



26 May 2023

Our Reference: 2023/796

Bertha Binderschmitt

By email: [foi+request-10119-d13b2ae7@righttoknow.org.au](mailto:foi+request-10119-d13b2ae7@righttoknow.org.au)

Dear Ms Binderschmitt,

### **Your FOI Request – Decision letter**

I refer to your request to Comcare dated 27 March 2023, seeking access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

*...all emails, correspondence, and reports exchanged between Comcare Inspectorate employees and the NDIS Quality and Safeguards Commission's HR department or current Senior Executive Service (SES) officers, as well as former COO Mr. Jason Stott, former Commissioner Graham Head, and former Registrar/Advisor to the Commissioner Samantha Taylor.*

*The request pertains to communications from 1 July 2019 to today, 27 March 2023, concerning areas of concern within Comcare's area of responsibility, as well as any documentation relating to Comcare compliance action against the Commission, if applicable.*

*For clarity, the areas of concern may include, but are not limited to, the following examples of Comcare's Inspectorate responsibilities over an Australian Public Service (APS) agency, as outlined on the Comcare website:*

*Monitoring and enforcing compliance with the Work Health and Safety Act 2011 (Cth)*

*Providing advice and guidance on work health and safety matters*

*Investigating workplace incidents*

*Undertaking workplace inspections*

*Please note that the above examples are not an exhaustive list, and my request covers any other areas of concern within Comcare's jurisdiction. Moreover, I am not requesting any personal or private information of individual claimants, nor am I seeking any correspondence that pertains to specific claim data.*

On 30 March 2023, in response to my email, you further clarified the scope of your request as follows:

*To help facilitate the search for the requested documents, I am seeking correspondence from any Comcare Inspectorate employees to the following NDIS Quality and Safeguards Commission's SES officers, including their respective titles during the requested period:*

*Jason Gary Stott - COO*

*Lisa Claire Pulko - COO*

*Samantha Jane Taylor - Registrar, Acting Commissioner and advisor to the Commissioner.*

*Jeffrey Beng-Choon Chan - Senior Practitioner*

*Melissa Jane Clements - Acting Registrar*

*Robert William Griew - Complaints Commissioner*

*Lynne Maree Coulson Barr - Acting Complaints Commissioner*

*Sian Mary Leathem - Complaints Commissioner*

*Tracy Anne Mackey - Commissioner*

*Graeme Head - Commissioner*

*Simone Illett - Chief People Officer*

*Sushila Shandil - Former Acting Chief People Officer*

*Alec Forbes - Former Acting Chief People Officer*

*Joseph Hanna - Former Acting Chief Operating Officer*

*Miranda Bruynicks - Former Complaints Commissioner*

*(SES information obtained from transparency.gov.AU)*

On 4 May 2023, I consulted with you to revise the scope of your request since a practical refusal reason existed under section 24AA of the FOI Act. On 5 May 2023, you responded to say:

*I appreciate the concerns you have raised regarding the potential exemptions under the FOI Act, which may apply to the requested information. In order to address these concerns and facilitate the processing of my FOI request, I would like to offer the following suggestions to move forward:*

*1. Subsection 37(1): I fully understand the importance of not jeopardising ongoing investigations into breaches or possible breaches of law. To mitigate this concern, I am more than willing to exclude any documents that specifically pertain to active investigations. Instead, I would like to focus my request on completed investigations only. This approach should help ensure that no ongoing investigations are adversely affected by the release of information.*

*2. Section 47C: While I acknowledge that certain deliberative material may be exempt from release under the FOI Act, my primary interest lies in obtaining factual information and the final outcomes of any discussions, rather than the deliberative content itself. By focusing on these aspects, we can maintain the integrity of Comcare's decision-making processes while still promoting transparency and accountability in the public interest.*

*3. Section 45: I completely respect the need to protect confidential information and have no intention of causing any harm or discomfort to individuals or organisations involved. Should any documents contain confidential information, I would be content with receiving redacted versions where such information has been removed, thereby protecting the confidentiality of the parties involved.*

*4. Section 47E(d): I recognise that releasing certain information may have an adverse impact on Comcare's operations. However, my intention is to promote transparency and accountability in the public interest, which is a crucial aspect of maintaining trust and confidence in government agencies. If specific documents or information do indeed fall under this exemption, I kindly request a brief explanation as to why releasing such information would be contrary to the public interest. This approach will allow me to better understand the reasoning behind the decision and ensure that the public interest is upheld.*

*5. Section 47F: The protection of personal privacy is of utmost importance, and I share your concern in this regard. Please be assured that I am not seeking any personal information of individuals, and I am willing to accept redacted versions of the documents with any personal information removed. This will ensure that the privacy of individuals is not compromised while still allowing me to access the relevant information in the documents.*

*I hope these suggestions serve to address your concerns and facilitate the processing of my FOI request. I believe that refining the scope of my request in this manner will strike a balance between promoting transparency and upholding the exemptions provided by the FOI Act. Please do not hesitate to contact me if you require any further clarification or modifications.*

You further emailed Comcare on 6 May 2023, seeking to add more documents to the scope of this request. I note this email was taken to be a new request, and was assigned reference number 2023/1250. Your request dated 6 May will be processed separately.

