

**Australian Government****Department of the Prime Minister and Cabinet****ONE NATIONAL CIRCUIT
BARTON**PM&C ref: FOI/2020/172IC
OAIC ref: MR20/01015***FREEDOM OF INFORMATION ACT 1982*****REQUEST BY: Trav S****DECISION BY: Mr Peter Rush
Acting First Assistant Secretary
Government Division*****Revised decision under section 55G of the Freedom of Information Act 1982***By email: foi+request-6535-36db7e85@righttoknow.org.au

Dear Trav S

On 25 January 2021 the Office of the Australian Information Commissioner (the **OAIC**) notified the Department of the Prime Minister and Cabinet (the **Department**) that you had requested that the Information Commissioner (**IC**) review the Department's internal review decision (the **internal review decision**) made on 19 October 2020 under the *Freedom of Information Act 1982* (the **FOI Act**), which affirmed the primary decision made on 14 September 2020 that granted access, in part, to two documents (Documents 1 and 2) and refused access to one document (Document 3).

Section 55G of the FOI Act

Section 55G(1)(a) of the FOI Act provides that after an application is made to the IC for review, an agency or minister may (at any time during the IC review) revoke or vary an access refusal decision to favour the applicant by giving access to a document in accordance with the request.

Section 55G(2) of the FOI Act provides that an agency must notify the IC of the new decision (section 55G(2)(a)) and the revised decision will be the decision under review (section 55G(2)(b)).

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.

Revised decision under section 55G of the FOI Act

There are three documents within the scope of your FOI request, as described in the schedule at Attachment A.

I have decided to make a revised decision, in accordance with section 55G of the FOI Act, to:

- release Document 1 in full, with irrelevant material deleted under section 22 of the FOI Act;
- release Document 2 in part, with material exempt under section 47F of the FOI Act and irrelevant material deleted under section 22 of the FOI Act;
- release Document 3 in part, with material exempt under section 47C and section 47E(d) of the FOI, and with irrelevant material deleted under section 22 of the FOI Act.

The documents for release are attached.

The practical effect of my revised decision is to release material in the three documents that was previously exempted from release.

Material taken into account

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

- the FOI request;
- the Department's primary decision of 14 September 2020;
- the Department's internal review decision of 19 October 2020;
- the documents relevant to the request;
- your application for IC review as notified to the Department on 25 January 2021;
- consultation comments received from an Australian Government agency;
- 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**).

The FOI request

On 28 July 2020, you made a request (the **FOI request**) under the FOI Act to the Department in the following relevant terms:

On 19 April 2004, PM&C wrote to the Minister responsible for honours policy recommending they seek the Governor-General declare service in Iraq eligible for the Humanitarian Overseas Service Medal.

PM&C advised the Minister that:

"Following an assessment of service of service in Iraq and consultation with DFAT and Defence, it was agreed that service in Iraq meets the criteria of the medal's regulations and should be declared as eligible service for the medal".

We request a copy of:

¹ FOI Guidelines combined November 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/>

1. *the assessment of service in Iraq, and*
2. *the documents recording, or evidencing the consultations with DFAT and Defence.*

The primary decision

On 14 September 2020, the Department notified you of the primary decision on the FOI request. The primary decision identified three documents falling within the scope of the FOI request. The decision on access to the documents was as follows:

- grant access to Document 1, in part, with material exempt under sections 47C and 47E(d) of the FOI Act, with irrelevant material deleted under section 22 of the FOI Act;
- grant access to Document 2, in part, with material exempt under sections 47C, 47E(d), and 47F of the FOI Act, with irrelevant material deleted under section 22 of the FOI Act;
- exempt Document 3 in full under sections 47C and 47E(d) of the FOI Act.

The internal review decision

On 17 September 2020, you requested internal review of the primary decision.

On 19 October 2020, the Department notified you of the internal review decision, which was to affirm the primary decision.

The applicant's request for IC review

On 25 January 2021, the OAIC notified the Department that you had requested IC review of the Department's internal review decision of 19 October 2020.

Your request for IC review provided the following summary as to why you think the Department's decision is wrong:

The information disclosed suggests the assessment was not comprehensive. Following this, it appears only two stakeholder organisations were consulted before the Branch advised government. Australian government contractors serving with the Australian contingent to the rehabilitation program in Iraq carried out by the Coalition Provisional Authority were evidently not identified or considered by the assessment. We were denied the opportunity to present a detailed submission regarding HOSM eligibility for consideration.

