



Decision and Reasons for Decision

Application Number: 210751

Applicant: Dr M Haneef

Respondent: Department of Police

Decision Date: 24 August 2010

Catchwords: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER AFFECTING RELATIONS WITH OTHER GOVERNMENTS – whether disclosure of the matter in issue could reasonably be expected to cause damage to relations between the State and another government – whether public interest considerations favouring disclosure outweigh public interest considerations favouring non disclosure – whether the matter in issue is exempt from disclosure under section 38(a) of the *Freedom of Information Act 1992* (Qld)

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER AFFECTING RELATIONS WITH OTHER GOVERNMENTS – whether disclosure of the matter in issue could reasonably be expected to divulge information of a confidential nature that was communicated in confidence by or on behalf of another government – whether public interest considerations favouring disclosure outweigh public interest considerations favouring non disclosure – whether the matter in issue is exempt from disclosure under section 38(b) of the *Freedom of Information Act 1992* (Qld)

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REASONS FOR DECISION

Summary

1. The Applicant applied to the Queensland Police Service (**QPS**) for access to transcripts of conversations he had with others while in custody.
2. For the reasons set out below, I am satisfied that the only transcript in the possession of QPS is a four page transcript of a conversation between the Applicant and the Indian Consul General on 4 July 2007 (**Transcript**) and that the Transcript is exempt from disclosure under section 38(a) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) and partially exempt under section 38(b).
3. QPS's internal review decision refusing access to the Transcript is affirmed.

Background

4. At 4:50am on 2 July 2007 the Australian Federal Police (**AFP**) Manager of Counter Terrorism (Domestic Operations), Commander Ramzi Jabbour became aware of some information from the UK Metropolitan Police Service possibly connecting Dr Mohamed Haneef (**Applicant**) with incidents in the UK.¹ Commander Jabbour became the Senior Investigating Officer responsible for the investigation named Operation Rain from 3 July 2007.²
5. Reporting to him was the Manager of the AFP Brisbane Office, Federal Agent David Craig who was responsible for the Joint Counter Terrorism Team in Queensland consisting of 5 AFP officers and 2 QPS officers. Federal Agent Neil Thompson was one of the AFP officers. The QPS officers were Detective Sergeant Adam Simms and Detective Sergeant David Timms, both of whom had been at some point sworn as special members of AFP.³ While they remained QPS officers, they operated within the legal, operational and administrative framework of AFP.⁴
6. AFP's Joint Counter Terrorism Team could request assistance from and was supported by QPS State Crime Operations Command under Detective Chief Superintendent Barnett who reported to AFP Commander Jabbour through QPS Detective Superintendent Gayle Hogan.⁵
7. At 11:05pm on 2 July 2007 after receiving information from AFP, Detective Sergeant Simms accompanied by Federal Agent Thompson arrested the Applicant at the Brisbane Airport.⁶ The Applicant was detained at AFP Headquarters⁷ where he was formally interviewed by Detective Sergeant Simms and Federal Agent Thompson.⁸
8. During a further interview on 3 July 2007 the Applicant indicated he would like to contact the Indian consul and arrangements were made.⁹

¹ Commonwealth, Clarke Inquiry into the Case of Dr Mohamed Haneef, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) vol 1, 45.

² Ibid, 20.

³ Ibid, 20.

⁴ Ibid, 21.

⁵ Ibid, 22.

⁶ Ibid, 50.

⁷ Ibid, 54.

⁸ Ibid, 56.

⁹ Ibid, 75.

9. At 12:45am on 4 July 2007 the Applicant was transported to the Brisbane Watchhouse.¹⁰
10. On 4 July 2007 Consul General Nallacoundanpallayam Gopalan Vasanth Kumar (**Consul General**) accompanied by another person attended the Brisbane Watchhouse and spoke with the Applicant.¹¹
11. On 8 July 2007, the Applicant was permitted to telephone his wife on a number provided by the Indian High Commission, but the call was not answered and AFP refused to try alternative numbers suggested by the Applicant because those numbers had not been verified. The applicant was eventually able to speak to his wife by telephone on 11 July 2007.¹²
12. On 27 July 2007, the Commonwealth Director of Public Prosecutions formally offered no evidence against the Applicant and asked the charge be dismissed.¹³ This occurred, and the Applicant was immediately taken into immigration detention. He then left Australia for India on the night of 28 July 2008.¹⁴

The FOI application

13. By letter dated 21 October 2008 (**FOI Application**), Maurice Blackburn Lawyers, acting for the Applicant, applied to QPS for copies of:
 - a translated transcript of a conversation between the Applicant and consular staff of the Indian Consulate at the Brisbane Watchhouse; and
 - any other transcripts of conversations by the Applicant while he was in custody (which may include the Applicant's phone conversations with his wife).
14. QPS located only the recording and translated Transcript of a conversation between the Applicant and consular staff at the Brisbane Watchhouse on 4 July 2007.
15. QPS consulted with AFP and the Department of Foreign Affairs and Trade (**DFAT**) under section 51 of the FOI Act.
16. QPS and AFP were of the view that, in the absence of any objection from DFAT, the Transcript could be released.
17. By email dated 11 December 2008, DFAT advised QPS that it recommended QPS exempt the Transcript from disclosure under section 38 of the FOI Act. DFAT advised that it had consulted with the Indian High Commission which objected to the release of the Transcript.
18. QPS subsequently refused access to the Transcript under section 38(a) of the FOI Act (**Original Decision**¹⁵) and, on Internal Review, affirmed that access was refused pursuant to this provision (**Internal Review Decision**¹⁶). No reasons were given by either decision maker but both had regard to *'the content of the document, the views of another government and other matters'*.

