



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2019/260

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Mr James Pritchard

DECISION BY: Ms Alison Green
Assistant Secretary
Protocol and International Visits Branch

The FOI request

On 21 September 2019, Mr James Pritchard (the applicant) made a request under the *Freedom of Information Act 1982* (the FOI Act) to the Department of the Prime Minister and Cabinet (the Department) in the following relevant terms:

I request under the Freedom of Information Act the disclosure of any and all communications, from or to this office, relating to Brian Houston's accompaniment of the Prime Minister on his trip to the United States in September 2019.

I would expect this to include any internal memorandum or communications electronic or written between this office and other government departments, current MP's, departments of US government or any person acting on behalf of such. Staffers and any and all others persons this office would reasonably find in the public interest of this request are also expected.

On 11 October 2019, the Department advised the applicant as follows:

... we can advise that Mr Houston did not accompany the Prime Minister on his trip to the United States in September 2019; thus, the Department does not hold any documents that would fall within the scope of your request.

In light of the above, we would be grateful if you could please advise in writing if you wish to revise the terms of your request such that they provide clarity on the documents you are seeking to access.

In the event you provide revised terms with such information as is reasonably necessary for the Department to identify any documents it may hold, we would accept and process your request as valid from that date onwards.

If you indicate that you wish to continue with your request in the above current form, the Department would expect to issue you with a decision refusing your FOI request on the grounds that no relevant documents exist.

On 14 October 2019, the applicant advised as follows:

I would hope that any communication relating to Brian Houston's possible accompaniment of the PM to the United States would have been understood to be included in my original request as would be done so by a reasonable person.

For clarification I am seeking under FOI any documents held by this office relating to any of the following;

- A planned accompaniment of the PM by Brian Houston to the United States at any stage from Jan 1 2019 to date of request.
- A rumoured accompaniment of the PM by Brian Houston to the United States at any stage from Jan 1 2019 to date of request.
- A suggested accompaniment of the PM by Brian Houston to the United States at any stage from Jan 1 2019 to date of request.
- An disputed accompaniment of the PM by Brian Houston to the United States at any stage from Jan 1 2019 to date of request.
- A disproven accompaniment of the PM by Brian Houston to the United States at any stage from Jan 1 2019 to date of request.

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.

Decision

I have decided to neither confirm nor deny the existence of a document meeting the terms of the FOI request under section 25 of the FOI Act on the ground that, assuming the existence of such a document, the document would be an exempt document by virtue of section 33(a)(iii) of the FOI Act.

Material and advice taken into account

In making this decision, I have had regard to the following material or advice:

- the FOI request;
- the FOI Act;
- the 'Guidelines issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*'¹ (the FOI Guidelines); and
- advice from an expert in the Department on whether a document meeting the terms of the FOI request, if it existed, would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

¹ The references to the FOI Guidelines in this notice are to the version of the FOI Guidelines combined June 2019 published on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

Reasons

Section 25 Information as to the existence of certain documents

Section 25 of the FOI Act relevantly provides as follows:

- (1) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last mentioned document to be:
 - (a) an exempt document by virtue of section 33 ... ;
 - ...
- (2) If a request relates to a document that is, or if it existed would be, of a kind referred to in subsection (1), the agency or Minister dealing with the request may give notice in writing to the applicant that the agency or the Minister (as the case may be) neither confirms nor denies the existence, as a document of the agency or an official document of the Minister, of such a document but that, assuming the existence of such a document, it would be:
 - (a) an exempt document by virtue of section 33 ... ;
 - ...
- (3) If a notice is given under subsection (2) of this section:
 - (a) section 26 applies as if the decision to give the notice were a decision referred to in that section; and
 - (b) the decision is taken, for the purposes of Part VI, to be a decision refusing to grant access to the document in accordance with the request referred to in subsection (2) of this section, for the reason that the document would, if it existed, be:
 - (i) an exempt document by virtue of section 33 ... ;
 - ...

In relation to refusing to confirm or deny the existence of a document pursuant to section 25 of the FOI Act, the FOI Guidelines relevantly provide as follows:

The act of confirming or denying the existence of a document can sometimes cause damage similar to disclosing the document itself. For example, merely knowing that an agency has a current telecommunications interception warrant in connection with a specific telephone service would be sufficient warning to a suspect who could modify their behaviour and possibly undermine an investigation into serious criminal activity.

Section 25(2) allows an agency or minister to give an applicant notice in writing that does not confirm or deny the existence of a document but instead tells the applicant that, if it existed, such a document would be exempt.

