



Our reference: FOIREQ17/00024

Dear Ms Pane

## Outcome of your Freedom of information request for internal review

I am writing to advise you of my decision in response to your application of 21 April 2017 for internal review of an Office of the Australian Information Commissioner (OAIC) decision of 21 April 2017 (OAIC reference FOIREQ17/00018) refusing access to certain documents you requested under the *Freedom of Information Act 1982* (the FOI Act).

An internal review decision is a 'fresh decision' made by a person other than the person who made the original decision (s 54C of the FOI Act).

### Background

On 23 March 2017, you requested access to OAIC case management reports. Specifically:

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.

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.

On 21 April 2017, the OAIC made a decision on your request. That decision found that documents within the scope of your request do not exist (s 24A) and noted that, because the reports you requested cannot be produced by a computer or other equipment ordinarily available to the OAIC the OAIC is not required to create a document under s 17(1) of the FOI Act.

On 21 April 2017, you applied for internal review of that decision. In your application, you said:

The FOI request made was refused on the grounds that "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"

While it is true that the case numbers on that report were manually removed on the copy of the report provided to me under FOI (as I consented to their removal), the original report that the OAIC ran did include them. The OAIC retained the original unmodified report [the original report], which does have the case numbers, and despite the claims made by the OAIC, can provide the information requested.

...

The OAIC retained the unedited report, as is required by the Archives Act, and it would be part of the FOI decision file. It is therefore deeply misleading to claim the OAIC does not have access to the case file numbers in question, and the fact the OAIC has made this claim in complete bad faith is appalling, not to mention unlawful.

You appear to be challenging the statement in the OAIC's initial decision on your FOI request that "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..." because you assert that there must be an 'original report' that contained those case numbers. I draw your attention to the table in the document provided to you on 23 December 2016 in relation to privacy complaint and IC review matters that were still 'open' at the time, reproduced here:

## Open privacy complaints age by month

Open Status: = OpenRun by: Ryan McConville @21/12/2016 10:35:21 AM

Elapsed Days	Count
0 - 30	210
31 - 60	185
61 - 90	191
91 - 120	106
121 - 150	127
151 - 180	49
181 - 210	28
211 - 240	38
241 - 270	21
271 - 300	17
301 - 330	15
331 - 360	9
> 361	2122*

\*Note: 2090 of these complaints relate to two specific alleged privacy breaches with multiple complainants in relation to each alleged breach.

# Open IC Reviews age by month

Open Status: = Open

Run by: Ryan McConville @13/12/2016 11:33:16 PM

Elapsed Days	Count
0 - 30	55
31 - 60	53
61 - 90	45
91 - 120	40
121 - 150	26
151 - 180	23
181 - 210	17
211 - 240	12
241 - 270	13
271 - 300	10
301 - 330	8
331 - 360	11
> 360	18

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From my own enquiries, I have established that these two reports, in response to your FOI request of 25 November 2016 (ref: FOIREQ16/00051), were created from our case management system and did not provide individual file numbers as part of the reports. They were simply statistical reports run from the case management system.

Therefore, the statement made in the initial decision on your request *“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”* is correct.

In your response (reproduced above), you state: *“While it is true that the case numbers on that report were manually removed on the copy of the report provided to me under FOI (as I consented to their removal), the original report that the OAIC ran did include them.”*

While this is true for the reports related to ‘closed’ privacy complaint and IC review matters provided to you in December 2016 it is not correct in relation to the tables above related to ‘open’ privacy complaint and IC review matters. There was an ‘original report’ of ‘closed’ cases which included file numbers but there was no ‘original report’ of ‘open’ matters that included individual file numbers or indeed any information about individual files. Your FOI request, which this internal review relates to, is only in relation to matters that were open in December 2016.

## Decision

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 access to the documents you seek under s 24A of the FOI Act on the basis that a document within the scope of your request does not exist and that for the purposes of s 17 of the FOI Act, I am satisfied that a report containing the information you seek cannot be produced by a computer or other equipment ordinarily available to the OAIC.

## Reasons for decision

### Material taken into account

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

- the original decision case file FOIREQ17/00018
- the November/December 2016 FOI request case file FOIREQ16/00051
- the FOI Act, in particular ss 17 and 24A
- the Guidelines issued by the Australian Information Commissioner under s 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), in particular paragraphs [3.80] — [3.84] and [3.182] — [3.188], and
- your submissions.