### **My decision**

I have decided to **refuse access** to your request under section 24(1) of the FOI Act because a practical refusal reason still exists under section 24AA of the FOI Act.

I am satisfied that the work involved in processing your revised request would substantially and unreasonably divert the resources of Comcare from its other operations as specified in section 24AA(1)(a)(i) of the FOI Act.

The reasons for my decision, including the relevant sections of the FOI Act, are set out in **Attachment A**.

### **Review rights**

If you disagree with any part of the decision you can ask for a review. There are two ways you can do this. You can ask for an internal review from within Comcare, or an external review by the Office of the Australian Information Commissioner. See **Attachment B** for more information about how arrange a review.

### **Further assistance**

If you have any questions please email [foi@comcare.gov.au](mailto:foi@comcare.gov.au).

Yours sincerely

Sam  
Authorised FOI Decision-maker  
Statutory Oversight Team



## REASONS FOR DECISION

### Request consultation process

On 4 May 2023, I wrote to you notifying you of my intention to refuse your request for access to documents because a practical refusal reason existed under section 24(1) of the FOI Act. I provided you with a notice under section 24AB of the FOI Act.

The practical refusal reason was that the work involved in processing the request would substantially and unreasonably divert the resources of Comcare from its other operations as specified in subsection 24AA(1)(a)(i) of the FOI Act.

The notice gave you an opportunity to revise the scope of your request so as to remove the practical refusal reason.

On 5 May 2023, you responded to the consultation notice with a very limited change in scope (excluding only documents relating to ongoing investigations). On 6 May 2023, you requested additional documents be processed as part of your request.

In a practical sense, only point '1' of your revised request modifies the scope of your request, by excluding documents relating to any ongoing investigations. The remainder of your email addresses your willingness to receive redacted copies of information that falls within the FOI exemptions.

### Information Considered

In reaching my decision I have considered:

- your original request dated 27 March 2023;
- correspondence with you on 30 March, and 4 & 5 May 2023;
- the documents that fall within the scope of your request;
- consultations with Comcare officers about:
  - the nature of the documents;
  - Comcare's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**); and
- the FOI Act.

### Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act.

Following the request consultation process outlined above, in accordance with section 24 of the FOI Act, I have decided to refuse your request as I am satisfied that a practical refusal reason still exists in that the work involved in processing your request would substantially and unreasonably divert the resources of Comcare from its other operations.

#### Practical refusal reason

Section 24AA of the FOI Act provides that a practical refusal reason exists in relation to a request for a document if the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations.

The word 'substantial' has 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.

In determining whether processing a request would substantially and unreasonably divert Comcare's resources, section 24AA(2) of the FOI Act provides that an agency must have regard to the resources that would have to be used for the following:

- a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;
- b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:
  - i. examining the document; or
  - ii. 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 any interim or final decision on the request.

Paragraph 3.117 of the Guidelines relevantly provides:

*Other matters that may be relevant in deciding if a practical refusal reason exists include:*

- *the staffing resources available to an agency or minister for FOI processing*
- *whether the processing work requires the specialist attention of a minister or senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities*
- *the impact that processing a request may have on other work in an agency or minister's office, including FOI processing*

- *whether an applicant has cooperated in framing a request to reduce the processing workload*
- *whether there is a significant public interest in the documents requested...*

In accordance with section 24AA(3) of the FOI Act, I did not consider your reasons for requesting access to the documents.

*Would the processing of your request substantially divert Comcare's resources from its other operations?*

As identified in my consultation notice dated 4 May 2023, you were notified that there were 1,501 pages of documents within the scope of your request. You revised the scope of your request slightly during the consultation process to exclude documents from ongoing investigations, which I am satisfied has reduced the scope of your request minimally, from 1,501 to 1,392 pages of documents.

In addition, I note that the relevant business area has recently identified a further 427 pages that fall within the scope of your request. This means that 1,819 pages of documents fall within the scope of your revised request.

I have undertaken a sampling exercise of approximately 10% of the documents (188 pages) to accurately assess the complexity of the material contained within the documents and confirm whether the work involved in processing the request would constitute a substantial and unreasonable diversion of resources from Comcare's other operations.

My sample of documents included a variety of the different types of documents which fall within the scope of your revised request. I am satisfied that the sample is representative of the request more broadly.

My review of the sample identified a number of exemptions under the FOI Act which would likely apply to the documents, including:

- information that is deliberative in nature (section 47C);
- information that, if released, would found an action by a person for breach of confidence (section 45 exemption);
- information that, if released, would, or could reasonably expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Comcare, and release of which would be contrary to the public interest (section 47E(d) conditional exemption); and
- information that relates to the personal privacy of individuals (section 47F conditional exemption).

