



**Australian Government**  
**Australian Building and  
Construction Commission**

6 December 2017

**By email:**  
[foi+request-4121-4ff8f26f@righttoknow.org.au](mailto:foi+request-4121-4ff8f26f@righttoknow.org.au)

Dear JS

**Your Freedom of Information request**

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and received by the Australian Building and Construction Commission (**ABCC**) on 7 October 2017 (**FOI request**).

The FOI request was as follows:

*The Public Service Act 1999 establishes a statutory Code of Conduct that binds all APS employees and agency heads to defined behavioural standards. It has been said that the scheme that currently applies in the Australian Public Service is robust and effective.*

*Media articles and a Federal Court report indicate that from 1 January 2013 to 28 July 2016 false information was disseminated by Fair Work Building and Construction (FWBC now ABCC), and the Agency was aware the information disseminated was false.*

*Clause 1.3(f) of the Australian Public Service Commissioner's Directions 2013 require all APS employees, having regard to their duties and responsibilities, to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way. Failure to report suspected misconduct may itself warrant consideration as a potential breach of the Code. It seems FWBC (ABCC) is or was represented on the Australian Public Service Commission (APSC) Ethics Contact Officer Network (ECONET), a network that promotes the Government's ethical agenda which focuses on enhancing ethics and accountability in the Commonwealth Public Sector.*

*In the Federal Court report dated 29 Sept 2017 it is revealed that the Director of the Fair Work Building Industry Inspectorate was supported by approximately 130 staff at the time of his appointment, including approximately 20 lawyers and 30 officers undertaking corporate functions. As the judge found "The consequence of his conduct was the dissemination by the FWBC – at his direction – of false information to the industry of which the FWBC was not only the regulator, but supposedly a trustworthy source of reliable information for industry participants".*

*I seek access under FOI to documents in the possession of the Agency relating to any assessment or consideration - conducted in the period 1 December 2013 to 12 September 2017 – that the behaviour of the Director of the Fair Work Building Industry Inspectorate involved a potential breach of the Australian Public Service Code of Conduct.*

**Timeframe for processing FOI request**

The ABCC acknowledged receipt of the FOI request on 20 October 2017. In this email the ABCC also informed you that, pursuant to section 15(5) of the FOI Act, the ABCC had 30 days to process the FOI request.

It should be noted, however, that the FOI Act provides for processing times to be extended for particular purposes. As explained below, your request was extended for one such purpose.

Consultations: extended period, notice of decision and review rights

By letter dated 3 November 2017, the ABCC notified you of an extended timeframe to process the FOI request pursuant to section 15(6)(a). Section 15(6)(a) provides:

*Extension of processing period to comply with requirements of section 26A, 27 or 27A*

(6) Where, in relation to a request, the agency or Minister determines in writing that the requirements of section 26A, 27 or 27A make it appropriate to extend the period referred to in paragraph (5)(b):

- (a) the period is extended by a further period of 30 days; and
- (b) the agency or Minister must, as soon as practicable, inform the applicant that the period has been so extended.

The letter communicated to you that the required further time arose because it was appropriate to consult relevant parties.

Those consultations are now complete. However, for the purposes of notifying a decision to you and of disclosure of the relevant document that may follow, it should be noted that relevant third-parties with whom we consulted are accorded review or appeal rights under the FOI Act. The relevant section is:

Under section 27A, “Consultation—documents affecting personal privacy”:

*Opportunity to make submissions*

- (3) The agency or Minister must not decide to give the applicant access to the document unless:
  - (a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
  - (b) the agency or the Minister has regard to any submissions so made.
- (4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

*Decision to give access*

- (5) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:
  - (a) the person concerned;
  - (b) the applicant.

*Access not to be given until review or appeal opportunities have run out*

- (6) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have **run out**, see subsection 4(1).

...

(Original emphasis.)

In other words, this section provides that in respect of the relevant document, the review or appeal rights that are available to the consulted parties are to “run out” before access to the document is provided to the FOI applicant.

### Decision

I am an officer authorised under s 23(1) of the FOI Act to make decision in relation to FOI requests.

In making this decision I have had regard to relevant materials including the FOI Act, relevant parts of the FOI Guidelines as published by the Office of the Australian Information Commissioner and results of searches undertaken to locate documents within the scope of the FOI request.

The FOI request sought:

*... documents in the possession of the Agency relating to any assessment or consideration - conducted in the period 1 December 2013 to 12 September 2017 – that the behaviour of the Director of the Fair Work Building Industry Inspectorate involved a potential breach of the Australian Public Service Code of Conduct.*

In relation to what is meant by the reference to “the behaviour” of the Director, the FOI request provides further clarity in this respect by making specific reference to:

*Media articles and a Federal Court report indicate that from 1 January 2013 to 28 July 2016 false information was disseminated by Fair Work Building and Construction (FWBC now ABCC), and the Agency was aware the information disseminated was false.*

Further, the FOI request goes on to state:

*In the Federal Court report dated 29 Sept 2017 it is revealed that the Director of the Fair Work Building Industry Inspectorate was supported by approximately 130 staff at the time of his appointment, including approximately 20 lawyers and 30 officers undertaking corporate functions. As the judge found “The consequence of his conduct was the dissemination by the FWBC – at his direction – of false information to the industry of which the FWBC was not only the regulator, but supposedly a trustworthy source of reliable information for industry participants”.*

The FOI request is made in the specific context of the Federal Court proceedings, referred to above. Accordingly, the scope of the request has been taken to relate to the behaviour of the Director which was the subject of those proceedings, and any information disseminated by the former FWBC, as outlined in the FOI request.

Searches of ABCC documents were undertaken in response to the FOI request. Further, as the FOI request sought documents of a particular nature, inquiries of current and former ABCC staff were undertaken.

Under section 24A of the FOI Act access can be refused because, after taking all reasonable steps to find documents, the agency is satisfied that the documents cannot be found or do not exist.

As a result of the searches and inquiries undertaken, I have concluded that no documents exist that meet the description referred to in the FOI request. I am satisfied that the circumstances under section 24A of the FOI Act apply to the FOI request.

Accordingly, my decision is to refuse access under section 24A(1) of the FOI Act on the grounds that all reasonable steps have been taken to find the documents requested and I am satisfied that the documents do not exist.

#### **No Charges**

I confirm that no charges apply to the FOI request.

#### **Review Rights**

You have the right to apply for an internal review of my decision under Part VI of the FOI Act. If you wish to apply for an internal review, you must do so in writing within 30 days of receiving this decision.

Applications for internal review can be submitted to Freedom of Information (ABCC), at either of the following contact addresses:

By post:  
GPO Box 9927 MELBOURNE VIC 3001 Australia

By email:  
[foi@abcc.gov.au](mailto:foi@abcc.gov.au)

You also have the right to apply directly to the Australian Information Commissioner for review of the decision. If you wish to have the decision reviewed by the Information Commissioner you must apply for the review within 60 days of receiving this decision. More details about such a process can be accessed from the OAIC's website: <http://www.oaic.gov.au/>

If you have any questions about this matter, please send them to [foi@abcc.gov.au](mailto:foi@abcc.gov.au).

Yours sincerely



**Ben Vallence**  
**Australian Building and Construction Commission**