¹⁰ Ibid, 22.

¹¹ Ibid, 38-39.

¹² Ibid, 75.

¹³ Ibid, 149, 179.

¹⁴ Ibid, 180.

¹⁵ Dated 19 December 2008.

¹⁶ Dated 16 January 2009.

19. By letter dated 9 February 2009 (**External Review Application**), the Applicant applied for external review of the Internal Review Decision.

Decision under review

20. The decision under review is the Internal Review Decision.

Steps taken in the review

21. The steps taken in this review are set out in the attachment to this decision.

Matter in issue

22. The matter in issue in this review is the Transcript sought by the Applicant in his FOI Application.

Matters taken into account in making this decision

23. In reaching this decision, I have taken the following into account:
- the FOI Application, Internal Review Application and External Review Application
 - the Original Decision and Internal Review Decision
 - written correspondence and submissions received from the Applicant, QPS, AFP (or its legal representative, the Australian Government Solicitor (**AGS**)), DFAT and the Premier during the course of the review
 - affidavits, statutory declarations and supporting evidence received from QPS and AFP
 - information and documents produced to the Office under notice/s issued pursuant to section 85 of the FOI Act
 - file notes of various telephone conversations between staff members of this Office and QPS, AFP, AGS, DFAT and the Applicant's legal representative during the course of the review
 - relevant provisions of the FOI Act referred to in this decision
 - legislation, case law and previous decisions of the Information Commissioner referred to in this decision
 - the Transcript
 - publicly available information.

The law

24. The FOI Act was repealed by the *Right to Information Act* 2009 (**RTI Act**)¹⁷ which commenced on 1 July 2009.¹⁸ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.¹⁹

Section 38 of the FOI Act

25. Section 38 of the FOI Act states:

¹⁷ Section 194 of the RTI Act.

¹⁸ With the exception of sections 118 and 122 of the RTI Act.

¹⁹ Section 199 of the RTI Act.

38 Matter affecting relations with other governments

Matter is exempt matter if its disclosure could reasonably be expected to –

- (a) *cause damage to relations between the State and another government; or*
- (b) *divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;*

unless its disclosure would, on balance, be in the public interest.

Section 434 of the Police Powers and Responsibilities Act 2000 (Qld)

26. Section 434 of the *Police Powers and Responsibilities Act 2000* (Qld) states:

434 Right of visiting foreign national to communicate with embassy etc.

- (1) *This section applies to a relevant person who is not—*
 - (a) *an Australian citizen; or*
 - (b) *a foreign national with a right of residence in Australia*
- (2) *Before a police officer starts to question the person, the police officer must inform the person that he or she may telephone, or attempt to telephone, the embassy or consular office of the country of which the person is a citizen*
- (3) *If the person wishes to telephone the appropriate embassy or consular office, the police officer must—*
 - (a) *as soon as practicable, make available to the person reasonable facilities for the purpose; and*
 - (b) *delay the questioning for a reasonable time to allow the person to telephone, or attempt to telephone, the appropriate embassy or consular office.*

Police Commissioner's Circular

27. The QPS Commissioner's "*Terrorist Interventions – Control Orders and Preventative Detention Orders Circular*" No. 03/2007, which was in force at the relevant time, provided that all communication or contact with a detainee had to be effectively monitored.

Vienna Convention on Consular Relations

28. Articles 35 and 36 of the *Vienna Convention on Consular Relations*²⁰ (VCCR) state:

**Article 35
Freedom of communication**

- 1. *The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes.....*

**Article 36
Communication and contact with nationals of the sending State**

²⁰ Opened for signature 24 April 1963, 1973 ATS 7 (entered into force for Australia 19 March 1967).

1. *With a view to facilitating the exercise of consular functions relating to nationals of the sending State:*
 - (a) *consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;*
 - (b) *if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
 - (c) *consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*
 2. *The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.*
29. The consensus amongst signatories to the VCCR was that the special circumstances of detainees were considered such as to require a specific article. Article 36 deals with the freedom of consular officers to communicate with and have access to nationals and vice versa. This Article states these rights are to be exercised in conformity with the laws and regulations of the receiving State subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. Importantly, Article 36 clarifies how the freedom of communication espoused by Article 35 applies with respect to detainees; in particular, that the freedom of communication referred to in Articles 35 and 36 cannot be curtailed by domestic laws.

Relevant Consular Privileges and Immunities

30. The obligation of freedom of communication between consular officials and detainees in the course of official duties provided for in Article 35 is specifically incorporated into section 5 of the *Consular Privileges and Immunities Act 1972* (Cth) (**CPI Act**) which provides:

5 Vienna Convention on Consular Relations to have force of law

- (1) *Subject to this section, the provisions of Articles 1, 5, 15 and 17, paragraphs 1, 2 and 4 of Article 31, Articles 32, 33, **35** and 39, paragraphs 1 and 2 of Article 41, Articles 43 to 45 (inclusive) and 48 to 54 (inclusive), paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1, 2 and 3 of Article 58, Articles 60 to 62 (inclusive), 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Convention have the force of law in Australia and in every external Territory.*

