



10 October 2016

In reply please quote:

FOI Request FA 16/08/01361
File Number: ADF2016/44104

Ato Nduvho

Sent via email: foi+request-2144-057bfa3f@righttoknow.org.au

Dear Ato Nduvho,

Practical refusal notice - *Freedom of Information Act 1982*

I am writing to you in relation to your request under the *Freedom of Information Act 1982* (the Act) on 18 August 2016 for:

'I am seeking the following documents in this FOI:

- 1. All documents which address, or mention, the impact of prolonged bargaining on employee morale. This includes all impact, whether actual, perceived, anticipated, or otherwise.*
- 2. Documents which describe how employee morale has been measured over time, covering a period of at least the last 2 years.*
- 3. All documents which detail the estimated productivity losses resulting from prolonged bargaining and/or decreased employee morale.'*

I note that your request is currently due on Monday, 17 October 2016.

Purpose of this notice

The purpose of this notice is to advise you (as required under s.24AB of the Act) that I consider that a *practical refusal reason* exists under s. 24AA of the Act and that I am considering refusing access to the requested documents, under s.24 of the Act. My reasons are set out in this notice. This notice sets out the actions required from you in order to ensure that no 'practical refusal reason' applies to your request.

Advice regarding practical refusal reasons

The Act contains two practical refusal reasons. The first is that processing the request *would substantially and unreasonably divert the resources of the agency from its other operations* (s.24AA(1)(a)). An agency may also refuse an FOI request if the agency is satisfied that the request does not *provide such information concerning the document as is reasonably*

necessary to enable a responsible officer of the agency to identify the document in question (s.24AA(1)(b)).

It is the Department's view that where it appears that a request under the Act for access to documents is likely to take more than 40 hours to complete, the request should be assessed under s.24AA(1) of the Act to determine whether a practical refusal reason exists in relation to the request. This balances the right of applicants to seek information under the Act with the Department's need to appropriately allocate resources to its functions.

Application of s.24AA of the FOI Act to your request

It is my view that the request, as it currently stands, satisfies the first practical refusal reason because it would take an unreasonable amount of time to assess the documents.

Point 1 – *All documents which address, or mention, the impact of prolonged bargaining on employee morale. This includes all impact, whether actual, perceived, anticipated, or otherwise.*

The Enterprise Agreement Taskforce (EA Taskforce) within the Department has advised that in relation to point 1, the only documents within scope would be emails from individuals within the Department sent to the dedicated EA Taskforce inbox. The Department would need to:

- access every email received since 1 July 2015;
- review every email received since 1 July 2015;
- identify any email from a staff member that may indicate a morale issue;
- where an email from a staff member may indicate a morale issue, attempt to identify the cause of the issue eg. is it due to prolonged bargaining, something else or is the cause even stated?

Once the above filters have been applied, identifying personal information would need to be removed.

The EA Taskforce has approached the Department's IT Services Team to attempt to ascertain the number of emails received since 1 July 2015 (the creation date of the Department of Immigration and Border Protection). Advice from the relevant business area is that obtaining this information would require numerous technical works and would also take an unreasonable amount of time and resources.

Point 2 - *Documents which describe how employee morale has been measured over time, covering a period of at least the last 2 years.*

It is not clear if you require documents which describe how employee morale has been measured over time in relation only to the Enterprise Agreement, or if you require this information more generally. Your clarification on this point would help the Department to assess the scope of your request.

In light of the above, I am satisfied that your request as it currently stands 'would substantially and unreasonably divert the resources' of the Department 'from its other operations' and that a practical refusal reason applies to your request as it currently stands. Therefore, I am required to consult with you under s.24AB of the Act regarding the scope of your request.

Consultation over scope

You may consult with me on the scope during the *consultation period* which is from the date this notice until close of business **Monday, 24 October 2016**.

You may request that I extend the consultation period if you wish, by writing to me before the end of the consultation period at foi@border.gov.au. The requirements for the consultation period are contained in s.24AB(5).

