



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2020/286

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Trav S

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

By email: foi+request-6982-0a7226ab@righttoknow.org.au

Dear Trav S

I refer to your email of 18 December 2020, made 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:

Administrative decisions often include the exercise of discretion. By this I mean decisions in which a government decision maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions. In these cases the decision maker's role is to make a judgment taking into account all relevant information.

We would like to ask for a copy of the policies and guidelines currently in place to guide PM&C staffs discretionary decision making.

On 12 January 2021, the Department wrote to you to seek clarification of your request as follows:

Section 15 of the Freedom of Information Act 1982 (the FOI Act) requires that a request for access to documents under the FOI Act must, among other requirements, provide such information as is reasonably necessary to enable the agency to identify the document being sought.

Your request does not provide such information as is reasonably necessary to enable the Department to identify the document you are seeking.

To enable the Department to identify the document(s) you are seeking, please specify the subject matter of the administrative decision(s) in respect of which you are seeking 'policies and guidelines currently in place to guide PM&C staffs discretionary decision making'.

On 12 January 2021, you responded as follows:

Thank you for replying, to clarify.

Please regard the 1999 Humanitarian Overseas Service Medal Regulations. Section 4 Eligible service, paragraph (3) states:

"a declaration ... MAY also specify, in relation to the declared operation, conditions about ineligibility for an award of the medal".

Please regard the Acts Interpretation Act 1901. The preliminary states "This Act is like a dictionary and manual to use when reading and interpreting Commonwealth Acts and instruments made under Commonwealth Acts."

Part 7, Section 33 'Exercise of powers, functions and duties'. Paragraph (2A) prescribes that:

"Where an Act ... provides that a person MAY do a particular act or thing, and the word MAY is used, the act or thing may be done at the discretion of the person".

The HOSM regulations delegate two powers to the Assistant Secretary, Awards and Culture Branch. The power to 1) treat a period of service as eligible service, and 2) recommend the award of the medal.

The Regulations governing the medal do not prohibit the medal being awarded to commercial contractors. The Assistant Secretary confirms this and advised government that the regulations:

"allow virtually any class of persons to be determined an eligible group".

Regarding a case in which the medal was awarded to commercial contractors engaged to provide essential services to a humanitarian operation, the Branch advised:

"the case establishes a precedent for extending eligibility to commercial contractors in cases in which the contractors are engaged in Australian humanitarian operations".

Additionally to this precedent, the Foreign Minister advised PM&C that:

"there are precedents to open eligibility of the HOSM to commercial entities where these services are essential to the Government's work."

To clarify our request.

1. *We seek a copy of the policy, procedures or rules guiding or related to the discretionary decision prescribed in HOSM Regulations (1999) Section 4, paragraph (3).*

On 13 January 2021, you wrote to the Department as follows:

We would be grateful if you can accept this amendment to include the following in our FOI request.

Commonwealth Departments and agencies normally have policies and guidelines to assist and provide guidance to decision makers making discretionary decision.

Can we request a copy of PM&C's policies, rules and guidelines guiding discretionary decision making.

On 15 January 2021, the Department wrote to you to seek further clarification as follows:

Thank you for your email of Wednesday, 13 January 2021, in response to the Department's email of Tuesday, 12 January 2021 in which we sought clarification of your FOI request.

We note that you responded to Department's email of 12 January 2021 on the same day with a different clarification (see attached email).

We note that the documents you have requested in your email of 13 January 2021 ('a copy of PM&C's policies, rules and guidelines guiding discretionary decision making') appear to be substantially identical to the documents you requested in your email of 18 December 2020 ('a copy of the polices and guidelines currently in place to guide PM&C staffs discretionary decision making') and in respect of which we sought clarification.

We would be grateful if you could clarify whether we are to take your email of 12 January 2021 (attached) or your email of 13 January 2021 (below) as the clarification of your FOI request.

On 15 January 2021, you responded as follows:

Thank you, to clarify.

We seek a copy of the policy/guidelines that relate to informing the discretionary decision prescribed by HOSM Regulation (1999) Section 4, paragraph (3).

If PM&C has more general policy/guidelines guiding discretionary decisions we would also ask for a copy of/or reference to those documents.

On 27 January 2021, the Department wrote to you to seek further clarification as follows:

Thank you for your below email, received by the Department of the Prime Minister and Cabinet (the Department) on 15 January 2021 in which you advised that:

We seek a copy of the policy/guidelines that relate to informing the discretionary decision prescribed by HOSM Regulation (1999) Section 4, paragraph (3).

If PM&C has more general policy/guidelines guiding discretionary decisions we would also ask for a copy of/or reference to those documents.

We request your clarification on whether you are only seeking part 1, namely a copy of the policy/guidelines that relate to informing the discretionary decision prescribed by HOSM Regulation (1999) Section 4, paragraph (3).

Otherwise, if you are also seeking part 2, namely more general policy/guidelines guiding discretionary decisions, your request remains unclear (we note that it is drafted in similar terms as per your original scope dated 18 December 2020, and which was the subject of our previous request for clarification).

Processing of your request will commence once it meets the requirements of section 15 of the FOI Act.

On 27 January 2021, you responded as follows:

I am sorry for the confusion, please just go with Part 1.

On 29 January 2021, the Department confirmed that the terms of your clarified request were as follows:

We seek a copy of the policy/guidelines that relate to informing the discretionary decision prescribed by HOSM Regulation (1999) Section 4, paragraph (3).

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.

Decision

I have decided to refuse your request under section 24A(1)(b)(ii) of the FOI Act.

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

- the terms of your request;
- searches undertaken by the Department regarding your request;
- the FOI Act; and
- the 'Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982*'.

Reasons

Section 24A(1) of the FOI Act provides that:

An agency or Minister may refuse a request for access to a document if:

- (a) all reasonable steps have been taken to find the document;*
- and*
- (b) the agency or Minister is satisfied that the document:*
 - (i) is in the agency's or Minister's possession but cannot be found; or*
 - (ii) does not exist.*

Having regard to the terms of your request, searches for documents were undertaken by the business area in the Department with responsibility for the subject matter of the FOI request. Those searches did not locate any documents meeting the terms of the request.

I am satisfied that all reasonable steps have been taken to find documents meeting the terms of your request and I am satisfied that no documents meeting the terms of your request exist in the Department's possession.

I have therefore decided to refuse your request under section 24A(1)(b)(ii) of the FOI Act.

Processing and access charges

I have decided not to impose 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 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



Peter Rush
Assistant Secretary
Parliamentary and Government Branch

26 February 2021