



Trent Morrison-Francis

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Our ref: 1-S946L8Q
1-S946LCI

Date: 4 February 2022

Dear Mr Morrison-Francis

Freedom of Information Act 1982 – Request Consultation Notice

I refer to your two requests for documents under the *Freedom of Information Act 1982 (FOI Act)*, made via the ‘Right To Know’ website and received by our office on 7 January 2022.

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

Notice under subsection 24AB(2) of the FOI Act

This is a notice of my intention to refuse your requests for documents pursuant to section 24 of the FOI Act.

Section 24 of the FOI Act states:

- (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.

Subsection 24AA(1) of the FOI Act states:

- (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;
 - (ii) ...
 - (b) The request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).

Paragraph 15(2)(b) states 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”.

Having reviewed your requests dated 7 January 2022, and having consulted with senior officers in the relevant ATO business line, I am of the view that a ‘practical refusal reason’ exists in relation to your requests.

A practical refusal reason exists because, in summary:

- Across multiple parts to your requests, I consider that you have not provided sufficient information that would enable us to reasonably, and meaningfully, conduct searches for documents, and identify what you mean by (or what you are specifically looking for), in relation to those parts. In some instances, we consider we may not have some of the categories of documents you are seeking at all, however without sufficient information it is difficult to confirm this or suggest other ways in which we can assist.
- Given the breadth of what you have asked for in more than 20 different parts, across both of your requests, I am also of the view that, even if we were to attempt to search for and retrieve documents potentially within the scope of all parts, (notwithstanding the difficulties above), I consider that to do so would also substantially and unreasonably divert the resources of the ATO from its other operations.

Further detail about my reasons for finding a 'practical refusal reason' are set out below.

Before I make a final decision to refuse your requests, the purpose of this notice is to give you the opportunity to revise your requests. This is called a 'request consultation process' as set out under section 24AB of the FOI Act.

You have 14 days to respond to this section 24AB 'request consultation' letter via one of the ways set out below. If you do not respond to this letter within the 14 days, your requests will be taken to be withdrawn.

Your FOI requests

As mentioned above, we received two FOI requests from you via the 'Right To Know' website on 7 January 2022. Subsection 24(2) of the FOI Act states that, for the purposes of considering whether a practical refusal reason exists, the agency may treat two or more requests as a single request if the agency "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."

I have considered the subject matter of your two requests, and I consider that the subject matter of the two requests is substantially the same because:

- They both refer to records that the ATO holds regarding information exchanged with, or which relate to, the Commonwealth Superannuation Corporation (**CSC**);
- They both cover the same schemes that the CSC manages; and
- They both cover the same time period.

While I am therefore treating your requests as a 'single' request, for the purposes of subsection 24(2) and assessing a 'practical refusal reason', I will nevertheless refer to the scope of your 'first' and 'second' requests below, for ease of reference.

In the first email received by the ATO (first request), you made a request for:

Any documents held by the ATO in relation to any "Exemptions" or "Wavers" as defined by the Webster Dictionary or socially accepted definitions of the words in the country of Australia to comply with any legislation that the ATO has powers, authority or manages under legislation for its management as a superannuation provider.

To remove any doubt we are asking for all schemes that Commonwealth Superannuation Corporation manages including

CSS
ABN: 19 415 776 361
RSE: R1004649

DFRDB
ABN: 39 798 362 763

Military Super
ABN: 50 925 523 120
RSE: R1000306

ADF Super
ABN: 90 302 247 344
RSE R1077063

ADF Cover
ABN: 64 250 674 722

The period for the request relates to all documents created on or after the 01st January 2017 by either the ATO and or the Commonwealth Superannuation Corporation (where practicable if the ATO is not the creator of the documents).

In the second email received by the ATO (second request), you made a request for:

