



Australian Government

Comcare

5 July 2023

Our reference: 2023/1578

Bertha Binderschmitt

By email: foi+request-10119-d13b2ae7@righttoknow.org.au

Dear Bertha Binderschmitt

Your request for Internal Review – Decision letter

I refer to your email dated 5 June 2023, in which you requested an internal review of a decision made by Comcare on 26 May 2023 in response to a request under the *Freedom of Information Act 1982* (the **FOI Act**).

Background and original decision

On 27 March 2023 you requested access under the *Freedom of Information Act 1982* (the **FOI Act**) to the following documents:

...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*



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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 you 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

Comcare provided you with the original decision on your request on 26 May 2023. Our reference for this decision is **2023/796**.

The original decision maker decided to **refuse access** to your request under section 24(1) of the FOI Act because a practical refusal reason existed under section 24AA of the FOI Act. That reason was that the work involved in processing your 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.

Scope of this internal review

On 5 June 2023, you made a request for internal review. Your request for internal review was made in the following terms:

I am writing to request an internal review of the decision made regarding my Freedom of Information (FOI) request, submitted on 27 March 2023. I respect the complexity of your work and understand the decision has been taken after careful consideration. However, I believe there are critical points that may have been overlooked in the decision-making process, and hence, I would like to express my disagreement with your decision.

1. Misinterpretation of Applicant Cooperation: During the consultation process, I earnestly attempted to cooperate by modifying the scope of my request to minimise the potential



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strain on Comcare's resources. Notably, I revised the request to exclude documents relating to ongoing investigations. Although this reduction was deemed minimal, it should be taken into account that the exclusion aimed at streamlining the processing. The request to include a few related documents was under the belief that the existing parameters of my request would cover them and they would not drastically increase the overall processing workload.

2. Overestimation of Processing Time: While I recognise that the reference to the cited cases (Cambridge; Chief Executive Officer, Services Australia and Urquhart; Chief Executive Officer, Services Australia) was an attempt to draw a parallel, equating Comcare's capacity with Services Australia may not be an appropriate measure, considering their relative sizes and operational complexities.

3. Diminishment of Public Interest: The FOI Act was designed to uphold the principles of transparency and accountability, fostering public confidence in governmental operations. My request was aimed at accessing documents of significant public interest, the disclosure of which would enhance Comcare's transparency and promote public understanding of its functions and decisions. This public interest consideration should be balanced against the projected administrative resource allocation especially in light of the increased attention to this matter over the last week in the media.

4. Underutilisation of Processing Alternatives: I am willing to discuss alternatives to facilitate processing the request. This includes the phased release of documents, further narrowing the scope of the request, or excluding specific categories of documents that might prove to be significantly complex to process. I intend to work collaboratively with Comcare to achieve a balance between my right to access the requested information and the preservation of Comcare's resources.

5. Overemphasis on Impact on Other Operations: The decision significantly impacts Comcare's FOI team and Regulatory Operations Group due to the processing of my request. However, it lacks a detailed analysis of the tangible effects these operations would experience. An elaborate justification is required to validate this point.

6. Assumption of Extensive Redaction: The decision seems to adopt a broad-brush approach to redaction across all documents. It would be more proportionate to evaluate each document on its merit and redact only the portions of the documents where necessary.

7. Disregard for Efficiency-enhancing Strategies: The decision lacks any discussion about efficiency-enhancing strategies such as leveraging technology for redaction, using existing document management systems for quicker location and collation, or distributing the workload amongst a larger team over a more extended period.

In light of the above points, I respectfully request you to reconsider your decision. I stand ready to engage in constructive discussions to explore potential solutions that respect both my right to access information and Comcare's operational needs.

My Internal Review Decision

I am authorised to make decisions under section 23 of the FOI Act, including internal review decisions under section 54C of the FOI Act.



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I have decided to affirm the original decision and to **refuse access** to your request under section 24(1) of the FOI Act because a practical refusal reason continues to exist under section 24AA of the FOI Act.

I have considered your submission and note your willingness to continue to engage in further consultations to remove the practical refusal reason that has resulted in the refusal decision. It is not appropriate to undertake further consultations to narrow the scope of a request that is subject to an internal review decision. However, you may wish to make a new FOI request and continue to consult with Comcare to narrow the scope of that request.

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 this internal review decision you can ask for an external review by the OAI. See **Attachment B** for more information about how to arrange a review.

Further assistance

If you have any questions, please email foi@comcare.gov.au.

Yours sincerely

Stephanie

Legal Adviser
Statutory Oversight Team
Comcare



REASONS FOR DECISION

YOUR REQUEST

Your original request, dated 27 March 2023, and clarified on 30 March 2023, was made in the following terms:

...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.

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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

On 5 June 2023, you requested an internal review of Comcare's decision dated 26 May 2023.