Disclosure promotes the objects of the FOI Act, including to:

1. *Inform the community of HOSM administration by government, including to interrogate the veracity of related advice to government.*
2. *Reveal if the assessment or stakeholder consultations considered the eligibility of the Australian government contractors serving with the Australian contingent to the rehabilitation program in Iraq carried out by the Coalition Provisional Authority.*
3. *Reveal if the assessment or stakeholders consultations considered matters relating to*

HOSM Regulations Part 2 Section 4 (2) and (3) (c).

4. Provide background and contextual information that informed the decision to specify certain conditions about ineligibility.

5. Enhance the scrutiny of subsequent HOSM administrative decisions and related advice to government and inform debate on the eligibility of Australian government contractors.

6. Assist public enquiry in matters related to HOSM (Iraq) administration

7. Contribute to the administration of procedural fairness for Australian government contractors serving with the Australian contingent to the rehabilitation program in Iraq carried out by the Coalition Provisional Authority.

8. Contribute to the administration of justice for Australian government contractors engaged to assist in Iraq's reconstruction efforts from 2003/05.

8. advance the fair treatment of armed service veterans who as civilians volunteered to go to Iraq to participate in the relief operation.

9. contribute to the facilitation of research into HOSM assessments and the quality of related advice to government.

Reasons

Document 2

Section 47F of the FOI Act – personal information

Section 47F(1) of the FOI Act provides as follows:

A document is conditionally exempt if its disclosure under this Act would involve the disclosure of personal information about any person (including a deceased person).

‘Personal information’ under the FOI Act has the same meaning as in the *Privacy Act 1988* and means

... information or an opinion about an identified individual, or an individual who is reasonably identifiable:

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

Section 47F(2) of the FOI Act states that in determining whether disclosure of the document would involve the unreasonable disclosure of personal information, an agency must have regard to the following matters:

- the extent to which the information is well known;
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- the availability of the information from publicly accessible sources; and
- any other matters that the agency or Minister considers relevant.

The FOI Guidelines states that key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable;
- the document contains third party personal information;
- release of the document would cause stress on the third party; and
- no public purpose would be achieved through release.²

The FOI Guidelines provide that other factors that may be relevant to whether disclosure of personal information would be unreasonable under section 47F of the FOI Act include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information
- whether disclosure of the information might advance the public interest in government transparency and integrity.³

I am satisfied that the document contains the personal information of an individual. I consider that the following factors weigh in favour of a finding that disclosure of the personal information would be unreasonable:

- the personal information may not be well known;
- the person to whom the information relates may not be known to be (or to have been) associated with the matters dealt with in the document;
- the personal information may not be available from publicly accessible sources;
- the personal information does not appear to have been provided to Government on the understanding that it would be made public;
- the personal information may be sensitive.

I am satisfied that the personal information is conditionally exempt under section 47F of the FOI Act.

Document 3

Section 47C of the FOI Act – deliberative material

Section 47C of the FOI Act provides as follows:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*
- (a) an agency; or*

² FOI Guidelines, [6.142].

³ FOI Guidelines, [6.143].

- (b) a Minister; or
- (c) the Government of the Commonwealth.

Section 47C(2)(b) of the FOI Act provides that ‘deliberative matter’ does not include ‘purely factual material’.

The FOI Guidelines relevantly provide as follows:

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

‘Deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.⁴

...

‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.⁵

The FOI Guidelines provide that ‘purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.⁶

I am satisfied that a relevant part of Document 3 contains deliberative matter prepared or recorded in the course of or for the purposes of, the deliberative processes involved in the functions of the Department. I am further satisfied that the relevant part of Document 3 contains no ‘purely factual’ material.

I am therefore satisfied that a relevant part of Document 3 contains material that is conditionally exempt from release under section 47C of the FOI Act.

Section 47E(d) of the FOI Act – certain operations of an agency

Section 47E(d) of the FOI Act provides as follows:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

⁴ FOI Guidelines, [6.58] – [6.59] (footnotes omitted).

⁵ FOI Guidelines, [6.63] (footnotes omitted).

⁶ FOI Guidelines, [6.73] (footnotes omitted).

...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The FOI Guidelines relevantly provide as follows:

An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.

...