The agency or minister does not have to search for or conduct an inquiry into the nature of the document being sought. Rather, s 25(2) requires only an assessment of whether a document of the kind requested is, or would be, an exempt document under ss 33 (documents affecting national security, defence or international relations) In answering this question, the decision maker must first turn their mind to whether the document sought is of such a kind that it would fall within the scope of the FOI request by considering the terms of the request and the technical expertise of the decision maker. Where a document of the kind requested is, or would be, exempt under [s 33] ... the agency or minister is entitled to rely on s 25 in neither confirming or denying the existence of the document.

Similarly, where a decision is made to refuse access to a document in accordance with the request, agencies and ministers should keep in mind not to inadvertently disclose in its reasons for decision the existence of a document where that disclosure would reveal exempt matter (s 26(2)). The other requirements of a notice under s 26 still apply

Agencies and ministers should use s 25 only in exceptional circumstances. For the purposes of IC review, a notice under s 25 is deemed to be notice of a decision to refuse access on the grounds that the document sought is exempt under s 33 ... (s 25(2)).²

Section 33 Documents affecting national security, defence or international relations

Section 33(a)(iii) of the FOI Act provides as follows:

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:
 - (i) ... ;
 - (ii) ... ; or
 - (iii) the international relations of the Commonwealth; ...

In relation to international relations, the FOI Guidelines relevantly provide as follows:

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 exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.

The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies. 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 also be real and substantial grounds for the exemption that

² FOI Guidelines, [3.103] – [3.107] (footnotes omitted).

are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

For example, the disclosure of a document 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. On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.³

Also relevant to the application of s 33 of the FOI Act is the ‘mosaic theory’. The FOI Guidelines describe the mosaic theory as follows:

When evaluating the potential harmful effects of disclosing documents that affect Australia’s national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the ‘mosaic theory’. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia’s national security, defence or international relations. Therefore, decision makers may need to consider other sources of information when considering this exemption.

The mosaic theory does not relieve decision makers from evaluating whether there are real and substantial grounds for the expectation that the claimed effects will result from disclosure.⁴

Consideration

The significance of Australia’s relationship with the United States is well recognised. The Prime Minister has reaffirmed the importance of the relationship only recently, describing the relationship in the following terms: *‘There’s no better there’s no stronger nor any deeper relationship than that exists between the United States and Australia ...’*⁵

In light of the significance of Australia’s relationship with the United States, informed also by my consultation with a relevant expert in the Department, I am satisfied that disclosure of a document containing information communicated in confidence between the United States and Australia may diminish the confidence which the United States would have in Australia as a reliable recipient of its confidential information, making the United States or its agencies less willing to cooperate with Australian agencies in future.

Further, disclosure of such confidential communications could reasonably be expected to damage international perceptions of the Australian Government’s ability to protect confidential information, thereby making other foreign governments less willing to cooperate with Australian agencies in the future. This expectation of trust by Australia’s foreign counterparts is critical to enabling Australia to conduct both its domestic and international affairs in a manner which best serves Australia’s national interest.

³ FOI Guidelines, [5.36] – [5.38] (footnotes omitted).

⁴ FOI Guidelines, [5.39] – [5.40] (footnotes omitted).

⁵ (sic), Prime Minister of Australia, ‘Remarks, Lunch Co-Hosted by the Vice President and the Secretary of State’, 20 September 2019, The Benjamin Franklin Room, US Department of State, <https://www.pm.gov.au/media/remarks-lunch-co-hosted-vice-president-and-secretary-state>.

I consider that a document meeting the terms of the FOI request, if it existed, could reasonably be expected to contain confidential communications between the United States Government and the Australian Government concerning the Prime Minister's attendance at official events hosted by the United States Government. If a document of that type existed (which I neither confirm nor deny), such communications could reasonably be expected to refer to the identities of possible attendees at official events such as the State Dinner hosted by the President of the United States for the Prime Minister on 20 September 2019.

Given the reference in the FOI request to a particular individual (in this case, Mr Brian Houston), mere identification of the existence of a document meeting the terms of the FOI request, if such a document existed, would in itself disclose the content of the confidential communication.

I have therefore decided to neither confirm nor deny the existence of a document meeting the terms of the FOI request under section 25 of the FOI Act on the ground that, assuming the existence of such a document, the document would be an exempt document by virtue of section 33(a)(iii) of the FOI Act.

Review rights

Information about the applicant's rights of review can be found on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Complaint rights

Information about the applicant's complaint rights can be found on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.



Alison Green
Assistant Secretary
Protocol and International Visits Branch

22 November 2019