- (2) *For the purposes of those provisions as so having the force of law:*
- (a) *a reference in those provisions to the receiving State shall be read as a reference to Australia and, where the context so permits, as including a reference to every State of the Commonwealth and every Territory;*
 - (b) *a reference in those provisions to a national of the receiving State shall be read as a reference to an Australian citizen;*
 - (c) ***a reference in those provisions to authorities of the receiving State shall be read as including a reference to members and special members of the Australian Federal Police, members of the police force of a State of the Commonwealth or of a Territory and persons exercising a power of entry to premises;***
 - (d) *a reference to a grave crime shall be read as a reference to any offence punishable on a first conviction by imprisonment for a period that may extend to 5 years or by a more severe sentence;*
 - (e) ***a waiver shall be deemed to have been made by an overseas country if the waiver has been made by the head of the diplomatic mission, or by a person for the time being performing the functions of the head of the diplomatic mission, in Australia of that country, or, if there is no such mission by the head of the consular post concerned;***
 - (f) *the reference in paragraph 2 of Article 17 to any privileges and immunities accorded by customary international law or by international agreements shall be read as a reference to any privileges and immunities conferred under the International Organisations (Privileges and Immunities) Act 1963;*
 - (g) *Article 58 has effect as if the references in that Article to other Articles of the Convention the provisions of which do not have the force of law by virtue of subsection (1) were omitted;*
 - (h) *Articles 50, 51, 52, 54, 62 and 67 shall be treated as granting the privileges or immunities that those Articles require to be granted;*
 - (j) *Article 50 shall be treated as extending to career consular officers of a consular post the head of which is an honorary consular officer;*
 - (k) *the reference in Article 57 to the privileges and immunities provided in Chapter II shall be read as a reference to the privileges and immunities provided in Section II of that Chapter;*
 - (l) *the references in paragraph 1 of Article 50 and in Article 62 to such laws and regulations as the receiving State may adopt shall be read as including references to this Act and any law of an external Territory; and*
 - (m) *the reference in Article 70 to the rules of international law concerning diplomatic relations shall be read as a reference to the provisions of the Diplomatic Privileges and Immunities Act 1967.*
- (3) *Nothing in subsection (1) affects the application of any law of the Commonwealth or of a Territory relating to quarantine, or prohibiting or restricting the importation into, or the exportation from, Australia or that Territory, as the case may be, of any animals, plants or goods, but this*

subsection does not prejudice any immunity from suit or from civil or criminal process that a person has by virtue of subsection (1).

- (4) *The provisions of the Convention, in so far as they provide for the exemption from tax of any income, apply, for the purposes of the application of the Income Tax Assessment Act 1936 or the Income Tax Assessment Act 1997, to assessments in respect of income of the year of income that commenced on 1 July 1972, and in respect of income of all subsequent years of income.*
- (5) *For the purposes of section 38 of the Judiciary Act 1903, a matter arising under the Convention as having the force of law by virtue of this section shall be deemed not to be a matter arising directly under a treaty*

[emphasis at 5(1), (2)(c) and (e) added]

31. The CPI Act implements the obligations created by the VCCR that require enforceability in Australian domestic law. It follows that both AFP and QPS are obligated under section 5 of the CPI Act to permit and protect freedom of communication by consuls for all official purposes.
32. The scope of the concept of “freedom of communication” was considered by the High Court of Australia in *Lange v Australian Broadcasting Corporation*²¹ when it considered whether a right to freedom of political communication was implied in the Australian Constitution. The Court characterised this freedom as a ‘freedom from governmental action’²² creating ‘an area of immunity from legal control’²³. In that context the High Court identified as possibly invalid a law that effectively burdens freedom of communication in its terms, operation or effect²⁴. The immunity considered was against both legislative and executive action. On that analysis it follows that if AFP and QPS take action that violates the consular’s freedom of communication, whether or not their own regulatory framework is permissive of such a violation, AFP or QPS can be taken to have breached their obligations under the CPI Act.

Findings

The existence of other transcripts falling within the scope of the FOI application

33. The FOI Application sought a translated transcript of a conversation between the Applicant and the Indian Consul General; and any other transcripts of conversations by the Applicant while he was in custody (which may include the Applicant’s phone conversation with his wife). The only responsive material located by QPS was the Transcript.²⁵ By letter dated 5 March 2009 QPS stated that ‘[n]o other conversations of Dr Haneef were recorded during his time in QPS custody’. QPS also advised on 9 March 2009 that apart from the Transcript, no other documents were found.
34. This Office made further inquiries of QPS about the existence of other transcripts (on the basis of information contained in the matter under consideration in related external reviews) including:
 - the instruction of Detective Superintendent Hogan on the Watchhouse register dated 4 July 2007: ‘Unless further advised the only phone call will be undertaken

²¹ (1997) 189 CLR 520

²² *McClure v Australian Electoral Commission* (1999) 13 ALJR 1086 at [28] per Hayne J.

²³ Above n 21 at 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

²⁴ Above n 21 at 567-568.

