



26 November 2018

Mr P Wright

BY EMAIL: foi+request-4859-bcc87e29@righttoknow.org.au

In reply please quote:

FOI Request: FA 18/10/00518

File Number: ADF2018/207439

Dear Mr Wright

Freedom of Information (FOI) request - Access Decision

On 4 October 2018, the Department of Home Affairs (the Department) received a request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

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

1 Scope of request

You have requested access to the following documents:

Copies of the 2001 and 2005 Memorandums of Understanding between Australia and Nauru including:

- *Memorandum of Understanding between Australia and Nauru for Australian Development Assistance to Nauru and Cooperation in the Management of Asylum Seekers' (2005)*
- *Memorandum of Understanding (MOU) between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues (2001).*

2 Authority to make decision

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

3 Relevant material

In reaching my decision I referred to the following:

- the terms of your request
- the documents relevant to the request
- the FOI Act

- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- the Department's guidance material on the FOI Act
- advice from other Commonwealth Departments

4 Documents in scope of request

The Department has identified two documents as falling within the scope of your request. These documents were in the possession of the Department on 4 October 2018 when your request was received.

5 Decision

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

- Exempt two documents in full from disclosure.

6 Reasons for Decision

Detailed reasons for my decision are set out below.

My findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

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

Section 33(b) provides that a document is an exempt document if disclosure would divulge information or matter communicated in confidence by a foreign government, an authority of a foreign government or an international organization to the Commonwealth.

The Information Commissioner Guidelines state that information is communicated in confidence by or on behalf of another government if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Where the information is, in fact confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.

The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access to that communication.

An agreement to treat documents as confidential does not need to 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 communication occurred, including the relationship between the parties and the nature of the information communications.

Memorandums of understanding by its very nature are considered to be the documents created in confidence between the parties to the agreement. I have consulted the Commonwealth agency responsible for creating these documents. I have also taken into consideration the response received from the relevant agency that the documents were held to be confidential between the parties at the time of signing.

Having considered these factors, I am satisfied that the information contained within the document subject to this request was communicated in confidence by or on behalf of another government, and was received by the Australian Government under an understanding of confidentiality. There was clear general understanding between the relevant parties that the communication would be treated in confidence.

As such, I have decided that release of the document would divulge information agreed in confidence by or on behalf of a foreign government to the Commonwealth of Australia and I have decided that the document is exempt from disclosure under section 33(b) of the FOI Act.

Section 33(a)(iii) of the FOI Act permits exemption of a document if disclosure of the document would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.

The phrase 'international relations' has been interpreted as meaning 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. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence.

The information detailed in the documents relates specifically to memorandums of understanding between the Commonwealth of Australia and Government of Nauru. The Republic of Nauru is a sovereign nation and I consider that releasing the information marked 's33(a)(iii)' would adversely impact on the ability of the Department to maintain good working relations with the Government of Nauru.

This assessment is made considering the nature of the information contained within the document and the current nature and extent of the Australian Government's relationship with the Government of Nauru.

It is important for Australia to maintain good working relationships with coalition partners. Our agency advisers with close working responsibility for those relationships consider that disclosure of the material in the documents could reasonably be expected to damage Australia's relationship with that foreign government, based on that government's previous advice about the handling of material concerning it. As such, I accept that advice.

I have decided that in addition to being except under section 33(b) of the FOI Act (as referred to above) I am also satisfied that the document is exempt from disclosure under section 33(a)(iii) of the FOI Act.

7 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Details/C2017C00251>. If you are unable to access the legislation through this website, please contact our office for a copy.

8 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:

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

OR

By mail to:
Freedom of Information Section
Department of Home Affairs
PO Box 25
BELCONNEN ACT 2617

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>.

9 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 Home Affairs as the relevant agency.

10 Contacting the FOI Section

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



Nerys Jones
Authorised Decision Maker
Department of Home Affairs