



Request consultation notice due to existence of a practical refusal reason under section 24AB of the *Freedom of Information Act 1982*

Practical Refusal Consultation Notice of Molly (Position Number 62213164), Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Mr Stuart McCarthy

Consultation date: 11 February 2020

FOI reference number: FOI 33675, 33770 and 34037

Sent by email: foi+request-6065-4c9cd7ba@righttoknow.org.au

Dear Mr McCarthy

Freedom of Information Request: FOI 33675, 33770 and 34037

Purpose of this notice

1. The purpose of this notice is to advise you (as required under section 24AB of the *Freedom of Information Act 1982 (FOI Act)*) that I intend to refuse your requests on the basis that a practical refusal reason exists, as defined by section 24AA of the FOI Act.
2. Based on the terms of your requests, and from initial searches undertaken to respond to your requests, I am of the view that a practical refusal reason exists because:
 - a. Processing your requests, as best the Department can understand the terms, is likely to result in a substantial and unreasonable diversion of the Department's resources from its other operations (section 24AA(1)(b) of the FOI Act).

Authority to make decision

3. I, Molly (Position Number 62213164), Legal Officer, Information Law Section, am an officer authorised by the Secretary of the Department to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982 (FOI Act)*.

Scope of your request

4. On 10 January 2020, you made a request for access to documents in the possession of the Department (**FOI 33675**). Your request was made in the following terms:

On 22 July 2019, the Canberra Times reported (according to an anonymous spokeswoman):

"... the federal government has committed \$2.1 million to a new initiative to support veterans who are concerned about having taken the anti-malarial drugs mefloquine or tafenoquine."

"This initiative will deliver a national program that will provide concerned veterans with the option to receive a comprehensive health assessment with a general practitioner to identify service-related illness, disease and injury."[1]

The same story quoted DVA Secretary Liz Cosson, who stated that the initiative was being developed in response to affected veterans who were "aggrieved" by medical mistreatment.[1]

In accordance with the FOI Act, I hereby request to be provided with correspondence relating to this initiative between DVA and the Office of the Minister for Defence Personnel and Veterans Affairs, from 1 July 2018 to 31 December 2019, including but not limited to: letters, emails, briefings, file notes and text messages between senior DVA staff and staff from the Minister's office.

I request that normal fees be waived for this FOI request given that this is already a matter of public interest, and I am experiencing financial hardship.

5. On 15 January 2020, you made a request for access to documents in the possession of the Department (**FOI 33770**). Your request was made in the following terms:

On or around 14 June 2019, the Open Arms National Advisory Committee (NAC) held a meeting which was attended by Brigadier Leonard Brennan.[1] Brigadier Brennan was the 3rd Brigade Senior Medical Officer during the period of the Army Malaria Institute (AMI) tafenoquine and mefloquine clinical trials in Bougainville and East Timor during the period 1999 to 2001 and co-authored the AMI tafenoquine-mefloquine study involving 654 personnel from the 1 RAR Battalion Group in East Timor 2000-2001.[2]

Noting that the role of the NAC is to provide advice to the Minister, as part of this FOI

request I specifically request to be provided with:

1) Minutes of the Open Arms NAC meeting on or around 14 June 2019.

2) Correspondence between members of the NAC regarding the adverse effects of tafenoquine and mefloquine, and the health needs of affected veterans, including emails, memos or text messages.

3) Correspondence between the NAC Chair (or Secretariat) and the Minister for Veterans Affairs (or his office) regarding the adverse effects of tafenoquine and mefloquine, and the health needs of affected veterans, including emails, memos or text messages.

Noting that a contract for the comprehensive health assessments has recently been awarded to BUPA and NAC Chair Jane Burns is a BUPA consultant, as part of this FOI request I specifically request to be provided with: correspondence between Jane Burns and employees/directors of BUPA relating to the development of the comprehensive health assessments, including emails, memos or text messages.

6. On 15 January 2020, you made a request for access to documents in the possession of the Department (**FOI 34037**). Your request was made in the following terms:

'In accordance with the FOI Act, I hereby request to be provided with correspondence between members of the Open Arms NAC (including, but not limited to, Professor Jane Burns and Dr Stephanie Hodson) and directors, executives or employees of BUPA Australia discussing the health of veterans affected by tafenoquine or mefloquine, from 1 July 2018 to 24 January 2020, including but not limited to:

1) Letters, emails, memos, briefings, text messages or file notes.

2) Correspondence from members of the NAC to BUPA Australia directors, executives or other employees.

3) Correspondence from BUPA Australia directors, executives or other employees to members of the NAC.'

7. In accordance with section 24(2) of the FOI Act, the Department may treat two or more requests as a single request if:

- 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.

8. The Department has decided to treat your FOI requests as a single combined request (**combined request**) because they all relate to a substantially similar subject matter; being the Government's anti-malarial drugs mefloquine or tafenoquine veteran support program.

Power to refuse a request

9. Section 24 of the FOI Act provides that if the Department is satisfied that a practical refusal reason exists in relation to a request, the Department must undertake a consultation process with you, and if, after that consultation process, the Department remains satisfied that the practical refusal reason still exists, the Department may refuse to give you access to the documents subject to the request.
10. However, before I make a decision to refuse your combined request you have an opportunity to revise it, so as to remove the practical refusal reason. This is called a 'request consultation process'. You have 14 days to respond to this notice in one of the ways set out below at page 6. As mentioned below, you can request more time to consider and respond to this notice. Please let me know if you would like additional time to respond.