- 1. Number of Veterans in receipt of a Class A pension**
- 2. Number of Veterans in receipt of a Class B pension**
- 3. Number of Veterans in receipt of a Class C pension**
- 4. Number of veterans that had been APPROVED Withholding Variations for the FY 2021 applied by your agency*
- 5. Number of veterans that had been REJECTED Withholding Variations for the FY 2021 applied by your agency*
- 6. Number of veterans that had been APPROVED Withholding Variations for the FY 2022 applied by your agency*
- 7. Number of veterans that had been REJECTED Withholding Variations for the FY 2022 applied by your agency*
- 8. Number of veterans that had been PENDING Withholding Variations for the FY 2022 applied by your agency*
- 9. Documents that clearly show the number of veterans that are receiving a LARGER YEARLY income after the relevant Taxation has been withheld at the END OF THE YEAR.*
- 10. Documents that clearly show the number of veterans that are receiving a LARGER income after the relevant Taxation has been withheld in each pay run performed by the Commonwealth Superannuation Corporation.*
- 11. Documents that clearly show the number of veterans that are receiving a SMALLER YEARLY income after the relevant Taxation has been withheld at the END OF THE YEAR.*
- 12. Documents that clearly show the number of veterans that are receiving a SMALLER income after the relevant Taxation has been withheld in each pay run performed by the Commonwealth Superannuation Corporation.*
- 13. If your agency has ever reported incorrect figures in relation to the above please provide any copy of a retraction, correction statement or any document confirming that you have modified the incorrect information.*
- 14. Number of Veterans in receipt of a Class A pension* that your agency is refusing to treat as a Lump Sum Payment as defined by the relevant acts and the decision.*
- 15. Number of Veterans in receipt of a Class B pension* that your agency is refusing to treat as a Lump Sum Payment as defined by the relevant acts and the decision.*
- 16. Number of Veterans in receipt of a Class C pension* that your agency is refusing to treat as a Lump Sum Payment as defined by the relevant acts and the decision.*
- 17. The TOTAL number of Veterans that have applied for a review of previous tax returns that were affected by the decision to date regardless of the status of this request.*
- 18. The TOTAL number of Veterans that have applied for a review of previous tax returns that were affected by the decision to date that your department still has not made corrections to.*

19. Any documents that your department has sent to the "Veteran Community" directly via post, fax, email advising them that they can apply for Disability Superannuation Benefit "DSB" after the Federal Court handed down the Douglas decision.

20. Copies of any ministerial briefing documents that relate to the above-mentioned case.

21. Any other document that you deem necessary to release as part of this request to help the wider community understand or interpret the documents above.

I believe due to the significant amount of misinformation that is being presented by government agencies about this matter I note that as per the Freedom of Information Act an agency such as yours is not able to use the public interest exemptions for the following reasons

1. access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government; or

2. access to the document could result in any person misinterpreting or misunderstanding the document.

Furthermore, I remind you that under the act that the agency, or the Minister, must publish the information to members of the public generally on a website by

(a) making the information available for downloading from the website; or

(b) publishing on the website a link to another website, from which the information can be downloaded; or

(c) publishing on the website other details of how the information may be obtained.

In relation to the above, the agency or Minister must comply with this section within 10 working days after the day the person is given access to the document.

To remove any doubt we are asking for all schemes that Commonwealth Superannuation Corporation manages including

CSS

ABN: 19 415 776 361

RSE: R1004649

DFRDB

ABN: 39 798 362 763

Military Super

ABN: 50 925 523 120

RSE: R1000306

ADF Super

ABN: 90 302 247 344

RSE R1077063

ADF Cover

ABN: 64 250 674 722

The period for the request relates to all documents created on or after the 01st January 2017 by either the ATO and or the Commonwealth Superannuation Corporation (where practicable if your office is not the creator of the documents).

Reasons why I am of a view that a practical refusal reason exists

As foreshadowed above and for the reasons set out below, I am of the view that a practical refusal reason as defined in section 24AA of the FOI Act exists in relation to your requests.

Considerations relevant to your first request

I consider that the language that you have used in your first request (i.e. *‘Any documents... in relation to any “Exemptions” or “Wavers”...’*) is very broad, and consequently does not sufficiently identify documents which you are seeking to the extent that it would allow myself, or another responsible officer of the ATO, to reasonably search for and locate what you have asked for under FOI.

I have reviewed the previous requests that you made under FOI, in particular your requests dated 4 June 2021 (our references 1-PMJUMS7 and 1-PM9II0A) and 17 July 2021 (our references 1-Q4GO9ZI and 1-Q4FX2EC).

