

Attachment A**DECISION RECORD****Request Details**

FOI Request: FA 16/05/01039

File Number: ADF2016/20597

Scope of request

On 10 May 2016 you requested:

"Under Freedom of Information, I request any documents outlining the final amount the Department of Immigration and Border Protection has agreed to pay Save the Children in compensation for the organisation's staff being removed from Nauru."

Document in scope

The Department of Immigration and Border Protection (Department) has interpreted the scope of your request to be the final deed of agreement between Save the Children Australia and the Department. It should be noted that the arrangements leading up to the financial settlement and the terms of the settlement, which are set out in the deed, including the settlement amount, are confidential.

Authority to make decision

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

Information considered

In reaching my decision, I have considered the following:

- the terms of your request
- the *Freedom of Information Act 1982*
- the Australian Information Commissioner's Guidelines relating to access to documents held by government and
- consultation with the relevant business areas.

Reasons for decision

I am satisfied that I have been provided with the document that is relevant to your request. For the reasons set out below, I have decided to partially exempt the document under section 45(1) [Documents containing material obtained in confidence] of the FOI Act.

Section 45 – Documents containing material obtained in confidence

Section 45(1) of the FOI Act exempts a document if its disclosure would found an action by a person for breach of confidence.

I have given consideration to the Information Commissioner's guidelines regarding the application of section 45 and provide the following considerations:

Paragraph 5.141 – *The exemption operates as a separate and independent protection for confidential relationships...*

Paragraph 5.143 - *To found an action for breach of confidence (which means a section 45 would apply), the following five criterion must be satisfied in relation to the information:*

- *it must be specifically identified*
- *it must have the necessary quality of confidentiality*
- *it must have been communicated and received on the basis of a mutual understanding of confidence*
- *it must have been disclosed or threatened to be disclosed, without authority*
- *unauthorised disclosure of the information has or will cause detriment.*

I find that disclosure of the document is exempt under section 45(1), as disclosure would found an action for breach of confidence.

Identified with specificity

The overall compensation amount awarded to Save the Children Australia that you are seeking access to, has been specifically identified as confidential information within the document which is relevant to your request. This meets the above criteria for a section 45(1) exemption to apply.

Confidential in nature

The information contained within the document comprises information relating to the *Deed of Release and Indemnity*, which is a legally binding agreement between the Department and Save the Children Australia. This document contains highly confidential information, the knowledge of which is limited only to the parties involved. The Department itself has safe-guards in place in relation to the handling of this document and its handling is strictly limited to a need-to-know basis.

The document that you have requested access to contains the “overall compensation amount” which has not been publicly disclosed by the parties involved, as it is confidential in nature.

On 6 May 2016, the Department issued a statement “Agreed statement about the Department of Immigration and Border Protection’s direction to Save the Children Australia to remove 10 employees from work in Nauru”. I draw your attention to paragraph five of this public statement which notes “the Department... reaching a confidential financial settlement with SCA”. This agreed statement confirms the confidential nature of the agreement reached with the Save the Children Australia and consists of part of the settlement with Save the Children Australia.

Communicated in confidence

I further note the Information Commissioner’s Guidelines which provide:

5.148 ‘The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency needs to have understood and accepted an obligation of confidence. The mutual understanding must have existed at the time of the communication. The most obvious example is a contractual obligation of confidence. Confidence may arise in other circumstances. For example, when a person gives information to an agency they may ask that it be kept confidential and the agency could accept the information on that basis.

5.149 It may be clear from an agency’s actions whether the agency accepted an obligation of confidence and is maintaining that obligation. For example, an agency may mark a document as confidential, keep it separate from documents that are not confidential and ensure that the material is not disclosed to third parties without consent.’

I find that the information was communicated within the context of a mutual understanding and that the Department has a strong obligation to treat the information as confidential. Both parties signed the deed, confirming that they agree to uphold the terms and conditions, including terms which specify the confidential nature of the settlement.

As obligations of confidence are contained in, and arise from the deed, I have determined that the agreed terms of the settlement were communicated and received on the basis of a mutual understanding of confidence, which is a specific requirement for a section 45(1) exemption to apply under the FOI Act.

In considering the FOI guidelines as detailed above, I also note the document in question was provided to the FOI Section from the relevant business area with the markings of 'Confidential' noted in clear text. Further, the document was provided with instructions that it be *stored in such a way that it is abundantly clear that it is to be kept confidential*.

Disclosure a misuse

I find that disclosure under FOI would constitute a misuse of the information. Such disclosure would be inconsistent with the understanding that the Department would keep the information confidential. There is nothing to suggest that the person or body that communicated the information would authorise the Department to disclose it under FOI.

Detriment

Paragraph 5.155 of the Information Commissioner's Guidelines notes that it is *not* necessary to show that unauthorised disclosure of the information will cause detriment to the person who provided the confidential information, however, I have still considered this aspect.

Having regard to the information within the document and the surrounding circumstances, I am satisfied that if the information contained in the document were disclosed in response to your request, this would mean the confidentiality agreement would be void or nullified and consequently Save the Children Australia and the Department would suffer a significant detriment. In addition, the Department has a strong obligation to maintain confidentiality where it has agreed to keep such information confidential.

Additionally, the detriment caused would be substantial to any future negotiations for other similar claims and thus the ability for the Department to gain such confidential information in the future would be significantly prejudiced.

Further consideration

The exemption in section 45(1) does not apply to information that is conditionally exempt under section 47C(1) (deliberative matter), or would be conditionally exempt but for section 47C(2) or 47C(3).

I also considered whether the document contains information that is of a kind as described in section 47C [Public interest conditional exemptions-deliberative processes] of the FOI Act, being a document which contains deliberative matter relating to the functions of the Department, and if so whether disclosure of that information would breach a confidence owed to a person or body other than:

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- (a) a person in the capacity of Minister,
 - (b) member of the staff of a Minister or officer of an agency; or an agency, the Commonwealth or Norfolk Island.

As required by section 45(2), I have not claimed exemption under section 45 for any document which falls within section 47C(1)(a) and for which no such obligation of confidence would be breached.

Accordingly, based on the reasons stated above I am satisfied that the document is exempt under section 45(1) of the FOI Act.



Authorised decision maker
Department of Immigration and Border Protection

Email FOI@border.gov.au

30 June 2016

Attachment B**EXTRACT OF RELEVANT LEGISLATION UNDER THE FOI ACT****45 Documents containing material obtained in confidence**

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
 - (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
 - (b) an agency, the Commonwealth or Norfolk Island.