



## 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

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**Applicant:** Mr John Smith

**Decision date:** 8 October 2020

**FOI reference number:** Combined reference - **38197** (38197, 38198, 38200, 38202)  
Withdrawn - FOI 38201

**Sent by email:** foirequest-6720-8acba2cf@righttoknow.org.au  
foirequest-6723-93c6787f@righttoknow.org.au  
foirequest-6724-404ecfb1@righttoknow.org.au  
foirequest-6722-67ec0df0@righttoknow.org.au  
foirequest-6721-c9949b31@righttoknow.org.au

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Dear Mr Smith,

### **Freedom of Information Requests: 38197 (38197, 38198, 38200, 38202)**

#### **Purpose of this notice**

1. I refer to your five (5) requests made to the Department of Veterans' Affairs (**the Department**) seeking access to documents under the *Freedom of Information Act 1982 (FOI Act)*. The reference numbers for these requests are FOI 38197, 38198, 38200, 38201 and 38202.
2. The purpose of this notice is to:
  - a. Confirm that on 30 September 2020 you agreed to withdraw your request FOI 38201, on the basis that the Department did not hold any relevant documents.

- b. Advise you that the Department has decided to combine your remaining four (4) requests, (FOIs 38197, 38198, 38200, 38202) into one single request, in accordance with section 24(2) of the FOI Act. The Department's reference number for the combined requests is **FOI 38197**; and
- c. Consult with you under section 24AB of the FOI Act, on the basis that I intend to refuse your combined request due to the existence of practical refusal reasons as defined by section 24AA 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 FOI Act.

**Combing your requests (section 24(2) of the FOI Act)**

- 4. On 15 September 2020, you made 5 FOI requests for access to documents in the possession of the Department. The details of your requests and an update on how the Department is processing each request is outlined in the below table:

Ref No	Request	Processing Update
<p><b>FOI 38197</b></p>	<p><i>I request copies of any contracts, MOUs, tenders, or agreements that have existed between your department and the following entities:</i></p> <ul style="list-style-type: none"> <li>- 'TJ Affiliates'</li> <li>- 'Remembrance Foundation'</li> <li>- The 'modern soldier' social media page</li> <li>- The natural person 'Talissa Papamau'</li> </ul> <p><i>Please also include the most recent email between your department and the above four entities in this FOI request, if such emails exist.</i></p>	<p>Combined under s 24(2) and s 24AB Consultation</p>
<p><b>FOI 38198</b></p>	<p><i>I request a copy of the following documents:</i></p> <ul style="list-style-type: none"> <li>- Any terms of agreement, purchase orders, or contracts between the DVA and the developers of the app 'Swiss8'.</li> </ul>	<p>Combined under s 24(2) and s 24AB Consultation</p>

Ref No	Request	Processing Update
	<p><i>- The five most recent emails as at the date of this email, between DVA and the developers of Swiss8.</i></p> <p><i>If no such documents exist please advise.</i></p>	
FOI 38200	<p><i>I request a copy of any contract, correspondence, and terms of agreement held by your department in relation to the Commonwealth tender ID CN3528664</i></p>	Combined under s 24(2) and s 24AB Consultation
FOI 38201	<p><i>I request a copy of the following documents</i></p> <p><i>- The department's guidelines for the awarding of tenders</i></p>	Withdrawn by Applicant
FOI 38202	<p><i>I request copies of any contracts, correspondence, and/or terms of agreement that relate to the awarding of Commonwealth tender ID CN3574734.</i></p>	Combined under s 24(2) and s 24AB Consultation

5. On 29 September 2020, the Department advised you that the Department does not hold any documents in scope of FOI 38201. Noting that the Department does not hold any documents in scope of your request, the Department asked you to confirm whether you agree to withdraw this request. You agreed to withdraw FOI 38201 on 30 September 2020.
6. Noting your withdrawal of FOI 38201, this consultation notice relates to the remainder of your FOI requests being FOI 38197, FOI 38198, FOI 38200 and FOI 38202.
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 relates to the same document or documents; or
  - b. The requests relate to documents, the subject matter of which is substantially the same.
8. Paragraph 3.123 of the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**), notes that the most common circumstances that requests will be combined includes where multiple requests are made by a single applicant.