### Document do not exist or cannot be found (s 24A) / requests involving computers (s 17)

The document you seek is a report containing information relating to 32 specific privacy complaint matters and 18 specific Information Commissioner review matters.

Section 24A of the FOI Act relevantly provides:

- (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 FOI Guidelines relevantly explain:

The Act is silent on what constitutes 'all reasonable steps'. Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request.<sup>1</sup>

You do not contend that the OAIC is in possession of a physical document containing the information you seek. Rather, you have requested that the OAIC produce a report in discrete form from its case management system in accordance with s 17 of the FOI Act.

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<sup>1</sup> FOI Guidelines [3.81].

Section 17 relevantly provides:

(1) Where:

- (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;
- (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
- (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
- (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 a request 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.

(2) An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations

The FOI Guidelines relevantly explain:

[In *Collection Point Pty Ltd v Commissioner of Taxation the Full Federal*] Court ... held that 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.' This will be a question of fact in the individual case, and may require consideration of 'the agency's ordinary or usual conduct and operations'. For example, new software may be ordinarily available to an agency that routinely commissions or otherwise obtains such software, but not to an agency that does not routinely do such things.<sup>2</sup>

The OAIC case management system contains a number of report templates that allows OAIC officers to produce reports by use of the computer system ordinarily available to them. Reports are produced from the system data at a point in time.

I have undertaken enquires within the OAIC. From those enquiries, I am satisfied that the OAIC cannot produce a report based on the search terms you have defined. Those terms being the change in status of 50 open privacy complaint and IC review matters from December 2016 to April 2017, and for each case how many days it has/had been open and the case outcome recorded.

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<sup>2</sup> *FOI Guidelines* [3.185] (footnotes omitted).

On my reading of the original decision, I understand that the decision maker refused your request for the reason that the report you now seek cannot be produced by the OAIC's case management system. In particular, I note that the decision maker said:

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 OAIC does not routinely commission report templates or develop software. Rather, the OAIC's case management system is utilised by its case officers for the day-to-day management of cases; and by OAIC Management and its Executive for statistical analysis in accordance with the OAIC's operational and reporting requirements.

There is no automated report functionality, ordinarily available, that would allow a comparison to be made between the status of the particular open cases in December 2016 that you have requested, and which the reports run from our case management system (shown above) included in counts of all open privacy complaint and IC review matters but which were not, in and of themselves, individually recorded in the production of those reports of open matters and the status of those individual matters in April 2017. Nor, do I believe that the OAIC is required to develop this functionality in order to create a document to satisfy an FOI request.

Accordingly, I am satisfied that the OAIC is not required to produce a document containing the information you seek for the purposes of s 17 of the FOI Act and a document within the scope of your request does not exist for the purposes of s 24A of the FOI Act.

### Your review rights

If you disagree with my decision, you have the right to seek review by the Information Commissioner (IC review). If you wish to apply for IC review, you must do so in writing within 60 days from the date of my decision.

I note that, where it is in the interest of the administration of the FOI Act to do so, the Information Commissioner may decide not to undertake an IC review, to allow the applicant to go direct to the Administrative Appeals Tribunal (AAT) for a full merit review of the FOI decision. The Information Commissioner considers that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of an FOI 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 any review be undertaken 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.

### Complaints about the handling of FOI requests

If you are not satisfied with the way that your FOI request has been handled, you can complain to the Information Commissioner or the Commonwealth Ombudsman.

If you wish to complain to the Information Commissioner the OAIC prefers that you use the FOI complaint application form available at [www.oaic.gov.au/foi/complaints.html](http://www.oaic.gov.au/foi/complaints.html). Other ways to contact the OAIC to lodge an FOI complaint are by email to [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au), by facsimile to 02 9284 9666 or by post to GPO Box 5218, Sydney NSW 2001. For further information, please call our enquiries line on 1300 363 992.

If you wish to complain to the Commonwealth Ombudsman, they can be contacted on 1300 363 072.  
Other contact details are available at their web site: [www.ombudsman.gov.au](http://www.ombudsman.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ken Richards', with a stylized flourish at the end.

Ken Richards  
Assistant Director  
Freedom of Information

22 May 2017