



## Australian Government

### Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT  
BARTON

FOI/2020/208IR

#### INTERNAL REVIEW DECISION AND REASONS UNDER SECTION 54 OF *THE FREEDOM OF INFORMATION ACT 1982*

**REQUEST BY:** Trav S

**DECISION BY:** Mr John Reid PSM  
First Assistant Secretary  
Government Division

By email: [foi+request-6687-ee442ba1@righttoknow.org.au](mailto:foi+request-6687-ee442ba1@righttoknow.org.au)

Dear Trav S

I refer to your email of 12 October 2020 in which you requested internal review of the decision (the **primary decision**) dated 12 October 2020 by Mr Peter Rush, Assistant Secretary, Parliamentary and Government Branch, Department of the Prime Minister and Cabinet (the **Department**) under the *Freedom of Information Act 1982* (the **FOI Act**).

Under section 54(2) of the FOI Act, an applicant is entitled to apply for an internal review of a decision refusing to give access to a document in accordance with a request.

#### **Authorised decision maker**

Section 54C(2) of the FOI Act provides that an agency must arrange for a person (other than the person who made the original decision) to review the decision. I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

#### **Internal review decision**

I have decided to affirm the primary decision to refuse your request under section 24(1) of the FOI Act.

In reaching my decision I have had regard to:

- your FOI request of 7 September 2020;
- the Department's practical refusal consultation notice of 25 September 2020 and your response of 26 September 2020;
- the Department's practical refusal consultation notice of 8 October 2020 and your response of 10 October 2020;

- the primary decision;
- your request for internal review;
- the FOI Act;
- the '*Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act*' (the **FOI Guidelines**).

## **Background**

### ***The FOI request***

On 7 September 2020, you made a request under the FOI Act to the Department in the following terms:

*On 26 September 2013 the then Assistant Secretary of PM&C's Honours, Symbols and Territories Branch produced document reference B13/1718 titled "Humanitarian Overseas Service Medal Iraq - eligibility of a commercial contractor".*

*In this document the Assistant Secretary states to the Minister for Honours Policy that:*

*"we would expect strong criticism from existing medal holders and others of a decision to extend eligibility for the medal beyond the original purpose, which is to recognise not-for-profit humanitarian service".*

- 1. We seek a copy of the documents substantiating the Secretary's assertion that the Department "would expect strong criticism from existing medal holders".*
- 2. We seek a copy of the document identifying the stakeholders the Secretary refers to as 'others'.*

*The Sovereign has ultimate authority for the Australian Honours and Awards System and the Sovereign instituted the medal in 1999 for the purposes of:  
"according recognition to persons who have given humanitarian service in hazardous circumstances outside Australia".*

*The Prime Minister reaffirmed the medal's original purpose again in 2011 via a Commonwealth of Australia Special Gazette in which he states the medal was instituted for the purposes of:*

*"according recognition to persons who have given humanitarian service in hazardous circumstances outside Australia".*

- 3. We seek a copy of the document evidencing the Secretary's assertion that the medal's original purpose was to recognise not-for-profit humanitarian service.*

### ***Request consultation process***

On 25 September 2020, the Department notified you of its intention to refuse your request for practical refusal reasons under section 24AA(1)(a)(i) and section 24AA(1)(b) of the FOI Act. The Department's notice commenced a request consultation process under section 24AB of

the FOI Act. I note that the Department's notice included suggestions as to how you may wish to revise the scope of your FOI request.

On 26 September 2020, you responded as follows:

*I will be grateful for your advice. Document B13/1718 informed a Ministerial decision. Recent FOI disclosures reveal the Minister's decision was predicated, at least in part, on the advice "we would expect strong criticism from existing medal holders and others of a decision to extend eligibility for the medal beyond the original purpose, which is to recognise not-for-profit humanitarian service".*

*The advice is unsubstantiated and may be incorrect. The Medal's original Letters Patent came before the governing regulations. They state the Medal was instituted to accord "recognition to persons who have given humanitarian in hazardous circumstances outside Australia". Definitions are important, they say what particular words mean and give words special meaning for particular Acts or instruments. The regulations governing the Medal prescribe "humanitarian service means service giving immediate remedy or action to assist the needy or distressed persons in order to sustain the life and dignity of those persons". The regulations do not appear to use the term not-for-profit.*

*The advice may have conflated the Medal's purpose, prescribed by Letters Patent, with the types of organisations the Medal is principally awarded to i.e. humanitarian not-for-profit organisations. However the Medal was designed to be flexible to accommodate Government approval of operations conducted under the authority of international or national agencies. This is evidenced by the Australian contingent to the rehabilitation program in Iraq carried out by the Coalition Provisional Authority being a prescribed eligible organisation in the Medal's declaration for Iraq.*

*The advice may be the opposite of the evidence. The public record shows examples of commercial contractors being awarded the Medal in recognition of their service with the Australian contingent to the Coalition Provisional Authority. Documents shows AusAID, the lead agency responsible for delivering the Australian Government's humanitarian programs for the Iraqi people supported the Medal being awarded. AusAID staff in Canberra supported the case as did medal holders from the Australian contingent to Iraq. It appears unreasonable for the advice to claim to know the public's opinion without reference. It appears reasonable to question the utility of uninformed opinions in any case.*

*I would like to revise my request to ask for the documents demonstrating the advice was predicated on substantive fact versus unsubstantiated opinion.*

On 8 October 2020, the Department notified you of its intention to refuse your revised request of 26 September 2020 for a practical refusal reason under section 24AA(1)(a)(i) of the FOI Act. The Department's notice commenced a further request consultation process under section 24AB of the FOI Act. I note that the Department's notice included suggestions as to how you may wish to revise the scope of your FOI request.

