



**Australian Government**

**Department of the Prime Minister and Cabinet**

ONE NATIONAL CIRCUIT  
BARTON

FOI/2021/118IR

FOI

**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-7616-6feee593@righttoknow.org.au](mailto:foi+request-7616-6feee593@righttoknow.org.au)

Dear Trav S

I refer to your emails of 15 and 16 September 2021 in which you requested internal review of the decision (the **primary decision**) dated 24 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 primary 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 access, in full, to the documents relevant to your FOI request on the grounds that they are:

- exempt under section 42 of the FOI Act; and
- conditionally exempt under sections 47C, 47E(d), 47F and 47G of the FOI Act and disclosure would, on balance, be contrary to the public interest.

In reaching my decision I have had regard to:

- your FOI request of 20 July 2021;

- the primary decision;
- your request for internal review;
- the FOI Act; and
- the ‘Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982*’ (the **FOI Guidelines**).

## **Background**

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

On 20 July 2021, you made a request under the FOI Act to the Department 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.*

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

On 24 August 2021, the Department notified you of the primary decision on your FOI request.

The decision-maker identified 31 documents relevant to your FOI request.

The decision-maker decided to refuse access, in full, to the requested documents, on the grounds 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).

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

On 15 September 2021, you sent the Department an email in the following terms:

*Part 1 regarding the Section 42(1) exemption claimed over documents 2-3, 5-12, 19-20 and 26*

*Section 42(2) of the FOI Act provides that 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 at paragraph 5.144 confirms that a document is not exempt if the person entitled to claim LPP waives that privilege. Section 5.145 provides LPP is the client's privilege to assert or waive. Section 5.146 provides waive of privilege may be express or implied.*

*The Australian Agency for International Development (AusAID) was one of the stakeholders entitled to claim LPP over some of the requested documents. AusAID decided to release documents to the public some time ago.*

*Please refer to your department's 19 March 2012 email 'Subject: HOSM for CRG Contractors in Iraq [SEC=UNCLASSIFIED]' to AusAID informing 'here's draft text for your consideration, that we propose to brief the new PSPM, Senator Jan McLucas with soon'. Please also refer to your department's 11 April 2012 email 'Subject: Humanitarian Overseas Service Medal (Iraq) Declaration [SEC=UNCLASSIFIED] providing a written agreement with AusAID to 'settle the declaration on the basis of that advice, and brief PSPM next week. Fingers crossed!'*

*The FOI Guidelines at Section 5.147 provide the High Court has held that waive of LPP will occur where there earlier disclosure is inconsistent with the confidentiality protected by the privilege. This inconsistency test has been more recently affirmed by the High Court as the appropriate test for determining whether privilege has been waived. It is immaterial that the client did not intend to waive the privilege.*

*The FOI Guidelines at paragraph 5.141 recommends agencies and minister consider that in 'Taggart and Civil Aviation Safety Authority (FOI) [2016] AATA 327, Forgie DP decided that additional material that was not the substantive content of privileged emails, such as the email subject line, address block, salutation, classification, closing words and signature block was not privileged material and therefore not exempt under s42.' We assure the purpose of the FOI Act will be served by disclosing edited copies of the documents - even if editing would leave only a skeleton of the former document. This will provide substance to due public scrutiny of government's administrative decision-making.*

*The FOI Guidelines at paragraph 5.142 provides that LPP does not apply to a communication that is not confidential. Paragraph 5.146 provides privilege may be waived in circumstances where the communication has been widely distributed, the content of the legal advice in question has been disclosed, and a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice.*

*Relevantly documents titled 'Subject: HOSM for CRG Contractors in Iraq [SEC=UNCLASSIFIED]' and 'Subject: Humanitarian Overseas Service Medal (Iraq) Declaration [SEC=UNCLASSIFIED] were widely distributed. Including to*

*members of the public, parliamentarians, officials, academics and journalists. The content of the advice, including the text of the proposed 'amendment of HOSM (Iraq) declaration 2004 to extend to specific commercial contractors' has been disclosed. The department's recommendations for the PSPM, and the amendment's purpose, key points and other details are disclosed. Very relevantly, they support the medal's extension. Members of the public have publicly announced their reliance on the substance of the legal advice*

On 16 September 2021, you sent the Department a second email in the following terms:

*Part 2 regarding conditional exemptions claimed under Sections 47C(1), 47E(d), 47F(1) and 47G(1) of the FOI Act.*