²⁵ And the recording of the relevant conversation.

under controlled circumstances with a detective and an interpreter present. The call will be recorded.'

and

- the QPS Commissioner's "*Terrorist Interventions – Control Orders and Preventative Detention Orders Circular*" No. 03/2007 (which set out instructions for watch house managers): '*All communication or contact that occurs between a detainee and persons is monitored by a police officer. If effective monitoring of the communication or contact cannot take place, the communication or contact is not to occur.*'

35. Generally, I note that, from the time of his arrest until the time that he was taken into immigration detention, the Applicant was held in custody by AFP, with the assistance of QPS, as part of the investigations that comprised Operation Rain.
36. In response to this Office's further inquiries, QPS ascertained that a recording of contact the Applicant had with his wife was made by an AFP officer. In the circumstances, I am satisfied that:
 - the Applicant's conversation with his wife was recorded while he was in custody, however, the recording was made by an AFP officer
 - QPS has no obligation under the *Public Records Act 2002* (Qld) to retain copies of recordings made by another police service
 - this document does not exist in the possession of QPS.
37. On the basis of the Indian Consul General's recollection of a second conversation with the Applicant, I find that it is more likely than not that a further conversation took place and that it is more likely than not that it was recorded. I am however satisfied on the basis of QPS advice and the information management practices of Operation Rain that QPS does not have any further recordings or transcripts in its possession.
38. QPS recorded the 4 July 2007 conversation between the Consul General and the Applicant under the direction of Commander Jabbour, the Senior Investigating Officer from AFP in charge of the investigation. I am satisfied that no waiver was sought or obtained by AFP from the head of the diplomatic mission or the head of the consular post in relation to the proposed recording of the conversation between the Consul General and the Applicant. On the basis of Detective Chief Superintendent Condor's diary notes, I find that QPS officers formed a mistaken belief that the consent of the Consul General to record the conversation had been obtained.

Section 38(a) of the FOI Act

39. Having considered the parties' submissions and the evidence before me, I find with respect to section 38(a) that:
 - As to whether the communication was by or on behalf of another government, I prefer the submissions of DFAT and QPS to that of the Applicant and find that the communications were by and on behalf of another government because the Indian Consul General is the representative of the Indian Government while in Australia and at the relevant time, he was performing official duties, i.e. communicating with nationals in custody. The definition of 'government' in the FOI Act is an inclusive one, including an agency and a Minister. It does not

exclude any other Australian government (including territory governments) nor does it exclude a non-Australian government.

- With respect to the question 'Could the disclosure of the transcript be reasonably expected to cause damage between the relations of the State of Queensland and another government?' I find the answer to be 'yes' for the following reasons.

Damage

40. It is relevant to consider what the term 'damage' might mean in the context of relations between the State of Queensland and a non-Australian government. The Federal Court in *Arnold v Queensland* dealt with a matter concerning two governments within the federation:

*... [T]he words "relations between the Commonwealth and a State" refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word "relations" includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to 'relations' between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect 'relations' between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case.*²⁶

41. Similarly, this approach also applies in the context of relations between a State government and a non-Australian government.
42. After seeking the advice of the Indian High Commission, DFAT submitted that disclosure of the Transcript could reasonably be expected to produce an adverse reaction from the Indian Government including a decrease in the willingness of persons holding senior positions to cooperate with Australian officials, 'potentially undermining' Australia's ability to provide effective consular assistance to its nationals and other unspecified areas of damage. Adverse reactions such as these could be categorised as retaliatory actions or reactions arising from the individual actions of particular officers. Something further is required to assess whether damage to the relationship could be expected to flow from disclosure of the Transcript.
43. The Applicant's lawyers submitted the opposite proposition to DFAT's: the non-release of the transcript would do damage to relations because Australia would be seen to be sweeping a breach of its international obligations under the carpet.
44. The nature of the Applicant's submission concerns the possible outcomes arising from the **non-disclosure** of the transcript.
45. For QPS to make out its claim for exemption from disclosure under section 38(a) of the FOI Act, it must establish that its expectation of damage to relations could be expected from **disclosure** of the Transcript. The Applicant's submission in this regard sheds no light on the applicability of the exemption but it is relevant to any public interest argument.
46. In my view the nature of the 'damage to relations' contemplated by section 38 is likely to be a loss of confidence in or trust between governments.

²⁶ *Re Arnold (on behalf of Australians for Animals) v Queensland* (1987) 13 ALD 195, 204.

47. What are the kinds of acts that might lead to a loss of confidence or trust between governments? Countries have distinct economic and political interests, so it is unsurprising that their relations often may be beset with tensions. Such tensions can upset relations in the short term but tend not to fundamentally disturb confidence or trust. Those acts which could reasonably be expected to cause damage to relations between the State of Queensland and a non-Australian government, in the sense that they might fundamentally disturb confidence or trust, would include those acts which offend the fundamental principles and standards on which sovereign states agree and which allow for relatively smooth international relations. Such principles include the sovereign equality of countries; the immunities of diplomatic and consular agents, non-intervention in the internal or external affairs of other countries, peaceful settlements of dispute, prohibition of the threat or use of force and respect for human rights.

The circumstances under which the Transcript came into existence

48. An examination of the Transcript may assist in deciding whether:
- its content or
 - the act of disclosing of the Transcript (regardless of its content) may bring the document within the scope of the exemption²⁷ or
 - the circumstances under which it came into existence may affect the decision at hand.

Content

49. There is nothing in the words of the Transcript itself that could reasonably be expected to cause damage to the relations between the State of Queensland and the Indian Government.
50. The recording is of the Consul General performing official duties with a detainee. Because of sections 35 and 36 of the VCCR, such duties concern consular immunity, which is one of the agreed international standards, the breach of which could reasonably be expected to damage relations. However, the further handling of the recording and Transcript through disclosure under the FOI Act would not in and of itself amount to a breach of section 5 of CPI Act or the international standards in the VCCR.

