



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ23/00055

By email: [foi+request-10087-04b4ca3c@righttoknow.org.au](mailto:foi+request-10087-04b4ca3c@righttoknow.org.au)

## Freedom of Information Request – FOIREQ23/00055

Dear George,

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act). Your Freedom of Information (FOI request) was received by the Office of the Australian Commissioner (OAIC) on 21 March 2023.

I am writing to inform you of my decision.

I have identified one document within the scope of your request. I have made a decision to create one document under s 17 of the FOI Act and grant you access in full.

In accordance with section 26(1)(a) of the FOI Act, the reasons for my decision and findings on material questions of fact are provided below.

### Background

#### Scope of your request

On 21 March 2023, your FOI request sought access to the following information:

*The purpose of this request is to get a better understanding of how the actions of Commonwealth officials are affecting the allocation of the OAIC's scarce resources.*

*I would like to know how many extant IC review requests are before the OAIC solely on the ground of a deemed refusal decision (i.e. the principal officer of an agency or a Minister is taken to have refused access to a document because they did not provide a decision to an access applicant).*

*I would also like to know which agencies and Ministers have failed to provide decisions.*

*For example, if there are 10 extant IC review requests that have been lodged on the ground of a deemed refusal decision, and 2 of those are in respect of deemed refusal decisions from the principal officer of the Department of Prime Minister, and the other*

*8 are in respect of deemed refusal decisions from the Attorney-General, then please provide a documents showing that:*

*a) 2 IC review requests have been lodged in respect of deemed refusal decisions from the principal officer of the Department of Prime Minister; and*

*b) 8 IC review requests have been lodged in respect of deemed refusal decisions from the Commonwealth Attorney-General.*

*Under the Freedom of Information Act 1982, I request access to documents identifying the number of extant IC review requests as at 20 March 2023, broken down by agency (as that term is defined in section 4 of the FOI Act) or Minister, which have been lodged on the ground of a deemed refusal decision on the parts of the relevant principal officers of agencies or Ministers.*

*To the extent that it applies, I would appreciate it if you would deal with this FOI request in accordance with section 17 of the Freedom of Information Act 1982.*

*Despite having made a formal FOI request, my preference would be for the OAIC to provide the requested document pursuant to an administrative release of information, and I would be pleased to cooperate in any reasonable way to assist you in facilitating access to the documents requested.*

## Request timeframe

Your request was made on 21 March 2023. Your request was acknowledged by the OAIC on 23 March 2023.

This means that a decision on your request is due by 20 April 2023.

## Decision

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests on behalf of the OAIC.

Subject to the following provisions of the FOI Act, I have made a decision to create and grant access in full to one document.

## Reasons for decision

### Material taken into account

In making my decision, I have had regard to the following:

- your FOI request dated 21 March 2023
- the FOI Act, in particular section 3, 11, 11A, 15, 17, 24A and 26 of the FOI Act
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act to which regard must be had in performing a function or exercising a power under the FOI Act (FOI Guidelines)
- consultation with the line area of the OAIC in relation to your request

#### Documents cannot be found or do not exist – (section 24A)

Section 24A of the FOI Act requires the OAIC to take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist.

The FOI Guidelines explain at [3.88]:

The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

Agencies and ministers 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 practices in the agency’s operating environment or the minister’s office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents, and
- the record management systems in place
- the individuals within an agency or minister’s office who may be able to assist with the location of documents, and
- the age of the documents.

#### Searches Undertaken

The FOI Act requires that all reasonable steps have been taken to locate documents within scope of an FOI request.

In the recent Information Commissioner decision of *ACZ and Fair Work Ombudsman (Freedom of Information)* [2023] AICmr 10 (28 February 2023), the Commissioner determined the following as further considerations in relation to evidence of searches undertaken:

- The FOI Act does not specify who within an agency or minister's office must conduct searches for documents within the scope of a FOI request. There is also no provision under the FOI Act that provides that an FOI applicant can request how an agency or minister conducts searches.
- The FOI Guidelines at [3.89] advise agencies to take comprehensive steps including considering individuals within the agency who may be able to assist in locating documents.
- Forensic searching if there is a requirement to retrieve documents held in Outlook accounts or network drives of staff who are no longer employed by an Agency, or staff on leave or otherwise unable to be contacted.
- Whether it is reasonable to request individuals in the relevant business area to provide documents

The FOI Branch conducted searches for documents relevant to your request. Searches were undertaken by staff in the relevant business area who are involved in the matters related to your FOI request. Searches were conducted across the OAIC's document storage systems including the OAIC's case management system – Resolve.

