



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

Practical Refusal Consultation Notice of Jo (Position Number 62210326), Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Julie

Decision date: 2 December 2020

FOI reference number: FOI 39042

Sent by email: foi+request-6870-ed406c6f@righttoknow.org.au

Dear Julie,

Freedom of Information Request: FOI 39042

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 request on the basis that a practical refusal reasons exists, as defined by section 24AA of the FOI Act.
2. Based on the terms of your request, and from initial searches undertaken to respond to your request, I am of the view that a practical refusal reason exists 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)(b) of the FOI Act).

Authority to make decision

3. I, Jo (Position Number 62210326), Assistant Director, 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.

Scope of your request

4. On 5 November 2020, you made a request for access to documents in the possession of the Department. Your request was made in the following terms:

'...I request copy of the following document/s, and any such discrete document does not exist but the official information does, I request the Department to produce a written document containing the information in discrete form by use of computer and other equipment to retrieve and collate the stored official information sought:

- *A list of all briefs that were signed by the Secretary during October 2020; and*
- *Copy of the first page only of each brief signed by the Secretary during October 2020....'*

5. On 20 November 2020, the Department contacted you to clarify the scope of your request. The Department sought clarification on what you meant by 'brief' and 'signed' within the scope of your request.

6. On 23 November 2020, you responded and provided the following clarification:

'I would highlight Re Gould and Department of Health [1985] AATA 63 and paragraph 3.54 of the Guidelines which state "A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used" and guidance that FOI entities are not to take up overly arbitrary technical positions over scope in lieu of the common or ordinary meaning of words used in a scope.

In government, a brief is a summary document prepared by agency staff for an office holder, that seeks to provide an overview of one or more issues, and that often seeks consent for a course of action to be approved, or presents options to be endorsed by that office holder (but sometimes can simply be advisory only, with no action required other than to "note" the contents of the brief).

A brief signed by the Secretary would, in terms of an FOI scope, include any brief signed by the Secretary regardless of the mechanism of that signature (physical, electronic, etc).

These are things I know you are already aware of, so a little bit of mischief is apparent.

To avoid all doubt, any document which received the Secretary's signature during the scope period (regardless of whether a physical or electronic signature), that had for that document (whether stamped on, stapled to, digitally attached, or in the document itself) a specific box or area for the Secretary's signature or initials (whether physical or electronic), and which had such a signature or initials, and was a document that sought the Secretary to either "note", "approve", "agree", "endorse" or "discuss" (or other similar verbs) as an action requested, is a document in scope in the scope period.'

7. Based on the clarification you provided, I have applied the ordinary meaning of 'brief' and 'signed' in considering the scope of your request. I have also taken the scope of your request to be for briefs in which the Secretary was the final signatory; that is, I have excluded briefs for the Minister for Veterans' Affairs which were reviewed by the Secretary. Please advise if you do not agree with this scope interpretation.

Power to refuse a request

8. 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.
9. 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 seven (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)

10. The practical refusal reason applicable to your request is that:
 - 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)(b) of the FOI Act).
11. 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.

12. 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.

13. I consider that the staffing resources available and the impact that processing your request may have on the Department 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

Request is substantial

14. 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.

15. Following initial enquiries, I estimate that 65 hours of processing time is required to deal with this request. The reasons for this are as follows:

- Briefings to the Secretary for signature are not received in the Secretary's Office through a single channel. Briefings may be received via the Parliamentary Document Management System (**PDMS**), by email or by hard copy. This means that in order to obtain an accurate list of all briefings signed by the Secretary in

October 2020, both the Secretary's Office and all seven (7) Divisions in the Department would be required to undertake searches. This would require staff resources to be diverted to undertaking these searches which would impact on the Department's ability to undertake its other functions.