The act of disclosure

51. The right of access to information under the FOI Act operates so that if a consular communication is recorded or transcribed by a Queensland agency, then, subject to any relevant exemption, a person may seek access to the recording or transcript. This fact and the knowledge of it do not effectively burden the freedom of communication between a consular post and its nationals. Any possible burden would arise from the recording or transcribing of the communication by the Queensland agency.
52. The right of access under the FOI Act arises from the fact that a Queensland agency has information, not otherwise exempt from the right of access. Such a "further use of the transcript" through disclosure under the FOI Act would not fall within one of the principles or agreed international standards of nation states, which if abused could reasonably be expected to damage the relationship between the Queensland Government and the Indian Government. In my view this is particularly so as Queensland and India share a commitment to Right to Information laws.

²⁷ Ibid 208.

The circumstances in which the document came into existence

53. The circumstances in which the document came into existence require examination. Using a surveillance device, QPS officers, under the direction of AFP and in the mistaken belief that the Consul General had been briefed by AFP, recorded and produced a transcript of the conversation between the Applicant and the Consul General at the Brisbane watch house on 4 July 2007, an action that may have breached Australia's obligations under Article 35 of the VCCR in force in domestic law. As such, the circumstances in which the Transcript came into existence concern one of the areas which may lead to a loss of confidence or trust: diplomatic and consular immunities and privileges.
54. Neither AFP nor QPS objected to the release of the relevant documents unless DFAT objected. The Queensland Government has nothing further to add to the DFAT submissions. DFAT submitted and QPS subsequently claimed that release of the matter claimed to be exempt could reasonably be expected to damage relations between the Queensland and Indian Governments. The relevant inquiry as expressed in *Attorney-General's Department v Cockcroft*²⁸ is whether the expectation claimed is reasonably based.
55. DFAT submitted that according to diplomatic and consular protocol, consular assistance is provided on a confidential basis, particularly given the sensitive circumstances that often give rise to the need for such assistance. DFAT argued that by virtue of Articles 35 and 36 of the VCCR, consuls are to be guaranteed freedom of communication.
56. The Macquarie Dictionary defines 'freedom' to mean:
A particular immunity or other privilege enjoyed, as by a city or corporation; Exemption from external control, interference, regulation; frankness of manner of speech.
57. The plain English meaning of 'freedom of communication' was supported by the High Court as discussed at paragraph 32 above.
58. In light of the important role of consular officials to monitor the well-being of nationals in detention, facilitate contact with legal advisors or friends and family and to provide legal information about the legal system of the country, and the ancient history that informs the customary practices codified in the VCCR, it appears plain to me that the obligation of freedom of communication in section 5 of the CPI Act would require communications between the Consul General and the Applicant to occur in private and in circumstances in which, so far as is practicable, the communication will not be overheard.
59. On the basis of its consultation with the Indian High Commission and its understanding of Australia's obligations and diplomatic relations, DFAT submitted that any further handling of the recording and Transcript will probably cause damage to the bilateral relationship with India.

The bilateral relationship

60. DFAT submitted that the Australia-India relationship is at a sensitive point and that the Haneef case was a particularly controversial issue in India at the time. Additionally, damage to the public perception of Australia in India has occurred as a result of the attacks of Indian students in Australia over the past twelve months.

²⁸ (1986) 10 FCR 180.

61. While both the Australian and Indian Governments are democratically elected, the general perception of either country's population is not necessarily determinative of the state of relations between the governments nor of any damage to those relations.
62. Significantly, the examples DFAT have given for relations being at a sensitive point reflect those matters of accepted principles between countries mentioned earlier, as having the greatest potential to damage relations: respect for human rights and diplomatic and consular immunities and privileges. Australia's international reputation as a country that respects the rule of law is also a touchstone. However, the examples primarily concern the Australian Government and other governments, rather than the Queensland government. DFAT submitted that current sensitivities heighten prospects of an adverse response from the Indian Government in response to further use of the Transcript.
63. DFAT also submitted that some damage to the bilateral relationship may have already flowed from the Indian Government's awareness of the taping of the relevant conversation and the production of the Transcript.
64. The AFP investigation of the Applicant had implications for the bilateral relationship between Australia and India. On this point, the Report on the Inquiry into the Case of Dr Mohamed Haneef provides that:
- *Providing accurate information to the Indian Government was important. As soon as Dr Haneef was arrested, the South and West Asia, Middle East and Africa Division (of the Department of Foreign Affairs and Trade) began assessing the implications of this for Australia's bilateral relationship with India. The arrest immediately became a major media story in India and for most of July received prominent coverage. Much of the coverage was critical of Australia's handling of the case. The Australian High Commission in New Delhi received a large number of inquiries from the Indian media.*
 - *The Indian Government took a close interest in Dr Haneef and made numerous requests to the Australian High Commission in New Delhi. These included requests about his treatment. The Indian Government also expressed its concern to the Australian Government. Two officials from the Indian Consulate visited Dr Haneef on 4 July 2007. Through the consulate, Dr Haneef also had telephone contact with his family.*
 - *To keep channels of communication open and to mitigate any negative effects on the bilateral relationship, DFAT prepared for the Indian Government information about developments in the investigation. The Australian High Commission sent letters to India's Ministry of External Affairs and also received inquiries from India's Minister for External Affairs, the Indian Ministry of External Affairs and the Indian High Commission in Canberra. The South and West Asia, Middle East and Africa Division contributed to coordination of the exchange of information within the department (including to and from the High Commission in New Delhi) and with the Office of the Foreign Minister. For example, by 17 July 2007 the Indian Ministry of External Affairs had conveyed its concern about developments to the Australian Head of Mission in New Delhi. As a consequence, the then Foreign Minister, the Hon. Alexander Downer MP indicated his readiness to call his Indian counterpart, the Minister of External Affairs, Mr Pranab Mukherjee. This conversation took place on 31 July 2007.²⁹*
65. I accept that the investigation was a matter that had the potential to damage relations between the Australian and Indian Governments. I also accept that damage may already have flowed from the Indian Government's awareness of the recording of the conversation.