I note that in your request with reference 1-PMJUMS7, you asked for a copy of *“all documents that shows that the Commissioner of Taxation or other authority has provided Commonwealth superannuation with an exception to comply with the Douglas ruling in relation to Military Super for the financial years.”* In a decision dated 2 July 2021, you were advised that no such documents could be found or exist, and your request was refused under section 24A. In this decision, however, you were further advised about the following ‘exemption’ relevant to CSC, in the hope that this was of assistance to you:

...on 11 February 2021, the Commissioner of Taxation provided an exemption, to CSC, from issuing PAYG payment summaries that are required under section 16-165 of Schedule 1 to the Taxation Administration Act 1953 within 14 days, in respect of certain superannuation lump sum payments made to members of specified superannuation schemes. Instead, the CSC will be required to issue a single PAYG payment summary within 14 days after the end of the financial year to the member covering total superannuation lump sum payments made, total tax withheld and any other reportable components for the financial year.

In response to your further FOI request with reference 1-Q4FX2EC, on 3 September 2021, you were provided with a copy of the 11 February 2021 ‘exemption’, referred to above. This was in response to your request for *“4. Any document’s held by your agency that supports that the ATO has provided approval \ exemption to issue the payment Summary and upload the EMPDUP outside the legislated 14 days required.”*

It appears you are casting an even wider net for documents to do with any *“Exemptions”* or *“Wavers”*, provided by the ATO in our *“management as a superannuation provider”*, (as per the wording of your current request), however these terms do not provide us with enough information to properly search for and identify the documents you are seeking. Given the information (and document) that has already been provided to you about a CSC ‘exemption’, as above, we are unsure how to interpret your request. It is unclear to us what (else) you might mean, or how else we can assist you, over and above our previous responses to do with an ‘exemption’.

I have been advised by a senior executive in the Superannuation and Employer Obligations business line (**SEO**) that there is unlikely to be any documents that set out a ‘waiver’, that would appear to be appropriate to the scope of your request, as the only recognised category of ‘waiver’ as it relates to superannuation concern waivers in respect to outstanding debts; which would fall out of the scope of your request as it is not relevant to the CSC’s obligations as a superannuation provider.

I have further been advised that it is likely that any search for ‘exemptions’ could return results about any exemptions in relation to the reporting/payments/etc. for individual taxpayer’s or member’s circumstances. In these cases, it is highly likely that these documents will be exempt in full under section 38 of the FOI Act, which (amongst other things) exempts from release any documents that are prohibited from release under the secrecy provisions set out in Division 355-B of Schedule 1 to the *Taxation Administration Act 1953*, and which will take a significant amount of time to sort through and exclude.

It is not clear whether the current terms of your request are seeking documents that apply in specific instances to specific taxpayers, or whether you are seeking more general decisions or rulings by the Commissioner or his Delegates.

Taking into account all of the matters set out above, I am satisfied there is a 'practical refusal reason' with respect to your first request. We do not have sufficient information to enable us to properly search for or identify the documents you are seeking. To cast such a wide net for any mention of 'exemptions' or 'waivers' within ATO records would be an extremely extensive exercise, and noting our previous responses under FOI, this also contributes in my view to a finding that searches of this kind would be a substantial and unreasonable diversion of our resources.

Considerations relevant to your second request

While the terms of your second request are more targeted, I consider that the work required to respond to the 21 different parts of your second request, coupled with the work required for your first request, significantly adds to the total resources required by our agency to search for and process all documents potentially falling within the scope of both requests. As above, I am able to consider your requests together for the purposes of section 24 of the FOI Act.

I also wish to make the following observations which significantly impact our ability to identify what documents may be of interest to you and, without further clarification, may not enable us to properly assist.

With regard to points 1 to 3 in your second request, I am advised that the ATO does not administer these pensions and as such, is unlikely to hold this information. While the ATO could be in possession of a report or reports which show these figures at a specific point in time, a search would need to be undertaken in order to locate any documents containing this information and, the records held by the ATO would (therefore), likely be out of date. It is unclear whether the most up to date numbers are what you are seeking in which case, as above, the ATO does not hold this information as we do not administer these pensions.

In points 4 to 8, you have asked for statistics showing the number of veterans that have been affected in some way by decisions made by the ATO. It is possible that the ATO does not hold this information in the form for which you have asked, or if the information can be generated, it is possible that an ATO officer or officers would need to take a survey of all decisions made by the SEO business line over the relevant period, which would be a substantial diversion of resources.

With regard to items 9 to 12 of your request, I have been advised that the language in which you have put these requests is unlikely to return any documents, as yearly income is the same regardless of withholding. We therefore consider we are unable to conduct meaningful searches for documents, to satisfy what you are looking for, in relation to these parts.