When does a practical refusal reason exist (section 24AA of the FOI Act)

11. The practical refusal reason applicable to your combined request is that:
- a. Processing your combined request, as best the Department can understand the terms, is likely to result in a substantial and unreasonable diversion of the Department's resources from its other operations (section 24AA(1)(b) of the FOI Act).
12. Under section 24AA(2) of the FOI Act, the Department must have regard to the resources that would have to be used for:
- identifying, locating or collating the documents within the filing system of the agency;
 - 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 examining the document or consulting with any person or body in relation to the request);
 - making a copy or an edited copy, of the document; and

- notifying any interim or final decision on the request.

13. Further, the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**) identify matters that may be relevant when deciding whether processing the request will unreasonably divert an agency's resources from its other functions. These include:

- the staffing resources available to the agency for FOI processing;
- the impact that processing a request may have on other work in the agency, including FOI processing;
- whether an applicant has cooperated in framing a request to reduce the processing workload;
- 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.

14. I consider that all of the above factors have a bearing on your request. The reasons why a practical refusal reason exists in relation to your request are set out below.

Why I intend to refuse your request

Request is substantial

15. Section 24AA(1)(a) of the FOI Act provides that a practical refusal reason exists in relation to a request for a document if the work involved in processing the request would substantially and unreasonably divert the resources of the department from its other operations.

16. Following initial enquiries in relation to your first two requests (**FOI 33675 and FOI 33770**) I estimate that over 90 hours of processing time is required to deal with the two requests alone. The reasons for this are as follows:

- Preliminary searches for *FOI 33675 and FOI 33770* have identified over 1130 pages of material, which may be relevant to your request.
- Relevant business areas have already spent over 20 hours searching for documents falling within scope of *FOI 33675 and FOI 33770*.

- Searches are still underway for your third request *FOI 34037*.
- Your requests require the department to consult with multiple business areas and members of the Senior Executive Staff.
- I estimate a minimum of 70 hours to make an access decision on the requested documents, including time spent to consider applicable exemptions and prepare a statement of reasons and documents schedule.

17. Accordingly, processing your request from start to finish, would likely take further time in excess of 90 hours. Taking these factors into account, I have concluded that your combined request is substantial.

Request is unreasonable

18. For the purpose of providing this notice, I have considered whether the substantial resource burden would be unreasonable having regard to the following:

- 90 hours of processing time is, at face value, an unreasonable burden for the department to process. My view has taken into account the need to process multiple requests at any given time, and the impact such a burden would have on responding to other FOI applicants and for the relevant business area to undertake their designated duties.
- It is understood that the Department has previously corresponded with you about this topic on multiple occasions.
- Due to the broad nature of your combined request the relevant business area would be required to expend significant amount of time and resources in order to fulfil the initial stages of this FOI request.

19. Taking the above factors into account, I am of the view that the request as it currently stands is unreasonable, as well as substantial.

Ways you can revise the scope of your request

20. You now have an opportunity to revise your request so that the grounds for a practical refusal are removed.

21. 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. For example, by providing more specific information about exactly what documents you are interested in, we will be able to pinpoint the documents more quickly and avoid using excessive resources to process documents you are not interested in.
22. You may wish to consider providing the following information in reply to this consultation notice:
 - further clarification about the information/specific documents you are seeking access to;
 - a date range of documents sought; and
 - a narrower scope of emails to a more specific subject matter, or as received by specific individuals and/or sections.
23. You may also wish to consider excluding duplicate and draft material.
24. Please note that even if you do modify your request, it is possible that a practical refusal reason under section 24AA may still exist and/or the Department may need further time to process your revised request. This will depend on the revision you agree to make. As far as is reasonably practicable, we are happy to provide you with further information to assist you in revising your request so that it removes the practical refusal grounds.

Next steps

25. Before the end of the consultation period, which is **close of business Tuesday, 25 February 2020** (being 14 days from receiving this notice), you must do one of the following, in writing:
 - withdraw the request;
 - make a revised request; or
 - indicate that you do not wish to revise the request.
26. During this period, you can ask me for help to revise your request. If you revise your request in a way that adequately addresses the practical refusal grounds outlined above, we will recommence processing it.
27. If you indicate you do not wish to revise your request, the Department will proceed to make a decision on whether to refuse the request on the grounds that processing your request will result in a diversion of the Department's resources under section 24(1) of the FOI Act.

28. If you do not respond in one of these ways within 14 days (by **COB 25 February 2020**), the request will be taken to have been withdrawn pursuant to section 24AB(7) of the FOI Act.
29. If you need more time to respond, please contact the Information Law Section via the below contacts, within the 14 day period to discuss your need for an extension of time.

Suspension of processing time

30. Please note under section 24AB(8) of the FOI Act, the time for processing your FOI request is suspended from the day you receive this notice until the day you do one of the things listed above.
31. An extract of the provisions of the FOI Act that are relevant to this notice are set out at **Schedule 1**.

Contact us

32. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the following details:

Post: Legal Services and Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: Information.Law@dva.gov.au

Yours sincerely,

Molly (Position Number 62213164)

Information Access Officer
Information Law Section
Legal Services and Audit Branch

11 February 2020



Schedule of relevant provisions in the FOI Act

15 Requests for access (as related to the requirements for requests)

Persons may request access

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
 - (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).
- (2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:
 - (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the agency or Minister.

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.