



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2022/100

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Mr Francis Unmeopa

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

Mr Francis Unmeopa

By email: foi+request-8670-8bebbba0a@righttoknow.org.au

Dear Mr Unmeopa

I refer to your email received by the Department of the Prime Minister and Cabinet ('the Department') on 30 March 2022, in which you made a request under the *Freedom of Information Act 1982* (FOI Act) in the following terms:

In February 2012, Peter Rush from the Awards and Culture Branch of PM & C communicated with AusAID regarding the topic of Humanitarian Overseas Service Medal (HOSM) Iraq.

I respectfully seek under the FOI act any documentation and or electronic correspondence related to those discussions between the Awards and Culture Branch and AusAID.

I also seek any documentation and or electronic correspondence related to the topic of the HOSM (Iraq) between Mr Peter Rush and AusAID in 2012

On 18 May 2022, the Department applied to the Office of the Australian Information Commissioner (OAIC) for an extension of time under section 15AC of the FOI Act. An extension was granted to 30 May 2022. We apologise for the delay in processing your 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.

Relevant documents

Following steps taken by the Department to find documents relevant to your request, including searches, 4 documents have been identified as relevant to your request (the **requested documents**).

Decision

I have decided to refuse access, in full, to the requested documents, on the basis that they contain material that is exempt under the following provisions:

- Section 42 of the FOI Act (documents subject to legal professional privilege);
- Section 47C of the FOI Act (deliberative processes);
- Section 47E(d) of the FOI Act (proper and efficient operations of an agency);
- Section 47G(1)(a) of the FOI Act (business information).

In making my decision, I have considered the following:

- the terms of your FOI request;
- the requested documents;
- the FOI Act; and
- the 'Guidelines issued by the Australian Information Commissioner issued under section 93A of the *Freedom of Information Act 1982*' (**FOI Guidelines**).

My reasons for decision are set out below.

Reasons for decision

Section 42 – Legal Professional Privilege

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.¹

The FOI Guidelines 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 used in connection with actual or anticipated litigation;
- whether the advice given is independent; and
- whether the advice given is confidential.²

I am satisfied that Document 4 meets the common law requirements for establishing a claim of legal professional privilege.

I am therefore satisfied that Document 4 is exempt in full under section 42 of the FOI Act.

¹ FOI Guidelines at 5.127

² FOI Guidelines at 5.129

Section 47C – Deliberative material

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.*

As the FOI Guidelines outline:

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.³

‘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.

...

‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document. [44] There is no recommendation, consultation or deliberation’.⁴

Section 47C(2) of the FOI Act provides that deliberative matter does not include purely factual material.

The Guidelines state:

‘Purely factual material’ does not extend to 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.⁵

The whole of documents 1 – 4 would “disclose matter (deliberative matter) in the nature of ... [a] consultation or deliberation that has taken place for the purposes of the deliberative processes’ of the Department within the meaning of section 47C(1) of the FOI Act. In addition, parts of documents 1 – 4 contain opinion, advice or recommendation recorded for

³ FOI Guidelines at 6.58 to 6.59

⁴ FOI Guidelines at 6.63

⁵ FOI Guidelines at 6.73

the purposes of a deliberative process undertaken by the Department within the meaning of section 47C(1) of the FOI Act. I am therefore satisfied that the requested documents contain information that meets the definition of “deliberative matter”.

I am also satisfied that to the extent requested documents contain any ‘purely factual material’, that material is an integral part of the deliberative content and purpose of the document, or is embedded in, or intertwined with, the deliberative content, such that it is impractical to excise it.

Accordingly, I am satisfied that the requested documents are conditionally exempt under section 47C(1) of the FOI Act.

Section 47E(d) – Certain operations of agencies – Proper and efficient conduct

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.

As mentioned above, the requested documents contain the views, analysis and recommendations of officers within the Department and other agencies in relation to the administration of the Humanitarian Overseas Service Medal (HOSM).

I consider that disclosure of the information contained in the requested documents 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. It also may inhibit the preparation and provision of advice by Departmental officers to the Minister with responsibility for Australian honours and symbols policy.

Accordingly, I am satisfied that the requested documents are conditionally exempt in full under section 47E(d) of the FOI Act.

Section 47G – Business information

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:

a) 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

b) 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 documents 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 organisations.

Public Interest test

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

Section 11B(3) of the FOI Act sets out four factors favouring disclosure which must be considered if relevant, namely:

- a) promote the objects of the FOI Act;
- b) inform debate on a matter of public importance;
- c) promote effective oversight of public expenditure; or
- d) allow a person to access his or her personal information.

I am satisfied that disclosure of the conditionally exempt information may promote the objects of the FOI Act and improve public oversight and scrutiny of government decision making.

Factors against disclosure

The FOI Act does not provide for any public interest factors weighing against disclosure that decision-makers may consider. The FOI Guidelines contain a non-exhaustive list of factors that may, depending on the circumstances of the case, operate against disclosure.⁶

In relation to the material I have found to be conditionally exempt under sections 47C, 47E(d) and 47G of the FOI Act, I consider that 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 Australia's honours and symbols policy, including regarding the administration of a key Commonwealth program, namely the HOSM.

⁶ FOI Guidelines at 6.22

The HOSM is one of the Commonwealth Government's significant medals. Decisions regarding the award of the 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 documents 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 documents 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 documents, 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 conditionally exempt material contained in the requested documents, would be contrary to the public interest.

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 under the FOI Act is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

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



Petra Gartmann
Assistant Secretary
Legal Policy Branch

7 June 2022