



19 June 2023

Jon Andre Vergara

BY EMAIL: foi+request-10028-91bddbae@righttoknow.org.au

In reply please quote:

FOI Request: FA 23/03/00576

File Number: FA23/03/00576

Dear Jon Andre Vergara

Freedom of Information (FOI) request – Access Decision

On 6 March 2023, the Department of Home Affairs (the Department) received a request for access to documents under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

1 Scope of request

You have requested access to the following documents:

I want to know if Planit Testing is an accredited visa sponsor and if they have any pending issues/sanctions placed on them as a sponsor.

On 9 March 2023 the Department issued you a notice under section 24AB of the FOI Act.

In response 28 March 2023 you amended the scope of your request to be:

I want to know if Planit Testing is an accredited visa sponsor and if they have any pending issues/sanctions placed on them as a sponsor (accredited sponsors from June 2022 - March 2023). This is for TSS visa subclass.

2 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access documents or to amend or annotate records.

3 Relevant material

In reaching my decision I referred to the following:

- the terms of your request
- the FOI Act
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access.

4 Decision

The Department can neither confirm nor deny documents exist under section 26 of the FOI Act 1982.

5 Section 26 of the FOI Act - Neither confirm nor deny the existence of documents

Section 26 of the FOI Act regulates the extent to which an agency is required to give reasons for a decision made under the FOI Act.

Section 26(2) of the FOI Act further provides that when providing an FOI applicant with a statement of reasons for a particular FOI decision, agencies are not required to include any information that would cause that statement of reasons (this decision letter) to itself be an exempt document under the FOI Act.

I have considered section 26 in relation to the existence of any documents the Department may or may not hold relating to Planit Testing against Section 47G of the FOI Act.

5.1 Section 47G of the FOI Act – Business Affairs

You have requested access to documents containing information relating to the Department's interactions with Planit Testing. I consider that providing any further particulars of the decision would cause this letter to be an exempt document, by the operation of section 47G of the FOI Act.

Section 47G(1)(a) of the FOI Act provides that documents are conditionally exempt if disclosure would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, in a case in which the disclosure of the information would or could reasonably be expected to unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs.

In this case, confirming the existence of documents relating to Planit Testing would have the effect of revealing that the company *had* been the subject of any issues or sanctions. This would be information about the business affairs of Planit Testing which could reasonably be expected to adversely impact that company.

Similarly, confirming the non-existence of documents relating to Planit Testing would have the effect of revealing that the Department has *not* received any issues or sanctions against the company, which would also reveal information about Planit Testing's business affairs.

I note that you have not provided any evidence of third party consent from Planit Testing to act on their behalf or access their business information. There is no information before me to indicate that you have a right of access to this information. The absence of third party consent weighs strongly against disclosure of the existence or non-existence of documents in scope of your request.

On the basis of the information before me, I am satisfied that disclosure of the existence or non-existence of the documents in scope of your request could reasonably be expected to have a substantial adverse effect on the business affairs of Planit Testing.

As I have made a finding that section 47G would apply to a decision letter which confirms the existence or non-existence of documents, I have considered whether it would be in the public interest to release this information.

5.2 The public interest – section 11A of the FOI Act

I have considered whether revealing the existence or non-existence of document/s in scope of your request would be contrary to the public interest (section 11A of the FOI Act).

In summary, the test is whether access to a decision letter revealing the existence or non-existence of documents would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether information relating to the existence or non-existence of document/s would do any of the following:

- (a) *promote the objects of this Act (including all the matters set out in sections 3 and 3A)*
- (b) *inform debate on a matter of public importance*
- (c) *promote effective oversight of public expenditure*
- (d) *allow a person to access his or her own personal information.*

Having regard to the above I am satisfied that:

- Access to information revealing the existence or non-existence of documents would promote the objects of the FOI Act.
- The subject matter of your request does not seem to have a general characteristic of public importance. The matter has a limited scope and, in my view, would be of interest to a very narrow section of the public.
- No insights into public expenditure will be provided through disclosure of the existence or non-existence of documents.
- The release of information revealing the existence or non-existence of documents would not allow you access to your own personal information.

I have also considered the following factors that weigh against the release of information revealing the existence or non-existence of documents:

- Disclosure of the information which is conditionally exempt under section 47G of the FOI Act could reasonably be expected to reveal and/or prejudice the business affairs and competitive commercial activities of Planit Testing. I consider that this would be contrary to the public interest and that this factor weighs strongly against disclosure.

- I am satisfied that if the Department were to routinely release information about whether or not it had received feedback or complaints about various entities it would seriously undermine public confidence in the Department's ability to receive, retain and manage confidential information. Any reticence of individuals or organizations to engage with the Department would be against the public interest, and this weighs strongly against disclosure.

I have also had regard to section 11B(4) which sets out the factors which are irrelevant to my decision, which are:

- a) *access to document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government*
- b) *access to the document could result in any person misinterpreting or misunderstanding the document*
- c) *the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made*
- d) *access to the document could result in confusion or unnecessary debate.*

I confirm that I have not taken into account any of those factors in this decision.

Upon balancing all of the above relevant public interest considerations, I have concluded that disclosing whether a documents within the scope of the request would be contrary to the public interest. Any statement of reasons that disclosed the existence or non-existence of a document within the scope of this request would itself be exempt from disclosure under the FOI Act.

5.3 Whether reasons or other particulars required to be given

I have determined that section 26(2) of the FOI Act applies to the request and that the Department is not required to state whether it has identified documents within the scope of the request or provide further reasons for its refusal decision.

In forming that view, I have taken into consideration the view of the Federal Court in *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited [2010] FCA 1442 (21 December 2010)*. In that case, Emmet J found that:

There is nothing in s 26(1) that would, in terms, require a decision maker to include in the notice of the decision a statement that a particular document existed that was exempt. It would be quite anomalous if, notwithstanding s 26(2), the decision maker would be required to disclose, in the notice of the decision, the fact that a document existed or did not exist, notwithstanding that that fact made the notice of the decision itself an exempt document within any of the provisions of Part IV of the FOI Act.

The Federal Court further considered that, while section 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) imposes an obligation in certain circumstances to give reasons for a decision, it does not apply to a decision referred to in section 26 of the FOI Act.

The provision of any further particulars of the decision would cause this letter to be an exempt document under section 47G of the FOI Act, and accordingly the Department is not required to provide further reasons for its decision, by the operation of section 26(2) of the FOI Act.

6 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

7 Your Review Rights

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

8 Making a Complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

- Phone 1300 363 992 (local call charge)
- Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Home Affairs as the relevant agency.

9 Contacting the FOI Section

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@homeaffair.gov.au.

Yours sincerely,

[Electronically signed]

Phil

Position No. 60157242

Authorised FOI Officer - Freedom of Information

FOI and Records Management Branch | Legal Group

Department of Home Affairs | www.homeaffairs.gov.au

Email foi@homeaffairs.gov.au