



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2021/266

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: (Name redacted at request of applicant)

DECISION BY: **Ms Petra Gartmann**
Assistant Secretary
Legal Policy Branch

By email: foi+request-7986-80289aaf@righttoknow.org.au

Dear (Name redacted at request of applicant)

I refer to your email of 19 October 2021 in which you made a request under the *Freedom of Information Act 1982* (the **FOI Act**) to the Department of the Prime Minister and Cabinet (the **Department**) in the following relevant terms:

On 28 July 2021, your department served notice of intent to consider a vexatious declaration application on a member of the public engaged in scrutinising your department's administrative decision-making regarding the Humanitarian Overseas Service Medal. On 1 August 2021, the member of the public replied refuting your department's allegations and implications. The reply informed your department of significant errors in their administrative processes associated with the HOSM that were revealed through FOI. The response respectfully asked your department to take a number of actions.

Please provide a copy of:

- 1. the 28 July 2021 and 1 August 2021 letters*
- 2. all departmental correspondence between 1 August and 19 October 2021 related to this matter*
- 3. draft and final documents created by the department in response to the 1 August 2021 letter.*

On 1 November 2021, the Department advised you that you were seeking correspondence relating to another individual, and that you would need to provide the Department with proof that you are the same individual as the individual to which that correspondence relates.

In response, on 2 November 2021, you advised:

Thank you. I am happy to provide proof again. Please note, I do not consent to my name, email, address or phone number being disclosed. Regarding your statement 'Your request is for a letter to the Department dated 28 July 2021 and the Department's correspondence in response dated 1 August 2021. As that correspondence, and related documents'. To amend and clarify our request, we would like to ask for copies of:

1. *PMC's 28 July 2021 letter serving notice of intent to consider a vexatious declaration application with the Information Commissioner*
2. *The 1st August 2021 letter 'Response to PMC notice of intent to consider vexatious declaration application proceedings'*
3. *All departmental (as in PMC) correspondence occurring from 1 Aug to 19 Oct 2021 related to this vexatious declaration matter*
4. *The department's draft and final responses to the 1st August 2021 letter 'Response to PMC notice of intent to consider vexatious declaration application proceedings'*

On 4 November 2021, the Department responded to your email as follows:

Based on a number of factors, including

- *your use of email address (Email redacted at request of applicant) when responding to our identification enquiry and cross-referencing of the FOI request made under pseudonym (Name redacted at request of applicant) through the Right to Know platform,*
- *your history of FOI requests with the Department under both (Names redacted at request of applicant), and*
- *your detailed knowledge of the Department's letter serving notice of intent to a FOI applicant regarding our consideration of a vexatious applicant declaration with the Information Commissioner,*

the Department is satisfied of your identity for the purpose of this FOI request and does not require further proof of identification. However, in light of the content of that original correspondence, and your related response, we recommend that communications relating to this FOI request be processed from now on using your personal email address ... and not disseminated via the Right to Know email address.

On 8 November 2021, you replied that

With the exception of my name, postal address, email address and phone number which I respectfully ask the department to redact. I consent to the department releasing all other information. Please send the documents (with my name, postal address, email address and phone number redacted) to the originating email on Right to Know.

Steps taken to find the documents

Having regard to the terms of your request, 11 documents (the **requested documents**) were identified as meeting the terms of your FOI request.

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.

Decision

I have decided to partially release the requested documents on the basis that they contain information that is conditionally exempt under section 47F, section 47C (deliberative material) and section 47E(d) (operations of an agency) of the FOI Act.

Copies of the documents that are released to you in accordance with my decision are **attached**.

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

- the FOI request;
- the requested documents;
- the FOI Act; and
- the ‘Guidelines issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*’¹ (the **FOI Guidelines**).

Reasons

Section 47C of the FOI Act

Section 47C(1) of the FOI Act provides that:

A document is conditionally exempt if its disclosure 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 an agency, a Minister, or the Government of the Commonwealth.

The FOI Guidelines provide that ‘deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document.² The FOI Guidelines further provide that ‘deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or the thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.³

Parts of the requested documents contain internal departmental advice or recommendations recorded in the course of, or for the purpose of, the deliberative processes involved in the functions of the Department. This includes draft material. I am therefore satisfied that this material is conditionally exempt under section 47C of the FOI Act.

