



Australian Government

Fair Work OMBUDSMAN

Our reference: FOI-1052

28 March 2019

Mr/Ms D Ward

Via email: foi+request-5268-86c088ca@righttoknow.org.au

Dear Mr/Ms Ward

FREEDOM OF INFORMATION REQUEST

Consultation Notice under section 24AB of the *Freedom of Information Act 1982*

I refer to your request for information held by the Fair Work Ombudsman (**FWO**) made under the *Freedom of Information Act 1982 (FOI Act)* dated 22 February 2019.

Following my correspondence to you on 28 February 2019, you confirmed the scope of your request on 1 March 2019 by noting the incorrect reference to Mr Wilson.

Scope of request

You have sought access to -

"any emails contained in all of Mr Mark Lee's FWO-issued email account (including deleted items) that contain any of the following terms (in the body of an email and/or in the addressee fields of an email): "liberal.org.au", "ipa.org.au" or "@aph.gov.au".

Relevant documents

I confirm that the FWO's enquiries to date indicate that the FWO holds approximately 51 relevant documents numbering approximately 227 pages.

We have not identified any documents containing the term "ipa.org.au" and only two documents containing the term "liberal.org.au". The remaining documents consist of emails containing the term "@aph.gov.au".

The relevant emails all relate to Mr Lee's former role as Director of Media for the previous Fair Work Ombudsman. The majority of the emails deal with the agency's response to emails from a Member of Parliament's (**MP**) office relating to constituents' enquiries. Often, MPs draw attention to allegations of non-compliance affecting their constituents or request information held by the FWO that might assist the MP in considering a constituent's complaint or issue relating to an employment matter. The FWO is authorised to disclose certain information in accordance with section 718 of the *Fair Work Act 2009*.

Other relevant emails include correspondence from Senate Committee staff regarding the FWO's attendance at Senate inquiry hearings. Both staff in MPs' offices and Senate Committee staff who are not affiliated with a political party have email addresses ending in "@aph.gov.au".

There are also relevant emails from members of the public who have copied Mr Lee into emails directed to a long list of recipients including multiple government agencies, media outlets and MPs. Mr Lee's email address was publically available given it was included at the bottom of media releases from the previous FWO.

Finally, there are also some relevant emails from a journalist to Mr Lee seeking an official comment about an issue on behalf of the FWO. Again, the correspondence demonstrates Mr Lee acting in accordance with his role as Director, Media for the then Fair Work Ombudsman.

Several relevant documents constitute email chains or attachments, resulting in significant duplication of the same information and inclusion of emails that do not contain any of the terms included in the scope of your request.

Requirement to consult with third parties

Many relevant emails contain correspondence relating to approximately 23 third parties. These third parties include MPs' constituents and the emails contain business and/or personal information that may be exempt from disclosure under the FOI Act. Relevant business information includes information about employers and relevant personal information includes contact information that is likely to identify individuals.

In accordance with sections 27 and 27A of the FOI Act, the FWO would be required to consult with those third parties before deciding whether to release the relevant documents to you.

The consultation mechanisms under sections 27 and 27A of the FOI Act apply when we think:

- an organisation might reasonably wish to contend that a requested document is exempt from disclosure due to the existence of business information under sections 47 and/or 47G of the FOI Act;¹ and
- an individual might reasonably wish to contend that a requested document is exempt from disclosure due to the existence of personal information under section 47F of the FOI Act.

Purpose of this Notice

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

Following the necessary searches for and review of relevant documents, I have formed the view that a practical refusal reason exists within the meaning of section 24AA of the FOI Act.

Subsection 24AA(1)(a) of the FOI Act states that a 'practical refusal' exists if the work involved in processing the request would 'substantially and unreasonably divert the resources of the agency from its other operations'.

The purpose of this notice is to invite you to participate in a 'request consultation process' under section 24AB. During this process, I invite you to consider refining the scope of your request if you wish. If, after the consultation process, the FWO is satisfied that the practical refusal reason still exists, the FWO may refuse to give access to relevant documents under section 24.

¹ More information about exemptions under the FOI Act can be found in Part 6 of the Australian Information Commissioner's Guidelines and FOI Fact Sheet 8, both of which are available on the website of the Office of the Australian Information Commissioner: www.oaic.gov.au

If the FWO was to continue processing your request in its current form, it is likely to take approximately 77 hours of work. A significant portion (46 hours) of the estimated 77 hours is likely to constitute the necessary third party consultation, based on an estimate of 2 hours for consulting each of the approximately 23 third parties. The remaining approximately 31 hours would be made up of processing work including:

- searches (including searches already undertaken) – approx. 10 hours;
- preparing a schedule of relevant documents – approx. 1 hour;
- examining relevant pages for decision-making – approx. 7.6 hours (or 2 minutes per page);
- applying any applicable exemptions – approx 9.1 hours (or 3 minutes per page); and
- preparing a decision under the FOI Act, including a statement of reasons – approx 3 hours.

The above calculations were made with reference to the Australian Government Solicitor's (AGS) calculator for FOI matters.

Practical refusal

In deciding whether the work involved in processing your request in its current form would meet the relevant threshold, I considered guidance provided by the Office of the Australian Information Commissioner (OAIC) (including Part 3 of the OAIC review decisions), and the FWO's staffing and resources involved in processing information access requests.

