



## Australian Government

### Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT  
BARTON

FOI/2021/092IR

#### 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-7414-b116d6fe@righttoknow.org.au](mailto:foi+request-7414-b116d6fe@righttoknow.org.au)

Dear Trav S

I refer to your email of 13 July 2021 in which you requested an internal review of the decision (the **primary decision**) dated 12 July 2021 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 FOI request under section 24A(1)(b)(ii) of the FOI Act.

In reaching my decision I have had regard to:

- your FOI request;
- the primary decision;
- the record of searches undertaken for documents meeting the terms of your FOI request;

- your email of 13 July 2021 3:32AM in which you requested internal review, and your email 13 July 2021 5:57PM, in which you clarified your request for internal review;
- the FOI Act; and
- the *Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act* (the **FOI Guidelines**).

## **Background**

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

On 11 June 2021, you made a request under the FOI Act to the Department in the following terms:

*Can we ask for a copy of all documents related to a file titled "Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp".*

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

On 12 July 2021, the Department notified you of the primary decision on your FOI request.

The decision was to refuse your FOI request under section 24A(1)(b)(ii) of the FOI Act, for the following 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.*

*The Department has searched its files, but no file has been found with the title 'Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp'.*

*I am satisfied that all reasonable steps have been taken to find documents relevant to the FOI request, and that no documents relevant to the FOI request exist in the Department.*

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

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

On 13 July 2021 3:32AM, you requested internal review in the following terms:

*Please review Mr Rush's decision that:*

*"I am satisfied that all reasonable steps have been taken to find documents relevant to the FOI request, and that no documents relevant to the FOI request exist in the Department".*

*Mr Rush's claim conflicts with his own Department's claim to hold Legal Professional Privilege (LPP) over 29 documents the Attorney Generals Department holds related to the "Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp".*

*We contend it is unreasonable to claim LPP on documents that don't exist. It is unreasonable to claim documents don't exist when there is a LPP claim made on them.*

*I bring your attention to:*

*22 Feb 2012, the public record shows Mr Rush in email correspondence with AusAID and other PMC stakeholders. The email subject title is "'HOSM for CRG Contractors in Iraq [SEC=UNCLASSIFIED]". These documents are relevant to our FOI request, there were around 10 emails.*

*19 Mar 2012, the public record shows Mr Rush received an email with his Department proposing draft text for AusAID's consideration that his Department proposed to brief PSPM Senator Jan McLucas with soon. The draft "Amendment of HOSM (Iraq) declaration 2004 to extend to specified commercial contractors" is relevant to our FOI request.*

*5 Dec 2012, the public record shows Mr Rush decided "The Minister for Foreign Affairs would need to write to the PM supporting the case for a new declaration to apply". Relevantly, earlier in 2012 Mr Rush failed to give PSPM Senator the Hon Jan McLucas the proposed amendment without reasonable excuse.*

*26 June 2013, the public record shows the Minister for Foreign Affairs, Senator the Hon Bob Carr, provided the letter Mr Rush requested.*

*26 Nov 2019, the public record shows Mr Rush was to be informed of OPC's decision to refuse access to a public FOI request seeking access to an amendment to the HOSM Declaration in 2012.*

*23 April 2021, the public record shows PMC emailed the Attorney General's Department. The AGs holds 29 documents relating to the HOSM Amendment Regulation: Iraq clasp. They largely comprise communications between PMC and Office of Legislative Drafting and Publications. Their dominant purpose being the provision of legislative drafting instructions, legal advice and draft legislation. AGs confirms the documents regard our case.*

*The FOI Guidelines state:*

*"It is not enough for an agency to simply assert that the document cannot be found or does not exist before taking any demonstrable steps to try and find the requested document."*

*Mr Rush has not satisfied the two elements that must be established before refusing a request via section 24A. It is unreasonable they claim PMC holds no documents*

*relevant to our FOI request. He has knowledge of documents directly relevant to the request but has not taken reasonable steps to find them.*

*Mr Rush's claim that PMC holds no documents relevant to our FOI request is untrue. It conflicts with the AGs claim of holding 29 documents relating to the "Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp".*

On 13 July 2021 5:57PM, you provided the following clarification:

*Please accept the following clarification:*

- 1. The Attorney Generals Department created file number 12/5946 - Humanitarian Overseas Service Medal Regulation: Iraq clasp. This is evidenced in Senate Order Final List - Jan to Jun 2012*
- 2. The Office of Parliamentary Counsel holds file number 12/5946 related to the Humanitarian Overseas Service Medal Regulation: Iraq clasp. There are 29 relevant documents in this file. This is evidenced by OPC FOI request no. 7-2021*

*Please also take the following information into consideration:*

- 3. Mr Rush waived legal professional privilege over documents prepared for Parliamentary Secretary to the Prime Minister Senator the Hon. Jan McLucas. This is evidenced by PMC FOI request 2020/267. Mr Rush states "The Department is not required to seek legal advice in the course of drafting briefs. The responsible line area has confirmed that no such legal advice as described in the terms of your request was sought."*
- 4. Legal professional privilege cannot reasonably be applied to documents that already exist in the public space. Mr Rush acknowledges AusAID disclosed documents to me. We ask PMC release documents titled "HOSM for CRG Contractors in Iraq [SEC=UNCLASSIFIED]" and "Humanitarian Overseas Service Medal (Iraq) Declaration [SEC=UNCLASSIFIED]".*
- 5. Within these documents are drafts of the "proposed declaration under the new HOSM Regulations 2011, which would repeal the current Iraq declaration made under the repealed regulations." Mr Rush implies these documents do not exist while at the same time he acknowledges AusAID disclosed copies to us.*

## **Reasons**

I have considered your email of 13 July 2021 3:32AM in which you requested internal review, and your email 13 July 2021 5:57PM, in which you clarified your request for internal review. I agree with the findings and reasons given in the primary decision for refusing your FOI request under section 24A(1)(b)(ii) of the FOI Act.

I note that, in your subsequent emails, you have sought to clarify the documents to which you are seeking access. However, your FOI request (and the subject of this internal review decision) was for 'a copy of all documents related to a file titled "Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp"'. The Department does not hold a file titled 'Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp'. It is therefore not possible for the Department to identify what documents 'relate' to such a file. It

is open to you to make new requests under the FOI Act for the documents you have identified in your emails of 13 July 2021.

### **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.

John Reid PSM  
First Assistant Secretary  
Government Division

29 July 2021