



Our reference: FOIREQ17/00018

Dear Ms Pane

Outcome of your Freedom of Information request

I refer to your request for access to documents under the *Freedom of Information Act 1982* (Cth) (the FOI Act) received by the Office of the Australian Information Commissioner (OAIC) on 23 March 2017.

Decision on your request

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

I have decided to refuse your request under s 24A of the FOI Act on the basis that the documents you seek do not exist.

Document does not exist or cannot be found (s 24A)

An agency or Minister may refuse a request if it has taken 'all reasonable steps' to find the document requested, and is satisfied that the document cannot be found or does not exist (s 24A(1)).

On receiving your request this office undertook searches for documents within the scope of your request. You requested two types of documents – case management reports and formal policies.

Case management reports

You requested the following case management reports:

1. Reports that show the status of the 32 conventional privacy complaints aged 361 days or older open as at 21 December 2016 (as in the report run by the OAIC and provided to you previously) which includes the following information:
 - a. How many are still open and yet to be resolved.
 - b. For each one, how many days they have been open.
 - c. For any that have been closed, the number of days each one was open and the case outcome recorded.

2. Reports that show the status of the 18 IC Reviews aged 360 days or older open as at 13 December 2016 (as in the report run by the OAIC and provided to you previously) which includes the following information:
 - a. How many are still open and yet to be resolved.
 - b. For each one, how many days they have been open.
 - c. For any that have been closed, the number of days each one was open and the IC decision outcome recorded.

Section 24A – documents do not exist

The relevant staff member with knowledge of the reporting capacity of our case management system has confirmed that the OAIC does not have established reports that would provide the information you have requested.

The reports created in December 2016 for your previous FOI request (Open privacy complaints – age by month and Open IC Reviews – age by month) are ‘point in time’ reports. They count the cases open for a particular period (e.g. longer than 360 days). The OAIC regularly uses this type of report and it is available to staff on our case management system. This particular report shows the cases open for a certain number of days, as at the date of the report.

The report released to you in December contained no case numbers to identify which cases were open longer than 360 days on the date of the report. The OAIC is unable to reproduce this report now to identify the specific cases open longer than 360 days in December 2016 and therefore to determine their current status.

I am satisfied that case management reports falling within the scope of your request do not exist for the purposes of s 24A of the FOI Act.

When information is stored in electronic form, s 17 of the FOI Act requires the agency to undertake a search of its databases to identify whether a written document could be produced from its database before the request can be refused under s 24A.

Section 17 – Requests involving use of computers etc.

Under s 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 a written document to which the FOI Act applies.

In *Collection Point Pty Ltd v Commissioner of Taxation*, the full bench of the Federal Court looked at whether a computer is ordinarily available to an agency. The Court took into account the age of the provision and the fact that at this time, a computer being ordinarily available would include its software. The Court decided that:

If a new computer program is required to be written to produce the document then a computer is not being used in a manner that is ordinarily available to the agency because an extraordinary step is required to be taken.¹

The Court confirmed the view of the Administrative Appeals Tribunal that:

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.²

The OAIC has a case management system that contains a number of reports the OAIC can create and which are ordinarily available to OAIC staff (such as the report released to you in December 2016).

A report, created in April 2017, showing the outcome of cases open longer than 360 days in December 2016, is not a report that is ordinarily available in the OAIC's case management system.

The service providers who assisted the OAIC set up the case management system in 2012 implemented the system with certain reports available to OAIC staff. The report you have requested is not one of them.

The OAIC does not approach its service provider to create new reports in the case management system as part of its day-to-day activities. The OAIC would need to take the extraordinary step of requesting its service provider to create a new report in the case management system to satisfy your request. This is not required under s 17(1) of the FOI Act.

For the above reasons, I am satisfied that the reports you requested cannot be produced by a computer or other equipment ordinarily available to the OAIC. As a result, the OAIC is not required to create a document under s 17(1) of the FOI Act.

Formal policies for cases open for an extended time

You have also requested:

... any formal policy the OAIC may have, with respect to any review procedure it may have, to any privacy complaint or IC Review that remains open for an extended timeframe (such as a year) ... if any formal policy exists.

The four (4) Directors in our Dispute Resolution Branch, who manage our privacy complaints and IC Review teams, were asked for documents relevant to this part of your request. These Directors have confirmed there is no formal policy.

¹ *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67 [20].

² *Ibid* [22].

I am satisfied that formal policies falling within the scope of your request do not exist for the purposes of s 24A of the FOI Act.

However, the Privacy Directors have confirmed that they take steps to ensure cases open for longer than 12 months are prioritised, scrutinised regularly and actioned appropriately. This includes reviewing old matters in regular section management meetings and Directors focusing on these cases when conducting file reviews with individual case officers.

Further, the FOI Director has confirmed that matters over 12 months are prioritised and are discussed in team meetings as well as in individual file review meetings with the relevant case officers.

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.

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, it is likely that the Information Commissioner will decide (under s 54W(b) of the FOI Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the AAT.

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 internal review or IC review can be submitted to:

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Alternatively, you may submit your application by email to foi@oaic.gov.au, or by fax on 02 9284 9666.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Raewyn Harlock', with a long horizontal flourish extending to the right.

Raewyn Harlock
Assistant Director
Dispute Resolution Branch

21 April 2017