



Australian Government
Office of Parliamentary Counsel

Our ref: c20/14

By email to: [REDACTED]

Dear Darren

**Freedom of Information decision – request for documents
regarding Biosecurity Act**

1 I refer to your email of 14 April 2020 (11.43am) seeking access under the *Freedom of Information Act 1982* (the FOI Act) to:

- (a) the document/s the drafters of the Biosecurity Act 2015 rely upon so as to establish every provision of that Act is supported by a constitutional power and that no constitutional prohibitions were breached consistent with the requirements of the Office of Parliamentary Council Drafting Manuals requiring every provision of every Act must be supported by a constitutional power.
- (b) a copy of the Office of Parliamentary Council minute to the Attorney General and letter it is accompanied by for the Attorney General signature for the Biosecurity Act 2015 as per the drafting direction No. 4.10 Presentation of Bills for Royal Assent.

2 This letter sets out my decision on your request for access.

3 I am an authorised decision-maker under section 23 of the FOI Act.

Decision

4 For the reasons set out below I have decided to refuse your FOI request under section 24 of the FOI Act. A copy of the provisions of the FOI Act relevant to your request are at Attachment A.

5 Section 24 provides that if an agency is satisfied that a practical refusal reason still exists in relation to a request following a request consultation process, the agency may refuse to give access to documents in accordance with a request.

Reasons

The request consultation process

6 In response to your initial request on 16 March 2020, the Office of Parliamentary Counsel (OPC) sought to assist you in clarifying your request to resolve the practical refusal reason. As your clarification email of 24 March 2020 was still unclear, on 1 April 2020, the

FOI officer emailed you a written notice of her intention to refuse access to documents on the basis that a practical refusal reason existed in relation to your request. This correspondence advised you should contact the officer to discuss your request to consult with a view to removing the practical refusal reason.

7 On 2 April 2020, you advised that you would like to speak to the FOI officer to clarify your request. On 9 April 2020, the FOI officer, along with myself spoke with you by telephone to assist you to revise your request to clarify the documents that you sought access to. On 13 and 14 April 2020, you sent three emails revising your request of 16 March 2020. We refer to the request you sent on 14 April at 11.43am, which you referred to as the 'final revision'.

8 Following the request consultation process, in accordance with 24(1), I am satisfied that a practical refusal reason still exists in that the scope of your request is still unclear and I am not able to identify the specific documents you are requesting. In addition, a practical refusal reason exists in that the work involved in processing your request and identifying the relevant documents would substantially and unreasonably divert the resources of OPC from its other operations. The reasons for my decision, including consideration of the factors I am required to take into account in section 24AA(2), are outlined below.

Lack of sufficient information to identify the specific documents

9 Section 24AA provides that a practical refusal reason exists if the request does not provide sufficient information required to identify the document (see section 15(2)(b) of the FOI Act).

10 While your revised request on 14 April 2020 provided some clarification, the scope of part 1 is still unclear.

11 The Biosecurity Bill was developed over a number of years and was eventually passed as part of a package of 5 bills to provide for a regulatory framework to:

- (a) manage biosecurity risks, the risk of contagion of a listed human disease, the risk of listed human diseases entering Australian territory, risks related to ballast water, biosecurity emergencies and human biosecurity emergencies; and
- (b) give effect to Australia's international rights and obligations, including the International Health Regulations 2005, the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures, and the Convention on Biological Diversity 1992.

12 The consideration of legal questions occurs throughout the process of drafting legislation and questions may often be raised and responded to across a range of documents including drafting instructions, draft legislations and comments on these, email correspondence as well as more formal legal advice or briefing documents.

13 It is not clear if you intended your request to:

- (a) be confined to specific legal advice from Australian Government Solicitor and the Office of Constitutional Law about the Biosecurity Bill in the form it was eventually enacted as the Biosecurity Act 2015 (Biosecurity Act);

- (b) include all material related to constitutional consideration of drafting instructions and proposed sections of the Biosecurity Bill throughout its development over a number of years; or
- (c) also include discussion of constitutional questions related to the broader package of legislation of which the Biosecurity Act was a part.

14 Even if your request was confined to the narrowest option (the first option above), the work involved in identifying the specific documents relevantly within the scope of part 1 of your request would substantially and unreasonably divert the resources of OPC from its other operations. For the reasons discussed below, this is also a practical refusal reason under s 24AA(1)(a)(i).

Substantial and unreasonable diversion of resources

15 Section 24AA also provides that a practical refusal reason exists if the work involved in processing the request would ‘substantially and unreasonably divert the resources of the agency from its other operations’.

16 The word ‘substantial’ has previously been interpreted to mean severe, of some gravity, large or weighty or of considerable amount, real or of substance and not insubstantial or of nominal consequence. The use of the word ‘unreasonable’ has been interpreted to mean that a weighing of all relevant considerations is needed, including the extent of the resources needed to meet the request and considerations.