9. The Department considers that your 4 remaining requests (FOI 38197, FOI 38197, FOI 38200 and FOI 38202) relate to a similar subject matter, in that they all request documents relating to Department tender processes, terms of agreement or other commercial arrangements with third parties.
10. Accordingly, as the subject matter of these requests is substantially similar and on the basis that all 4 requests were made on the same day, the Department has decided to combine these requests pursuant to section 24(2) of the FOI Act.
11. For the purposes of this consultation notice, the Department's reference number is **FOI 38197** and your combined request has been paraphrased as follows:

*'...copies of any contracts, MOUs, tenders, or agreements that have existed between your department and the following entities:*

- 'TJ Affiliates'*
- 'Remembrance Foundation'*
- The 'modern soldier' social media page*
- The natural person 'Talissa Papamau'*

*Please also include the most recent email between your department and the above four entities in this FOI request, if such emails exist.*

*copies of any contracts, correspondence, and/or terms of agreement that relate to the awarding of Commonwealth tender ID CN3574734.*

*Any terms of agreement, purchase orders, or contracts between the DVA and the developers of the app 'Swiss8'.*

*The five most recent emails as at the date of this email, between DVA and the developers of Swiss8.*

*a copy of any contract, correspondence, and terms of agreement held by your department in relation to the Commonwealth tender ID CN3528664...'*

## **Power to refuse a request**

12. 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.

13. However, before I make a decision to refuse your request you have an opportunity to revise your request 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 and 7. 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)**

14. Based on the terms of your request, and from the initial searches and business area consultation undertaken in relation to your request, I am of the view that practical refusal reasons exist because:
  - a. processing your 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)(a)(i) of the FOI Act); and
  - b. your request does not satisfy section 15(2)(b) of the FOI Act, in that it does not provide such information concerning the requested documents as is reasonably necessary to enable a responsible officer of the agency to identify it (section 24AA(1)(b) of the FOI Act).
15. 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.

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

### **Why I intend to refuse your request**

#### *Identification of documents*

18. Section 24AA(1)(b) of the FOI Act provides that a practical refusal reason exists in relation to a request for a document if the request does not satisfy section 15(2)(b) of the FOI Act. That section provides that a request must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency to identify it.
19. As your request currently stands, I am unable to identify the specific documents you are requesting. This is because parts of your request are phrased broadly and the Department has been unable to confidently undertake satisfactory searches and identify all documents falling within scope of your request.
20. Your request broadly seeks access to various suites of correspondence and does not specifically identify the specific kinds, types or dates of the correspondence that you are seeking access to. Specifically, the Department seeks the following clarification:
- a. Whether you are able to revise the scope of your request to specific date periods, so as to narrow the Department's search fields;

- b. Whether your request extends to documents relating to grant applications or grant funding relating to any of the parties noted in your request.
- c. In relation to request for documents regarding specific Commonwealth tenders, whether your request extends to:
  - i. Correspondence relating to all aspects of the tender process including any internal department procedures, drafting or consideration processes, or a more specific and identifiable subject matter (i.e formal offer and acceptance correspondence, or tender applications);
  - ii. Correspondence between internal Department staff regarding these tender processes (i.e the review and consideration of applications, internal briefing documents, the drafting of any terms of agreement or seeking of legal advice); and
  - iii. Correspondence between any and all external stakeholders that applied for a specific tender including any parties who were ultimately not successful in the tender process; or alternatively
  - iv. Whether you are only seeking correspondence between the Department and the successful Tender Applicant.
- d. In relation to your request for *The five most recent emails as at the date of this email, between DVA and the developers of Swiss8*, the Department seeks the following clarification:
  - i. Whether you are seeking correspondence between the Department and any person's involved in Swiss8 or whether you are only seeking correspondence that specifically relates to any formal agreement between Swiss8 and the Department, should one exist.
  - ii. Whether this request extends to correspondence between any person involved in Swiss8 in their own personal interactions with the Department, or whether you are only seeking correspondence relating to their professional involvement with Swiss8. One relevant business noted, that undertaking specific searches on your current request without further clarification would be difficult because the Department may have corresponded with staff members of Swiss8 in their own personal capacity, or without noting their connection with Swiss8.

- iii. What you mean by the term 'developer'. One relevant business area of the Department noted that the Department would normally email an employee of an organisation rather than the organisation itself, and that it would be unlikely for DVA to be aware if they were communicating with a 'developer' or Swiss8 or another employee. As such further clarification is also required as to what you mean by the term 'Developer'.

21. For the reasons listed above, I do not consider that your combined request meets the identification requirements of section 15(2)(b) of the FOI Act.