²⁹ Clarke Inquiry, above n 1, 36-40.

66. The concern of the Indian Government could have been further raised by the findings of the Clarke Inquiry which raised concern about the ability of police to understand the implications of administering laws in a compliant way and in the fair processing of visas. These were matters that had the potential to damage relations between the Australian and Indian Governments but I have had no submissions to the effect that this was the case.
67. The point that damage may have already occurred may not be relevant. The relevant consideration is whether the disclosure of the Transcript could reasonably be expected to damage relations. On this point, I am of the view that the disclosure of the Transcript could reasonably be expected to damage relevant relations given the circumstances in which it came into existence, the current sensitivities in the relationship which heighten that prospect and on the basis of DFAT's advice.
68. I agree with the Queensland Government's view that this is a matter primarily for the Australian Government. However I accept DFAT's advice that the federal and Queensland governments' interests coalesce in this matter. It is a Queensland Government agency that holds the Transcript.
69. As I am satisfied that section 38(a) *prima facie* applies to exempt the Transcript from disclosure, I must also determine whether disclosure of the Transcript '*would, on balance, be in the public interest*'.³⁰

Section 38(b) of the FOI Act

70. Under section 38(b) of the FOI Act, matter is exempt if its disclosure could reasonably be expected to divulge information of a confidential nature that was communicated in confidence by or on behalf of another government.³¹ QPS confined its submissions to section 38(a) of the FOI Act but given DFAT's general submission about the confidential nature of the Consul General's communications, I have also considered the application of section 38(b).
71. Having considered the evidence before me and for the reasons set out below, I find with respect to the application of section 38(b) that:
 - Those parts of the Transcript which record the words of the Consul General were communicated in confidence by or on behalf of another government, which satisfies the first limb of the test for exemption from disclosure under section 38(b) of the FOI Act.³²
 - In the circumstances, those parts of the Transcript which record the words of the Applicant (and do not reveal the nature of the information communicated by the Consul General) were not communicated by or on behalf of another government and are therefore incapable of satisfying the first limb of the test for exemption under section 38(b) of the FOI Act.

Is information contained in the Transcript of a confidential nature?

72. The Transcript records a conversation between the Applicant and the Consul General. This exemption is limited to information that was communicated by or on behalf of

³⁰ See discussion commencing at paragraph 81 below.

³¹ "Unless its disclosure would, on balance, be in the public interest".

³² This information will be exempt from disclosure "unless its disclosure would, on balance, be in the public interest".

another government. That is, the words of the Consul General. In the circumstances, the exemption does not extend to the words spoken by the Applicant.

73. The role of the Consul General in performing official duties with a detainee is set out at paragraph 58. It has been agreed for hundreds of years that these duties should take place in private. The definitions of the words 'private' and 'confidential' in the Macquarie Dictionary both incorporate each other. The effectiveness of the role of a consular official may be compromised if the role was not performed confidentially from the authorities responsible for detaining the non-national.

74. That the information was shared in a particular context—in which the parties knew that a special significance attached to the information—is borne out by the Applicant's submissions:

'... the actions of the Queensland Police Service, presumably at the behest of the Australian Federal Police, were clearly unlawful. There is no doubt that Dr Haneef and the official were entitled to have their conversation in private; both without anyone else being in the room and in the absence of any form of electronic surveillance.'

75. I rely on Francis Gurry³³ for a summary of the relevant law where he states³⁴:

While the general rule is that information must be inaccessible in order to be confidential, in certain cases information which is generally available may be considered as confidential between two parties because of the context in which it occurs. In these cases, confidentiality inheres not so much in the information itself, but in the association of the information with a particular context which the parties know attaches a special significance to the information.

76. However on this occasion, the conversation was overheard, recorded, and a transcript of it read by a number of government agencies. The Applicant has submitted that he is free to convey what was said to him by the Consul General to his lawyer, his family and if he chose, to the wider community, with or without a copy of the Transcript.

77. While the 'general rule is that information must be inaccessible in order to be confidential', Gurry also states:

The law does not require information to be absolutely inaccessible before it can be characterised as confidential. This is obvious from the nature of the breach of confidence action itself, which arises out of a limited disclosure by the confider to a confidant....It is clear that the publication of information to a limited number of persons will not of itself destroy the confidential nature of information...On the other hand, it is equally clear that the disclosure of information to the public at large will destroy the confidentiality of the information... Whether the publication which information has received is sufficient to destroy confidentiality is 'a question of degree depending on the particular case'.³⁵

78. I find that the limited degree to which the Transcript has been read does not destroy the confidentiality of the information imparted by the Consul General.

79. But what of the information imparted by the Applicant during the conversation? The confider of this information retains the capacity to control the dissemination of the information in question. While he may decide to disseminate it widely, this does not change the fact that the information is not generally available and it may be considered

³³ Francis Gurry, *Breach of Confidence* (1984) 78.

³⁴ Citing *Cranleigh Precision Engineering Ltd v Bryant* [1966] RPC 8, *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321 and *G v Day* [1982] 1 NSWLR 24.

