



Australian Government
Attorney-General's Department

Our ref: FOI22/043; CM22/3292

30 March 2022

Dominic Manganaro

By email: foi+request-8537-1daa91c5@righttoknow.org.au

Dear Mr Manganaro

Freedom of Information Request FOI22/043 – Request consultation process

The purpose of this letter is to consult you in relation to a proposed decision to refuse access to documents on the basis of a practical refusal reason, in relation to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

Your Request

On 2 March 2022 you requested access to:

- *Legal advice provided by the Attorney-General's Department to the Federal Government related to both the closure and the subsequent re-opening of Australia's International borders from the period between March 2020 until January 2022*
- *Specifically any legal advice provided by the Attorney-General's Department to the Federal Government related to the Western Australian state border closures from the period between March 2020 until January 2022.*

On 24 March 2022, the department wrote to you, informing you that the scope of your request in its current terms was too broad, and captured a very large number of documents. The department invited you to narrow the scope of the request in order to assist the department's processing of your request.

In response to the department's consultation, you revised the terms of your request to the following:

The final documents and email chains, excluding any drafts or duplicate documents/attachments/ email chains/ministerial briefings etc, that were created by the Attorney-General's Department in March 2020 containing formal legal advice that was subsequently relied upon by the Federal Government for the closure of Australia's International borders in March 2020.

Practical refusal reason

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have decided that the work involved in processing your revised request, dated 24 March 2022, in its current form would substantially and unreasonably divert the resources of this department from its other

operations due to its broad scope and size. Section 24AA of the FOI Act refers to this as a 'practical refusal reason' (copy at **Attachment A**).

A preliminary search of the department's holdings indicates the department holds more than 300 documents potentially relevant to your revised request. The departmental resources required to identify, locate and collate all documents within the scope of your request, and to decide whether to grant, refuse or defer access to each of those documents (in whole or in part), would unreasonably divert the resources of the department from its other operations.

Request consultation process

Before I decide to refuse access to the documents you requested on the basis of a practical refusal reason, section 24AB of the FOI Act requires me to undertake a 'request consultation process' with you (copy at **Attachment A**). This means you have 14 days in which to respond to this notice revising your request in one of the ways described below. If you would like to proceed with your FOI request, you must make a further revised request, in writing, within 14 days of the date you receive this letter.

As noted above, you revised the scope of your original request to the following:

The final documents and email chains, excluding any drafts or duplicate documents/attachments/ email chains/ministerial briefings etc, that were created by the Attorney-General's Department in March 2020 containing formal legal advice that was subsequently relied upon by the Federal Government for the closure of Australia's International borders in March 2020.

Given that your revised request is still seeking access to formal legal advice, I consider it likely that the documents you are seeking will be subject to particular exemptions under the FOI Act. In particular, your request for documents 'containing formal legal advice' means that it is very likely that most of the documents within the scope of your request would attract legal professional privilege and would likely be exempt in accordance with s 42 of the FOI Act. In addition, documents in respect of activities undertaken by the Australian Government Solicitor (which includes legal advice prepared by the Australian Government Solicitor) are exempt from the operation of the FOI Act (see section 7(2) and Part II of Schedule 2).

Further, based on the department's preliminary searches in response to your request, I consider many of the documents you have requested may have been brought into existence for the dominant purpose of deliberations of Government, and may contain information relating to third parties that would also likely be exempt under the relevant sections of the FOI Act.

Based on this preliminary analysis that your request in its existing form may result in a large number of exemptions and/or be refused for a practical refusal reason, you may wish to consider further revising the terms of your request to expressly exclude formal legal advice, including legal advice produced by the Australian Government Solicitor and/or the department.

During the consultation period, you are welcome to seek assistance from the contact person listed below to revise your request. If you revise your request in a way that adequately addresses the practical refusal grounds outlined above, the department will recommence processing it. Please note that the time taken to consult you about the scope of your request is not included in the 30 day time limit for processing your request.

If you do not wish to proceed with your FOI request, you may either withdraw your request or advise the department that you do not wish to revise your request. Your request will be withdrawn if you do not contact us or provide written notice of the revised scope of your request within 14 days from receipt of this notice.

Questions

If you wish to discuss this decision, the FOI case officer for this matter is Fiona, who can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'D. Lewis'.

David Lewis
General Counsel (Constitutional)
Office of Constitutional Law

Attachments

Attachment A: Sections 24AA and 24AB of the FOI Act

Attachment A

Section 24AA of the FOI Act: 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.

Section 24AB of the FOI Act: 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.