



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2021/112

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Trav S

DECISION BY: Peter Rush
Assistant Secretary
Parliamentary and Government Branch

By email: foi+request-7585-3f426f13@righttoknow.org.au

Dear Trav S

I refer to your email, dated 14 July 2021, 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:

On 11 June 2021, we requested a copy of all documents related to a file titled Humanitarian Overseas Service Medal Amendment Regulation: Iraq clasp.

On 12 July 2021, Mr Peter Rush stated “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”.

We bring the department’s attention to the 22 Feb 2012 email subject titled “HOSM for CRG Contractors in Iraq [SEC=UNCLASSIFIED]”. Mr Rush was the principal recipient of this email.

Under the FOI Act, please provide a copy of that email. Including all correspondence and attached documents.

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.

Searches for relevant documents

The Department has undertaken searches and identified 6 documents meeting the terms of your FOI request. The documents are listed in the schedule at Attachment A.

Decision

My decision on your FOI request is as follows:

- Documents 1, 3, 4 and 5: exempt in full under section 47C, section 47E(d) and section 47G(1)(a) of the FOI Act; and
- Documents 2 and 6: exempt in full, with part of the documents exempt under section 42, section 47C, section 47E(d) and section 47G(1)(a) of the FOI Act, and part of the documents exempt under section 47C, section 47E(d) and section 47G(1)(a) of the FOI Act.

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

- the FOI request;
- the requested documents;
- the FOI Act;
- the 'Guidelines made by the Australian Information Commissioner issued under section 93A of the *Freedom of Information Act 1982*' (the **FOI Guidelines**).

Reasons

Documents 2 and 6

Section 42 of the FOI Act – Legal professional privilege

Section 42 of the FOI Act relevantly provides as follows:

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.*

...

The FOI Guidelines relevantly provide as follows:

The FOI Act does not define LPP [legal professional privilege] for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of LPP.¹

...

LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.²

¹ FOI Guidelines, [5.127].

² FOI Guidelines, [5.128] (footnotes omitted).

At common law, determining whether a communication is privileged requires a consideration of:

- *whether there is a legal adviser-client relationship*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential.*³

I am satisfied that parts of the documents meet the common law requirements for establishing a claim of legal professional privilege. Further, the Department, as the entity entitled to claim legal professional privilege, has not waived that claim.

I am therefore satisfied that parts of the documents are exempt under section 42 of the FOI Act.

Documents 1 to 6

Section 47C of the FOI Act – Deliberative process

Section 47C of the FOI Act provides as follows:

- (1) A document is conditionally exempt if its disclosure under this Act 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:*
- (a) an agency; or*
 - (b) a Minister; or*
 - (c) 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.*⁴

³ FOI Guidelines, [5.129] (footnotes omitted).

⁴ 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'.⁵

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.⁶

I am satisfied that the documents contain deliberative matter prepared or recorded in the course of or for the purposes of, the deliberative processes involved in the functions of the Department. I am further satisfied that the documents contain no 'purely factual' material.

I am therefore satisfied that the documents are conditionally exempt from release 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 as follows:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(d) 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.

...

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.⁷

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.

⁵ FOI Guidelines, [6.63] (footnotes omitted).

⁶ FOI Guidelines, [6.73] (footnotes omitted).

⁷ FOI Guidelines, [6.120] – [6.123] (footnotes omitted).

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 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.⁸

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’.⁹

I am satisfied that the documents could reasonably be expected to have a substantial adverse effect on the proper and efficient administration of the Department by inhibiting officers in inhibiting officers in the recording, or exchanging, opinions, advice and recommendations.

I am therefore satisfied that the documents are conditionally exempt under section 47E(d) of the FOI Act.

Section 47G of the FOI Act – Business information

Section 47G(1)(a) of the FOI Act provides as follows:

A document is conditionally exempt if its disclosure under this Act 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, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that 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.¹⁰

⁸ FOI Guidelines, [5.16] – [5.18] (footnotes omitted).

⁹ FOI Guidelines, [5.20] (footnotes omitted).

¹⁰ FOI Guidelines, [6.192] – [6.193] (footnotes omitted).

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 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.¹¹

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

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

Section 11A(5) of the FOI Act – the public interest test

¹¹ FOI Guidelines, [6.187] – [6.191] (footnotes omitted).

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:¹²

- 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.¹³ 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,¹⁴ to which I have had regard.

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

- reduce the quality, clarity or frankness of written advice;
- inhibit officers in the recording, or exchanging, opinion, advice and recommendation;

¹² See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

¹³ FOI Guidelines, [6.19].

¹⁴ FOI Guidelines, [6.22].

- inhibit the preparation of draft material and thereby adversely affecting the iterative process of settling such material in the light of new information or further consideration or reflection;
- inhibit the proper and efficient administration of the Humanitarian Overseas Service Medal by the Department; and
- harm the interests of an organisation in respect of its lawful business affairs.

Balancing the public interest

After careful consideration of all relevant factors, I consider the public interest against disclosure outweighs the public interest for disclosure.

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

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/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



Peter Rush
Assistant Secretary
Parliamentary and Government Branch

13 August 2021