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## Office of the Attorney-General

Your reference: MR14/00419

Ms Karen Toohey  
Assistant Commissioner  
Office of the Australian Information Commissioner

By email only: Kenneth.Richards@oaic.gov.au

27 November 2015

Dear Ms Toohey

### **MR14/00419 (Josh Taylor)**

I write in response to your letter dated 16 October 2015, in which you gave the Attorney-General's Office ("the AGO") notice under s 55V of the FOI Act to conduct further searches for documents falling within the scope of a request originally made by Mr Josh Taylor on 29 July 2014.

On 12 November 2015, Kenneth Richards in your office agreed to an extension of time to comply with the s 55V notice. The deadline was extended to Friday 27 November 2015.

### **The approach taken to the further searches**

The AGO suggests that the further searches required to be undertaken under s 55V should be reasonable in the circumstances of the request. Accordingly, we believe that receipt of a notice under s 55V does not modify the "reasonable steps" standard in s 24A(1)(a). More particularly, there does not appear to be anything to suggest that such a notice requires steps to be taken when those steps would give rise to a "practical refusal reason" under s 24AA. The AGO seeks clarification as to whether the effect of a s 55V notice is to require conduct that would substantially and unreasonably interfere with the performance of the Minister's functions.<sup>1</sup>

In addition, on my reading, s 55V(2) empowers the Information Commissioner only to require further searches. It does not seem to mention the production of documents arising from those searches. Accordingly, the AGO seeks clarification regarding the OAIC's request for 'copies of any documents found (either in electronic or hard copy form)', because, as I seek to explain below, I believe this would likely constitute a substantial and unreasonable interference with the functions of the Attorney-General

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<sup>1</sup> See FOI Act s 24AA(1)(a)(ii).

### **Relevant background**

It is important to specify the context in which the further searches have been undertaken in accordance with your notice. I should note at the outset that I am not a trained specialist in telecommunications or information technology. Nor are the other staff in the office.

The Attorney-General operates a smartphone that is taxpayer-funded. He also, at various times, operates desktop computers located in his electorate office, Commonwealth Parliamentary Offices in Brisbane and other capital cities and Parliament House office, and Sydney Law Courts office. Some of the desktop computers at these locations are used for secure communications. Some are connected to the Attorney-General's Department IT network. Others are not.

At any given time, the Attorney-General might use any of these devices to browse the internet, make voice or video calls, and send emails, text messages or other written communications. Given the nature of his position, a significant portion of the Attorney-General's time is taken up by telecommunication with colleagues, officers, agencies, staff and stakeholders.

On the interpretation that the OAIC seems to have adopted in your letter, Mr Taylor's request encompasses, at a minimum, information about all of the aforementioned communication activities, on all of the aforementioned devices. The information would include, at a minimum, dates and times, duration, telephone numbers or IP addresses or email addresses of parties involved, location details, and URLs (to the extent that they do not identify the content of a communication). It should be noted that at the time of processing, the AGO sought informal advice from the Attorney-General's Department on the question of what may constitute 'metadata' for the purposes of Mr Taylor's FOI request. I note that Mr Taylor relies on the determination of the Privacy Commissioner in *Ben Grubb and Telstra Corporation*,<sup>2</sup> and the OAIC appears to have adopted the Commissioner's broad definition of 'metadata'. Given the *Grubb* determination was handed down on 1 May 2015, the AGO did not have knowledge of the Commissioner's definition at the time this FOI decision was made. The AGO makes no comment, at this stage, about whether the *Grubb* definition should be accepted or adopted.

### **Further searches carried out**

I have limited the further searches carried out pursuant to your notice under s 55V to the following:

1. Identifying the telecommunications devices (discussed above) on which metadata of the kind you have outlined in your notice may be stored; and
2. Identifying the range of communications and activity captured by the definition of metadata apparently adopted in your notice.

### **Outcome of the further searches**

Having conducted the further searches, I am of the view that some information falling within the scope of your notice may be stored on the various devices operated by the Attorney-General. Whether the information is contained in "official documents of a Minister" within the statutory meaning of that term is a separate question that I do not propose to broach at this stage. I am further advised that some of the potentially relevant information may be stored on the devices themselves, while other information, such as the dates and times of some

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<sup>2</sup> [2015] AICmr 35 [24].

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emails, are stored on the Attorney-General's IT profile and are therefore not stored exclusively on one or other device. In other words, it would plainly be possible, in some instances, for the Attorney-General to log onto a computer in Sydney to retrieve the date and time of an email that he sent from a computer in Brisbane. On the other hand, the same is not necessarily true of other metadata, as you appear to have defined that term in your notice. For instance, the storage of some URLs appears to be device-specific. Plainly, that is also true of written communications such as text messages that are sent from, or received by, a particular phone. I do not have knowledge as to whether or not this information still exists.

### **Substantial and unreasonable interference**

In my view, to conduct any further searches or to attempt to retrieve all the information potentially covered by your s 55V notice would constitute a substantial and unreasonable interference with the functions of the Attorney-General. His personal attention would be required for significant periods of time, as his personal IT log-in details would be required, and his own communications would need to be examined. Even if security and privacy concerns could be overcome, so that at least parts of the job could be delegated to others, it remains the case that the Attorney-General's smartphone would need to be taken away from him, perhaps for a significant period of time. It is the AGO's view that processing the request in accordance with the OAIC's interpretation of its scope would hamper the performance of his official functions.

Moreover, any delegation of work would still involve a very substantial diversion of the resources of the office away from supporting the Attorney in the exercise of his functions. I can only assume that a substantial amount of consultation with IT experts would be required, many hours would need to be devoted to redaction of irrelevant or exempt material, and devices across a number of locations would need to be examined. Assuming (without agreeing) that the OAIC is right to suggest that the times, dates, recipients and senders of emails constitute telecommunications metadata within the scope of Mr Taylor's request, the task of gathering emails and redacting irrelevant material would alone be very resource-intensive. No doubt thousands of documents would be involved. In respect of each document, it would need to be considered whether third-party email addresses should be redacted for personal privacy reasons (s 47F) or for other reasons. I am of the view that third parties would also need to be consulted.

A similar but perhaps more complex process would probably need to be undertaken in respect of text messages and other written communications sent via smartphone. Other considerations would no doubt have to be taken into account with respect to URLs and IP addresses.

Given the Attorney-General's national security portfolio responsibilities, there would need to be consultation on whether the release of any particular metadata (as defined in your letter), or the release of a collection of metadata of this kind, would have security implications.

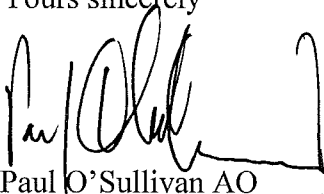
### **Submissions as to a "practical refusal reason"**

In light of the above, and if the OAIC proposes to adopt the expansive interpretation of metadata, the AGO requests the opportunity to make submissions as to why Mr Taylor's request must be refused under s 24.

The AGO is happy to discuss any specific aspects of your letter, or this letter, to progress the matter.

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Yours sincerely



Paul O'Sullivan AO  
Chief of Staff