



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2020/231

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Francis Unmeopa

DECISION BY: Peter Rush
Assistant Secretary
Parliamentary and Government Branch

By email: foi+request-6670-951754c3@righttoknow.org.au

Dear Mr Unmeopa

I refer to your email, dated 2 October 2020, to the Department of the Prime Minister and Cabinet (the **Department**), in which you made a request under the *Freedom of Information Act 1982* (the **FOI Act**) in the following terms:

I seek the Department's assessments justifying the award of The Humanitarian Overseas Service Medal to Australians from the following commercial contractors General Electric Infrastructure, Water and Process Technologies; and Aspen Medical Pty Ltd.

On 30 October 2020, the Department wrote to advise you that in accordance with section 15(6) of the FOI Act, the processing period had been extended for a further 30 days in order to allow the Department to consult a State government under section 26A of the FOI Act.

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.

Documents meeting the terms of your request

The Department has identified two documents relevant to the terms of the FOI request (the **requested documents**), described in the schedule at [Attachment A](#).

Decision

I have decided to:

- grant access, in part, to Document 1, on the basis it contains information that is conditionally exempt under sections 47F (personal information) and 47G(1)(a) (business information) of the FOI Act, and its disclosure would be contrary to the public interest; and

- grant access, in part, to Document 2, on the basis it contains information that is conditionally exempt under sections 47C (deliberative processes) and 47E(d) (certain operations of an agency) of the FOI Act, and its disclosure would be contrary to the public interest.

Further information is in the schedule at Attachment A.

The documents that can be released to you are attached.

In making my decision, I have considered the following:

- the terms of your request;
- the requested documents;
- submissions made by a State government agency consulted under section 26A of the FOI Act;
- comments from an Australian Government department;
- a prior internal review decision made by the Department on Document 2;
- the FOI Act; and
- The 'Guidelines made by the Australian Information Commissioner issued under section 93A of the *Freedom of Information Act 1982*' (the **FOI Guidelines**).

Reasons

Section 47C of the FOI Act – deliberative material

Section 47C(1) of the FOI Act provides that a document is conditionally exempt if its disclosure 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 an agency, a Minister, or 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.¹

¹ FOI Guidelines, [6.58] – [6.59] (footnotes omitted).

...

'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'.²

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.³

I am satisfied that parts of Document 2 contain deliberative matter regarding the Humanitarian Overseas Service Medal. The deliberative matter was prepared in the course of, or for the purposes of, the deliberative processes involved in the functions of the Department. I am also satisfied that those parts of Document 2 do not contain 'purely factual material'.

I am therefore satisfied that parts of Document 2 are conditionally exempt under section 47C of the FOI Act.

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

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, 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.⁴

...

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.⁵

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

² FOI Guidelines, [6.63] (footnotes omitted).

³ FOI Guidelines, [6.73] (footnotes omitted).

⁴ FOI Guidelines, [6.120] (footnotes omitted).

⁵ FOI Guidelines, [6.123] (footnotes omitted).

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.⁶

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’.⁷

I am satisfied that parts of Document 2 contain 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 on the basis that its disclosure would inhibit the Department’s ability to prepare material relevant to the Department and/or ministers’ Parliamentary responsibilities.

Accordingly, I am satisfied parts of Document 2 are conditionally exempt under section 47E(d) of the FOI Act.

Section 47F of the FOI Act – personal information

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable 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:

⁶ FOI Guidelines, [5.16] – [5.18] (footnotes omitted).

⁷ FOI Guidelines, [5.20] (footnotes omitted).

- 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.⁸

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.⁹

The FOI Guidelines further provide that the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of section 47F to protect personal information.¹⁰ The FOI Guidelines further explain as follows:

*Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future. On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.*¹¹

I am satisfied that Document 1 contains the personal information of identified individuals, or individuals who are reasonably identifiable. 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 persons 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.

Disclosure of the information might advance the public interest in government transparency and integrity, however, I consider that this is outweighed by the interests of the individuals concerned in the protection of their privacy.

⁸ FOI Guidelines, [6.142].

⁹ FOI Guidelines, [6.143].

¹⁰ FOI Guidelines, [6.144].

¹¹ FOI Guidelines, [6.145] (footnotes omitted).

