



Australian Government

Office of the Special Investigator

OSI reference: FOI24/15; ACON24/30

18 September 2024

Mr James Smith

By email: foi+request-11650-407e8553@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request FOI24/15 – Request consultation

This letter seeks information about your request for access to documents under the *Freedom of Information Act 1982* (FOI Act) which you submitted to the Office of the Special Investigator (OSI).

Background

All correspondence for this matter is available online at the Right to Know webpage for this request¹. A summary is provided at **Attachment A**.

Scope of your request

Your request is currently for:

1. ***The agendas and minutes of the OSI's Executive Board and Audit and Risk Management Committee (ARMC) meetings. Also provide lists of the documents presented at each meeting (tabulating subject, author, date, number of pages), rather than copies of the presented documents.***
 - a. *final versions of the agendas and minutes (i.e. no drafts are requested)*
 - b. *only documents created between 1 January 2022 to date*

2. ***Training presentations and lecture notes, slides or handouts:***
 - a. *given by Mr Mark Weinberg, Mr Chris Moraitis, Ms Helen Daniels or Mr Ross Barnett.*
 - b. *final versions of documents (i.e. no drafts are requested)*

Practical refusal reason

I am authorised to make decisions in relation to FOI requests received by the OSI.

I have decided that the OSI is required or authorised to refuse access to your request because, in its current form, the work involved in processing it would substantially and unreasonably divert the resources of the OSI from its other operations. This is called a 'practical refusal reason' under s 24AA of the FOI Act.

¹ https://www.righttoknow.org.au/request/osi_board_committee_and_presenta

Additionally, I have decided that the OSI is not required to produce the list of documents sought under part 1 of your request in accordance with s 17 of the FOI Act.

Your request - volume of documents captured

The OSI has identified 54 documents comprising an estimated 277 pages for part 1 of your request.

Based on advice provided to me, I conservatively estimate it will take 78.5 hours to process your request. A breakdown of the estimated processing time, categorised by reference to processing resource, is provided below.

Processing resource		Est. hours
<i>Identifying, locating or collating documents within the filing system of the OSI.</i>	<p>This part of work for your request is complete and has involved:</p> <ul style="list-style-type: none"> • Searching for and retrieving the relevant documents from the OSI's records management system. This also involved manually extracting from omnibus records the specific documents relevant to your request. • Liaising with officers who manage relevant records as part of their core duties to ensure all relevant documents were located. • Converting the relevant documents to .PDF format where required. • Placing all documents in chronological order, or in another order that is appropriate for responding to this FOI request. • Applying relevant header information (eg FOI document numbers). • Inputting relevant document details into a schedule for preliminary assessment. 	9
<i>Assess the relevant documents for the application of exemption.</i>	<p>This work is not yet complete. However, to project estimated processing time, a timed assessment of a sample of the relevant documents (approximately 11% of all documents identified) was used.</p> <p>As a result of the assessment, it was found that it took an average of 2 minutes to assess each page for a preliminary assessment for the application of exemptions. As such, I conservatively estimate that it would take at least 9 hours (2 minutes x 277 pages) to complete a preliminary assessment on all 54 documents identified for your request.</p> <p>However, I expect that this estimate could increase due the complexity and breadth of subject matter covered within the documents. Specifically, the documents:</p> <ul style="list-style-type: none"> • Cover all of the OSI's corporate, legal and policy and operational functions, and are not confined to a particular subject-matter or issue. Topics include, but are not limited to, investigations work, health and safety, security, risk management, records management, privacy, operational updates and legal and policy matters. • Include highly sensitive information which would require careful consideration. For example, information affecting law enforcement and national security, defence or international relations. 	9
<i>Consultation with third parties</i>	<p>Based on the sample of documents, the OSI would need to consult at least the following third parties in processing your request:</p>	27

