision
 - enhancing the scrutiny of government decision making
- inform debate on a matter of public importance

- promote effective oversight of public expenditure
- allow a person to access his or her own personal information

I do not find that the factors *in favour* of disclosure would *outweigh* those *against* disclosure in respect of material I have found to be conditionally exempt under section 47G. I accept that there is a public interest in providing access to government documents, however, I do not believe that there is a strong public interest consideration in favour of disclosure of the commercially sensitive information which has been identified above as exempt under section 47G.

As mentioned above (under 'Consultation') a third party objected to the release of details that would identify their organisation and an individual within that organisation, citing sections 47F(1) and 47G(1) of the FOI Act as grounds for exemption. I consider that it would be reasonable to disclose the information identifying that organisation and an individual within that organisation. The organisation is well known and the documents in question contain information about the organisation that is publicly available. I therefore consider that the information is not conditionally exempt under section 47G (1) (a) of the FOI Act and should be released in full to the FOI requester.

The schedule of documents is provided in **Attachment A**.

Preliminary assessment of charges

On 2 July 2013, Mr Sean Applegate wrote to you to provide you with a preliminary estimate of charges. You responded, also on 2 July, requesting that the preliminary assessment of charges be re-assessed. Your letter contended that the proposed fee of \$2160 is excessive, that the request has been wrongly assessed, that the request is in the public interest, and that fees should be waived.

Your letter contends that the ambit of the request to IP Australia is substantially the same as that of the request to the Attorney-General's Department (AGD). I disagree with this statement. While there is some overlap in the subject matter of the two requests, the request to IP Australia was substantially different as it involved documents on files relating to the pharmaceutical provisions, international exhaustion/parallel importation issues, and traditional knowledge issues for the Trans Pacific Partnership Free Trade Agreement. It also involved briefing and ministerial correspondence relating to the issue of gene patenting.

Your letter also contends that the proposed fee is excessive. **Attachment C** to this letter details the time spent on retrieval and decision-making at IP Australia for this request. As you can see, the retrieval and decision-making process was very time-consuming. Having reviewed the scope of the work involved in processing your request, I do not consider that the time spent on this request was excessive.

Finally, your letter contends that the request is in the public interest and that the fees should therefore be waived. In considering your application to waive charges on public interest grounds in accordance with section 29 of the FOI Act, I have considered your reasons carefully, and have balanced your arguments in favour of waiving the fees due to public interest considerations, with the broader public interest in the economic sustainability of the FOI system. I am persuaded by the public interest arguments that you have presented. Nevertheless, I note that the complex nature of the request, the large number of documents that fall within it and the need for consultation with a number of parties has resulted in significant diversion of IP Australia resources to fulfil this request. Charges in the FOI Act are a vital component of the FOI regime which makes it sustainable and appropriately balanced from a public policy perspective. The processing charges are designed to ensure that the Australian community recoups a fair proportion of the costs of processing non-personal FOI requests, given that processing such requests diverts significant community resources away from other

key community priorities. I consider that, given the resources involved, it is in the public interest that this cost to the Australian taxpayer is recovered to some extent.

On balance, I have therefore decided to grant a 50% reduction of the assessed value of the processing costs pursuant to subsection 29(5) (b) of the FOI Act. Therefore, in accordance with section 29 of the Act, I have decided that you are liable to pay a charge of \$1080.

Within 30 days of receipt of this letter, you must:

- agree to pay the charge; or
- contend, providing full reasons, that the charge
 - has been wrongly assessed;
 - should be reduced or not imposed or both; or
- withdraw your request.

If within 30 days of receipt of this letter, you fail to notify me of one of the matters mentioned in the above dot points, you will be taken to have withdrawn your request.

Please send advice of your chosen course of action to me:

- by e-mail to adam.wright@ipaaustralia.gov.au;
- by fax to 02 6283 7999; or
- by post to PO Box 200, Woden ACT 2606.

Please note: you do not have to pay the charge until I send you a notice of imposition of the charge.

If you wish, you can pay the total amount of the estimated charge above immediately. If you do so, I will take that payment to be your agreement to pay the relevant charge, and, under subsection 29(3) of the FOI Act, I will impose a charge equal to the amount of the estimated charge: so you will not have to make any further payment before you receive a decision on your request. In that event, I will not send you any notice of imposition of the charge.

Even if you pay the total amount of the estimated charge, you can still contend that the charge should be re-assessed, reduced or not imposed. IP Australia will consider your contentions, and if appropriate may refund part or all of the charges paid.

Access to documents in accordance with my decision

In accordance with regulation 11 of the *Freedom of Information (Charges) Regulations 1982*, no access will be given to the documents in accordance with my decision until you have paid the amount of any applicable charges, or unless IP Australia decides on review to not impose any charges for your request. The amount of the applicable charges could be the amount assessed in this letter, or as reduced following any review you request of my decision on the charges.

Review rights

If you are dissatisfied with my decisions, you may apply for internal review or Information Commissioner (IC) review of them. Whilst you may request IC review directly, the IC is of the view that it is usually better for a person to seek internal review by an agency before applying for IC review. Further information on your rights of review is available in the attached fact sheet (**Attachment B**).

As required by sections 27 (business affairs) and 27A (personal information) of the FOI Act, I have advised the third party of my decision on your request, and they have until 8 August 2013 to seek administrative review of my decision. If the third party seeks internal review, you will be informed of their application, so that you may also exercise your right to seek a concurrent internal review. If the third party applies for review by the Administrative Appeals Tribunal, I shall inform you of that fact, and I understand that you would be entitled to be joined as a party under the provisions of section 30(1A) of the Administrative Appeals Tribunal Act 1975.

