



5 June 2017

I Whittaker

By email: <mailto:foi+request-3465-871ba2a9@righttoknow.org.au>

Our reference: LEX 743

Dear Sir/Madam,

**Notice of decision on Freedom of Information request of 4 May 2017**

1. I refer to your correspondence of 4 May 2017 in which you sought access under the *Freedom of Information Act 1982 (Cth) (FOI Act)* to the following:

*[A] document or documents (likely prepared under s.17 of the FOI Act) that details the year on year increase in remuneration (as a percentage, rounded to the nearest decimal point) paid to each of IP Australia's SES staff for the financial years: 2013/14 to 2014/15 and 2014/15 to 2015/2016 as determined from the group certificates/PAYG summaries issued to those SES staff (pro-rated, to reflect full year amounts, if necessary).*

2. I note you advised you are not interested in the names of the SES officers and agree to the removal of that information from any document provided in response to the request.

**Decision on access to documents**

3. I am authorised to make decisions under the FOI Act. My decision regarding your request and the reasons for my decision are set out below.
4. Pursuant to subparagraph 24A(l)(b)(ii) of the FOI Act, I have decided to refuse your request for access to documents on the basis that the documents you are requesting do not exist.

**Material relied upon**

5. In making my decision, I have had regard to the following:
  - your application for access to documents received by IP Australia on 4 May 2017;
  - the relevant provisions of the FOI Act; and
  - Guidelines issued under section 93A of the FOI Act (**Guidelines**) published by the Office of the Australian Information Commissioner (**OAIC**).

**Sufficiency of search**

6. The Guidelines relevantly state, at paragraph 3.54, that:

*What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's environment. At a minimum, an agency or minister should take comprehensive steps to locate a document having regard to:*

- the subject matter of the documents;
- the current and past file management systems and the practice of destruction or removal of documents;
- the record management systems in place;
- the individuals within the agency who may be able to assist with the location of documents; and
- the age of documents.

7. IP Australia undertook searches for documents falling within the scope of your request. Searches were undertaken in relation to the areas most relevant to the request.
8. The relevant time periods were used to conduct searches for the information specified in your request.
9. The searches were undertaken by staff with knowledge of IP Australia's files, as well as appropriate expertise in the relevant file management systems, electronic drives and email systems.
10. Relevant individuals in the team which administers IP Australia's payroll and the team which administers the setting of remuneration for SES officers were contacted to determine whether they were aware of or were able to locate documents falling within the scope of your request.

#### **Reasons for decision**

##### *Documents do not exist*

11. An agency or Minister may refuse a request for access to a document under subsection 24A(1) of the FOI Act 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 the Minister's possession but cannot be found; or
    - (ii) does not exist.
12. A full search has been conducted for any documents meeting the description you have provided and in accordance with the search strategy above. I am satisfied that IP Australia is not able to identify any documents within the scope of your request.
13. As there were no documents identified falling within the scope of your request, I am therefore formally refusing your request for access pursuant to section 24 of the FOI Act.

##### *Production of a document under section 17*

14. In your request, you suggested that section 17 of the FOI Act may apply to your request. After consideration of the circumstances, I have determined that section 17 does not apply.
15. Section 17(1) of the FOI Act provides:

##### *Requests involving use of computers etc.*

##### *(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 disc 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.*

16. The Guidelines explain the operation of section 17 further. At paragraph 3.182, the Guidelines state:

*Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if the applicant does not wish to be provided with a computer tape or disk. Examples include a transcript of a sound recording or a written compilation of information held across various agency databases.*

17. Accordingly, section 17 relates to transferring information held electronically or in a recording into a written form.
18. In the Federal Court case of *Collection Point Pty Ltd v Commissioner of Taxation* [2012] FCA 720, it was held that where a 'new computer program' was required to be written to produce the document, the computer is not being used in a manner that is 'ordinarily' available under section 17(1) of the FOI Act. In the subsequent Full Federal Court decision of *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67 the Full Bench upheld the decision and the rationale regarding section 17 of the FOI.
19. At IP Australia, increases to SES salaries are advised on a dollar amount basis. Providing the information requested would require identifying any relevant changes in arrangements for each individual and calculating the percentages based on the dollar amounts. Section 17 does not require IP Australia to conduct calculations based on information it holds and produce a new document containing the requested information.
20. Accordingly, IP Australia has not produced a document under section 17 of the FOI Act for the purposes of your FOI request.

#### **Information on SES salaries**

21. I understand that you are interested in information regarding SES salary increases.
22. For your assistance, I note that information on the range of salaries paid to IP Australia SES officers is available from the Department of Industry, Innovation and Science Annual Report for each of the financial years to which the request relates.<sup>1</sup> Each Annual Report notes that

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<sup>1</sup> Commonwealth of Australia, *Department of Industry Annual Report 2013-2014*, Table 21; Commonwealth of Australia, *Department of Industry and Science Annual Report 2014-15*, Table 11; Commonwealth of Australia, *Department of Innovation, Industry and Science Annual Report 2015-2016*, Table 20.

given the small number of IP Australia SES officers, the figures are included in the Department of Industry, Innovation and Science data to ensure non-identification of recipients. The information is reported in aggregate, specifying the APS classification level of the employee (including SES Band 1, 2 and 3) and the salary range associated with the relevant classification.

#### **Rights of review**

23. If you are dissatisfied with this decision, you may make an application for internal review by another officer of IP Australia within 30 days of receiving this letter or such further period as IP Australia allows.
24. If you wish to seek Information Commissioner review of this decision, you may do so within 60 days of receiving this letter.
25. Further information about your review rights is available in FOI Fact Sheet 12 published by the OAIC. I have attached a copy of the Fact Sheet to this letter.
26. If you are concerned about the way your FOI request was handled, you may complain to the OAIC. Enquiries regarding lodging a complaint to the OAIC can be directed to:

online: [www.oaic.gov.au](http://www.oaic.gov.au)

post: GPO Box 5218, Sydney NSW 2001

fax: +61 2 9284 9666

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

in person: Level 3, 175 Pitt Street, Sydney, NSW 2000

27. If you have any questions regarding this notice, please contact me in writing by email at: [olc@ipaustalia.gov.au](mailto:olc@ipaustalia.gov.au)

Yours sincerely,



Elizabeth Carroll  
Chief Legal Counsel  
**Office of Legal Counsel**  
**IP Australia**