	<ul style="list-style-type: none"> • Fourteen Australian Government agencies and departments or authorities of the Commonwealth. • Two entities required to be consulted under s 27 of the FOI Act (business information). • Two individuals required to be consulted under s 27A of the FOI Act (personal information). <p>I estimate it would take 1.5 hours to complete each individual third party consultation, having regard to:</p> <ul style="list-style-type: none"> • The time involved with preparing correspondence and document packs for each third party – there are several third parties who would need to provide views on several of the documents. • Answering enquiries the third parties may make during the consultation process. • Considering any final submissions the third parties make to the OSI and, if required, updating the relevant documents accordingly. 	
<i>Deciding whether to grant, refuse or defer access.</i>	<p>This involves:</p> <ul style="list-style-type: none"> • Preparing a draft decision, statement of reasons and a finalised schedule of documents (3 hours). • Relevant internal areas and officers with necessary subject-matter expertise reviewing the draft decision and relevant documents. In this case, 7 OSI areas would be required to review the documents and provide input (3 hours per area = 21 hours). • Final review decision-making on the request by an OSI authorised officer (7 hours). A decision-maker must consider in detail the terms of the FOI request, relevant provisions of the FOI Act and the FOI guidelines, the content of the relevant documents, as well as input from third parties and internal OSI work areas. 	31
<i>Redacting exempt material from the documents and notifying you of an interim or final decision and preparing any relevant documents for disclosure.</i>	<p>This involves redacting identified material per the decision-maker's decision and a range of other administrative tasks, such as:</p> <ul style="list-style-type: none"> • Ensuring appropriate metadata and security controls are placed on the documents as required, and that relevant footer information is also included. • Manually applying a strikethrough on all classification markers that appear in the documents to be disclosed. • Preparing and seeking clearance of the correspondence enclosing the final decision and attachments notifying you of the decision on your request. 	2.5
Total hours		78.5

Other matters I have considered in deciding whether a practical refusal reasons exists

In line with the FOI Guidelines² published by the Information Commissioner under s 93A of the FOI Act, I have considered other factors in deciding whether a practical refusal reasons exists in relation to your request. These factors are detailed below.

The staffing resources available to the OSI for FOI processing

The OSI has one member of staff dedicated to processing FOI requests on a day-to-day basis. However, FOI-related work is just one part of their role.

Whether the processing work requires the specialist attention of a senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities

Due to the breadth and complexity of the documents sought, it is anticipated that processing this request would require:

- Review and input from 7 OSI areas, including staff with specialist expertise in ICT, finance, legal and policy, risk, security, governance and operational matters. Staff in these areas have competing priorities, including priorities which are central to the purpose for which the OSI was established.
- The decision to be made by a senior member of OSI staff with oversight and/or knowledge of the matters concerned. This is due to the broad scope of subject-matter contained within the documents and the sensitive nature of some of the information.

The impact that processing a request may have on other work in the OSI, including for FOI

All of the OSI's corporate and legal and policy functions are supported by a small cohort of staff.

I consider that processing a request of this scale and breadth would substantially and unreasonably divert the resources of the OSI from its other priority operations. The OSI was established by Executive Order for a specific purpose³ and it is essential that the agency remain focussed on delivering its mandate in the manner required.

Specifically, processing this request in its current form would substantially and unreasonably:

- Impact the OSI's ability to process and respond to other FOI requests in a timely manner.
- Impact other OSI business areas ability to deliver on their work by diverting staff from their priorities. This could compromise the OSI's ability to deliver on a range of outcomes and requirements. For example, external reporting required by other Australian Government agencies and the Parliament, as well as deadlines imposed by legal and other processes with which the OSI is required to comply.

² Paragraph 3.117, <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>

³ <https://www.osi.gov.au/about/our-purpose>

Whether an applicant has cooperated in framing a request to reduce the processing workload

The OSI acknowledges that you have sought to revise the terms of your request and that fewer overall documents have been captured as a result. However, the date range and/or breadth of subject-matter covered within the documents remains an issue, and the OSI has suggested on several occasions that you either:

- provide a limited date range for the request
- focus your request to be for documents about a particular topic or issue, or to documents authored by particular areas of the OSI.

