



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2020/285

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Trav S

DECISION BY: Mr Peter Rush
Assistant Secretary
Parliamentary and Government Branch

By email: foi+request-6975-23ea8e2d@righttoknow.org.au

Dear Trav S

I refer to your email of 13 December 2020 in which you made a request to the Department of the Prime Minister and Cabinet (the **Department**) under the *Freedom of Information Act 1982* (the **FOI Act**) in the following terms:

In November 2008, the Australian Government formally accepted an offer from the then-President of Timor-Leste for Australian personnel to accept and wear the Timor-Leste Solidarity Medal (TLSM).

We would like to ask for a copy of the correspondence between the Timor-Leste and Australian governments related to the TLSM's offer and acceptance.

On 11 January 2021 you agreed to an extension of time under section 15AA of the FOI Act for the Department to issue its decision by 29 January 2021.

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 Act.

Relevant documents

The Department has identified two documents relevant to the scope of the FOI request (the **requested documents**).

Decision

I have decided to refuse access to the requested documents, on the basis that

- they are exempt from release in full under sections 33(a)(iii) and 33(b) of the FOI Act; and
- parts of the requested documents contain information that is conditionally exempt under section 47F of the FOI Act and its disclosure would, on balance, be contrary to the public interest.

Further information is in the schedule at Attachment A.

I note that Documents 1 and 2 might also be exempt from disclosure under other provisions of the FOI Act, such as section 47C (deliberative process) and section 47E(d) (operations of an agency) of the FOI Act. However, given I am satisfied that Documents 1 and 2 are exempt under the abovementioned provisions of the FOI Act, I consider it is not necessary for the purpose of this decision that I consider the application of those other exemptions in detail.

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

- the terms of your request;
- the requested documents;
- consultation comments from the Department of Foreign Affairs and Trade;
- 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

Documents 1 and 2

Section 33(a)(iii) of the FOI Act – damage to the international relations of the Commonwealth

Section 33(a)(iii) of the FOI Act provides that:

A document is an exempt document if disclosure of the document under this Act:

(a) *would, or could reasonably be expected to, cause damage to:*

...

(iii) *the international relations of the Commonwealth;*

The FOI Guidelines state that:

The phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.

The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or

speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies...

For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future....¹

The requested documents contain information that would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

I am therefore satisfied that the requested documents are exempt under section 33(a)(iii) of the FOI Act.

Section 33(b) of the FOI Act – information or matter communicated in confidence by or behalf of a foreign government

Section 33(b) of the FOI Act provides that:

A document is an exempt document if disclosure of the document under this Act:

...

- (b) *would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.*

The FOI Guidelines relevantly provide as follows:

The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made — it is not a matter of determining whether the information is of itself confidential in nature. Information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations. They may assist the decision maker to determine whether, on the balance of probabilities, information was communicated in confidence.

The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access. It is irrelevant for the purposes of the exemption that the foreign government or agency may have since reviewed the status of the document and it is no longer confidential. The document will still be an exempt document under the FOI Act, noting however that agencies and ministers have

¹ FOI Guidelines, [5.36] – [5.38] (footnotes omitted).

a discretion to provide access to an exempt document where the law permits (see [5.6] above).

An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated.

...

Information communicated by an Australian Government agency to a foreign government can also fall under s 33(b) if it restates information the foreign government previously communicated to the agency in confidence.²

I am satisfied that the requested documents contain information that was communicated in confidence by or behalf of another Government to the Government of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth.

I am therefore satisfied that the requested documents are exempt in full under section 33(b) 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:

- the author of the document is identifiable;
- the document contains third party personal information;

² FOI Guidelines, [5.42] – [5.46].

- release of the document would cause stress on the third party; and
- no public purpose would be achieved through release.³

I am satisfied that the requested documents contain the personal information of identified individuals, or individuals who are reasonably identifiable. I consider that disclosure of the personal information would be unreasonable for the following reasons:

- 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; and
- the personal information may be sensitive.

I am therefore satisfied that the personal information in the requested documents is conditionally exempt under section 47F 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.

Factors in favour of disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:⁴

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;

³ FOI Guidelines, [6.142].

⁴ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

- 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.

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,⁵ to which I have had regard.

I consider the following factors favour non-disclosure of the personal information in the requested documents:

- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- disclosure could reasonably be expected to harm the interests of an individuals.

After careful consideration of all relevant factors, I have decided that the factor in favour of disclosure is outweighed by the factors against disclosure.

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

Section 22 of the FOI Act – access to edited copies with exempt or irrelevant matter deleted

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 advised by the Department on 16 December 2020, it is the Department's policy to withhold:

- any person's signature;
- the names and contact details of Australian Public Service officers not in the Senior Executive Service (SES);
- the mobile or direct numbers of SES officers;
- 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 excluded the parts of the requested documents that contain the above details, and any parts of the requested documents that are outside the scope of your request.

Processing and access charges

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

⁵ FOI Guidelines, [6.22].

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 a 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/>.

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

29 January 2021