INFORMATION CONSIDERED

I have considered the following in making my decision:

- your original request dated 27 March 2023;
- clarification of your request dated 30 March 2023;
- your response to the request to revise the scope of your request dated 5 May 2023;
- your request for internal review dated 5 June 2023;
- consultations with Comcare officers about:
 - the nature of your request;
 - Comcare's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **Guidelines**); and
- the FOI Act.

REASONS FOR MY DECISION

I have conducted an internal review in relation to the original decision and made a fresh decision on your FOI request.

The scope of your request

Your request for internal review indicates you believe that there are critical points that may have been overlooked in the decision-making process.

Practical refusal reason – Section 24AA of the FOI Act

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.

Relevant Legislation and Guidelines

24AA When does a practical refusal reason exist?

(1) For the purposes of section 24, a **practical refusal reason** exists in relation to a request for a document if either (or both) of the following applies:

- (a) the work involved in processing the request:
 - (i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or



- (ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister’s functions;
- (b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).

(2) Subject to subsection (3), but without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister 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;
- (d) notifying any interim or final decision on the request.

(3) In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:

- (a) any reasons that the applicant gives for requesting access; or
- (b) the agency’s or Minister’s belief as to what the applicant’s reasons are for requesting access; or
- (c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

In addition to the legislation, 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...

Analysis of legislation and guidance

Section 24AA allows for a practical refusal when the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations. Your request captured 1,392 pages of documents.

Having reviewed the broad nature of the documents, and more closely examining a sample of the documents, I am satisfied that the work involved in processing the request would substantially and unreasonably divert Comcare’s resources from being able to undertake its other operations.



I have carefully considered the sampling exercise undertaken in the original request and determined that the sample of documents sufficiently captures the nature of documents contained in the request and it was unnecessary for me to undertake a further sampling exercise.

Your request included all emails and correspondence between Comcare and a large number of people working at the NDIS Quality and Safeguards Commission. This would require consultations with those people as their personal information and opinions may be included in the documents. Further, noting that the *Work Health and Safety Act 2011* contains coercive powers for Comcare Inspectors to be able to carry out their duties, the documents must be examined to identify confidential material that may be included alongside factual information in those documents.

The sample of documents satisfied me that examining 1,392 pages for complex sensitivities and undertaking consultations with numerous personnel would require extensive work and satisfies the requirements of s24AA(1)(a)(i).

I have not considered any of the factors listed in s24AA(3) in making my decision. You have not been asked for any information about why you made your FOI request, and no charges were estimated.

As you are aware, the Guidelines also provide matters for a decision maker to consider when deciding whether to issue a practical refusal reason under s24AA. Your request for internal review contains details of why you believe these matters are not relevant to the decision. I have dealt with your contentions below.

Staffing Resources and Specialist Officers

You have stated that equating Comcare's capacity with Services Australia, when estimating processing time is not an appropriate measure, considering the relative sizes and operational complexities.

The way in which Comcare estimates the processing time for an FOI request is in accordance with the Guidelines. Comcare is a small agency with a unique Regulatory function that results in a greater number of requests for information than much larger Commonwealth agencies. Our operational complexities as the Work Health and Safety Regulator and the Safety Rehabilitation and Compensation agency means that the Freedom of Information team and the Regulatory Operations Group would be required to divert their resources from their other functions and activities in order to process your request.

It follows that Comcare's capacity to process a large request is significantly smaller than that of a larger agency.

Cooperation of the Applicant

I understand that you clarified your request in order to assist with the search for documents, and that you revised your request to reduce the scope. I note that you later made an additional request which was considered separately and will not be considered as part of this internal review. Your cooperation in attempting to reduce the scope of your request is appreciated and did not affect the decision to issue a practical refusal reason. Your revision did not significantly reduce the number of pages included in your request and therefore it did not have an effect on being able to process the request without causing a substantial and unreasonable diversion of resources.



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Significant public interest in the documents

You have stated that your request would enhance Comcare's transparency and promote public understanding of its functions and decisions. Comcare's website sets out Comcare's functions and activities and you can subscribe to Comcare's email newsletter and social media channels for up to date news and decisions about Comcare's activities.

Section 24AA does not require me to consider the public interest test, and I am not required to decide whether, on balance, the public interest in publishing the documents is greater than the substantial and unreasonable diversion of resources. However, I am satisfied that there is not a significant public interest in the specific documents requested, as there is information about Comcare's Regulatory functions available on our website.

Conclusion

I have decided to uphold the original decision and **refuse access** to your request under section 24(1) of the FOI Act because a practical refusal reason continues to exist under section 24AA 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 section 54L of the FOI Act, you can apply for a review of this decision by the Information Commissioner.

Information Commissioner review

You must apply in writing within 30 days of the receipt of this decision letter and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au

Post: GPO Box 5218, Sydney NSW 2001

mail: enquiries@oaic.gov.au

An application form is available on the website at 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

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

Phone: 1300 363 992 (local call charge)

Email: 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.