Similarly, with regard to points 14, 15, and 16 of your request, I have been advised that it is likely that no documents exist that match the scope of your request, as any individual that was affected by the decision in *Douglas* would have been processed in accordance with that decision if they had sought review. In particular, Class C pensions would not have been affected by the decision in *Douglas*. As above, we are therefore unable to know what to reasonably search for and what documents may assist you, in relation to these parts.

With regard to items 17 and 18 of your request, I understand that the ATO may count and update these figures (i.e. '*The TOTAL number of Veterans that have applied for a review of previous tax returns...*'), on a weekly basis, as well as providing reports on these numbers. This means that there could be a significant number of documents that fall within the scope of your request, all but the latest of which would contain out of date numbers. Because of this, it would take a significant amount of time to process all the documents that could fall within the scope of these parts, and it

is unclear if this is what you are looking for, as opposed to a document which shows the most up to date numbers only.

I am also advised that, with regard to item 20 of your request, prior to releasing any Ministerial submissions and other briefings to Ministers, I would be required to consult with the Minister's offices and consider whether there are any applicable exemptions. This consultation process would take a significant amount of time.

Again, taking into account all of the above, I am of the view that a 'practical refusal reason' exists in relation to both of your requests. I have come to this conclusion on the basis that you have not provided sufficient information across multiples parts, in order for me to properly identify the documents that you are seeking; and cumulatively, your requests in their current form require searches and processing that would substantially and unreasonably divert the ATO's resources from its other operations.

Invitation to revise your request

Subsection 24AA(1) of the FOI Act requires that, where an agency is satisfied that a practical refusal reason exists, they must undertake a request consultation as described by section 24AB.

You have the opportunity to revise your requests to enable them to proceed.

At the outset, I would suggest that you revise your request by describing the nature of the 'waiver' or 'exemption' to comply with relevant legislation that you believe the ATO has given to the CSC, and restricting your request to documents to which this applies.

For example, if there is a particular legislative provision you believe the 'waiver' or 'exemption' applies to, it may be beneficial for you to specify that legislative provision. Alternatively, if there is a particular obligation imposed on the CSC by the tax or superannuation legislation that you believe the 'waiver' or 'exemption' applies to it might be beneficial for you to describe that obligation. As above, we are otherwise unsure how else we can assist you, over and above our previous responses to do with an 'exemption'.

I would also suggest that you review the issues raised above in relation to your second request, and consider removing certain points where I have advised that documents matching your request may not exist; or, where you have asked for certain 'numbers' (such as those described at points 17-18 of your request), that you exclude all but the latest document capturing the most up to date numbers only.

For completeness, information on the ATO's response to the *Douglas* decision can be found here: [Treatment of military invalidity benefits following Full Federal Court decision](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Treatment-of-military-invalidity-benefits-following-Federal-Court-decision/)¹, and information on CSC's PAYG withholding obligations following the *Douglas* decision can be found here: [Pay as you go withholding for military superannuation payments | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Pay-as-you-go-withholding-for-military-superannuation-payments-Australian-Taxation-Office-ato.gov.au)².

These webpages may provide information to help with your queries, or may assist you to revise your requests.

I will note that all of the above are suggestions only, and that even if you do elect to revise your requests, the clarification and reduction in the scope of your requests may not be sufficient to fully address the practical refusal reasons that apply.

¹ <https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Treatment-of-military-invalidity-benefits-following-Federal-Court-decision/>

² <https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Pay-as-you-go-withholding-for-military-superannuation-payments/>

Next steps

The request consultation period runs for 14 days and starts on the day after you receive this notice. Before the end of the consultation period, **you must do one of the following, in writing, otherwise your requests will be taken to have been withdrawn pursuant to subsection 24AB(7) of the FOI Act:**

- a) Withdraw your requests;
- b) Revise your requests; or
- c) Tell us that you do not wish to revise your requests.

During this period, you are welcome to contact me to discuss this request consultation letter. If you need more time to respond, please contact me within the 14 day period to discuss an extension of time.

In addition, if you do choose to submit a revised request with a reduced scope, we would ask that you also consent (in the same reply) to a 30-day extension under section 15AA of the FOI Act. This will allow the ATO to conduct further searches as well as to properly process any documents that fall within the scope of a revised request and to make a decision under the FOI Act.

You can contact me via email to foi@ato.gov.au.

Yours sincerely,

M Tonglee
A/g Senior Lawyer
General Counsel, ATO