



Australian Government
**Department of Employment
and Workplace Relations**

Our Ref LEX 390

BE
Right to Know

By email: foi+request-9244-57aac32d@righttoknow.org.au

Dear BE

Refusal of your Freedom of Information Request

I refer to your request, received by the Department of Employment and Workplace Relations (department) on 8 August 2022, for access under the *Freedom of Information Act 1982* (Cth) (FOI Act) to the following documents:

1. *All documents including advice and submissions provided by the Department to the Minister's Office in relation to Australian Building and Construction Commission (ABCC), the Code for the Tendering and Performance of Building Work 2016 (Building Code) or the Code for the Tendering and Performance of Building Work Amendment Instrument 2022 (Amended Building Code).*
2. *Communication between the Department and the Minister's Office in relation to the ABCC or the Building Code or Amended Building Code during the period 1 June 2022 to 25 July 2022.*
3. *Internal communication within the Department between 1 June 2022 and 25 July 2022 relating to the ABCC or the Building Code or the Amended Building Code.*

In this request a reference to the Minister's Office includes a reference to the Minister and a reference to communication includes emails, correspondence, electronic messages (eg whatsapp, signal etc), meeting invites, and other forms of communication.

Names and contact details for departmental staff below the SES level are not required and can be treated as irrelevant under s22 of the Act for the purposes of this request.

Duplicates of documents are not required.

My decision

I am an authorised decision maker pursuant to section 23 of the FOI Act.

I have decided to refuse access to the documents you have requested under subsection 24(1) of the FOI Act because I am satisfied that a practical refusal reason still exists under subparagraph 24AA(1)(a)(i) of the FOI Act.

The practical refusal reason is that the work involved in processing your revised request would substantially and unreasonably divert the resources of the department from its other operations.

In reaching my decision, I have had regard to the following:

- your correspondence dated 8 August 2022, setting out your original request;
- the notice issued by the department under section 24AB of the FOI Act on 22 August 2022;
- your correspondence dated 31 August 2022, revising the scope of your request;
- consultation undertaken with departmental officers about:
 - the searches that would be required in order to locate the relevant documents;
 - the number and nature of documents that would be covered by the scope of your request;
 - the number of third parties likely to require consultation; and
 - the department's operating environment and functions;
- public interest factors relevant to the assessment of whether processing your request would involve an unreasonable diversion of the department's resources;
- the FOI Act;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines);
- the Cabinet Handbook, published by the Department of the Prime Minister and Cabinet (PMC); and
- the general body of law relevant to my decision, including various decisions of the Commissioners of the Office of the Australian Information Commissioner and the Administrative Appeals Tribunal.

Practical refusal reason

Subparagraph 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 agency from its other operations'.

In determining whether processing the request would substantially and unreasonably divert the department's resources, subsection 24AA(2) of the FOI Act requires me to have regard to the resources that would be used for the following:

- identifying, locating and collating the documents within the filing system of the department;
- deciding whether to grant, refuse or defer access to a document, including resources used for examining the document and consulting with any person or body in relation to the request;
- making a copy or an edited copy of the document; and
- notifying of any decision on the request.

The request consultation process

On 22 August 2022, I wrote to you on behalf of the department to advise you of my intention to refuse access to documents on the basis that a practical refusal reason existed in relation to your request.

This correspondence initiated a 14-day consultation period, during which time you were invited to make submissions in support of your request as currently worded, withdraw your request, or revise the scope of your request so as to remove the practical refusal reason. You were also invited to contact me during the consultation period to discuss your request.

To remove the practical refusal reason, I suggested that you:

- reduce the time period in which you have requested documents to a two-week period;
- exclude certain categories of documents from your request, such as documents that relate to legal advice, the legislative process and Cabinet documents;
- narrow the scope of your request to focus only on certain issues, such as the Government's election commitment to abolish the Australian Building and Construction Commission (ABCC), including amending the Building Code; and
- limit the scope of your request to relevant correspondence between Senior Executive (SES) officers in the Bargaining and Coverage Branch and the Bargaining and Industry Policy Branch.

On 31 August 2022, you sent an email to the department advising that you wished to revise the scope of your request to:

1. *All communications between the Department and the Minister's Office between 20 June 2022 -20 July 2022 inclusive in relation to:*
 - a. *the potential abolition of the Australian Building and Construction Commission (ABCC); or*
 - b. *the amendment or potential amendment of the Code for the Tendering and Performance of Building Work 2016 (including in relation to the Code for the Tendering and Performance of Building Work Amendment Instrument 2022).*
2. *Communication within or between any of the following areas of the Department: the Workplace Relations Legal Group; the Bargaining and Industry Policy Branch and the Office of the Secretary between 20 June – 20 July 2022 relating to:*
 - a. *the potential abolition of the ABCC; or*
 - b. *the amendment or potential amendment of the Code for the Tendering and Performance of Building Work 2016 (including in relation to the Code for the Tendering and Performance of Building Work Amendment Instrument 2022).*

I note that I have consulted the material that is publicly available including documents provided to the Parliament and the publicly available documents do not fulfil my requests. I note that above is a significant reduction in the scope of the request and trust that it is now able to be processed by the Department.

Following the request consultation process outlined above, in accordance with section 24AB of the FOI Act, I am satisfied that a practical refusal reason still exists in that the work involved in processing your revised request would substantially and unreasonably divert the resources of the department from its other operations. The reasons for my decision, including consideration of the factors that I am required to take into account under subsection 24AA(2) of the FOI Act, are outlined below.

