



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2021/112IR

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-7585-3f426f13@righttoknow.org.au

Dear Trav S

I refer to your emails dated 10 September 2021 and 16 September 2021 in which you requested internal review of the decision (the **primary decision**) dated 13 August 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 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 reaching my decision I have had regard to:

- your FOI request of 14 July 2021;
- the primary decision;
- the six documents within the scope of your FOI request;
- 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 14 July 2021, you made a request under the FOI Act to the Department 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.

The primary decision

On 13 August 2021, the Department notified you of the primary decision on your FOI request. There were six documents identified as relevant to the FOI request and the decision maker found, for the reasons given in the primary decision, that the documents were exempt from release 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.

The internal review request

On 10 September 2021, your requested internal review in the following terms:

... after careful consideration of all relevant factors, we consider the public interest for disclosure outweighs the public interest against disclosure. We therefore request an internal review. As a minimum please release the documents with material that is not the substantive content of privileged information i.e. the email subject line, address block, salutation, classification, closing words and signature block.

Relevantly in Taggart and Civil Aviation Safety Authority (FOI) [2016] AATA 327 Forgie DP decided that such information was not privileged and therefore not exempt under section 42 of the FOI Act.

Please refer to PMC's 19 March 2012 email to AusAID informing 'here's draft text for your consideration, that we propose to brief the new PSPM, Senator Jan McLucas with soon'. The draft is titled 'amendment of humanitarian overseas service medal (iraq) declaration 2004 to extend to specified commercial contractors'. There are two recommendations for the PSPM, the remaining material describes the amendment's purpose, key points and other details. The amendment is favourable, the department's recommendations and brief support the extension of the medal.

FOI Act section 42(2) confirms a document is not exempt if the person entitled to claim the LPP waives the privilege. AusAID was one of the stakeholders entitled to claim LPP, they released documents to the public in 2012. A DFAT official unfamiliar with this case advised 'they do not waive LPP in this matter' however that advice came seven years after AusAID's disclosure. FOI Act Guidelines section 5.142 states 'LPP does not apply to a communication that is not confidential'. Section 5.1462 states 'The High Court has held that waiver of LPP will occur where the earlier disclosure is inconsistent with the confidentiality protected by the privilege... It is immaterial that the client did not intend to waive privilege.' Section 5.146 states that LPP 'may be waived in circumstances where the communication in question has been widely distributed'

AusAID was an independent statutory government agency and a relevant stakeholder in the process. The Agency decided to release documents to the public in 2012 including the 19 March 2012 email with the draft text of the proposed amendment. Since that time the documents were widely distributed to persons including, but not limited to, Federal Members of Parliament and their staff; government officials from various departments, international academics, corporate executives, lawyers, journalists and members of the public.

On 22 April 2013 for an example, the Deputy Leader of the Australian Greens wrote to PSPM Leigh referring to the documents. Around this time DFAT and PMC also received public correspondence citing direct quotes with footnoted references to the documents. Most recently, on 15 Aug 2021, Defence reporter Charles Miranda cited direct quotes from the documents in a Herald Sun Sunday exclusive story titled 'The forgotten ex-SAS band of brothers hired by Australia during the Iraq War'. The story was read by at least several tens of thousands of people in the week following its publication thereby demonstrating the public interest.

Disclosure will achieve the FOI Act's fundamental objects. It will promote Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision making. It will promote Australia's representative democracy by increasing due public scrutiny, discussion, comment and review of the department's administrative decision-making.

On 16 September 2021, the Department wrote to you to seek clarification of which decision you were seeking internal review.

On 16 September 2021, you advised that you were seeking internal review of the decision with reference number FOI/2021/112.

Reasons

I have considered your reasons in support of your request for internal review, however I agree with the findings and reasons in the primary decision.

Section 42 of the FOI Act

You have submitted that, in light of the circumstances described in your request for internal review, legal professional privilege has been waived. However, I am satisfied that the Department, as the client agency, has not waived legal professional privilege over the documents within the scope of your FOI request, and that the circumstances described in your internal review request do not amount to waiver of legal professional privilege. I have noted your submissions that the public interest in disclosure outweighs the public interest against disclosure, however, section 42 of the FOI Act, as an exemption in Division 2 of Part IV of the FOI Act, is not subject to a separate public interest test, as explained in the FOI Guidelines:

The exemptions in Division 2 of Part IV are not subject to an overriding public interest test. If a document meets the criteria to establish a particular exemption, it is exempt. There is no additional obligation to weigh competing public interests to determine if the document should be released.¹

I am satisfied that the primary decision was correct that relevant parts of Documents 2 and 6 are exempt under section 42 of the FOI Act.

Section 47C, section 47E(d) and section 47G(1)(a) of the FOI Act

You have contended that the public interest in disclosure outweighs the public interest against disclosure. I have considered your submissions in support of that contention in respect of the documents found in the primary decision to be conditionally exempt under section 47C, section 47E(d) and section 47G(1)(a), however, I am satisfied that the conditional exemptions continue to apply and that disclosure would, on balance, be contrary to the public interest.

Release of edited copies of the documents under section 22 of the FOI Act

You have requested that the Department '[a]s a minimum please release the documents with material that is not the substantive content of privileged information i.e. the email subject line, address block, salutation, classification, closing words and signature block', and cite *Taggart and Civil Aviation Safety Authority*² in support of release of that information.

Section 22 of the FOI Act requires an agency to consider whether it can prepare an edited copy of a document so that the document does not contain exempt or irrelevant content. In determining whether an edited copy of a document can be prepared, the FOI Guidelines relevantly provide that

... an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document

¹ FOI Guidelines, [5.9], and see item 1 in section 31A, and s 11A(4) of the FOI Act..

² [2016] AATA 327.

*would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.*³

In *Paul Farrell and Australian Customs and Border Protection Service*⁴ it was stated that

*... the FOI Act does not require agencies to apply section 22 of the FOI Act in a way that achieves little more than providing access to a document that is 'merely a skeleton of the former document that conveys little of its content or substance'.*⁵

An additional factor weighing against the preparation of edited copies of the documents is the following guidance in the FOI Guidelines concerning unintentional waiver of legal professional privilege:

*The Information Commissioner suggests that agencies should take special care in dealing with documents for which they may wish to claim LPP to avoid unintentionally waiving that privilege.*⁶

I am satisfied that any editing of the documents would be so extensive as to leave only a skeleton of the former documents conveying little of the content or substance of the former documents, and that therefore there is no requirement to prepare edited copies of the documents under section 22 of the FOI Act.

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/>.

³ FOI Guidelines, [3.98].

⁴ [2015] AICmr 52.

⁵ [2015] AICmr 52, [28], citing *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71, [77].

⁶ FOI Guidelines, [5.149].

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 'John Reid', is positioned above the typed name.

John Reid PSM
First Assistant Secretary
Government Division

20 October 2021