Having regard to the above, I consider that all reasonable steps have been taken to find a document containing the requested information and I am satisfied that no documents within scope of your request exist.

#### Requests involving the use of computers (section 17)

Under section 17 of the FOI Act, if an FOI request is made for a document that could be produced by using a computer ordinarily available to the agency for retrieving or collating stored information, an agency is required to deal with the request as if it was a request for written documents to which the FOI Act applies.

The FOI Guidelines [at 3.204] explain that section 17 may require an agency 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. 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 (section 17(1)(c)(i)), or making a transcript from a sound recording (section 17(1)(c)(ii)); and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (section 17(2)).

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

Your request sought access to 'how many extant IC review requests are before the OAIC solely on the ground of a deemed refusal decision'. The FOI Branch advised me that the material sought is not available in a discrete form but instead is able to be produced in a written document through the use of a computer.

In light of this, a document has been created under section 17 in response to your request and is included in the schedule of documents attached. The FOI Branch was consulted in order to create a section 17 document in response to your request and advised the following:

*The table included in this document indicates that as at 20 March 2023, there were 556 IC review applications where the IC review applicant sought review on the basis that the applicant had not received a decision within the processing timeframes under the FOI Act.*

*Please note that this table captures applications that are in various stages of the IC review process, including:*

- *where the applicant has sought review and the OAIC is conducting ongoing or further preliminary inquiries with the respondent to ascertain whether the FOI request is deemed to have been refused*
- *where the applicant has sought review and the respondent has since made a revised decision under s 55G of the FOI Act providing access either in full or in part, which results in substituting the respondent's deemed decision as the IC reviewable decision, i.e. there is no longer a deemed decision. The table below therefore captures instances where the OAIC may be seeking confirmation from the applicant as to whether they wish to continue with the IC review following the revised decision under s 55G of the FOI Act, as well as capturing instances where the applicant wishes to continue with the IC review and the matter needs to proceed to a further review of the exemptions claimed.*

### **Disclosure log decision**

Section 11C of the FOI Act requires agencies to publish online document released to members of the public within 10 days of release, except if they contain personal or business information that would be unreasonable to publish.

I have not identified any personal or business information in the document that would be unreasonable to publish. Accordingly, I have made a decision to publish the document subject to your request on the OAIC's disclosure log.

### **Release of document**

The document is enclosed for release and a schedule describing the access decision I have made is provided as a separate document to this decision.

Please see the following page for information about your review rights.

Yours sincerely,

**Jessica Summerhill**

Lawyer

20 April 2023

## **If you disagree with my decision**

### **Internal review**

You have the right to apply for an internal review of my decision under Part VI of the FOI Act. An internal review will be conducted, to the extent possible, by an officer of the OAIC who was not involved in or consulted in the making of my decision. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

If you wish to apply for an internal review, please mark your application for the attention of the FOI Coordinator and state the grounds on which you consider that my decision should be reviewed.

Applications for internal reviews can be submitted to:

Office of the Australian Information Commissioner  
GPO Box 5288  
SYDNEY NSW 2001

Alternatively, you can submit your application by email to [foi@oaic.gov.au](mailto:foi@oaic.gov.au), or by fax on 02 9284 9666.

### **Further review**

You have the right to seek review of this decision by the Information Commissioner and the Administrative Appeals Tribunal (AAT).

You may apply to the Information Commissioner for a review of my decision (IC review). If you wish to apply for IC review, you must do so in writing within 60 days. Your application must provide an address (which can be an email address or fax number) that we can send notices to, and include a copy of this letter. A request for IC review can be made in relation to my decision, or an internal review decision.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC. For this reason, if you make an application for IC review of my decision, and the Information Commissioner is satisfied that in the interests of administration of the Act it is desirable that my decision be considered by the AAT, the Information Commissioner may decide not to undertake an IC review.

Section 57A of the FOI Act provides that, before you can apply to the AAT for review of an FOI decision, you must first have applied for IC review.

Applications for IC review can be submitted online at:

<https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR>  
10

Alternatively, you can submit your application to:

Office of the Australian Information Commissioner  
GPO Box 5288  
SYDNEY NSW 2001

Or by email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au), or by fax on 02 9284 9666.

### Accessing your information

If you would like access to the information that we hold about you, please contact [foi@oaic.gov.au](mailto:foi@oaic.gov.au). More information is available on the Access our information page on our website.