³⁵ Gurry, above n 33, 73-74.

confidential. In any event, while the information imparted by the Applicant might be considered confidential, in the circumstances it is not information covered by this exemption, as it was not communicated by or on behalf of another government.³⁶ It was communicated by the Applicant to another government.

80. Given my findings set out above in respect of the *prima facie* application of section 38(a) of the FOI Act to the entire Transcript, and section 38(b) of the FOI Act to the information imparted by the Consul General, it is necessary to consider whether on balance, disclosure of the Transcript would be in the public interest.

Public interest considerations

81. In this matter the public interest factors in favour of disclosure and those in favour of non-disclosure are finely balanced.
82. In favour of disclosure are significant issues of public interest including transparency, accountability, the proper enforcement of the criminal law and the maintenance of public confidence in the police services.
83. The significance of these considerations in this matter is relevantly captured by Moira Paterson when she stated:

*Freedom of information laws have an important role to play in ensuring that security organisations do not exceed their extensive powers in an era which had been notable for the enactment of wide-ranging anti-terrorism laws...*³⁷

84. More specifically, I consider that those public interest factors that favour disclosure include the following:
- the degree to which current laws and the QPS Commissioner's procedures explicitly reflect Australia's international obligations and provide police officers with sufficient guidance about implementation
 - the degree to which law enforcement agencies balance their obligations to protect the safety of Australians and respect international obligations in the context of new terrorist laws that significantly enhance police powers and reduce public scrutiny and
 - the public interest in the police conducting themselves in a way that does not jeopardise Australians' safety overseas and Australia's reputation.
85. On their face, these matters should be accorded significant weight. However, that weight is reduced by the fact that such considerations are not judicially determined and QPS is adamant that it acted lawfully. The weight to be accorded is also significantly reduced by the fact that these matters can be addressed in ways other than through disclosure of the Transcript.
86. The public interest factors in favour of non-disclosure are those that derive from any damage that arises in relations between the Australian and/or Queensland Governments and the Indian Government.³⁸ Damage to relations with the Australian

³⁶ Nor does it reveal the nature of the information communicated by another government, in this case by the Consul General.

³⁷ Moira Paterson, *Freedom of Information and Privacy in Australia* (2005) 325.

³⁸ In this respect, I repeat and rely upon the matters and findings set out in this decision under the headings 'Damage' and 'The bilateral relationship' in my consideration of the application of section 38(a) of the FOI Act to the Transcript.

government affects Queenslanders in the same way other Australians' interests might be affected. It also may affect relations with the Queensland Government. In the circumstances, having particular regard to DFAT's submissions and the objections of the Indian High Commission as communicated to DFAT, I am satisfied that on balance, the national interest favours non-disclosure of the Transcript to avoid damage or further damage to relevant relationships and that this outweighs those public interest factors favouring disclosure.

DECISION

87. I affirm the decision under review and find that the Transcript is exempt from disclosure in its entirety under section 38(a) of the FOI Act and partially exempt from disclosure under section 38(b) of the FOI Act.

Julie Kinross
Information Commissioner

Date: 24 August 2010

ATTACHMENT

Steps taken in the external review

1. By facsimile dated 11 February 2009, this Office made preliminary inquiries with QPS under section 75 of the FOI Act.
2. By letter dated 13 February 2009, QPS:
 - provided this Office with a copy of the Internal Review Application, consultation letters under section 51 of the FOI Act and the responses to the section 51 consultations
 - advised that DFAT objected to the dissemination of its original consultation response dated 11 December 2008 as it contained references to other issues outside the scope of the FOI Application
 - provided this Office with a copy of a further response from DFAT dated 13 February 2009 addressing the matter at hand specifically, explaining the current view of DFAT.
3. By letter dated 5 March 2009 to QPS, this Office:
 - advised QPS that an external review of the Internal Review Decision would be conducted
 - sought a copy of the matter in issue
 - sought submissions and/or evidence in relation to:
 - the basis for the Internal Review Decision (given that this Decision provided no reasons other than stating that regard had been had to *'the content of the document, the views of another government and other matters'*)
 - arrangements between QPS and AFP concerning the recording of the conversation
 - any communications between QPS officers and the Consul General prior to the recording of the conversation that resulted in the Transcript
 - the legislative basis for the power to record such conversations, and the relevant parts of police procedures regarding same
 - whether any other conversations of the Applicant's were recorded during his time in QPS custody
 - the full name of the Indian Consul General
 - issued a formal notice to QPS under section 85 of the FOI Act to produce a copy of the email from DFAT to QPS dated 11 December 2008.
4. By letter dated 9 March 2009, QPS:
 - provided this Office with a copy of the Transcript
 - advised that no further documents were located in relation to the Applicant's request
 - produced a copy of the email from DFAT to QPS dated 11 December 2008 in accordance with the notice issued pursuant to section 85 of the FOI Act.³⁹
5. By letter dated 9 March 2009 to QPS, this Office issued a formal notice to QPS under section 85 of the FOI Act to:

³⁹ QPS objected to the release of the email to the Applicant on the basis that it contained exempt material.