- Briefings are not always received by the Secretary's Office in the same month that they are signed. This means that in order to ascertain an accurate number of documents falling within the scope of your request, manual searches of briefs received in September (and possibly earlier) would need to be undertaken. As there is no central system through which briefs are received in the Secretary's office, this would again require manual searches to be undertaken by the Secretary's office and all Divisions. A review of all briefs would then need to be conducted in order to determine the date on which the Secretary signed it.
- As a guide as to the number of documents potentially falling within the scope of your request, the Secretary's Office has estimated that approximately 111 briefs were received via PDMS alone for the Secretary's signature in October 2020. This estimate does not take into account other channels of communication with the Secretary's Office including email and physical copies being provided to the office.
- Based on the above information, it is estimated that at least 26 hours would be required for all searches to be undertaken.
- As there is not a central system for recording briefs received by the Secretary's Office, a list of documents in scope will need to be created under section 17 of the FOI Act and reviewed for possible duplication of records. It is estimated that this will take approximately 11 hours.
- As you have also requested a copy of the first page of each brief signed by the Secretary, each page will need to be extracted, analysed and a decision made before they can be released to you. It is estimated that approximately 10 minutes will be required per brief for this task. Based on the 111 briefs received in PDMS in October 2020, it is estimated that 18 hours will be required for this task.
- Due to the broad range of issues the Secretary is briefed on, many of which are highly sensitive, it is anticipated that some documents will require redactions to withhold material considered to be exempt from release under the FOI Act. On an initial review of the advice provided by the Secretary's Office, I anticipate that redactions may be required under section 47E (operations of an agency), section

47F (personal privacy) and section 34 (cabinet material) of the FOI Act. It is estimated that:

- Eight (8) hours will be required to consider the exemptions and applicable redactions to the documents;
- One (1) hour will be required to prepare a decision and statement of reasons; and
- Two (2) hours will be required to prepare a schedule of documents to accompany the decision and statement of reasons.

16. Taking these factors into account, I have concluded the request as it currently stands is substantial.

Request is unreasonable

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

- 65 hours of processing time is, at face value, an unreasonable burden for a single FOI request, taking 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.

18. I have also considered the current pressures the Department is facing in the relation to the processing of its FOI requests. The Department is currently managing both the impact of COVID-19 on different business areas and significant resourcing pressures being experienced by the Department's Information Law Team.

19. As the Department continues to focus its efforts on managing the impact of COVID-19 on its critical services and employees, other non-critical services may not be delivered within expected timeframes. During this time, business areas that would ordinarily have capacity to undertake searches and assist in the processing of FOI requests have not always been readily available to provide that assistance.

20. Additionally, the Department's Information Law team processes a high volume of information access related requests every day and are regularly the third highest recipient of FOI requests across the Commonwealth. These workload demands are impacting on the manner and timeframe in which the Department can process FOI requests. This increased

workload and resourcing constraints also means that broad and significant FOI requests such as yours, would place an even greater burden on the Department's resources at this time. Processing a request of this size would unreasonably divert the resources of the Department.

21. 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

22. You now have an opportunity to revise your request so that the grounds for a practical refusal are removed.
23. 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.
24. For example, you may want to consider:
 - Limiting the scope of your request to briefs *received* by the Secretary's Office for the Secretary's signature in October 2020 via PDMS only.
 - Removing your request for a copy of the first page of each brief that contains the Secretary's signature.
 - Limiting the scope of your request to briefs signed by the Secretary in October 2020 on a particular topic.
25. For example, you may consider revising the scope of your request to:

A list of all briefs, excluding briefs classified as Protected or Cabinet in Confidence, registered in PDMS in October 2020 received by the Secretary Coordinating area for which the Secretary was the final signatory.

26. 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

27. Before the end of the consultation period, which is **close of business 15 December 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.
28. 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.
29. 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.
30. If you do not respond in one of these ways within 14 days (by **COB 15 December 2020**), the request will be taken to have been withdrawn pursuant to section 24AB(7) of the FOI Act.
31. 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

32. 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.
33. An extract of the provisions of the FOI Act that are relevant to this notice are set out at **Schedule 1**.

Contact us

34. 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,

Jo (Position Number 62210326)

Assistant Director

Information Law Section

Legal Services and Audit Branch

2 December 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.

17 Requests involving use of computers etc

- (1) Where:
- (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;
 - (b) It appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
 - (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
 - (c) the agency could produce a written document containing the information in discrete form by:
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

- (2) An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.

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.