



18 April 2017

Our reference: LEX 28482

Mr Graeme Smith

By email: foi+request-3039-73e673e4@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request – Internal Review Decision

I refer to your correspondence, dated 16 March 2017 and received by the Department of Human Services (the **department**) on that same date. You have sought an internal review of the department's decision on 14 March 2017 in relation to your original request (LEX 27077) (the **Primary Decision**).

I am authorised under subsection 23(1) of the FOI Act to make internal review decisions under section 54C of the FOI Act. My decision and reasons are set out below.

Background

The department received your original request on 11 February 2017 for access under the *Freedom of Information Act 1982* (the **FOI Act**) to the following documents:

'....

The Minister (Mr Tudge) has stated that the main concern of this 'system' is to ensure the all claimants receive the correct amount: to quote his words "no more and no less".

...

This statement indicates that as well as identifying over payments ("no more"- the value of \$300m has been publically quoted) the system must also identify occasions when there have been underpayments (no less).

I request that you provide me with details as to:

what value of underpayments have been identified by the process?

Additionally, what value of reimbursements have been sent out to correct this?

On 16 March 2017, the department provided you with the Primary Decision to refuse your request, on the basis that all reasonable steps had been taken to locate the documents you have requested and they do not exist.

On 16 March 2017, you requested an internal review of the Primary Decision. You stated:

'I am writing to request an internal review of Department of Human Services's handling of my FOI request 'Value of underpayments identified in the Centrelink Debt Recovery Process (wrt quoted overpayment figure of \$300million).'

The Minister (Mr Tudge) has publically stated that his main concern is to ensure the all claimants receive the correct amount: to quote his words "no more and no less". He has publically quoted a figure (\$300 million) relating to overpayments detected, this indicates that a process exists for its calculation. (Actual payment - due payment)

There are only three possible states for such a calculation:

1. Positive-overpayment (\$ figure quoted by Minister Tudge), 2. Zero-Accurate payment made, 3. Negative-underpayment

If the system checks the correct amount is paid 2. (the value of these must be known) and Mr Tudge has quoted a figure for underpayment of 1. as \$300million, then logically the figure I seek 3. is the remainder.

Total budget spend less (1. and 2.) will give a figure for underpayments (3).'

The department acknowledged your request for an FOI Internal Review on 20 March 2017.

Internal Review Decision

I have reviewed the Primary Decision and made a fresh decision on your request. Accordingly, I have decided to refuse your request for access under section 24A of the FOI Act. This is on the basis that all reasonable steps have been taken to locate the requested documents and the department is satisfied that no such documents exist.

The reasons for my decision, including the relevant sections of the FOI Act, are discussed below.

Reasons for my decision

In reaching my decision, I took into account:

- the terms of your original request dated 11 February 2017;
- the Primary Decision dated 14 March 2017;
- the terms and submissions of your internal review request dated 16 March 2017;
- documents falling within the scope of your request;
- consultations with department officers about:
 - the nature of the documents;
 - the department'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.

Section 24A of the FOI Act – the Documents do not exist

Section 24A of the FOI Act provides that:

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document; and

- (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.

The Primary Decision advised that the Debt Management and Compliance Risk Branches do not produce reports on the value of underpayments or reimbursements. The data is held on individual records and is not compiled for broader analysis.

For the purpose of this internal review, I have reviewed your original request and the responses from the relevant business areas in relation to the original request, and I have determined that no compiled reports exist which contain the information that you originally requested. On the basis of these further investigations and consultations, I am satisfied that in accordance with section 24A of the FOI Act:

1. all reasonable steps have been taken to find the documents; and
2. the documents cannot be located or do not exist.

Section 17 of the FOI Act

Section 17 of the FOI Act relevantly provides that:

- (1) Where:
 - (a) a request ... is made in accordance with the requirements of subsection 15(2) to an agency;
 - ...
 - (c) the agency could produce a written document containing the information in discrete form by:
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency;

The agency shall deal with the request as if it were requested for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

Paragraph 3.185 of the Guidelines provides:

'...the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available ... [T]he computer or other equipment ... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.'

I affirm the Primary Decision in that your request for data would require a computer programmer to write a program that does not currently exist within the department. In order to provide the requested data, numerous approvals would need to be obtained from relevant areas to develop the computer program required. It would then take a significant amount of time to extract the data which would be costly to the department.

The decision of the Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2012] FCA 720 (affirmed by the Full Court of the Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67) makes it clear that where a new computer program is required to be written to produce a written document, then a computer is not being used in a manner that is 'ordinarily available' to the agency because of the

extraordinary steps that is required to be taken. In considering the obligations of the Australian Taxation Office (**ATO**), the Court held (at [22]):

The documents requested by Collection Point were not capable of being produced by the ATO by the use of a computer, being a use that is ordinarily available to the ATO for retrieving and collating stored information. Instead, to answer the request, the ATO would have been required to use a computer in an extraordinary manner, as compared to the ordinary processes available for the retrieval and collation of such material. Put simply, the ATO would be required to use a computer in a manner other than that which is ordinarily available to it.

I have further investigated this matter and reviewed the responses from the relevant areas within the department. Consistent with the Primary Decision, I am satisfied that to produce a document containing data relevant to your request, the department would not be using a computer in a manner that is ordinarily available.

Based on the above, I uphold the Primary Decision and I am satisfied that section 17 of the FOI Act does not apply to your request, as the department cannot use an ordinarily available computer system to produce a written document containing the information you have requested.

If you have any questions please email FOI.LEGAL.TEAM@humanservices.gov.au.

Yours sincerely

Lisa

Authorised FOI Decision Maker
Freedom of Information Team
FOI and Litigation Branch | Legal Services Division
Department of Human Services



Attachment A

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 the Information Commissioner.

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
Post: GPO Box 5218, Sydney NSW 2001
Email: 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 Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.