Whether there is a significant public interest in the documents requested

I acknowledge that there may be substantial public interest in the OSI's functions and activities. However, the sensitive and singular focus of the OSI's work necessarily places limits on the amount of information the OSI is able to release publicly while investigations are ongoing. This also ensures that the OSI is able to continue working with key partners to:

- Investigate possible breach(es) of the law relevant to the OSI's remit.
- Fulfil its core purpose in the manner expected by the Government and, consequently, support the administration of justice generally.

Part 1 of your request – List of documents lists of documents presented at each meeting.

As a component of part 1 of your request, you have asked the OSI to provide

Provide lists of the documents presented at each [Audit Risk Management Committee (ARMC) and Executive Board (EB) meeting] (tabulating subject, author, date, number of pages), rather than copies of the presented documents.

Under s 17 of the FOI Act, agencies are required to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded. Examples include a transcript of a sound recording, a written compilation of information held across various agency databases, or the production of a statistical report from an agency's dataset. The obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)), and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s 17(2)).⁴

The Federal Court has held that the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the

⁴ Office of the Australian Information Commissioner Guidelines - Guidelines issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*, paragraph 3.210, accessible from: <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>

requested document without the aid of additional components which are not themselves ordinarily available ... [T]he computer or other equipment ... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.⁵

The OSI does not have a computer or other equipment that is ordinarily available, nor capable of functioning independently, for retrieving or collating the list of documents you have requested to access. To prepare a list such as you have requested, the OSI would be required to have a staff member manually review all of the ARMC and EB minutes and agendas already caught by your request and compile the relevant information into a schedule. Accordingly, the OSI is not required to produce the list of documents you have requested.

Notwithstanding the above, I have not considered the time and resources that may be involved with producing such a list because I consider that a practical refusal reason already exists in relation to your request.

Request consultation process

Before I make a decision to refuse your request, s 24AB of the FOI Act requires a 'request consultation process' (see FOI Act extracts at **Attachment B**). Under this request consultation process you have 14 days commencing the day after you are given this letter to do one of the following:

- Withdraw your request.
- Revise your request in writing.
- Tell us in writing you do not want to revise your request.

Further information about each of these options is below.

Withdraw your request

It is open to you to tell us in writing that you want to withdraw your request.

Your request will be finalised as withdrawn if you do not respond to this letter by providing a revised request or telling us you do not want to revise your request within 14 days commencing the day after you are given this letter.

Revise your request

Revising your request can mean narrowing the scope of the request to make it more manageable or explaining in more detail the documents you want to access. By providing more information about exactly what documents you seek to access, the OSI will be able to focus on processing documents that are of interest to you. You may wish to consider the following suggestions if you wish to revise your request:

- Advise whether the documents sought:
 - relate to a particular subject-matter or topic, or contain certain information

⁵ Ibid, paragraph 3.213

- were authored by a particular area of the OSI (e.g. Finance, Human Resources, Governance and Security, Communication and Information Access, Information Communication Technology, Legal and Policy, Investigations).
- Limit the date range for the request further. Currently it covers a period exceeding 2 years and captures agendas and minutes relating to 9 ARMC meetings and 18 Executive Board EB meetings that occurred during the specified period.
- Seek to access only the agendas of the ARMC and EB – these will provide an overview of the matters discussed and, generally, each document is approximately 2 pages long.

Additionally, you may wish to withdraw your request for the list of documents described in part one of your request, noting the OSI is not required to produce such a document under the FOI Act.

If you do not want to revise your request

It is open to you advise you do not want to revise your request. However, this may have an impact on the outcome of your request, and the decision-maker may decide to refuse your request if a practical refusal reason still exists in relation it.

Next steps and questions

During this consultation period, you are welcome to seek assistance from the OSI's Communication and Information Access Manager to revise your request. If you revise your request in a way that adequately addresses or removes the practical refusal reason outlined above, we will review your revised request and tell you if further information is needed or if we can continue to process your request on the revised terms.

Please note this request consultation period is not included in the 30 day time limit for processing your request. We will tell you the new due date for your request when this consultation process is finalised.

If you wish to discuss this letter for any reason, please contact the OSI's Communication and Information Access area by email to: foiandprivacy@osi.gov.au.