*Request is substantial*

22. Section 24AA(1)(a)(i) 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.

23. Your request seeks access to a broad range of documents held by the Department including correspondence, agreements and contracts relating to:

- TJ Affiliates, Remembrance Foundation, The 'modern soldier' social media page and the natural person 'Talissa Papamau';
- Swiss 8;
- Commonwealth tender ID CN3528664; and
- Commonwealth tender ID CN3574734.

24. I have consulted with the following relevant business areas of the Department in relation to your requests:

- VEA, Compensation and Support;
- Open Arms – Veterans & Families Counselling;
- Mental Health Policy;
- Grants Policy;
- Transformation, Change & Capability;
- Provider Engagement & Management Branch; and
- Veterans' Recognition & Projects.



25. The relevant business areas advised that a significant number of documents would likely fall within scope of your combined request and that an extensive search and retrieval process across a number of different Department areas would be required.
26. Additionally, in the absence of further guidance and clarification to the questions of scope noted above, the Department considers that a significant number of document storage locations and documents would need to be reviewed to identify and produce documents falling within scope of your request.
27. Following these initial enquiries and in consideration of the time already spent by a number of the Department's business areas in reviewing and considering the terms of your request, I estimate that a minimum of 50 hours of processing time would be required to respond to your request. The reasons for this are as follows:
  - A significant number of business areas would be required to undertake an extensive search and retrieval process;
  - Your broad request for all tender related correspondence, would require a significant review and scoping exercise to determine what documents fall within scope. This is because the Department's tender processes are extensive and often involve a number of Department staff members (including senior executive), Department contractors and other involved third parties (including Tender applicants). As such, the Department understands there to be significant amounts of internal and external correspondence and documents relevant to your combined requests;
  - As part of the FOI decision making process, the relevant business areas would need to review and advise the relevant FOI decision maker on the sensitivities contained within these documents. I consider that that the requested documents will require the consideration of exemption under the FOI Act. At an absolute minimum, I consider that the FOI officer will have to have regard to sections 22 (irrelevant material), 47, 47G, 47C (deliberative material), 47E (operations of an agency) and section 47F (personal privacy) of the FOI Act;
  - It is likely that the FOI Office would have to organize and engage in a number of third party consultations under sections 27 and 27A of the FOI Act in relation to third party business and personal information; and

- The FOI officer will then be required to take time to draft a decision on access in respect of the requested material, including the preparation of a document bundle and a statement of reasons.

28. Taking these factors into account, I have concluded that the minimum estimated processing time of 50 hours is substantial.

*Request is unreasonable*

29. I have also considered whether the processing of your request would constitute an unreasonable diversion of the Department's resources. I have decided that the minimum processing time of 50 hours is, at face value, an unreasonable burden for FOI requests. Specifically, this I have taken the following factors into consideration:

- The Department's need to process multiple FOI requests from multiple applicants at any given time, and the impact that processing your request would have on the Department's ability to respond to other FOI applicants. Specifically, the Department's Information Law Team would be required to divert a substantial amount of staff resources to process your request, meaning that less resources were available for its other functions (including the processing of other applicant's FOI requests);
- The current staffing and resources constraints experienced by the Department's Information Law team; and
- The relevant business areas needs to undertake their designated duties in addition to the processing of your request. The relevant business areas have advised that the work required to collate and review the documents falling within scope of your request would substantially affect their business as usual work and would divert a significant amount of their time and resources.

**Ways you can revise the scope of your request**

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

31. 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.

32. In considering a revision and/or reduction of scope, so as to try and remove any practical refusal reason, you may want to consider:

- narrowing the scope of the specific documents you are seeking access to (i.e. to just terms of agreements or contracts);
- removing your request for correspondence relating to the various subjects;
- further clarifying the types, subjects and date periods of documents you are seeking; and
- withdrawing your requests at this time and staggering your requests over a period of time so that they would not constitute an unreasonable diversion of the Department's resources.

33. 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

34. Before the end of the consultation period, which is **close of business 22 October 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.

35. 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.

36. 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.

37. If you do not respond in one of these ways within 14 days (by **COB 22 October 2020**), the request will be taken to have been withdrawn pursuant to section 24AB(7) of the FOI Act.

38. 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**

39. 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.
40. An extract of the provisions of the FOI Act that are relevant to this notice are set out at **Schedule 1**.

### **Contact us**

41. 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](mailto:Information.Law@dva.gov.au)

Yours sincerely,

**Molly (Position Number 62213164)**

Information Access Officer

Information Law Section

Legal Services and Audit Branch

8 October 2020



## Schedule of relevant provisions in the FOI Act

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### 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.