



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2021/267

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-7981-fe1bc995@righttoknow.org.au

Dear Trav S

I refer to your email, dated 18 October 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:

On 19 March 2012, your department emailed AusAID (DFAT) stating 'further to your recent discussion with Peter, here's draft text for your consideration that we propose to brief the new PSPM Senator Jan McLucas with soon'. Titled 'amendment of humanitarian overseas service medal (iraq) declaration 2004 to extend to specified commercial contractors' the document recommended the PSPM:

'1. Sign the letter to the Governor-General recommending she makes a declaration under HOSM Regulations 2011, extending eligibility for the 'Iraq' clasp to the medal, to specified commercial contractors (Attachment A).

2. Sign the proposed Humanitarian Overseas Service Medal (Iraq) Declaration 2011 (Attachment B).'

On 11 April 2012 your department emailed AusAID (DFAT) providing a written agreement to 'settle the declaration ... and brief the PSPM next week'. However FOI investigations reveal your department evidently withheld the documents from PSPM McLucas.

Please provide a copy of your department's subsequent correspondence to AusAID regarding this matter. Please limit the search to subsequent correspondence occurring between 11 April and 5 December 2012.

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 one document containing the information you have requested (the **requested document**).

Decision

I have decided to refuse access, in full, to the requested document, on the basis that it contains 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); 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 document 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**).

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 part of the requested document meets the common law requirements for establishing a claim of legal professional privilege. Accordingly, I am satisfied that the relevant part of the requested document is 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 document contains the views, analysis and recommendations of officers within the Department and other agencies.

I am satisfied that the requested document meets 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.

The requested document contains 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 document 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 document is conditionally exempt under section 47E(d) of the FOI Act.

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 document 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 factor in favour of disclosure in this case is, in my view, that disclosure would promote the objects of the FOI Act.

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 document 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 document contain 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 document, would, or could reasonably be expected to, adversely affect the 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 document 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
16 November 2021