Suspension of processing time

Please note that s.24AB(8) of the FOI Act provides that the legislated processing time for your request is 'suspended' until you have either:

- revised the request; or
- advised that you do not intend to revise the request.

In addition, if you do not contact me in writing before the end of the consultation period (to either withdraw your request, revise or affirm the scope of your request, or ask for an extension of time to respond to the s.24AB notice) your request will be deemed to be withdrawn in accordance with s.24AB(7) of the Act. The relevant legislation is attached to this notice.

Yours sincerely



Shannon Bevan

Authorised FOI Decision Maker
Freedom of Information Section
Department of Immigration and Border Protection
Phone (02) 6264 4667
Email foi@border.gov.au

Attachment

- ✓ Attachment A - Extract of relevant legislation

Attachment A – Extract of relevant legislation

24 Power to refuse request—diversion of resources etc.

- (1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
 - (a) must undertake a request consultation process (see section 24AB); and
 - (b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.
- (2) For the purposes of this section, the agency or Minister may treat 2 or more requests as a single request if the agency or Minister is satisfied that:
 - (a) the requests relate to the same document or documents; or
 - (b) the requests relate to documents, the subject matter of which is substantially the same.

24AA When does a *practical refusal reason* exist?

- (1) For the purposes of section 24, a ***practical refusal reason*** exists in relation to a request for a document if either (or both) of the following applies:
 - (a) the work involved in processing the request:
 - (i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
 - (ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister’s functions;
 - (b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).
- (2) Subject to subsection (3), but without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister must have regard to the resources that would have to be used for the following:
 - (a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;
 - (b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:
 - (i) examining the document; or
 - (ii) consulting with any person or body in relation to the request;
 - (c) making a copy, or an edited copy, of the document;
 - (d) notifying any interim or final decision on the request.
- (3) In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:
 - (a) any reasons that the applicant gives for requesting access; or
 - (b) the agency’s or Minister’s belief as to what the applicant’s reasons are for requesting access; or
 - (c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

24AB What is a *request consultation process*?

Scope

- (1) This section sets out what is a ***request consultation process*** for the purposes of section 24.

Requirement to notify

- (2) The agency or Minister must give the applicant a written notice stating the following:
 - (a) an intention to refuse access to a document in accordance with a request;
 - (b) the practical refusal reason;
 - (c) the name of an officer of the agency or member of staff of the Minister (the ***contact person***) with whom the applicant may consult during a period;
 - (d) details of how the applicant may contact the contact person;
 - (e) that the period (the ***consultation period***) during which the applicant may consult with the contact person is 14 days after the day the applicant is given the notice.

Assistance to revise request

- (3) If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists.
- (4) For the purposes of subsection (3), ***reasonable steps*** includes the following:
 - (a) giving the applicant a reasonable opportunity to consult with the contact person;
 - (b) providing the applicant with any information that would assist the applicant to revise the request.

Extension of consultation period

- (5) The contact person may, with the applicant's agreement, extend the consultation period by written notice to the applicant.

Outcome of request consultation process

- (6) The applicant must, before the end of the consultation period, do one of the following, by written notice to the agency or Minister:
 - (a) withdraw the request;
 - (b) make a revised request;
 - (c) indicate that the applicant does not wish to revise the request.
- (7) The request is taken to have been withdrawn under subsection (6) at the end of the consultation period if:
 - (a) the applicant does not consult the contact person during the consultation period in accordance with the notice; or
 - (b) the applicant does not do one of the things mentioned in subsection (6) before the end of the consultation period.

Consultation period to be disregarded in calculating processing period

- (8) The period starting on the day an applicant is given a notice under subsection (2) and ending on the day the applicant does one of the things mentioned in paragraph (6)(b) or (c) is to be disregarded in working out the 30 day period mentioned in paragraph 15(5)(b).

Note: Paragraph 15(5)(b) requires that an agency or Minister take all reasonable steps to notify an applicant of a decision on the applicant's request within 30 days after the request is made.

No more than one request consultation process required

- (9) To avoid doubt, this section only obliges the agency or Minister to undertake a request consultation process once for any particular request.