On 10 October 2020, you responded as follows:

*It appears the 'authorised decision maker' who rejected my 7 September 2020 FOI request may be the same person who produced the advice in Paragraph 6.b. If this is the case, it appears reasonable to put they would be able to help to identify the specific documents informing the advice without the department needing to undertaking extensive searches.*

*Please provide a copy of the document informing the advice regarding 'existing medal holders' in Paragraph 6.b.*

### ***The primary decision***

On 12 October 2020, the Department notified you of the primary decision on your FOI request.

The primary decision stated that in the decision maker's view the practical refusal reasons expressed in the Department's notice of 25 September 2020 and 8 October 2020 also applied to your revised request of 10 October 2020, and refused your FOI request under section 24(1) of the FOI Act. The reasons given for the refusal were as follows:

*... the Department has undertaken preliminary searches and identified 134 files that would need to be manually searched to identify any documents meeting all three parts of your FOI request. The Department estimates that each file contains an average of 150 pages. This means that Department would need to review approximately 20,100 pages to determine whether these files contain any documents meeting the terms of your request.*

*The Department conservatively estimates that it would take at least 30 seconds per page to undertake the tasks of search and retrieval associated with these files. These tasks would include: reading each page and, if the page meets the terms of your request, removing the page from the file and scanning the page; and collating the scanned pages into one electronic file to enable efficient processing of your request. The Department therefore estimates that the tasks of search and retrieval in relation to the 134 files or 20,100 pages would be at least 167 hours.*

*Ordinary hours of work for full-time employees in the Department are 38 hours per week.<sup>1</sup> Having regard to the estimate of time process the request, this means it would take one officer at least 4 weeks to process your FOI request.*

*There may be additional document holdings that need to be searched, which will add to the time required to undertake search and retrieval and therefore increase the time to process your request. Noting that there is no right of access under the FOI Act to documents in the open access period under the Archives Act, the current time frame for document searches is 1 January 2000 to the date of the brief referred to in your request namely 26 September 2013 – a period of over 13 years. For any documents identified as relevant to your FOI request, further time will be required to undertake such other tasks as may be required to process your request, thereby increasing the time required to process your request.*

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<sup>1</sup> Department of the Prime Minister and Cabinet, *Enterprise Agreement 2017-2020*, [315].

*The Department acknowledges that the processing of requests for access to documents is a legitimate part of each agency's functions, and that FOI requests may require reallocation of resources within an agency. However, the Department could not reasonably divert resources to assist in processing the request. In reaching this view, the Department has had regard to the public interest in access to information held by the Department but considers the public interest in access is outweighed by the competing public interest in the ability of the Department to undertake its ordinary functions without substantial impairment, including the processing of other FOI requests.*

### ***The internal review request***

On 12 October 2020, your requested internal review in the following terms:

*I'd like to ask for an internal review.*

*I reduced the scope of my FOI request and offered reasonable advice to help reduce the burden of the request following consultation.*

*As noted, the SES public service officer who produced the advice in Paragraph 6.b. appears to be the same person who rejected this FOI request, which seeks to assess the veracity of their advice. It appears reasonable that they should be able to produce such evidence when called to do so.*

*It is unreasonable to propose a SES public service officer would need to review 20,100 pages of documents to find the documents informing their advice to a Minister 6 years ago. If such documents existed it appears reasonable they should be able to locate them without such an extensive search. The public should be able to expect an SES officer charged with administering the HOSM for around a decade to be able to produce such basic documents if they existed.*

*The Department recalled the folders/files specifically pertaining to the HOSM from National Archives towards the end of 2019. In September 2020, the National Archives confirmed these documents had not yet been returned. The public is as such unable to access this information until the Department returns them to National Archives.*

*As noted, the advice in Paragraph 6.b. is unsubstantiated. It conflicts with evidence available at the time the advice was formed. It unreasonably claims to know the opinion of the general public and implies this opinion would be universally critical. It claims to know the opinion of other medal holders but is unable to provide a single document evidencing this claim. It appears to conflate the HOSM's legislative purpose with the types of organisation it is principally awarded to.*

*The decision-maker has consistently failed to provide documentary evidence with which to substantiate their advice in Paragraph 6.b. However they are ideally placed to access such documents if they existed. They have requisite HOSM specific knowledge to know where such documents should be.*

*It appears reasonable to believe the advice in Paragraph 6.b. is based on the decision-maker's unsubstantiated opinion unless the documentary evidence can be produced.*

## Reasons

I am satisfied that, before refusing your FOI request under section 24(1) of the FOI Act, the Department undertook at least one request consultation process with you in accordance with section 24AA of the FOI Act.<sup>2</sup> I note that the Department undertook two request consultation processes with you, as described in the primary decision.

I am further satisfied that your revised request of 10 October 2020 did not remove the practical refusal reason for the reasons given in the primary decision.

I note your statement in your internal review request that the National Archives of Australia (NAA) has confirmed that folders or files specifically pertaining to the HOSM have not been returned. If you believe the Department holds folders or files that are in the open access period under *Archives Act 1983* (the **Archives Act**), you may wish to contact the NAA and request access to those folders or files. I would expect that the NAA would then contact the Department to request return of the folders or files to the NAA to enable your request under the Archives Act to be processed.

## 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/information-commissioner-review/>.

## 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/make-an-foi-complaint/>.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J Reid', is positioned above the typed name and title.

John Reid PSM  
First Assistant Secretary  
Government Division

11 November 2020

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<sup>2</sup> Section 24AB(9) of the FOI Act provides that an agency is only obliged to undertake a request consultation process once for any particular request.