



OFFICIAL

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2022/231

To: BE

Email: foi+request-9286-02482fa2@righttoknow.org.au

Dear BE

I refer to your email of 25 June 2022 in which you made an FOI request 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.

Scope of request

You set out your request in the following terms:

I request all correspondence between Prime Minister Albanese and the Prime Minister of New Zealand since 22 May 2022.

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.

Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- searches and inquiries undertaken by the Department
- the documents relevant to your request
- the FOI Act
- the Guidelines issued by the Information Commissioner¹ (the FOI Guidelines)

¹ s 93A of the FOI Act

Documents in scope of request

The Department has identified five (5) documents that fall within the scope of your request (the requested documents).

Consultation

During the processing of your request we consulted the Department of Foreign Affairs and Trade, the Northern Territory Government and the Tasmanian Government on the requested documents.

Decision

I have decided to refuse access to the requested documents in full, on the grounds that the documents identified within the scope of your request are subject to exemptions under the FOI Act.

My decision is to exempt the requested documents in full under section 33(a)(iii) of the FOI Act. In addition, I have decided that documents 1 – 4 are exempt under section 33(b) of the FOI Act.

Reason for decision

My findings of fact and reasons for deciding that certain information is exempt is set out below.

1. Section 33(a)(iii) of the FOI Act – damage to international relations of the Commonwealth

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

The FOI Guidelines provide a test for determining whether release of a document ‘would, or could reasonably be expected to, cause damage’ at paragraphs 5.16 – 5.18:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice

Additionally, paragraph 5.37 of the FOI Guidelines provides that the phrase ‘international relations’ has been interpreted to mean:

The ability of the Australian Government to maintain good working relationships with other governments and international organisations and to protect the flow of confidential information between them.

I have decided that if disclosed, the documents are reasonably expected to damage Australia's bilateral relationship with New Zealand. Consultation with relevant agencies involved in the creation of the documents has confirmed this view.

I am therefore satisfied that the requested documents are exempt under section 33(a)(iii).

2. Section 33(b) of the FOI Act – information or matter communicated in confidence by or on behalf of a foreign government

Section 33(b) of the FOI Act 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 organisation, to the Commonwealth.

The FOI Guidelines at paragraphs 5.42 – 5.44 relevantly states that:

The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made – it is not a matter of determining whether the information is of itself confidential in nature.

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. Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations...

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 communicated.

I am satisfied that the information contained within the documents 1 to 4, being communications sent by foreign governments to the Commonwealth Government, were communications made under an implied understanding of confidentiality.

I am therefore satisfied that documents 1 – 4 are also exempt in full under section 33(b) of the FOI Act.

Review rights

If you disagree with my decision, you may apply for internal review or Information Commissioner review of the decision.

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 after the date of this letter. 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 from the date it is received.

Applications for review should be sent to foi@pmc.gov.au.

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 after the date of this letter.

More information about Information Commissioner review is available [here](#).²

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. More information about complaints is available [here](#).³

If you wish to discuss any aspect of your requests, you can contact the FOI Section by email at foi@pmc.gov.au.

Yours sincerely



Sam Baker
Acting Assistant Secretary
Pacific Branch
Department of the Prime Minister and Cabinet
19 September 2022

² <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review>

³ <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>