*After careful consideration of all relevant factors, we have decided that, on balance, the factors favouring disclosure outweigh the factors against disclosure. Accordingly, we are of the view that disclosure of the requested documents, would be in the public interest. Disclosure will promote Australia's representative democracy by contributing towards increasing public participation in government processes, with a view to promoting better-informed decision-making; and increasing scrutiny, discussion, comment and review of the government's activities.*

*On 11 April 2012, the department provided a written agreement to AusAID to perform an act. Namely 'settle the declaration on the basis of that advice, and brief PSPM next week. Fingers crossed!'. Relevantly at that time the department's recommendations, key points and other details favourably supported the medal's extension. Of significant concern, FOI inquiries subsequently revealed the department failed to act in accordance with their agreement. As a result, PSPM McLucas was not briefed and a proposed legislative amendment was unreasonably withheld from the lawful decision-maker.*

*Failing to comply with a written agreement, and withholding documents from a Minister may be serious breaches of the Australian Public Service Act. APS employees must act honestly and with integrity and with care and diligence. Members of the public adversely affected by this omission are entitled to scrutinise the decisions leading to the omission. The department has not satisfactorily explained why they failed to act and we seek to documentary evidence from that time to scrutinise the department's decision-making.*

*To reduce the complexity and burden please exclude the following documents from the review and remove them from the Schedule of Documents. Of the documents that remain, please separate them in line with the original FOI request so it is clear which documents relate to which PSPM's tenure. Thank you for your time.*

- 1. HOSM application forms & attachments submitted by the public*
- 2. The 5 December 2012 emails between a member of the public and the department with 'Subject: Thanks For Update'*
- 3. The 2013 letter from a member of the public seeking Foreign Minister Carr's 'support for a proposed amendment to the Humanitarian Overseas Service Medal (HOSM) declaration for Iraq.'*

3. *The 22 April 2013 letter titled 'Humanitarian Overseas Service Medal' from Senator Adam Bandt MP to Dr Leigh*
4. *The 27 May 2013 letter Reference C13/27986 from PSPM Dr Leigh to Adam Bandt MP*
5. *The 27 May 2013 letter from PSPM Dr Leigh seeking the Foreign Minister's input*
6. *The 26 June 2013 letter from the Minister for Foreign Affairs Bob Carr to PSPM Dr Leigh*

On 16 September 2021, the Department responded to both the 15 September and 16 September 2021 emails as follows:

*Dear Trav S*

*Thank you for your email below, received by the Department of the Prime Minister and Cabinet (the Department).*

*It is not clear in respect of which decision you are seeking internal review. Please provide the Department's reference number for the decision, or provide a copy of the decision, in respect of which you are seeking internal review.*

On 16 September 2021, you sent the Department a third email as follows:

*Hi, the department identified 31 documents meeting the terms of this request. Please refer to FOI/2021/118 and in particular the Schedule of Documents.*

## **Reasons**

I have considered your submissions in support of your request for internal review, however I am satisfied that the primary decision remains the correct and preferable decision, and I agree with the primary decision-maker's findings and the reasons underpinning those findings.

Having reviewed the documents which the primary decision-maker found to be exempt under section 42 of the FOI Act, I agree with the primary decision-maker's findings. The Department is entitled to claim legal professional privilege over the relevant documents and the Department has not waived that privilege.

Having reviewed the documents which the primary decision-maker found to be conditionally exempt under sections 47C, 47E(d), 47F and 47G of the FOI Act, I also agree with the primary decision-maker's findings that it would not be in the public interest to release those documents. The public interest in maintaining the integrity and reputation of the Humanitarian Overseas Service Medal and associated administration processes outweighs the public interest that would be served by releasing these documents. In addition, it is not in the public interest to release documents that contain the personal and business information of third parties, where such information is not in the public domain and where release would, or could reasonably be expected to, adversely affect the personal privacy and business interests of those third parties

I have therefore decided to affirm the primary decision to refuse access, in full, to the documents relevant to your FOI request on the grounds that they are:

- exempt under section 42 of the FOI Act; and
- conditionally exempt under sections 47C, 47E(d), 47F and 47G of the FOI Act and disclosure would, on balance, 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/reviews-and-complaints/make-an-foi-complaint/>.

Yours sincerely

A handwritten signature in blue ink that reads "Reid".

John Reid PSM  
First Assistant Secretary  
Government Division

15 October 2021