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.⁷

In relation to the test 'would or could reasonably be expected to', the FOI Guidelines provide as follows:

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.⁸

The FOI Guidelines provide that the term 'substantial adverse effect' broadly means

... 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.⁹

I am satisfied that a relevant part of Document 3 contains information which, if disclosed, would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

I consider that release of the material could reasonably be expected to have an adverse effect on a relevant agency's ability to effectively provide advice to other Australian agencies regarding Australian interests overseas and in Australia's national interest. It is essential to the

⁷ FOI Guidelines, [6.120] – [6.123] (footnotes omitted).

⁸ FOI Guidelines, [5.16] – [5.18] (footnotes omitted).

⁹ FOI Guidelines, [5.20] (footnotes omitted).

core functions of the relevant agency to ensure the integrity of these internal procedures and methods.

Accordingly, I am satisfied that the relevant part of Document 3 is conditionally exempt under section 47E(d) of the FOI Act.

Documents 2 and 3

Section 11A(5) of the FOI Act – the public interest test

Section 11A(5) of the FOI Act provides that a conditionally exempt document must nevertheless be disclosed to the applicant unless its disclosure would, on balance, be contrary to the public interest.

In determining whether disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors in favour of disclosure against the factors against disclosure.

Section 11B(4) of the FOI Act sets out the following factors that the decision-maker must not take into account when deciding whether access to the document would be contrary to the public interest:

- a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
- b) access to the document could result in any person misinterpreting or misunderstanding the document;
- c) the author of the documents was (or is) of high seniority in the agency to which the request for access to the document was made; or
- d) access to the document could result in confusion or unnecessary debate.

I have not taken any of the above factors into account in making my decision.

Factors in favour of disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:¹⁰

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; or
- allow a person to access his or her personal information.

I am satisfied that disclosure of the conditionally exempt information may promote the objects of the FOI Act. The FOI Guidelines contain a non-exhaustive list of public interest factors favouring disclosure that may also be relevant in particular circumstances.¹¹ However, the list in the FOI Guidelines contains no additional relevant public interest factors to those that I have already taken account of as described above.

¹⁰ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

¹¹ FOI Guidelines, [6.19].

Factors against disclosure

The FOI Act does not provide for any public interest factors against disclosure that decision makers may consider. The FOI Guidelines contain a non-exhaustive list of public interest factors against disclosure that may also be relevant in particular circumstances,¹² to which I have had regard.

I consider the following factors favour non-disclosure of that material:

- disclosure would affect the ability of the Department to provide comprehensive advice to Government on a key Commonwealth program, namely the Humanitarian Overseas Service Medal (HOSM), a significant medal in the Australian honours system, administered by the Department;
- disclosure could inhibit the ability of the Department to provide comprehensive advice to the Government, on the basis that the level of detail contained in future internal correspondence and briefs may be diminished, if there were a risk of such deliberations and discussions being publicly released;
- disclosure could inhibit the ability of the Department to undertake inter-departmental consultations, on the basis that the level of detail contained in future consultations may be diminished, if there were a risk of such deliberations and discussions being publicly released; and
- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.

After careful consideration of all relevant factors, I consider the public interest against disclosure outweighs the public interest for disclosure.

I am therefore satisfied that disclosing the conditionally exempt information in the documents would, on balance, be contrary to the public interest.

Section 22 of the FOI Act - Deletion of exempt or irrelevant information

Section 22 of the FOI Act provides that exempt or irrelevant information may be deleted from a copy of a document, and access granted to such an amended copy where it is reasonably practicable to do so, unless it is apparent that the applicant would not wish to have access to such a copy.

The requested documents contain exempt and/or irrelevant material. The irrelevant material is as follows:

- material subject to the Department's redaction policy as advised to you on 10 August 2020, namely:
 - any person's signature;
 - names and contact details of Australian Public Service officers not in the Senior Executive Service;
 - the mobile or direct numbers of SES officers; and

¹² FOI Guidelines, [6.22].

- the names and contact details of Ministerial staff at a level below Chief of Staff.

In accordance with section 22 of the FOI Act, I have deleted the parts of the documents that contain the above information, where relevant.

Publication of the documents

Under section 11C of the FOI Act the Department will make arrangements to publish the documents released to the applicant on the Department's web site in its FOI disclosure log.

Review rights

The FOI Guidelines state as follows:¹³

A revised decision does not automatically conclude the IC review. The revised decision will be the decision under review (s 55G(2)(b)). The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.

Complaint rights

An applicant may make a complaint to the Information Commissioner about the Department's actions in relation to this request. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

Yours sincerely



Peter Rush
Acting First Assistant Secretary
Government Division

12 March 2021

¹³ FOI Guidelines, [10.70].