While section 47C(2)(b) of the FOI Act provides that ‘deliberative matter’ does not include ‘purely factual material’, the FOI Guidelines provide that ‘purely factual material’ does not include factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.⁴

I am satisfied that the factual material contained in the draft documents is an integral part of the deliberative content and purpose of those documents, or is embedded in or intertwined with the deliberative content, such that it is impractical to excise it.

I am therefore satisfied that the relevant parts of the requested documents contain conditionally exempt material under section 47C(1) of the FOI Act.

¹ FOI Guidelines combined June 2019 published on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

² FOI Guidelines, [6.63].

³ FOI Guidelines, [6.59].

⁴ FOI Guidelines, [6.73].

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.

Parts of the requested documents are draft documents. The proper and efficient conduct of the Department's operations requires that officers prepare draft material subject to settlement before being made final. The process of settling material is an iterative process and material may change in the light of new information or further consideration or reflection.

I consider that the disclosure of the material in the draft documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department by:

- inhibiting the exchange of written views between officers and the preparation of draft material and thereby adversely affecting the iterative process of settling such material in the light of new information or further consideration or reflection,
- limiting the quality and detail of internal advice and recommended action by officers if draft documents, that do not constitute final agreed positions, are released.

Accordingly, I find that this material is conditionally exempt under section 47E(d) of the FOI Act.

Would disclosure be contrary to the public interest?

Section 11A(5) of the FOI Act provides that access must generally be given to a conditionally exempt document unless it 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:

- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- 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
- 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.

Public interest factors favouring disclosure

The FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:⁵

⁵ See section 11B(3) of the FOI Act and FOI Guidelines, [6.17].

- promoting the objects of the FOI Act
- informing debate on a matter of public importance
- promoting effective oversight of public expenditure
- allowing a person to access his or her personal information.

Having regard to the nature of the conditionally exempt information, I am satisfied that disclosure would promote the objects of the FOI Act and allow a person to access his personal information.

Public interest factors favouring non-disclosure

I consider that public interest factors weighing against disclosure for parts of the requested documents are:

- disclosure would or could reasonably be expected to reduce the quality, clarity and detailed nature of written internal deliberations if there is a risk that internal deliberations including draft documents are publicly released,
- disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department. Officers would be inhibited in the recording opinion, advice and recommendations and preparing draft material. The iterative process of settling such material in the light of new information or further consideration or reflection would be adversely affected.

Balancing the public interest

In weighing the public interest factors for and against disclosure, I note the FOI Guidelines provide that the pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure.⁶

Notwithstanding the weighting towards disclosure, in this case, I attach more weight to the public interest factors against disclosure. In weighing the factors, I consider the public interest against disclosure outweighs the public interest for disclosure.

I am satisfied that disclosing the conditionally exempt information would, on balance, be contrary to the public interest.

Section 47F of the FOI Act – personal information

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

‘Personal information’ is defined as:

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

⁶ FOI Guidelines, [6.8].

As you have requested the exemption of your personal information, I am satisfied that it is reasonable in this case to exempt all your personal information from the requested documents and that the public interest would be against the disclosure of your personal information..

Deletion of exempt or irrelevant matter

Section 22 of the FOI Act provides that exempt or irrelevant information may be deleted from a copy of a document, and access granted to such an amended copy where it is reasonably practicable to do so, unless it is apparent that the applicant would not wish to have access to such a copy.

For documents that fall within scope of the request, it is the Department's policy to withhold:

- any person's signature;
- the names and contact details of Australian Public Service officers not in the Senior Executive Service (SES);
- the mobile or direct numbers of SES officers;
- the names and contact details of Ministerial staff at a level below Chief of Staff.

I have also removed duplicate information in the requested documents, wherever relevant, to facilitate the processing of your request.

Publication of the documents

Section 11C of the FOI Act requires an agency to publish on its web site information released to an applicant under the FOI Act.

Processing and access charges

I have decided not to impose processing charges in respect of your request.

Review rights

Information about your rights of review 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 request. 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



Petra Gartmann
Assistant Secretary
Legal Policy Branch

25 November 2021