Disclosure Log release

As I have decided to grant you access to redacted material under section 11A of the FOI Act, I consider that the same material should be published online on IP Australia's disclosure log within 10 working days after the date that you are given access to the documents.

I consider that this action would be appropriate under section 11C of the same Act: online publication by IP Australia would not amount to an unreasonable disclosure of anyone's personal or business information.

Yours sincerely



Adam Wright
Assistant Director
Authorised FOI Decision-maker
Domestic Policy
Business Development and Strategy Group

Schedule of documents to be released

C2012/12282 Trans Pacific Partnership Free Trade Agreement - Pharmaceutical Provisions

FOI page no.	Description	Decision/Comment
72-79, 82-110, 114-151, 156-160, 218-247, 361-367, 385-389, 391-394, 398-405, 412-436, 444-471, 475-487, 490-491, 495-501, 509-511, 532-535, 540-541, 543-551, 558-583.	Information relating to the subject matter of the Trans Pacific Partnership Agreement negotiations	Not for release – exemption under s33
56, 62-63, 64-66, 80-81, 111-112, 113, 152-155, 357-360, 368-373, 378, 384, 396-397, 406-407, 409-411, 437-439, 440-443, 472-474, 488-489, 492-494, 502-507, 528-531, 536, 538-539, 552-557, 584.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemptions under both s33 and s47F
61, 163-167, 217, 248-250, 254-256, 284, 334-335, 352, 383, 390, 395, 408, 508.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemption under s47F
168, 374-377, 379-382, 537, 542.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemption under s33
512-527	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemptions under s47G, s47F, s33
1-55, 57-60, 67-71, 161-162, 169-216, 251-253, 257-283, 285-333, 336-351, 353-356.		To be released in full

C2012/12298 Trans Pacific Partnership 2012 Free Trade Agreement- Round 14 Negotiations - Leesburg (Washington DC) USA

FOI page no.	Description	Decision/Comment
13-96, 98-100, 105-106, 108-129, 145-201, 203-229, 236-291, 293-332, 335-351, 354-489, 491-538, 544-545, 556-557, 564-565, 567-568, 571-572, 574-577, 581-756.	Information relating to the subject matter of the Trans Pacific Partnership Agreement negotiations	Not for release – exemption under s33
1-2, 5-10, 97, 101-104, 107, 130-144, 202, 230-235, 292, 333-334, 352-353, 490, 539-542, 552-555, 559-563, 566, 569-570, 573.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemptions under both s33 and s47F
11-12, 543, 546-551, 578-580.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemption under s47F
558.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemption under s33
3-4.	USPTO Director's forum blog	To be released in full

C2012/12458 Trans Pacific Partnership Free Trade Agreement- International Exhaustion/Parallel Importation

FOI page no.	Description	Decision/Comment
6-14, 23-71, 73-142.	Information relating to the subject matter of the Trans Pacific Partnership Agreement negotiations	Not for release – exemption under s33

15-22, 143-150.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemptions under both s33 and s47F
1-5, 72, 122,	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemption under s33

C2012/12687 Trans Pacific Partnership Free Trade Agreement - Traditional Knowledge - Genetic Resources And Traditional Cultural Expressions

FOI page no.	Description	Decision/Comment
4-10, 12-14, 16-18.	Information relating to the subject matter of the Trans Pacific Partnership Agreement negotiations	Not for release – exemption under s33
1-3, 11, 15, 19-21.	Emails and papers relating to the Trans Pacific Partnership Agreement negotiations	To be released in part – exemptions under both s33 and s47F

C2012/12966 Briefing And Ministerial Correspondence 20.12 - Gene Patenting - Domestic Policy

FOI page no.	Description	Decision/Comment
4, 8, 12, 18, 22, 29, 81, 82, 276, 281, 284, 287, 309, 348, 352, 357, 359, 367, 374, 381, 383, 385-387, 390-391, 393-394, 401, 407, 419, 421, 424, 427, 429-433, 444.	Briefing and ministerial correspondence relating to the subject matter of gene patenting	To be released in part – exemption under s47F
395-399	Briefing and ministerial correspondence relating to the subject matter of gene patenting	To be released after review opportunities exhausted – third party objection s47F, s47G
1-3, 5-7, 9-11, 13-17, 19-21, 23-28, 30-80, 83-275, 277-280, 282-283, 285-286, 288-308, 310-347, 349-351, 353-356, 358, 360-366, 368-373, 375-380, 382, 384, 388-389, 392, 400, 402-406, 408-418, 420, 422-423, 425-426, 428, 434-443,	Briefing and ministerial correspondence relating to the subject matter of gene patenting	To be released in full

C2012/13878 Trans Pacific Partnership 2012 Free Trade Agreement - Round 15 Negotiations - Auckland NZ

FOI page no.	Description	Decision/Comment
1-421	Information relating to the subject matter of the Trans Pacific Partnership Agreement negotiations	Not for release – exemption under s33

Itemisation of costs

Date	Time	Activity
14.05.2013	3 hrs	retrieval
15.05.2013	3 hrs	retrieval
16.05.2013	5 hrs	retrieval
31.05.2013	5 hrs	retrieval
7.06.2013	6 hrs	retrieval
8.06.2013	2 hrs	retrieval
19-21.06.2013	24 hrs	decision-making
20-21.06.2013	8 hrs	decision-making
1-7.07.2013	24 hrs	decision-making
19.06.2013-1.07.2013	24 hrs	decision-making
2-9.07.2013	15 hrs	decision-making
TOTAL		
Retrieval	24 hrs	
Decision-making	95 hrs	