



Our reference: FOIREQ17/00046

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 29 June 2017 for internal review of an FOI decision provided to you on that same date¹ (OAIC reference FOIREQ17/00036), refusing access to documents you requested under the *Freedom of Information Act 1982* (the FOI Act).

Scope of your request

On 1 June 2017, you requested access to:

... details on if, and when, the Information Commissioner has ever used the powers provided to him under s 44 and/or s 45 of the Privacy Act. As you'll be aware s 44 allows the Information Commissioner to compel the production of information, documents or require the attendance of a person before him, and s 45 allows the Information Commissioner to examine a witness called under his s 44 powers under oath.

In your request, you said:

Now this information sought might be available in discrete records, or it may not. If not, then I seek the OAIC to follow s 17 and produce it as a discrete record ...

Ms Raewyn Harlock, Assistant Director as the original decision maker interpreted the scope of your request as:

1. The date on which the Information Commissioner has used the powers given to him under ss 44 and 45 of the Privacy Act 1988.
2. The name of the respondent the powers were used on.
3. What was sought (information, documents or a person directed to give evidence).

You also asked, if these powers have never been used, for the OAIC's decision to include an explicit statement to this effect.

On 29 June 2017, the original decision maker advised you that no documents within the scope of your request exist. In making her decision, the original decision maker relied on s 24A of the FOI Act.

On 29 June 2017, you applied for internal review of the original decision. In your application, you said:

Inherent in the s 44 exercise of powers is that the Information Commissioner must communicate that to the party that documents, information, or attendance is compelled from. That would be, given the nature of s 44, by formal letter or (worse case) email and these are discrete documents (so, if the OAIC believes it

¹ The original decision is dated 30 June 2017, but was provided to you on 29 June 2017.

can justify at law that no process to summarise is reasonable, it can provide the documents redacted as required instead, and I can summarise myself).

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) explain that ‘in making a decision about the release of documents, it is implied that the decision maker must first make findings about the scope of the request and the documents in the agency’s possession that fall within that scope.’²

Your request is for ‘details on if, and when’ the powers have been exercised, and if ‘this information’ is not available in discrete records, you seek the OAIC to follow s 17 and produce [the information] as a discrete record’.

I consider that you are seeking summary statistical information that identifies the use of the Information Commissioner’s powers under ss 44 and 45 of the *Privacy Act 1988* (Privacy Act).

This is also apparent from your application for internal review where you say that other documents, such as ‘formal letters’ could be provided to you ‘instead’ so that you can summarise the information yourself.

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 you access to a document containing information detailing the use of the Information Commissioner’s powers under ss 44 and 45 of Privacy Act on the basis that:

- a document containing the information you seek does not exist, and
- for the purposes of s 17 of the FOI Act, a document containing the information your seek cannot be produced by the use of a computer 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 FOIREQ17/00036, including the original decision maker’s decision and reasons for decision
- the FOI Act, in particular ss 17 and 24A
- the Guidelines issued under s 93A of the FOI Act (FOI Guidelines), in particular paragraphs [2.33] — [2.36], [3.80] — [3.84] and [3.182] — [3.188]
- relevant case law, in particular *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67, and
- your submissions.

² Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* at [3.28].

Documents do not exist (s 24A)

The original decision maker decided that a document within the scope of your request does not exist.

Section 24A of the FOI Act relevantly provides:

Document lost or non-existent

- (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 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. 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 operating environment. At a minimum, an agency or minister should take comprehensive steps to locate documents, 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 an agency who may be able to assist with the location of documents, and
- the age of the documents.³

In your application for internal review, you said:

It seems what this really is about is that the OAIC doesn't wish to admit it has never used either s 44 or it's s 45 powers (I guess because of the inferences involved), and while feeling it's no big thing on the s 45 powers, feels a bit exposed on the s 44 powers failure and chooses to engage in unethical opacity (where an agency has legislative coercive powers, it is generally recognised as appropriate that the use of those powers should be subject to some public disclosure, where it would not undermine the process, and certainly providing in summary form poses no risk).

The OAIC has not exercised the powers available to the Information Commissioner under s 45 Privacy Act. For this reason, no statistical information relating to the OAIC's use of the s 45 powers exists.

In her reasons for decision, the original decision maker explained the searches that were undertaken for a document relating to the use of the s 44 powers. The original decision maker relevantly said:

I have asked all relevant staff, including the Assistant Commissioner of the Dispute Resolution Branch, the Principal Legal Officer, and the reporting team whether the OAIC has a document containing the information specified in your freedom of information request. They have advised me that no such document is held by this office.

³ FOI Guidelines [3.81].

In this internal review, I have additionally conducted a search of OAIC's TRIM document management system using the keyword 's 44'. I have confirmed that none of documents found from that search include statistical or summary information recording the OAIC's use of the s 44 powers.

For these reasons, I am satisfied that the OAIC has taken all reasonable steps to find a document within the scope your request.

Accordingly, although the OAIC has exercised the powers available to the Information Commissioner under s 44 of the Privacy Act, a document containing the summary statistical information you are seeking does not exist.

Requests involving use of computers etc. (s 17)

The right of access under the FOI Act is to existing documents, rather than to information. The FOI Act does not require an agency or minister to create a new document in response to a request for access, except in limited circumstances where the applicant seeks access in a different format or where the information is stored in an agency computer system rather than in discrete form. A request may nevertheless be framed by reference to a document that contains particular information.⁴

Section 17 of the FOI Act provides that where the agency could produce a written document containing the information in discrete form by the use of a computer or other equipment that is ordinarily available to the agency, the FOI Act applies as if the agency has such a document in its possession and 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.

The FOI Guidelines explain:

... 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.⁵

The OAIC operates the 'Resolve' electronic case management system. Resolve is capable of producing some electronic reports from case management data.

In your application for internal review, you do not appear to disagree with the original decision that a relevant summary statistical report cannot be produced from Resolve. Rather, your contention is that discrete documents exist that have not been found. I have addressed this above in relation to s 24A.

For the purpose of this internal review, I agree with all of the original decision maker's discussions and reasoning regarding s 17.

⁴ *FOI Guidelines* [2.33].

⁵ In the full Federal Court case of *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67. *FOI Guidelines* [3.185].

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.

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 to the Administrative Appeals Tribunal (AAT) for 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. Other ways to contact the OAIC to lodge an FOI complaint are by email to 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.

Yours sincerely



Ken Richards
Assistant Director
Freedom of Information

31 July 2017