



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2021/118

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Trav S

DECISION BY: Peter Rush
Assistant Secretary
Parliamentary and Government Branch

Trav S

By email: foi+request-7616-6fee593@righttoknow.org.au

Dear Trav S

I refer to your email, dated 20 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* (Cth) (the **FOI Act**) in the following terms:

Please refer FOI/2021/007 and in particular Mr Rush's statement regarding documents prepared for the Parliamentary Secretary to the Prime Minister - Senator the Hon Jan McLucas.

Relevantly, Mr Rush states "the matter continued to be the subject of consultations and deliberations which were not finalised as at the date the Hon Jan McLucas ceased in the role of PSPM."

- 1. We would like to review the documents relevant to, and showing, the department's consultations and deliberations during Senator McLucas's tenure as PSPM.*
- 2. We would also like to review the documents relevant to, and showing, the department's consultations and deliberations during Senator the Hon Dr Andrew Leigh's tenure as PSPM.*

Please accept these requests for information under the FOI Act.

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 of its relevant electronic and paper records and identified 31 documents containing the information you have requested (the **requested documents**).

Decision

I have decided to refuse access, in full, to the requested documents, on the basis that they contain material that is exempt under the following provisions:

- Section 42 of the FOI Act (legally privileged information);
- Section 47C of the FOI Act (deliberative material);
- Section 47E(d) of the FOI Act (proper and efficient operations of an agency);
- Section 47F of the FOI Act (personal information); and
- Section 47G of the FOI Act (business information).

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

- the FOI request;
- the documents relevant to the FOI request;
- the FOI Act;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

Further information is contained in the Schedule at Attachment A.

Charges

On 30 July 2021, the Department issued you with a notice of the preliminary charge (in the amount of \$228.60) to process your request.

On 3 August 2021, the Department received your payment of a deposit (in the amount of \$57.15) towards the charge.

As you have paid the deposit, you are entitled to receive a decision in relation to your request.

As the decision does not include the release of any documents, there is no requirement for you to pay the remainder of the charges in respect of this request.

Reasons for decision

Legal Professional Privilege (section 42(1) of the FOI Act)

Section 42(1) of the FOI Act provides that 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.

The FOI Guidelines at paragraph 5.127 provide that to determine the application of the exemption, the decision maker must have regard to the common law concept of legal professional privilege. The FOI Guidelines at paragraph 5.129 provide that 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; and
- whether the advice given is confidential.

I am satisfied that parts of the requested documents (being Documents 2-3, 5-12, 19-20 and 26) meet the common law requirements for establishing a claim of legal professional privilege.

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

Deliberative material (section 47C(1) of the FOI Act)

Section 47C of the FOI Act provides that:

- (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.*

Paragraph 6.59 of the FOI Guidelines provides that:

'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.

The requested documents contain the views, analysis and recommendations of officers within the Department and other agencies.

I am satisfied that the requested documents meet the definition of “deliberative matter”. Accordingly, I am satisfied that they are conditionally exempt under section 47C of the FOI Act.

Certain operations of agencies – proper and efficient conduct (section 47E(d) of the FOI Act)

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

As mentioned above, the requested documents contain the views, analysis and recommendations of officers within the Department and other agencies in relation to the Humanitarian Overseas Service Medal (HOSM).

Release of the information contained in the requested documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient administration of the HOSM by the Department, on the basis that such disclosure would disclose the Department's HOSM process, methodology and procedures.

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

Personal information (section 47F(1) of the FOI Act)

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person.

Section 47F(2) of the FOI Act provides that in determining whether the disclosure of personal information would be unreasonable, 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 considers relevant.

The term 'personal information' has the same meaning as it has in the *Privacy Act 1988* (the Privacy Act). Section 6(1) of the Privacy Act defines 'personal information' to mean

... 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;

(b) whether the information or opinion is recorded in a material form or not.

Paragraph 6.138 of the FOI Guidelines provides that:

The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s11A(5), which follows later in the decision making 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 when assessing the public interest balance.