Yours sincerely



Name: Sam

Position: A/g Chief Operating Officer

Attachments

Attachment A: Background to FOI24/15

Attachment B: Relevant extracts of the FOI Act

Attachment A – Background to FOI24/15

- On 8 July 2024, you submitted your FOI request to the OSI.
- On 10 July 2024, the OSI requested that you provide further information about your request because parts 1-2 captured a large volume of documents and it was not possible for the OSI to conduct reasonable searches for documents were sought under part 3. Later that same day, you responded to the OSI's request and provided additional information.
- On 17 July 2024, the OSI contacted you again and advised that it had considered the information you provided on 10 July 2024. However, that parts 1-2 of your request still captured a large volume of documents and that it was still not possible for the OSI to conduct reasonable searches for documents sought under part 3. The OSI requested that you provide further information to clarify the terms of your request.

Later that same day, you responded to the OSI's request and asked the OSI to provide a list of the documents for parts 1-2 of your request, and provide a list of topics/issues covered part 3 of the request.

- On 18 July 2024, the OSI invited you to refine the scope of parts 1-2 of your request to be for a list of documents that would be relevant to those parts – the OSI advised that such a document could be produced responsive to your request under s 17 of the FOI Act. The OSI also invited you to further consider the information already provided for part 3 of your request – the OSI advised it was not possible to provide *a list of topics/issues covered by the scope of the request* because – in its current form – it is not possible for the OSI to conduct reasonable searches to begin identifying the documents that would be relevant to this part of your request. The OSI asked you to clarify your request by 22 July 2024.
- On 22 July 2024, the OSI acknowledged your request and advised that *'we are still awaiting your response to our request for further information – we have asked you to clarify your request by today, 22 July 2024. As previously advised, if you do not clarify your request, the OSI may need to take steps to practically refuse it under s 24 of the FOI Act.'*
- On 23 July 2024, you responded to the OSI's request for information and advised *'I agree to your suggested refined scope for items 1 and 2. Regarding item 3, please limit it to training presentations and lecture notes, slides or handouts given by the senior staff mentioned.'*
- On 8 August 2024, the initial due date for your request, the OSI sought further information from you as it was unclear to the OSI in what ways you wished to clarify the scope of parts 1-2 of your request. The OSI also requested an extension to process your request until 9 September 2024.
- On 15 August 2024, you advised the OSI that:

In relation to request 1 and 2 please provide the agendas and minutes of the OSI's Executive Board and Audit and Risk Management Committee (ARMC) meetings and lists of the documents presented at each meeting (tabulating subject, author, date, number of pages), rather than copies of the presented documents.

In relation to the extension, I note the response is overdue. Rather than submitting the matter for review by the OAI, please confirm if the materials will still be provided? I agree to an extension to COB 6 September.

As an agreement to extend the processing period was not reached before before the expiration of the statutory processing period, the extension referred to above could not be applied to your request.

- On 22 August 2024, you contacted the OSI and sought an update on your request. Later that same day, the OSI responded to you and advised that the agency was still processing your request and intended to provide a decision. However, that due to '*competing priorities and other events there has recently been an impact on the staffing resources available for processing FOI requests at the OSI*'. The OSI also asked you if the following interpretation of your request was correct:

- 3. *The agendas and minutes of the OSI's Executive Board and Audit and Risk Management Committee (ARMC) meetings. Also provide lists of the documents presented at each meeting (tabulating subject, author, date, number of pages), rather than copies of the presented documents.***
 - a. final versions of the agendas and minutes (i.e. no drafts are requested)*
 - b. only documents created between 1 January 2022 to date*
- 4. *Training presentations and lecture notes, slides or handouts:***
 - a. given by Mr Mark Weinberg, Mr Chris Moraitis, Ms Helen Daniels or Mr Ross Barnett.*
 - b. final versions of documents (i.e. no drafts are requested)*

Later, on 22 August 2024, you responded to the OSI's request and advised that '*Yes, I believe your email now captures the scope of the request.*'

Attachment B - Relevant extracts of the FOI Act

Section 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.

Section 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.

Section 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.