17 In determining whether processing the request would substantially and unreasonably divert OPC’s resources, section 24AA(2) requires me to have regard to the resources that would have to be used for the following:

- (a) identifying, locating or collating the documents within OPC’s filing system;
- (b) 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;
- (c) making a copy or an edited copy of the document; and
- (d) notifying of any decision on the request.

Substantial resources would be required

18 The Biosecurity Act was drafted over six years and involved at least two senior drafters, multiple versions of drafts and instructions, and a substantial number of emails and correspondence. The Biosecurity Act is over 700 pages long and four other Acts were in the package that accompanied it. As a result, there is a very large number of documents that could potentially fall within the scope of your request and would need to be reviewed. While it is difficult to be exact, I estimate the number of pages that would exist across OPC’s information holdings would be in the thousands. The nature of the material is technical and complex, with policy instructions and legal questions and advice, intertwined in the documents that would need to be reviewed.

19 There is not a discrete file or way to separate out the discussion of Constitutional issues from the policy instructions and administrative arrangements for the drafting process that would be included in the files of material held by OPC. Identification of relevant documents could be assisted by a key word search or other electronic query process. However, a keyword search for ‘constitution’ for example, would not capture all documents containing constitutional advice. To determine the documents that are captured by your request, an OPC officer with an understanding of the legislative process and legal issues would need to read the content and assess the substance of each document on file. Constitutional issues could have been discussed at any stage of the drafting process over the six year period.

20 OPC is a small office of around 100 staff to cover all of the legal drafting functions under the Parliamentary Counsel Act 1970, as well as publishing, editing and corporate services functions of the office. There is only one FOI contact officer who also has other responsibilities. The work in processing your request would require an OPC lawyer who is skilled in legal and constitutional issues. Taking that officer away from their ordinary work would involve a substantial diversion of OPC’s resources from its core legal drafting function. The impact would be particularly significant at this time, in view of OPC’s high workload involving the legislative responses to COVID-19.

21 If one person were to dedicate themselves to processing this request full time for even one week, this would substantially divert the resources of OPC from its other operations. In reality, this task may be expected to take much longer than this and would need to be someone senior enough to be a decision-maker or otherwise require further significant review by the FOI decision-maker.

Diversion of resources would be unreasonable

22 I also consider that processing your request would be an unreasonable diversion of OPC’s resources, having regard to:

- (a) the significant adverse effect this would have on the achievement of OPC’s other functions under the *Parliamentary Counsel Act 1970*; and
- (b) the fact that it is reasonable to expect that this material would likely be subject to legal professional privilege (LPP) and exempt from release under section 42(1) of the FOI Act.

23 Section 42(1) of the FOI Act exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of LPP. A document is exempt from disclosure on the ground of LPP if there exists a lawyer-client relationship and the document records confidential communications for the dominant purpose of seeking or providing legal advice. The documents you are seeking would comprise legal communications and advice for the dominant purpose of providing drafting instructions to OPC, or Parliamentary Counsel providing the instructing government agencies with draft legislation. By its nature as Constitutional advice, this would include advice from the Australian Government Solicitor and possibly the Office of Constitutional Law in the Attorney-General’s Department. As the Federal Court found in *State of New South Wales v Betfair* [2009] FCAFC 160, such communications would, on their face, attract LPP. There is not an evident basis to consider that waiver of such privilege has occurred generally. It is also

not the role for OPC as the legal adviser to make a decision to waive privilege in advice it has provided or received from a client agency or minister.

24 For OPC to be required to divert significant resources to deal with a request for documents that can reasonably be expected to be exempt is unreasonable. There is not an evident public interest in processing an extremely large request for which no or limited access to documents would result on a proper application of the FOI Act. I am satisfied this would be an unreasonable diversion of resources.

25 Accordingly, I am satisfied that the work involved in processing your request would substantially and unreasonably divert OPC's resources from its other operations as the Commonwealth's principal provider of legislative drafting and publishing services.

26 Having undertaken a request consultation process with you and being satisfied that a practical refusal reason exists in relation to your request under both s 24AA(1)(a) and (b), I have decided to refuse it under section 24(1) of the FOI Act.

Review rights

27 If you are dissatisfied with this decision, you are entitled to seek review available.

Internal review

28 Under section 54 of the FOI Act, you may apply for an internal review of the decision. Your application must be made by 30 days of you receiving this notice.

29 An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be addressed to:

By email: foi@opc.gov.au

By post: FOI Coordinator
Locked Bag 30
Kingston ACT 2604

30 If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

Information Commissioner review

31 Alternatively, under section 54L of the FOI Act, you can request that the Australian Information Commissioner review the decision without first going to internal review. Your application must be made within 60 days of you receiving this notice. More information is available on the Australian Information Commissioner's website www.oaic.gov.au.

32 You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commission:

By email: enquiries@oaic.gov.au

By post: Director of FOI Dispute Resolution
GPO Box 5218
Sydney NSW 2001

Yours sincerely



Stephen Campbell

General Manager Corporate Services

29 April 2020