



Official

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2022/097

Trav S

By email to: foi+request-8650-7a1eeae2@righttoknow.org.au

Dear Trav S

I refer to your email of 25 March 2022 in which you made a request for access to documents to the Department of the Prime Minister and Cabinet (the Department), under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

Scope of request

You set out your request in the following terms:

...

Last year Mr John Reid served me with a notice of intent to consider a vexatious declaration with the Information Commissioner. I asked him to do so. Documents obtained via FOI reveal significant maladministration in the administration of the Humanitarian Overseas Service Medal. Public interest requires scrutiny, discussion, comment and review of the government's activities in this case.

Please provide a copy of the correspondence between Mr Reid and Mr Peter Rush relating to this vexatious declaration matter. Please include mobile phone text messages.

...

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.

Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- searches undertaken by the Department regarding your request
- the documents relevant to your request
- the FOI Act (specifically sections 24A and 47F)
- the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (the Guidelines).

Documents in scope of request

The Department has undertaken searches for relevant records and has identified two email chains that fall within the scope of your request. The email chains were subject of a decision in FOI/2021/266.¹

The Department has also conducted a search of the work mobile phones of the two relevant SES officers; however, no text messages related to the terms of your request were located.

Decision

With regard to the documents you have requested, and which have been identified as falling within the scope of your request, I have decided to grant access in part, with exempt and irrelevant material deleted under section 22 of the FOI Act.

I have decided to refuse your request for access to documents in the form of text messages under section 24A(1) of the FOI Act. This decision has been made on the basis that the Department has taken all reasonable steps to find the documents in the form of text messages, and those documents cannot be found or do not exist.

Reason for decision

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

1. Subsection 24A(1) – Documents cannot be found do not exist

Subsection 24A(1) of the FOI Act provides that:

An agency or Minister may refuse a request for access to a document if:

- (a) *all reasonable steps have been taken to find the document; and*
- (b) *the agency or Minister is satisfied that the document:*
 - i. *is in the agency's or Minister's possession but cannot be found; or*
 - ii. *does not exist.*

¹ See Document 10 which was partially released to you in part in the decision FOI/2021/266 decision.

In determining what the FOI Act means with respect to 'all reasonable steps', I have had regard to the FOI Guidelines which discuss the meaning of 'reasonable' in section 24A(1)(a) and that it is not designed to be constructed so as to go beyond the limit assigned by reason, not to be extravagant or excessive, rather to be moderate and of such an effort as is judged to be appropriate or suitable to the circumstances .

Part of your request seeks access to text messages between two of the Department's SES officers. I am satisfied that if such texts existed they would only be found on the mobile phones of these officers. Accordingly, the Department conducted searches of the relevant mobile phones. I am satisfied that these searches are appropriate and suitable given the circumstances. No text messages related to the terms of your request were located.

Accordingly, I am satisfied that all reasonable steps have been taken to find documents in the form of text messages, and those documents cannot be found or do not exist. I have therefore decided to refuse your request for access to documents in the form of text messages under section 24A(1) of the FOI Act.

2. Section 47F - Public interest conditional exemption—personal privacy

Section 47F(1) of the FOI Act provides:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Personal Information has the same meaning as set out in section 6 of the *Privacy Act 1988* and 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.*

I have examined the documents and I am satisfied that they contain 'personal information' that relates to you. Your request has been made via the Right-To-Know website, which automatically publishes all correspondence between an FOI applicant and the agency to which the request has been made. Accordingly, PM&C's correspondence of 5 April 2022 advised we would assess any personal information identified within documents and apply section 47F(1) of the FOI Act where personal information may be conditionally exempt from release. As an alternative, PM&C invited you to provide a different address for the delivery of an access decision. You have not done so.

Given the above, it is my view that releasing the documents containing your personal information via Right-To-Know is tantamount to 'disclosure to the world at large'. You have not advised PM&C of your

consent for this to occur. Therefore, I am satisfied that to do so would involve the unreasonable disclosure of your personal information and that this material is conditionally exempt from release under section 47F(1) 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 interest². 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 parts of the documents are conditional 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 subsection 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 Act³ and the factors favouring access as listed in subsection 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 of the following:

- access would promote the objects of the FOI Act⁴; and,
- access will provide you with your own personal information.

The FOI Act does not set out any public interest factors against disclosure and require that agencies are to have regard to the FOI Guidelines in determining whether disclosure would, on balance, be contrary to the public interest⁵. 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.

Factoring against disclosure in this case is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy. I give this significant weight.

The conditionally exempt material identifies you and the application of s 47F prevents the unreasonable disclosure of your identity on a publically available website, while providing you access to the material covered by the scope of your request. On this basis, I am satisfied that the disclosure of the conditionally exempt material in the requested documents would be contrary to the public interest.

² Section 11A(5) of the FOI Act.

³ Section 3 of the FOI Act

⁴ Section 11B(3)(a) of the FOI Act

⁵ Section 11B(5) of the FOI Act

I have therefore decided that parts of the requested documents are conditionally exempt under s 47F of the FOI Act.

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 5 April 2022, the Department advised you of its policy to exclude the 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 documents that fall within the terms of an FOI request. This category of information is identified as irrelevant and documents can be modified by the Department to delete the irrelevant material.

Accordingly I am satisfied that parts of the document are irrelevant under section 22(1)(a)(ii) of the FOI Act. The remainder of the document has been released to you as it is relevant to your request.

Review rights

If you disagree with my decision, you may apply for internal review or Information Commissioner review of the decision.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Department for an internal review of my decision. The internal review application must be made within 30 days after the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days from the date it is received.

Applications for review should be sent to foi@pmc.gov.au.

More information about making a request to the Department is at:

<https://www.pmc.gov.au/who-we-are/accountability-and-reporting/freedom-information>.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days after the date of this letter.

More information about Information Commissioner review is available at

<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing.

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

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

Yours sincerely



Petra Gartmann
Assistant Secretary
Legal Policy Branch
Department of the Prime Minister and Cabinet

9 May 2022