The OAIC's FOI guidelines state that practical refusal grounds operate to ensure that the capacity of agencies to discharge their normal functions is not undermined by processing unreasonably burdensome FOI requests. In deciding if a practical refusal reason exists, an agency must have regards to the resources required to perform a number of activities, including:

- identifying, locating or collating documents within the filing system of the agency;
- deciding whether to grant, refuse or defer access;
- consulting with other parties;
- notifying an interim or final decision to the applicant;
- the impact that processing a request may have on other work in an agency, including other information access requests;
- whether there is a significant public interest in the documents requested; and
- other steps taken by an agency or minister to publish information of the kind requested by an applicant.²

There is no set number of hours of processing time that determines whether a practical refusal reason exists. Rather, each case should be assessed on its own merits and in light of relevant Administrative Appeals Tribunal or OAIC decisions. Recent decisions by the Australian Information Commissioner has affirmed decisions by departments and agencies to practically refuse requests when they entail approximately 70 or more hours of work.³

The FWO's information access team processes approximately 150 information access requests per annum. Approximately three team members work on information access (including FOI matters) on a full-time basis. On the assumption that if three of our staff members worked 90% of their time on FOI matters over a whole year, we would spend over 5,400 hours just on FOI matters.

² OAIC Guidelines, [3.115]-[3.117].

³ For in 'NX' and Australian Trade and Investment Commission (Freedom of Information) [2018] AICmr 18 (2 February 2018), a practical refusal decision was issued for an FOI request involving an estimated further 63 hours of processing of 610 documents, and involving consultation with five external third parties. see: <https://www.oaic.gov.au/freedom-of-information/foi-decisions/ic-review-decisions/2018-aicmr-18>).

On average, this means the processing time equates to roughly 36 hours per request. As outlined above, we estimate that it would take approximately 77 hours to process your FOI request in its current form. This means that the request is likely to take at least twice longer than an average FOI request.

Having conducted a preliminary review of the relevant documents, I do not believe that there is a significant public interest in the requested documents. As summarised above under “Relevant documents”, the relevant emails all appear to relate to the usual and lawful exchange of information between individuals and Mr Lee, as Mr Lee was acting in proper accordance with his role as Director of Media for the then Fair Work Ombudsman. In many cases, Mr Lee has been copied into emails on a “for information” basis only by other FWO staff.

I confirm that if the FWO was required to make a decision in response to your request in its current form, a significant amount of time would need to be devoted to consulting with approximately 23 third parties, including members of the public and employers, about their personal and/or business information. This consultation is likely to take up significant resources over several weeks and possibly cause several third parties significant discomfort for no apparent useful reason.

Request consultation process

Before the FWO makes a final decision in response to your request, you have the opportunity to revise your request in accordance with the ‘request consultation process’ referred to in section 24AB of the FOI Act.

The OAIC’s FOI Guidelines note that a ‘broadly worded request is more likely to constitute an unreasonable diversion of resources than a request that is narrowly focused’. Revising your request can mean narrowing the scope of the request to make it more manageable or explaining in more detail the documents you wish to access.

By providing more specific information about exactly what documents you are interested in, we may be able to pinpoint the documents more quickly and avoid using excessive resources to identify and review irrelevant documents.

I invite you to consider refining the scope of your request if you still wish to apply for access to any of the relevant emails that my team has identified. Ideas that you may wish to consider to reduce the number and type of relevant documents include asking the FWO to remove from the package of relevant emails:

1. all duplicate information;
2. all emails that do not contain one or more of the relevant terms and have only been included in scope at this stage because they ‘contain’ (are attached to or follow on from) other emails that contain one or more of the relevant terms;
3. all emails where Mr Lee was copied in or listed as a recipient on a “for information only” basis;
4. all third party personal information (within the meaning of s47F of the FOI Act); and/or
5. all third party business information (within the meaning of ss47 and/or 47G).

The above list of ideas is not exhaustive and we may be able to assist you with other ideas to refine the scope of your request if you are prepared to talk to us. Please let me know if you wish to discuss the request via an alternative email address or over the telephone and I would be happy to do so.

Next steps

Under section 24AB, you have 14 days to respond to this notice from the day after it is received in one of the ways set out below. Before the end of the consultation period, you are required to, in writing:

- withdraw your request;
- make a revised request; or
- tell us why you do not wish to revise your request.

During this period, please consider seeking the FWO's assistance to revise your request scope. If you revise your request in a way that adequately addresses the practical refusal grounds outlined above, we will recommence processing it straight away.

Please also be aware that charges may still apply to the further processing of your request. Based on the current scope of your request and in accordance with the AGS' calculator, the current estimate of the applicable charges is approximately \$1,380. The FWO has not yet decided to issue a charges notice for this request, and will not do so whilst the section 24AB request consultation process is ongoing. The FWO will reconsider any applicable charges after the consultation process is complete.

Please feel free to contact me via foi@fwo.gov.au when you are ready.

Sincerely



Annabel Kent
Director (a/g) – Customer Feedback and Information Access
Fair Work Ombudsman