I am satisfied that the personal information in Document 1 is conditionally exempt under section 47F of the FOI Act.

Section 47G of the FOI Act – business information

Section 47G(1)(a) of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose information concerning a person in respect of his or her business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking (business information), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs

In relation to the term ‘business or professional affairs’, the FOI Guidelines relevantly provide as follows:

The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or private affairs and an organisation’s internal affairs. The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.

The internal affairs of an organisation include its governance processes, the processes by which organisations are directed and controlled. For example, documents relating to member voting processes are not exempt under s 47G, because member voting forms part of the governance affairs of an organisation.¹²

In relation to the concept of unreasonable adverse effect of disclosure, the FOI Guidelines provide as follows:

The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable. A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a); but this does not amount to the public interest test of s 11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance. Where disclosure is not unreasonable, the decision maker will need to apply the public interest test in s 11A(5). This is inherent in the structure of the business information exemption.

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business’ activities pose a threat to public safety, damage the natural environment; or that a service provider has made false claims for government money may have a substantial adverse effect on that business but may be reasonable in the circumstances to disclose. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality. These considerations require a weighing of a public interest against a private

¹² FOI Guidelines, [6.192] – [6.193] (footnotes omitted).

interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required; and in ensuring that public programmes are properly administered.

The AAT has distinguished between ‘truly government documents’ and other business information collected under statutory authority. The first category includes documents that have been created by government or that form part of a flow of correspondence and other documents between the government and business. The AAT concluded that such documents inclined more to arguments favouring scrutiny of government activities when considering whether disclosure would be unreasonable. By implication, the exemption is more likely to protect documents obtained from third party businesses.

Where disclosure would result in the release of facts already in the public domain, that disclosure would not amount to an unreasonable adverse effect on business affairs.¹³

I am satisfied that disclosure of parts of Document 1 would disclose the business affairs of an organisation and that disclosure would, or could reasonably be expected to, unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

I am therefore satisfied that parts of Document 1 are conditionally exempt under section 47G(1)(a) of the FOI Act.

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.

¹³ FOI Guidelines, [6.187] – [6.191] (footnotes omitted).

Factors in favour of disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:¹⁴

- 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.¹⁵ 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.

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,¹⁶ to which I have had regard.

I consider that disclosure of the conditionally exempt information could reasonably be expected to:

- affect the ability of the Department to provide comprehensive advice to Government on a key Commonwealth program, namely the Humanitarian Overseas Service Medal, a significant medal in the Australian honours system, administered by the Department;
- 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;
- have an adverse and substantial effect on the proper and efficient operations of the Department;
- harm the interests of an organisation in respect of its lawful business affairs; and
- prejudice the protection of individuals' rights to privacy.

Balancing the public interest

In weighing the public interest factors for and against disclosure, I note the FOI Guidelines provide that the pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure.¹⁷

Notwithstanding the weighting towards disclosure, in this case, I attach more weight to the public interest factors against disclosure. In weighing the factors, I consider the public interest against disclosure outweighs the public interest for disclosure.

¹⁴ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

¹⁵ FOI Guidelines, [6.19].

¹⁶ FOI Guidelines, [6.22].

¹⁷ FOI Guidelines, [6.8].

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.

As indicated in the schedule at Attachment A, the requested documents contain exempt and/or irrelevant material. The irrelevant material is as follows:

- material subject to the Department's redaction policy advised to you on 16 October 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
 - the names and contact details of Ministerial staff at a level below Chief of Staff; and
- material that is not within the scope of the FOI request, that is, material which does not constitute 'the Department's assessments justifying the award of The Humanitarian Overseas Service Medal to Australians from the following commercial contractors General Electric Infrastructure, Water and Process Technologies; and Aspen Medical Pty Ltd.'

I find that it is reasonably practicable to copy the documents with the exempt or irrelevant information deleted, and that you would wish to be granted access to those documents with the deletions.

Publication of the documents

Under section 11C of the FOI Act the Department will make arrangements to publish the documents released to you on the Department's FOI disclosure log.

Processing and access charges

I have decided not to impose processing charges in respect of your request.

Review rights

Information about your rights of review under the FOI Act is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Complaint rights

You may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. 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/>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Rush', written in a cursive style.

Peter Rush
Assistant Secretary
Parliamentary and Government Branch

1 December 2020