



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2021/267IR

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-7981-fe1bc995@righttoknow.org.au

Dear Trav S

I refer to your correspondence of 16 November 2021 in which you requested internal review of the decision (the **primary decision**) dated 16 November 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 document relevant to your FOI request on the grounds that it is:

- exempt under section 42 of the FOI Act; and
- conditionally exempt under sections 47C, 47E(d) 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 18 October 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 18 October 2021, you made a request under the FOI Act to the Department 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.

The primary decision

On 16 November 2021, the Department notified you of the primary decision on your FOI request.

The decision-maker identified one document relevant to your FOI request.

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

The internal review request

On 16 November 2021, you sent the Department email correspondence in the following terms:

Please review the decision and take the following into consideration:

- 1. The document is materially relevant to proceedings before the Information Commissioner. The public is entitled to scrutinise government decisions that adversely affect them and the document will be submitted as evidence in those proceedings. Releasing the document with redactions clearly serves the objects of the FOI Act.*
- 2. The Australian Courts have ruled that information such as an email subject line, address block, salutation, classification, closing words and signature block is not exempt under section 42 of the FOI Act.*
- 3. An Australian public servant sent the document to another Australian public servant. Those public servants and the infrastructure enabling the emails are publicly funded. The public is entitled to know which government department corresponded with which government agency. The name and position of the decision maker is relevant to proceedings before the Information Commissioner. We request this information be disclosed.*
- 4. Regarding the conditional exemptions, the public interest factors favouring disclosure appear to outweigh those against. We have previously demonstrated the public interest of this case to the Information Commissioner. Added to that, procedural fairness and natural justice holds that those adversely affected by a government decision are generally entitled to know the reasons for the decision. Given the department's previous erroneous and manifestly unreasonable HOSM advice to government the public needs to scrutinise their advice in this case.*
- 5. The APS Code-of-Conduct imposes binding obligations on Australian public servants in connect with their APS employment. Public servants must behave honestly and with integrity, and act with care and diligence. The public are entitled to scrutinise the department's decision-making and advice to AusAID to assess if it does or does not comply with the obligations imposed by the APS Act. Documents obtained via FOI show very significant omissions/errors in the department's HOSM assessments and the integrity of the associated processes is in doubt in this case. The public are entitled to know the truthfulness of the department's advice to AusAID as there are many sound causes for concern regarding the integrity department's advice on this matter. For example, FOI reveals the department withheld documents from a ministerial decision maker; the department provided manifestly unreasonable and clearly erroneous advice to government; the department omitted written agreements and materially relevant evidence from their deliberations, reports and advice to government; they appear to have failed to honour written agreements. The public expects public servants will be accountable for their decision. The public have a vested interested in determining the degree to which public servants complied with their duties and obligations in this case.*

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 information in the requested document 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. I am satisfied that legal professional privilege has not been waived over the relevant parts of the document.

Having reviewed the rest of the document which the primary decision-maker found to be conditionally exempt under sections 47C, 47E(d) 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 the document. 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 the document.

In response to your submissions concerning obligations of APS employees and the FOI Act, I am satisfied that it was open to the decision maker under the FOI Act to claim the exemptions as set out in the primary decision. The right of access to documents under the FOI Act, as set out in section 11 of the FOI Act, is not absolute. Decision makers are entitled to decide that a document meets criterion for a relevant exemption as set out in the Act.

I have therefore decided to affirm the primary decision to refuse access, in full, to the document relevant to your FOI request on the grounds that it contains material that is:

- exempt under section 42 of the FOI Act; and
- conditionally exempt under sections 47C, 47E(d) 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



John Reid PSM
First Assistant Secretary
Government Division

13 December 2021