



Australian Government
Department of Foreign Affairs and Trade

File No: 14/1483#1
FOI Ref: 1401-F737

7 March 2014

Mr Geordie Guy
Right to Know

Sent by email to: foi+request-505-bdee05c2@righttoknow.org.au

Dear Mr Guy

Re: Freedom of Information (FOI) Internal Review

I refer to your email dated 13 February 2014 seeking internal review of a decision by Ms Elizabeth Ward, Assistant Secretary Goods and Investment Branch, in relation to your request under the *Freedom of Information Act 1982* ('the FOI Act'). Your request under the FOI Act was for access to:

"The most recent working draft of the Trans-Pacific Partnership Agreement".

I am authorised under section 23 of the FOI Act to conduct a review of Ms Ward's decision and have been appointed to be the decision-maker on your request as required by departmental procedures. I had no part in the original decision making process.

Decision

In reaching my decision I have reviewed the document in question, together with the decision taken by Ms Ward. I have established that Ms Ward correctly identified that there is only one document that is relevant to your request and that this document is exempt from release in its entirety.

Section 26 of the FOI Act provides that where access to a document has been denied in full or in part, a statement must be provided to the applicant setting out findings on material questions of fact, the material on which those findings were based, and the reasons for the decision. Please find this information below.

Material considered

The material on which my decision is based includes:

- Your original FOI request and your request for internal review;
- The document within the scope of your request;
- Ms Ward's access refusal decision letter of 13 February 2014;
- the FOI Act; and
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act.

Reasons for my decision, including any material findings of fact

a) I consider that the material contained in the document you seek is exempt from release pursuant to section 33(b) of the FOI Act. Section 33(b) provides:

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

OAIC Guideline 5.36 states that 'the test is whether the information is communicated in confidence between the communicator and the agency ... it is not a matter of determining whether the information is of itself confidential in nature'. This Guideline also states that 'information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential'. Guideline 5.37 notes that 'the relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access' and that 'it is irrelevant for the purposes of the exemption that the foreign government or agency may have since reviewed the status of the document and it is no longer confidential'. OAIC Guideline 5.38 states that 'an agreement to treat documents as confidential does not need to be formal' and 'a general understanding that communications of a particular nature will be treated in confidence will suffice'.

I have decided to uphold Ms Ward's decision to exempt the document pursuant to section 33(b) of the FOI Act on the basis that release of the document would reveal matters communicated in confidence between Australia and foreign governments party to the TPP negotiations. All parties to the negotiations have expressly agreed to handle the negotiating text of the TPP agreement and other documents exchanged during the negotiations on a confidential basis, in order to facilitate candid and productive negotiations. Accordingly, release of the material at this time would divulge information communicated in confidence by foreign governments party to the TPP negotiations.

b) I consider that the material contained in the document is exempt from release under section 33(a)(iii) of the FOI Act which provides that:

"A document is an exempt document if disclosure of the document under this Act would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth".

Ms Ward identified that release of the document in question would result in damage to Australia's working relations with other parties to the negotiations. OAIC Guideline 5.30 states that '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'. I agree that release of the material in question, which is the subject of a confidentiality agreement, could reasonably be expected to damage Australia's working relations with other countries to the agreement negotiations.

Ms Ward also considered that release of the document would undermine the trust that foreign governments have in Australia's ability to protect confidential information. Guideline 5.21 states that the section 33(a)(iii) exemption encompasses 'intangible damage, such as loss of trust or confidence in the Australian Government or one of its agencies'. All parties, including Australia, have expressly agreed to keep confidential all negotiating texts, proposals of each government, explanatory material, emails relating to the substance of the negotiations and any other information exchanged in the context of the TPP agreement negotiations. Further, the parties to the negotiations have agreed to hold these documents in confidence for four years following entry into force of the TPP Agreement, or if no agreement comes into force, for four years after the last round of negotiations. The confidential handling of documents relating to TPP negotiations allows all parties to develop their negotiating positions and communicate openly and freely with each other. Having regard to the document in question and the OAIC Guidelines, I consider that releasing this confidential material would be in breach of Australia's undertaking to keep such material confidential and would undermine the confidence in the Australian Government's ability to protect confidential information, thereby damaging our international relations with other parties to the TPP agreement negotiations.

Ms Ward found that release of the document would also prejudice the willingness of foreign governments to provide confidential information to the Australian Government in future. OAIC Guideline 5.32 cites as an example the 'disclosure of a document [which] may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future'. In my view, release of this document could reasonably be expected to result in a loss of trust in the Australian Government's ability to protect confidential information which would result in other parties (foreign governments) being less willing to deal openly and productively with the Australian Government in future.

Having looked afresh at the document in question, the confidentiality agreement between the parties to the TPP Agreement negotiations, and the relevant OAIC Guidelines, I affirm the exemption pursuant to section 33(a)(iii) on the grounds that release could reasonably be expected to damage Australia's international relations.

Your review rights

Australian Information Commissioner

Under the provisions of section 54 of the FOI Act, you are entitled to request a review by the Australian Information Commissioner of my decision. You may also make a complaint to the

Australian Information Commissioner under section 70 on the Department's performance of its functions or the exercise of power under the FOI Act.

Your request for review or complaint should be directed to:

GPO Box 2999, Canberra ACT 2601

Telephone: 1300 363 992

Fax: (02) 9284 9666

Email: enquiries@oaic.gov.au

Complaints to the Commonwealth Ombudsman

You may complain to the Ombudsman concerning actions taken by an agency in the exercise of its powers or, more specifically, the performance of its functions under the FOI Act. There is no fee for making a complaint. The Ombudsman will conduct an independent investigation of your complaint.

You may complain to the Ombudsman by calling or writing to:

Commonwealth Ombudsman

GPO Box 442

Canberra ACT 2601

Telephone: 1300 362 072

Fax: (02) 6249 7829

Should you have any queries regarding this matter, please contact Ms Indra McCormick on (02) 6261 3056 or by email at foi@dfat.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris De Cure', is written over a horizontal line.

Chris De Cure
First Assistant Secretary
Office of Trade Negotiations