



Australian Government

Department of Communications

FREEDOM OF INFORMATION REQUEST NO. 22-1415

Peter Lawler, Right to Know.org.au

**ACCESS DECISION
STATEMENT OF REASONS**

I, Elizabeth Lawler, Manager FOI, Office of the General Counsel of the Department of Communications (the **Department**):

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982* (the **FOI Act**) to make decisions about access to documents under the FOI Act; and
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision;

make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based and giving the reasons for my decision.

A. BACKGROUND

1. On 6 March 2015, Peter Lawler (the **Applicant**) emailed the Department via the Right to Know website, requesting access to the following documents (the **FOI request**) under section 15 of the FOI Act:

'Legal advice correspondence to the Minister referencing usage of the 'Wickr' app.'

B. DECISION

2. I have decided to refuse the Applicant's FOI request for access to documents under subsection 24A(1) of the FOI Act because, upon the Department having taken reasonable steps to find documents, I am satisfied that the documents do not exist.

C. FINDINGS ON MATERIAL QUESTIONS OF FACT

3. Comprehensive searches of the Department's document management and parliamentary correspondence systems were undertaken. Those searches did not

identify any relevant documents. Enquiries were made of legal staff of the Office of General Counsel and of staff in the Minister's Office. Those enquiries did not identify any documents relevant to the request.

D. MATERIAL ON WHICH MY FINDINGS OF FACT ARE BASED

4. I based my findings of fact on the terms of the Applicant's FOI request dated 6 March 2015.

E. REASONS FOR DECISION

5. In considering the reasons for my decision in relation to the Applicant's FOI request, I have had regard to the relevant provisions of the FOI Act and the following relevant Guidelines:
- the Freedom of Information Guidelines made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (the OAIC FOI Guidelines); and
 - the Department's *Guidelines for Processing Freedom of Information Requests*.

Section 24A – Requests may be refused if documents cannot be found, do not exist or have not been received

6. Subsection 24A(1) of the FOI Act relevantly provides:

Document lost or non-existent

- (1) *An agency or Minister may refuse a request for access to a document if:*
- (a) *all reasonable steps having been taken to find the document;*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found; or*
 - (ii) *does not exist.*

7. The FOI Act is silent about what an Agency must do in terms of searching for documents that may be relevant to a request, that is, it does not provide guidance as to the meaning of 'reasonable steps'. Paragraph 3.54 of the OAIC FOI Guidelines provides that:

Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practice in the agency's environment. At a minimum,

an agency or minister should take comprehensive steps to locate a document, having regards to:

- *the subject matter of the documents;*
- *the current and past file management systems and the practice of destruction or removal of documents;*
- *the records management systems in place;*
- *the individuals within an agency who may be able to assist with the location of documents; and*
- *the age of the documents.*

8. The Information Commissioner considers that, as a minimum, an agency should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.
9. The Department has undertaken comprehensive searches of the records management and parliamentary correspondence systems and spoken with staff with relevant qualification or knowledge of advice relevant to the request.
10. Therefore, I am satisfied the Department has taken all reasonable steps to find the documents that are the subject of the Applicant's FOI request and that the documents do not exist. Accordingly, I have decided to refuse the Applicant's FOI request under subsection 24A(1) of the FOI Act.

F. REVIEW RIGHTS

11. This decision is subject to review under sections 54 and/or 54L of the FOI Act. The OAIC's *FOI Fact Sheet 12 – Your review rights* is attached.



Elizabeth Lawler
Manager | FOI | Office of the General Counsel

8 April 2015