- produce:
 - an unedited copy of the audio recording of the conversation between the Applicant and Consul General at the Brisbane City Watch house on 4 July 2007
 - an unedited copy of any audio recording made of a second conversation between Consul General and the Applicant (of which Consul General recollected)
 - a copy of QPS's response to DFAT's email dated 11 December 2008 and
 - advise:
 - whether the Applicant or Consul General were advised at any time that their conversation/s would be recorded and if so, details of the advice provided i.e. what was said by whom and when
 - with reference to the copy of the translated transcript provided to the Office, advice, if any as to what was occurring in the first 32:40 minutes of the conversation when there was silence.
6. By letter dated 20 April 2009, QPS produced documents and information relevant to the review and provided further submissions and evidence, including:
- entry of Detective Chief Superintendent Michael Condon's official police diary
 - official notebook and diary entries of Detective Sergeant Dearing and Detective Sergeant Dunn
 - AFP running log (as supplied to the QPS by the Applicant)
 - unedited copy of the CD audio recording of the relevant conversation – Master reference number 07/48632
 - letter dated 17 March 2009 from QPS to Mr Colin Hill, Director, Protection Privileges and Immunity Section, DFAT.
7. By letter dated 12 May 2009 to AFP, this Office:
- advised that an application for external review was received from the Applicant
 - gave AFP an opportunity to make submissions as to whether or not the matter in issue was exempt matter under the FOI Act
 - required AFP to provide the Office with:
 - affidavit or other documentary evidence regarding whether or not the Consul General's consent had been obtained for the recording of the relevant conversation or whether the Consul General had been personally briefed that the meeting would be recorded
 - submissions in relation to the extent to which the rights and immunities of consuls are subject to the exercise of police powers in the investigation of criminal offences.
8. By email dated 12 May 2009 to QPS, this Office sought additional evidence, in affidavit form, in relation to the issue of consent and police powers.
9. By email dated 23 June 2009, AGS on behalf of AFP, provided submissions in response to the letter of 12 May 2009.
10. By letter dated 30 June 2009, QPS, in response to the letter of this Office dated 12 May 2009:
- provided a signed statutory declaration made by Chief Superintendent Condon dated 23 June 2009

- attached folios numbered 510-512 '*watch house register recording by Detective Superintendent Gayle Hogan*'
 - made brief submissions.
11. By email dated 6 August 2009 to AGS, this Office sought an affidavit of Commander Jabbour and any documentary evidence as set out in the letter to AFP from this Office dated 12 May 2009.
 12. By email dated 19 August 2009, AGS provided the Office with copies of:
 - an affidavit of Commander Jabbour sworn 18 August 2009
 - parts of the notes of Commander Jabbour which related to the consular visit, dated 4 July 2007.
 13. On 19 August 2009, this Office contacted DFAT to discuss generally the various articles of the *Vienna Convention on Consular Relations*.
 14. By letter dated 26 August 2009, this Office issued a formal notice to AFP under section 85 of the FOI Act to produce a full and unedited copy of written evidence of Commander Jabbour's activities on 4 July 2007, as set out in his diary/log book.
 15. By letter dated 2 October 2009, AGS, on behalf of AFP advised that:
 - AFP had a number of reasonable excuses under section 94 of the FOI Act for not producing the document sought under the notice
 - the document is subject to the secrecy provision in section 60A of the *Australian Federal Police Act 1979* (Cth) and disclosure would be inconsistent with this provision
 - in the circumstances, the notice be withdrawn and the Information Commissioner view the notes with any classified national security or sensitive information subject to public interest immunity redacted.
 16. By letter to AGS dated 8 October 2009, this Office advised that it accepted that the Commissioner of AFP had reasonable excuse for non-compliance with the notice issued on 26 August 2009, given the matters set out in section 60A of the *Australian Federal Police Act 1979* (Cth).
 17. By letter dated 8 October 2009 to DFAT, this Office:
 - communicated a preliminary view that, on the information currently available:
 - the matter in issue was not exempt from disclosure under section 38(a) of the FOI Act
 - having regard to DFAT's previous submissions and the content of the VCCR, the matter in issue may constitute a confidential communication, the disclosure of which may or may not be in the public interest (in respect of section 38(b) of the FOI Act)
 - sought relevant submissions.
 18. By email dated 23 October 2009, DFAT provided submissions to this Office in respect of sections 38(a) and (b) of the FOI Act.
 19. On 2 November 2009 a staff member of this Office called the Applicant's lawyer and sought and received a copy of a letter from Mr M J Clarke QC, dated 16 October 2008.

20. In November 2009, the Office exchanged correspondence with DFAT concerning the disclosure of its submissions dated 23 October 2009 to the Applicant to enable the Applicant to respond.
21. By letter to the Applicant's legal representative, dated 2 December 2009, the Office:
 - communicated a preliminary view that the matter in issue qualifies for exemption from disclosure under section 38 of the FOI Act
 - enclosed a copy of DFAT's submissions for review, with some information redacted
 - sought submissions regarding the application of section 38 of the FOI Act.
22. By letter dated 12 January 2010, the Applicant's legal representative provided submissions to this Office in response to the letter of 2 December 2009.
23. By letter dated 4 March 2010 addressed to the Premier, this Office consulted with the Queensland Government under section 51 of the FOI Act.
24. By letter dated 12 March 2010, the Office requested that QPS provide further information regarding the possible existence of other transcripts of conversations involving the Applicant while he was in custody.
25. By letter dated 20 April 2010, QPS provided its response regarding the possible existence of other transcripts.
26. By letter dated 16 June 2010 the Premier conveyed the views of the Queensland Government.
27. By correspondence dated 12 March 2010 and 13 April 2010, this Office sought further information from QPS with respect to the existence of other transcripts and a reply was received on 20 April 2010.
28. By email dated 28 July 2010, this Office provided the Applicant's legal representative with a copy of the letter from the Premier dated 16 June 2010 to give the Applicant opportunity to comment regarding the views of the Queensland Government.