



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2021/116

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Trav S

**DECISION BY: Petra Gartmann
Assistant Secretary
Legal Policy Branch**

By email: foi+request-7612-b52a56b4@righttoknow.org.au

Dear Trav S

I refer to your email, dated 18 July 2021, to the Department of the Prime Minister and Cabinet (the **Department**), in which you made a request under the *Freedom of Information Act 1982* (the **FOI Act**) in the following terms (for ease of reference, the respective parts of your request have been labelled 'Part 1', 'Part 2' and 'Part 3'):

[Part 1] On 7 November 2019, the Office of Parliamentary Counsel sent email subject: 'FOI Consultation - Humanitarian Overseas Service Medal Declaration [DLM=Sensitive:Legal]' to FOI@PMC.

Please provide a copy of all documents attached to this email chain in it's entirety.

[Part 2] On 26 November 2019, FOI@pmc replied. The reply referred to 'PM&C reference: C19/174'. Please provide a copy of document C19/174.

[Part 3] The email goes on to discuss telephone conversations between PMC and OPC. After which FOI@pmc states "thanks for the below and for your time on the phone today. I will also let the relevant SES (Peter Rush) know of the below".

Please provide a copy of the documents recording Mr Rush being informed.

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.

Documents meeting the terms of your request

The Department has found no documents meeting the terms of Part 1 or Part 2 of your request. The Department has found one document meeting the terms of Part 3 of your FOI request.

Decision

My decision on your request is as follows:

- Part 1: refuse access under section 24A(1)(b)(ii) of the FOI Act;
- Part 2: refuse access under section 24A(1)(b)(ii) of the FOI Act; and
- Part 3: grant access, in part, to one document, with material exempt under section 47F and section 47G(1)(a) of the FOI Act, and irrelevant material deleted under section 22 of the FOI Act.

A copy of the document that can be released to you is attached.

In making my decision, I have considered the following:

- the terms of your FOI request;
- the emails identified in your request;
- the document relevant to Part 3 of your request;
- comments from relevant Australian Government agencies;
- 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

Part 1 and Part 2 of your request

Section 24A of the FOI Act – Documents cannot be found or do not exist

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.

In relation to Part 1 of your request, I have reviewed the email dated 7 November 2019 from the Office of Parliamentary Counsel with the subject 'FOI Consultation - Humanitarian Overseas Service Medal Declaration [DLM=Sensitive:Legal]'. There were no documents attached to this email.

In relation to Part 2 of your request, I have reviewed the email dated 26 November 2019 from the Department to the Office of Parliamentary Counsel referring to 'PM&C reference: C19/174'. The reference to 'C19/174' is not a reference to a particular document but is a reference to the reference number that was allocated by the Department to the consultation from the Office of Parliamentary Counsel.

I am satisfied that all reasonable steps have been taken to find documents relevant to Part 1 and Part 2 of your request, and that no documents relevant to those parts exist in the Department.

I have therefore decided to refuse Part 1 and Part 2 of your request under section 24A(1)(b)(ii) of the FOI Act.

Part 3 of your request

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;
- release of the document would cause stress on the third party; and
- no public purpose would be achieved through release.¹

The FOI Guidelines provide that other factors that may be relevant to whether disclosure of personal information would be unreasonable under section 47F of the FOI Act include:

- the nature, age and current relevance of the information;
- any detriment that disclosure may cause to the person to whom the information relates;
- any opposition to disclosure expressed or likely to be held by that person;
- the circumstances of an agency’s collection and use of the information;
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information; and

¹ FOI Guidelines, [6.142].

- whether disclosure of the information might advance the public interest in government transparency and integrity.²

The FOI Guidelines further provide that the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of section 47F to protect personal information.³ The FOI Guidelines further explain as follows:

*Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future. On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.*⁴

I am satisfied that the document relevant to Part 3 of your request contains the personal information of an identified individual, or individual who is reasonably identifiable. I consider that the following factors weigh in favour of a finding that disclosure of the personal information would be unreasonable:

- the personal information may not be well known;
- the person 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;
- the personal information may be sensitive.

Disclosure of the information might advance the public interest in government transparency and integrity, however, I consider that this is outweighed by the interests of the individual concerned in the protection of their privacy.

I am satisfied that the personal information in the document relevant to Part 3 of your request is conditionally exempt under section 47F of the FOI Act.

Section 47G of the FOI Act – business information

Section 47G(1)(a) of the FOI Act provides that a document is conditionally exempt if its disclosure 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 (business information), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the 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:

² FOI Guidelines, [6.143].

³ FOI Guidelines, [6.144].

⁴ FOI Guidelines, [6.145] (footnotes omitted).

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.⁵

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.⁶

⁵ FOI Guidelines, [6.192] – [6.193] (footnotes omitted).

⁶ FOI Guidelines, [6.187] – [6.191] (footnotes omitted).

I am satisfied that disclosure of part of the document relevant to Part 3 of your request 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 part of the document relevant to Part 3 of your request is conditionally exempt under section 47G(1)(a) 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:⁷

- 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.⁸ 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.

⁷ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

⁸ FOI Guidelines, [6.19].

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,⁹ to which I have had regard.

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

- prejudice the protection of an individual's right to privacy; 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 document relevant to Part 3 of your request would, on balance, be contrary to the public interest.

Section 22 of the FOI Act - Deletion of exempt or irrelevant information

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.

The document relevant to Part 3 of your request contains exempt and irrelevant material. The irrelevant material comprises the names and contact details of Australian Public Service officers not in the Senior Executive Service.¹⁰

I find that it is reasonably practicable to delete the exempt and irrelevant material from a copy of the document relevant to Part 3 of your request, and that you would wish to be granted access to a copy of the document with the deletions.

Publication of the document

Under section 11C of the FOI Act the Department will make arrangements to publish the document released to you on the Department's FOI disclosure log.

Processing and access charges

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

⁹ FOI Guidelines, [6.22].

¹⁰ Treated as irrelevant material under the Department's redaction policy notified to you on 22 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 black ink, appearing to read 'Petra Gartmann', with a long horizontal line extending to the right.

Petra Gartmann
Assistant Secretary
Legal Policy Branch

17 August 2021