Having regard to the sample of documents falling within the scope of your request, I am satisfied that the documents contain significant sensitivities, meaning they will need to be reviewed carefully, and where necessary, sensitive information will need to be removed. I estimate that this process will

take a decision-maker approximately 2 and a half minutes per page to consider and redact pages that are likely to be exempt in part or in full.

Using the averages identified above, I estimate that processing the requested documents would require approximately 100 hours. Factoring in additional time for writing a decision, scheduling the documents, and consulting with third parties, I am satisfied that it would take over 125 hours to process your entire request.

The Administrative Appeals Tribunal recently found in *Cambridge; Chief Executive Officer, Services Australia and (Freedom of information)* [2021] AATA 1142 and *Urquhart; Chief Executive Officer, Services Australia and (Freedom of Information)* [2021] AATA 1407 that, even for Services Australia (being one of the largest agencies in the Commonwealth), processing requests which would take 88.5 and 118.51 hours respectively would involve a substantial diversion of that agency's resources. Therefore, I am satisfied that processing a request in excess of 125 hours would clearly be a substantial diversion of Comcare's resources, especially noting its relative size compared to Services Australia.

Would the processing of your request unreasonably divert Comcare's resources from its other operations?

In *Dreyfus and Attorney-General (Commonwealth of Australia)* [2015] AATA 995, Jagot J (at [43]) observed that the determination of what is reasonable "... is a question of fact and degree which calls for a balancing of all the legitimate interests ...".

Based on the estimated hours it would take to process your request, I am satisfied that Comcare staff would be unreasonably diverted from their other operations. Specifically, staff from Comcare's FOI team would need to spend a substantial amount of time working on your FOI request to process and finalise a decision within the statutory timeframe set out in the FOI Act. While undertaking the work involved in this request, these staff would not be able to undertake their other functions, including but not limited to investigating privacy matters, managing complaints from stakeholders, releasing claim documents on request, and managing other FOI requests. In addition, processing the request would require additional assistance and input from Comcare's Regulatory Operations Group, which would limit their ability to undertake their usual regulatory inspections and investigations.

I have considered that the nature of your request is quite broad, and you have not cooperated in revising the request in such a way as to significantly reduce the processing workload; in fact, you sought to add further documents to your request two days after receiving a notice of intention to refuse under s24AB.

I am satisfied that processing your request would substantially and unreasonably divert Comcare's resources from its other operations, including assessing and managing claims for compensation, investigating Work Health Safety matters, and the processing of other FOI requests received by Comcare.

**Conclusion**

In summary, I am satisfied that the work involved in processing your revised request would substantially and unreasonably divert the resources of Comcare from its other operations,



namely its regulatory functions under the *Work Health and Safety Act 2011*, its functions managing compensation under the *Safety, Rehabilitation and Compensation Act 1988*, and the processing of other FOI requests.

I have found that a practical refusal reason exists in relation to your revised request for access to the documents. Accordingly, I have decided to refuse your request under section 24(1) of the FOI Act.



## INFORMATION ON RIGHTS OF REVIEW

### *FREEDOM OF INFORMATION ACT 1982*

#### **Application for review of decision**

The *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of this decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of this decision by:

- (i) an internal review officer within Comcare; or
- (ii) the Information Commissioner.

#### **Internal Review**

If you apply for internal review, it will be carried out by a different decision-maker who will make a fresh decision on your application. An application for review must be:

- made in writing;
- made within 30 days of receiving this letter; and
- sent to the postal or email address shown in this letter.

No particular form is required, but it is desirable to set out in the application the grounds upon which you consider the decision should be reviewed.

If the internal review officer decides not to grant you access to all of the documents to which you have requested access, you have the right to seek a review of that decision by the Information Commissioner. You will be further notified of your rights of review at the time you are notified of the internal review decision.

Please note that if you apply for an internal review and a decision is not made by an internal review officer within 30 days of receiving the application, you have the right to seek review by the Information Commissioner for a review of the original FOI decision on the basis of a 'deemed refusal' decision. An application for Information Commissioner review in this situation must be made within 60 days of the date when the internal review decision should have been made (provided an extension of time has not been granted or agreed).

#### **Information Commissioner review**

You must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

Online: [www.oaic.gov.au](http://www.oaic.gov.au)  
Post: GPO Box 5218, Sydney NSW 2001  
mail: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

If a person has sought an internal review and no result of that review is provided within 30 days, then the applicant may apply to the Information Commissioner to review the matter.

An application form is available on the website at [www.oaic.gov.au](http://www.oaic.gov.au). Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

### **Complaints to the Information Commissioner or the Commonwealth Ombudsman**

You may complain to either the Commonwealth Ombudsman or the Australian Information Commissioner about action taken by Comcare in relation to your request. The Ombudsman will consult with the Australian Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone: 1300 362 072 (local call charge)  
Email: [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

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

Phone: 1300 363 992 (local call charge)  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

No particular form is required to make a complaint to the Ombudsman or 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 Comcare as the relevant agency.