



Australian Government
Attorney-General's Department

13/18292

2 December 2013

Brendan Molloy
Councillor
Pirate Party Australia
Righttoknow

Sent via e-mail only: foi+request-457-ea8cd350@righttoknow.org.au

Dear Mr Molloy

Freedom of Information Request no. 13/194

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Andrew Walter, Assistant Secretary, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 31 October 2013, you requested access to documents relating to the Trans-Pacific Partnership Agreement. Specifically, you sought access to:

... documents relating to any discussion or advice (given or received) regarding the ALRC Copyright Review in the context of the Trans-Pacific Partnership Agreement.

I have identified that the department holds one document that falls within the scope of your request (the document). I did this by relying on searches of both electronic and hard copy records across the department, as well as making enquiries of those who may have been able to help locate documents within the scope of your request. I am satisfied that the searches undertaken constitute a reasonable search for the purposes of Part 3 of the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); that is, 'a reasonable search on a flexible and common sense interpretation of the terms of the request'.

Regarding the document, I have decided to exempt it in full. More information, including the reasons for my decision, is set out below.

Decision and reasons for decision

With regard to the document identified in the attached schedule, I have decided to refuse access in full to the document under section 33(a)(iii) of the FOI Act, 'Exemptions – Documents affecting international relations'; with remaining material removed and section 22(1) of the FOI Act, 'Irrelevant matter'.

Material taken into account

I have taken the following material into account in making my decision:

- the terms of your FOI request
- the contents of the document that falls within the scope of your request
- the FOI Act (specifically, sections 22(1), 33(a)(iii) and 33(b))
- the Guidelines issued by the Office of the Australian Information Commissioner and
- the views of an external agency (specifically, DFAT).

The attached document schedule indicates the document to which access is refused. My reasons for refusing access are provided below.

Findings on material questions of fact

My findings on material questions of fact are that the document that you have requested contains:

- matter involving the international relations of the Commonwealth
- matter communicated in confidence by a foreign government to the Commonwealth and
- irrelevant matter.

Exemption – documents affecting national security, defence or international relations

I have decided that some material within the document is exempt under sections 33(a)(iii) and 33(b) of the FOI Act, which provides:

A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

...

(iii) the international relations of the Commonwealth; or

(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Background

The document in question was produced by the department for use by Australian and other foreign negotiators to the Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA). I am advised that the parties to this agreement signed a confidentiality agreement to maintain the confidentiality of the TPP FTA text. The document also contains this department's comments and confidential position on matters currently under negotiation.

The release of this document would reveal confidential information for use in the TPP FTA negotiations which has been developed between this department and DFAT. That information involves this department's consideration of the Australian Law Reform Commission's copyright review in the context of the TPP FTA.

Damage to the international relations of the Commonwealth

I consider that damage to Australia's negotiating position in the negotiations with other TPP FTA countries (specifically, Brunei, Chile, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam) and a reduction in the future flow of confidential information to Australia in preparation for future TPP FTA rounds to be 'damage to the

international relations of the Commonwealth for the purposes of section 33(a)(iii) of the FOI Act and Part 5.30 of the Guidelines.

Would, or could reasonably be expected to

I consider that release of the document could adversely affect the strength of the Australian Government's present bargaining position, and could inhibit the future flow of confidential information from TPP FTA countries to Australia in preparation for future rounds. It is this sort of damage that section 33(a)(iii) of the FOI Act seeks to prevent. In applying this exemption, I have examined the contents of the document and have reached the conclusion that the potential for damage is real and could reasonably be expected to result from disclosure of the document.

Reasonable expectation test

I am satisfied that there are real and substantial grounds for expecting this sort of damage to occur should the document (or parts of the document) be prematurely released in response to an FOI request outside of the TPP FTA negotiations. The possibility of this predicted harm goes beyond *'the mere risk or mere possibility of prejudice'* and satisfies the *'reasonable expectation'* test under Parts 5.12 and 5.25 of the Guidelines.

Would divulge any information or matter communicated in confidence

After closely examining the contents of the document and considering DFAT's advice that the parties to this agreement signed a confidentiality agreement to maintain the confidentiality of the text, I am satisfied that the document was communicated in confidence from a foreign government (negotiators acting on behalf of TPP FTA countries) to an authority of the Commonwealth (this department) during the current round of TPP FTA negotiations.

Accordingly, I am satisfied that the elements of section 33(a)(iii) and section 33(b) of the FOI Act are met and that the document is exempt. In reaching this decision I considered the advice of DFAT as experts in assessing damage to the international relations of the Commonwealth.

Access to edited copies with exempt or irrelevant matter deleted

Section 22(1) of the FOI Act provides:

Scope

(1) *This section applies if:*

- (a) *an agency or Minister decides:*
 - (i) *to refuse to give access to an exempt document; or*
 - (ii) *that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and*
- (b) *it is possible for the agency or Minister to prepare a copy (an **edited copy**) of the document, modified by deletions, ensuring that:*
 - (i) *access to the edited copy would be required to be given under section 11A (access to documents on request); and*
 - (ii) *the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and*
- (c) *it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:*
 - (i) *the nature and extent of the modification; and*
 - (ii) *the resources available to modify the document; and*

(d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

I am satisfied that it would not be reasonably practicable for this department to prepare, in accordance with section 22(1)(c)(i) of the FOI Act, a copy (an **edited copy**) of the exempt document that falls within the scope of your request. I have reached this decision having regard to the amount of exempt and irrelevant material in the document and the extent of the modifications that would be required to release the document to you, with all exempt and irrelevant material removed.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

online: foi@ag.gov.au

post: FOI and Privacy Section
 Office of Corporate Counsel
 Attorney-General's Department
 3-5 National Circuit
 BARTON ACT 2600

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

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 of the date of this letter, and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

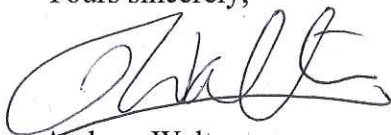
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

If you wish to discuss this decision, please contact the department on (02) 6141 6666 or e-mail foi@ag.gov.au.

Yours sincerely,



Andrew Walter

Assistant Secretary

Attachments

A. Schedule of documents



Australian Government
Attorney-General's Department

Attachment A

Schedule of documents for Freedom of Information Request no. 13/194

Date	Document subject / description	Decision on access	Exemptions
23 July 2013	INTELLECTUAL PROPERTY [RIGHTS] CHAPTER – CONSOLIDATED TEXT <ul style="list-style-type: none">• Draft intellectual property chapter for the Trans-Pacific Partnership Free Trade Agreement negotiations, August 2013• Rated, 'TPP CONFIDENTIAL' and• 43 pages in length.	Refused in full	Section 33(a)(iii) and 33(b) of the FOI Act, 'Exemptions – documents affecting international relations and material outside the ambit of your request removed under section 22(1) of the FOI Act, 'Irrelevant matter'.