The diversion would be substantial

Following the recent Federal election on 21 May 2022, in which the Labor Government was elected, the Bargaining and Coverage Branch and the Bargaining and Industry Policy Branch have been providing extensive advice on various issues associated with the implementation of the election commitment to abolish the ABCC and repeal the *Code for the Tendering and Performance of Building Work 2016*. The scope of your revised request is still very broad and based on a flexible, common-sense interpretation of its terms, captures thousands of documents that have been generated by the Bargaining and Coverage Branch and the Bargaining and Industry Policy Branch during the period 20 June to 20 July 2022.

I estimate that a significant amount of processing time is required to deal with this request. The reasons for this are as follows:

- Based on the results of IT forensic searches undertaken by the department, I estimate that there are over 9,500 documents relevant to your revised request as presently framed.
- I estimate that it would take relevant departmental officers in the Bargaining and Coverage Branch and Bargaining and Industry Policy Branch over 126 hours to identify and collate all of the relevant documents.
- It would also be necessary for the decision maker to undertake consultation with PMC on Cabinet-related material within the scope of your revised request before making their decision, as well as SES officers with specialised knowledge of the matters contained in the documents. They will also need to carefully examine the relevant pages for decision making, apply redactions to any exempt material, prepare a schedule of documents and statement of reasons. Due to the significant volume of material within the scope of your request, I estimate that it would take an experienced FOI officer over 1,000 hours to undertake this process.

Accordingly, I am satisfied that processing your revised request would substantially divert the resources of the department from its other operations.

The diversion would be unreasonable

I am required under subparagraph 24AA(1)(a)(i) of the FOI Act to consider whether, as well as being a substantial diversion of the department's resources, the diversion is also unreasonable.

The intention of Parliament is that there be a balance struck between the public interest in access to documents and the resources which must be employed by an agency or Minister to process a request. The fact that the FOI Act makes provision for agencies to refuse requests on the basis that to process them would involve a substantial and unreasonable diversion of agency resources recognises that there are competing factors that must be considered.

In determining whether the diversion of resources would be unreasonable, I have considered the public interest factors for and against processing your revised request. In this regard, I have identified and considered the relevant factors in favour of processing your revised request, including:

- the general public interest in obtaining access to Government held-information;
- the public interest in openness of administration, including the need for members of the public to be well informed on matters relevant to public debate; and
- the extent to which processing your revised request would promote the objects of the FOI Act.

I have decided, however, that the factors in favour of processing your revised request are outweighed by the public interest factors against processing such a large request. I have decided that the processing of your revised request would be contrary to the public interest for the reasons outlined below:

- the public interest in the department being able to continue to process FOI requests made by other applicants in accordance with the operation of the FOI Act. Specifically, if the department attempted to process your revised request, other FOI requests may not be processed in accordance with relevant statutory timeframes, which would negatively impact other applicants (including individuals seeking access to their personal information);
- the Bargaining and Coverage Branch and the Bargaining and Industry Policy Branch are responsible for advice and implementation of a range of complex workplace relations matters and frameworks. These issues include the enterprise agreement, industrial action, stand down, constitutional and geographical coverage frameworks under the *Fair Work Act 2009* and industry engagement on these matters. Other matters include the transfer of business, independent contractors and the gig economy, the Black Coal Mining Long Service Leave scheme and the Seacare workers' compensation and work health and safety scheme and supporting the Office of the Federal Safety Commissioner. Processing your request would impact on the ability of these areas to continue to provide the other important legal, policy and administrative functions they are responsible for, including the implementation of the policy agenda of the new Government; and
- the public interest in Government being able to carry on its business without a substantial diversion of its resources.

As previously outlined, there is also a range of publicly available material related to the scope of your request, including documents that were provided to the Senate in response to an Order to Produce. You state you have consulted the public available material, but that does not fulfil your request.

On balance, I am satisfied that the processing of your revised request would involve an unreasonable diversion of the department's resources.

In summary, I am satisfied that the work involved in processing your revised request would substantially and unreasonably divert the resources of the department from its other operations. I am also satisfied that a practical refusal reason exists in relation to your revised request, and on that basis, I have decided to refuse it under subsection 24(1) of the FOI Act.

In making this decision, I have not had regard to any of the irrelevant considerations set out at paragraphs 24AA(3)(a)-(c) of the FOI Act.

I have enclosed information about your rights of review under the FOI Act at **Attachment A**.

Yours sincerely

Claudia

Claudia
Authorised decision maker
Department of Employment and Workplace Relations

16 September 2022

YOUR RIGHTS OF REVIEW

Asking for an explanation of an FOI decision

Before you ask for a formal review of an FOI decision, you can contact us and we will explain the decision to you.

Asking for a formal review of an FOI decision

If you still believe the decision is incorrect, the FOI Act gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

- an internal review officer in the department and/or
- the Australian Information Commissioner.

There are no fees for applying for a formal review.

Applying for an internal review by an internal review officer

If you apply for internal review, a different decision maker to the decision maker who made the original decision will review your request. The internal review decision maker will consider all aspects of the original decision afresh and decide whether the decision should change.

An application for internal review must be made in writing within 30 days of receiving this letter. You can lodge your application:

Post: Commercial and Information Law Branch
Department of Employment and Workplace Relations
Location Code: C50MA1
GPO BOX 9828
CANBERRA ACT 2601

Email: foi@dewr.gov.au

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can lodge your application in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Complaints to the Australian Information Commissioner

Australian Information Commissioner

You may complain to the Australian Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Australian Information Commissioner must be made in writing and can be lodged in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001