



OFFICIAL

## Freedom of Information (FOI) request

Notice of Revised Decision under s 55G of the FOI Act

Reference: FOI/2021/267IC

To: Mr Trav S

[foi+request-7981-fe1bc995@righttoknow.org.au](mailto:foi+request-7981-fe1bc995@righttoknow.org.au)

Cc: Office of the Australian Information Commissioner

[foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

Dear Mr Trav S

I refer to your request under the *Freedom of Information Act 1982* (the FOI Act) to the Department of the Prime Minister and Cabinet (the Department) on 18 October 2021, for the following:

*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.*

On 16 November 2021, the Department notified you of its decision regarding one document identified within scope of your request (the requested document). The primary decision-maker refused access on the grounds that the requested document contains material that was exempt under section 42 (legal professional privilege), section 47C (deliberative material), section 47E(d) (operations of an agency) and section 47G (business information) of the FOI Act, and that relevant public interest factors weighed against disclosure of the documents. You sought internal review of this decision.

On 13 December 2021, the Department notified you of its internal review decision which affirmed the primary decision. On 11 August 2023, the Office of the Australian Information Commissioner (OAIC) notified the Department that you have applied for an Information Commissioner (IC) review of the Department's internal review decision. The purpose of this letter is to provide you, under section 55G of the FOI Act, with a revised decision on your request for access.

## Section 55G of the FOI Act

Section 55G(1)(a) of the FOI Act provides that after an application is made to the IC for review, an agency or Minister may (at any time during IC review) revoke or vary an access refusal decision to favour the applicant by giving access to a document in accordance with the request.

Section 55G(2) of the FOI Act provides that an agency must notify the IC of the new decision (section 55G(2)(a)) and the revised decision will be the decision under review (section 55G(2)(b)).

## Authorised decision-maker

I am authorised to make this revised decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

I have reviewed the requested document and consider I am now in a position to grant part access to the document in accordance with your request. Accordingly, I have decided to make this revised decision under section 55G of the FOI Act.

## Material taken into account

In reaching my decision, I referred to the following:

- your FOI request;
- the primary decision;
- the requested document;
- the internal review decision;
- your request for IC review;
- consultation comments from another agency;
- the FOI Act; and
- the Guidelines issued by the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines).<sup>1</sup>

## Documents in scope of request

I am satisfied that the requested document meets the terms of your request.

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<sup>1</sup> FOI Guidelines.

## Revised decision and reasons

I have considered all the information available to me, including the fresh consultation comments received from another agency. Due to the passage of time and the decreased sensitivity of the material contained within the document, I have decided to grant access in part to the document, while maintaining the exemptions over parts that contain legally privileged material (section 42) and business information of a third party (section 47G). Irrelevant material has been deleted under section 22(1)(a)(ii) of the FOI Act.

My findings of fact and reasons for deciding that certain information is exempt or irrelevant is set out below.

### 1. Legal Professional Privilege (section 42 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 provide that to determine the application of the exemption, the decision maker must have regard to the common law concept of legal professional privilege.<sup>2</sup> The FOI Guidelines also 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.<sup>3</sup>

I am satisfied that parts of the requested document meet the common law requirements for establishing a claim of legal professional privilege. I also note that the Department is the holder of the privilege, and has not waived that privilege. Accordingly, I am satisfied that those parts of the requested document are exempt under section 42 of the FOI Act.

### 2. Business information (section 47G of the FOI Act)

Section 47G(1)(a) 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

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<sup>2</sup> FOI Guidelines [5.127].

<sup>3</sup> FOI Guidelines [5.129].

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.

Parts of the requested document contain the business information of an organisation. 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 a third party. Accordingly, I am satisfied that those parts of the requested document are conditionally exempt under section 47G(1)(a) of the FOI Act.

### 3. Public interest

The FOI Act provides that a conditionally exempt document must nevertheless be disclosed unless its disclosure would, on balance, be contrary to the public interest.<sup>4</sup> In determining whether its disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors.

As I have decided that some material is conditionally exempt, I am now required to consider the public interest factors. In doing so, I have not taken into account the irrelevant factors as set out in section 11B(4) of the FOI Act, this includes:

- 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*
- d) *access to the document could result in confusion or unnecessary debate*

In applying the public interest, I have noted the objects of the FOI Act<sup>5</sup> and the factors favouring access as listed in section 11B(3) of the FOI Act. Having regard to the material before me and the circumstances of the documents found to be conditionally exempt I am satisfied that access would promote the objects of the FOI Act.<sup>6</sup>

The FOI Act does not set out any public interest factors against disclosure and require agencies to have regard to the FOI Guidelines in order to work out if disclosure would, on balance, be contrary to the public interest.<sup>7</sup> The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the documents found to be conditionally exempt, may weigh against disclosure.

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<sup>4</sup> FOI Act, s 11A(5).

<sup>5</sup> FOI Act, s 3.

<sup>6</sup> FOI Act, s 11B(3)(a).

<sup>7</sup> FOI Act, s 11B(5).

In my view, the factors against disclosure of the conditionally exempt material is that disclosure of the information could reasonably be expected to adversely affect the business interests of the relevant third party, given the subject matter discussed within the document.

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 conditionally exempt material would be contrary to the public interest.

#### 4. Deletion of irrelevant matter

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would be reasonably regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonable be regarded as irrelevant to the request.

On 29 October 2021, the Department advised you of its policy to exclude personal and direct contact details of officers not in the Senior Executive Service (SES) and any Ministerial staff, as well as any person's signature, and the mobile or direct numbers of SES officers, which are contained in the documents that fall within the terms of an FOI request. This category of information is identified as irrelevant and I am satisfied that those parts of the document may be deleted under section 22(1)(a)(ii) of the FOI Act.

The remainder of the document has been released to you (to the extent that it is not exempt) as it is relevant to your request. A copy of the document for release is **attached** to this decision.

### Publication of documents

Under section 11C of the FOI Act, the Department will make arrangements to publish the documents released to you on the Department's FOI Disclosure Log.<sup>8</sup>

### Review Rights

The FOI Guidelines state that:

*A revised decision does not automatically conclude the IC review. The revised decision will be the decision under review (s 55G(2)(b)). The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.*<sup>9</sup>

### Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. If you are not satisfied with our response, you can make a complaint to the

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<sup>8</sup> <https://www.pmc.gov.au/about-us/accountability-and-reporting/information-and-privacy/foi-disclosure-logs>

<sup>9</sup> FOI Guidelines [10.70].

Australian Information Commissioner. A complaint to the IC must be made in writing. More information about complaints is available [here](#).<sup>10</sup>

If you wish to discuss any aspect of your requests, you can contact the FOI Section by email at [foi@pmc.gov.au](mailto:foi@pmc.gov.au).

Yours sincerely



David Belgrove  
Acting Assistant Secretary  
Parliamentary and Government Branch  
Department of the Prime Minister and Cabinet

27 October 2023

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<sup>10</sup> <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints>