



May 2023

MBV

By email: foi+request-9970-23182a47@righttoknow.org.au

Dear MBV

Re: Freedom of Information Request

I refer to your request received by the Department of Foreign Affairs and Trade (the department) on 21 February 2023, for access under the *Freedom of Information Act 1982* (the FOI Act) to:

'All documents, including any electronic or physical communications, relating to the potential (and later actual) appointment of former Prime Minister Kevin Rudd to the Ambassadorship to the United States. Please also include any extant records of phone calls.

I request only documents internal to the Department or between the Department and other government entities (including Ministers and their offices).

The scope of this request is from 21 May 2022 to 21 February 2023.'

I am writing to provide you with a decision about your request.

I have identified documents relevant to your request. After careful consideration, I have decided to grant you access to an edited copy of the documents, with irrelevant and exempt material removed.

Reasons

I am an officer authorised under section 23 of the FOI Act to make decisions in relation to FOI requests.

In making my decision I have taken into account:

- the terms of your request;
- the documents that fall within the scope of your request;
- the FOI Act; and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

The reasons for my decision and for the application of exemptions under the FOI Act to the document are set out below. Where I refer to sections of the FOI Act, these are available at

www.legislation.gov.au. Sections of the FOI Guidelines referenced can be found online at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

Damage to international relations (*section 33(a)(iii) of the FOI Act*)

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

The phrase ‘international relations’ has been interpreted to mean 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 (FOI Guidelines, paragraph 5.36). As outlined in paragraph 5.38 of the FOI Guidelines, this applies to documents, the disclosure of which could diminish the confidence which another country has in Australia as a reliable recipient of confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.

Furthermore, according to the FOI Guidelines (paragraph 5.28), the expression ‘damage’ could include intangible damage, including inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government.

Considering these provisions, I am satisfied that the disclosure of the relevant material to which you seek access, would be reasonably likely to cause damage to Australia’s foreign relationships and that that this material is exempt under section 33(a)(iii) of the FOI Act. In coming to this view, I have had regard to the nature of the information, the circumstances in which some of it was communicated, and the likelihood and nature of the damage to international relations which could occur in the event of disclosure (FOI Guidelines, paragraph 5.37).

Material communicated in confidence (*section 33(b) of the FOI Act*)

Under section 33(b) of the FOI Act, a document is exempt if disclosure would divulge any matter communicated in confidence to the Australian Government by or on behalf of a foreign government, an authority of a foreign government or an international organisation.

Information is communicated in confidence by or on behalf of another government or international organisation if it was communicated under an express or implied understanding that the communication would be kept confidential (FOI Guidelines, paragraph 5.42).

Paragraph 5.44 of the FOI Guidelines also provides that an understanding of confidentiality need not be formal and may be inferred from the circumstances in which the communications occurred.

I have therefore determined that the relevant information to which you seek access was communicated in confidence by a foreign government and is exempt under section 33(b) of the FOI Act.

Substantial adverse effect on an agency’s proper and efficient conduct of operations (*section 47E(d) of the FOI Act*)

Under section 47E(d) of the FOI Act, a document is conditionally exempt if disclosure would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient

conduct of an agency's operations. FOI Guidelines, paragraph 6.92 specifies that the 'substantial adverse effect' need only be an indirect effect.

The documents in scope consist of email addresses which are used by departments for internal and operational reasons. I note that the department has established channels of communication through which members of the community and the media may submit enquiries. Other material exempt under section 47E(d) of the FOI Act, includes Cable reference numbers and internal processes for matters such as accrediting diplomats. Disclosure of this material could reasonably be expected to prejudice the department's operations in relation to the management of its secure overseas communications service and internal and external processing mechanism for credentials.

I therefore find that material contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Unreasonable disclosure of personal information (section 47F(1) of the FOI Act)

Under section 47F(1) of the FOI Act, a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person.

'Personal information' refers to information or opinion about an identified individual, or an individual who is reasonably identifiable:

- whether the information or opinion is true or not; and
- whether the information or opinion is recorded in a material form or not.

The test of 'unreasonableness' implies a need to balance the public interest in disclosing the information and the relevant individuals' privacy interests (paragraph 6.138 of the FOI Guidelines).

I have had regard to the following matters in considering whether disclosure of some information would involve an unreasonable disclosure of personal information:

- the extent to which the information is well known;
- whether the individuals to whom the information relates are known to be (or to have been) associated with the matters in the documents; and
- the availability of the information from publicly accessible sources; and
- any other matters that the agency considers relevant (section 47F(2) of the FOI Act).

Having regard to the nature of the information, and the implications for the identified individuals if disclosed, I am satisfied that the disclosure of the personal information in this case would be unreasonable. I am not satisfied that the information is well known or publicly available, or that the disclosure of the relevant information would achieve a public purpose.

For these reasons, I have decided that the relevant material is conditionally exempt under section 47F(1) of the FOI Act.

Conditional exemptions - public interest considerations (section 11A(5) of the FOI Act)

As sections 47E(d) and 47F of the FOI Act are conditional exemptions, I must grant you access to this material unless providing access would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act).

In assessing the public interest, I have considered the FOI Guidelines referred to above and the public interest factors listed in section 11B of the FOI Act as favoring access, including whether granting access to the documents would:

- promote the objects of the FOI Act; and
- inform debate on a matter of public importance.

I have also considered public interest factors against disclosure, including that disclosure may reasonably be expected to:

- prejudice an individual's right to privacy; or
- prejudice the management functions of the department.

On balance, I am of the view that the public interest is weighted against the disclosure of this material. In forming this view, I have not taken into account any of the irrelevant factors specified in section 11B(4) of the FOI Act.

Irrelevant material (section 22(1)(a)(ii) of the FOI Act)

Some of the material excluded from the documents released to you is outside the scope or could reasonably be regarded as irrelevant to your request (section 22(1)(a)(ii) of the FOI Act) as it does not relate to the appointment of Dr Rudd.

In determining what is relevant to your request, I have taken into account the terms of your request and the email which you received from the department on 21 February 2023, in which you were invited to respond if you required the names and contact details of government officials not in the Senior Executive Service (SES). As you have not stated that you require this information, I have decided to remove them from the document being released to you.

Review rights

Information about your review rights is set out in the **Attachment** for your reference.

Contact

Should you have any queries regarding this matter please contact the Freedom of Information Section by email (foi@dfat.gov.au).

Yours sincerely

Bina Chandra
Assistant Secretary
Department of Foreign Affairs and Trade

Your review rights

Internal review

You may apply for internal review of the decision (section 54 of the FOI Act). The internal review application must be made within 30 calendar days from the day you receive this notice.

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.

Any request for internal review should be directed via email to foi@dfat.gov.au or addressed to:

Freedom of Information Section
Department of Foreign Affairs and Trade
R G Casey Building
John McEwen Crescent
Barton ACT 0221
Australia

Australian Information Commissioner

You may apply to the Australian Information Commissioner to review my decision (section 54L of the FOI Act). To do this, you must contact the Australian Information Commissioner within 60 calendar days from the day you receive this notice.

You may also make a complaint to the Australian Information Commissioner about the Department's actions in relation to this decision (section 70 of the FOI Act). Making such a complaint about the way the Department has handled your FOI request is a separate process to seeking review of my decision.

Further information on applying for an Australian Information Commissioner review is available at: <https://www.oaic.gov.au/freedom-of-information/foi-review-process>

Further information about how to make a complaint is available at: <http://www.oaic.gov.au/freedom-of-information/foi-complaints>