Further, paragraph 6.142 of the FOI Guidelines provides that:

Key factors for determining whether disclosure is unreasonable include:

- (a) the author of the document is identifiable*
- (b) the documents contain third party personal information*
- (c) release of the documents would cause stress on the third party*
- (d) no public purpose would be achieved through release.*

Parts of the requested documents (Documents 27-31) consist of correspondence involving former Parliamentary Secretary to the Prime Minister the Hon Dr Andrew Leigh MP and contain the name and other personal details of a constituent of a Member of the House of Representatives who wrote to Dr Leigh on the constituent's behalf. After consideration of the FOI Act and the relevant paragraphs of the FOI Guidelines, I am satisfied that this information is personal information and falls within the scope of section 47F of the FOI Act. Therefore, I am also satisfied that those parts of the requested documents that contain this personal information are conditionally exempt from release.

Business information (section 47G(1) of the FOI Act)

Section 47G(1) of the FOI Act conditionally exempts documents where 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, or
- could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Parts of the requested documents (being Documents 1-12 and 16-31) contain the business information of persons and organisations. I consider that such business information is conditionally exempt from release, as its disclosure would, or could reasonably be expected to, involve the unreasonable disclosure of business information of persons and organisations.

Public Interest

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 particular factors in favour of disclosure in this case are, in my view, that disclosure would:

- a) promote the objects of the FOI Act; and
- b) improve public oversight and scrutiny of government decision making.

Factors against disclosure

The FOI Act does not provide for any public interest factors weighing against disclosure that decision makers may consider. However, in determining whether disclosure would be contrary to the public interest, I have had regard to the FOI Guidelines. The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the case, may be against disclosure.

The main factor against disclosure in this case is that disclosure of the information would affect the ability of the Department to provide comprehensive advice to Government on a key Commonwealth program, namely the HOSM.

HOSM is one of the Commonwealth Government's significant medals. Decisions regarding the awarding of HOSM to individuals is a formal process that is prescribed under legislation. This ensures the integrity and reputation of the HOSM eligibility and assessment process.

Disclosing the requested documents would inhibit the ability of the Department to (a) conduct robust internal deliberations and discussions with other agencies, and (b) provide comprehensive advice to the Government, on the basis that the level of detail contained in future internal correspondence and ministerial briefs may be diminished if there were a risk of such deliberations and discussions being publicly released.

Further, parts of the requested documents contain personal and business information of third parties. Such information is not in the public domain and, when considered in the context of the information in the requested documents, would, or could reasonably be expected to, adversely affect the personal privacy and business interests of those third parties.

After careful consideration of all relevant factors, I have decided that, on balance, the factors against disclosure outweigh those favouring disclosure. Accordingly, I am of the view that disclosure of the requested documents, would be contrary to the public interest.

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/foi-complaints>.

Yours sincerely



Peter Rush
Assistant Secretary
Parliamentary and Government Branch
24 August 2021



FOI REQUEST: FOI/2021/118

SCHEDULE OF DOCUMENTS (ATTACHMENT A)

FOI

Document	Decision
1	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
2	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
3	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
4	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
5	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
6	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
7	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
8	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
9	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
10	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
11	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
12	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
13	Exempt in full under ss 47C(1) and 47E(d) of the FOI Act.
14	Exempt in full under ss 47C(1) and 47E(d) of the FOI Act.
15	Exempt in full under ss 47C(1) and 47E(d) of the FOI Act.
16	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
17	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
18	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
19	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
20	Exempt in full under ss 42(1), 47C(1), 47E(d) and 47G(1) of the FOI Act.
21	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
22	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
23	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
24	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
25	Exempt in full under ss 47C(1), 47E(d) and 47G(1) of the FOI Act.
26	Exempt in full under ss 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.
27	Exempt in full under ss 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.
28	Exempt in full under ss 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.
29	Exempt in full under ss 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.
30	Exempt in full under ss 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.
31	Exempt in full under ss 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.