



Our reference: FOIREQ17/00036

Ms Verity Pane

By email to: Verity Pane [foi+request-3596-4e067484@righttoknow.org.au](mailto:foi+request-3596-4e067484@righttoknow.org.au)

Dear Ms Pane

## Your Freedom of Information request

I refer to your request for access to documents, made under the *Freedom of Information Act 1982* (Cth) (the FOI Act), received by the Office of the Australian Information Commissioner (OAIC) on 1 June 2017.

You sought access to:

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.

## Decision

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

I have decided to refuse your request for access to a document containing information about the use of the Information Commissioner's powers under ss 44 and 45 of the *Privacy Act 1988* under s 24A of the FOI Act on the basis that no document exists.

## Reasons for decision

In accordance with s 26 of the FOI Act, this is my statement of reasons.

### *Material taken into account*

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

- your freedom of information request dated 1 June 2017
- the FOI Act, in particular ss 4, 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 (the 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.

### Documents do not exist (s 24A)

This office does not have the document you requested in its possession. As a result I am refusing your request for access to a document containing information relating to the use of the powers in ss 44 and 45 of the *Privacy Act 1988* under s 24A of the FOI Act.

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.<sup>1</sup>

The Information Commissioner has not used his power under s 45 of the *Privacy Act 1988* to examine witnesses. As a result, the OAIC holds no document which contains information about the date the power in s 45 was used, the name of the respondent, or what was sought.

In relation to the exercise of powers under s 44 of the FOI Act, 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.

I am satisfied that all relevant searches have been undertaken to locate the document you have requested and that no document exists.

### Requests involving use of computers etc. (s 17)

In your request for access you asked, if the OAIC does not have the information sought in a discrete record, that the OAIC follow s 17 of the FOI Act and produce the information as a discrete record.

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [3.81].

Section 17 of the FOI Act 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

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 a computer being ordinarily available would now 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.<sup>2</sup>

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.<sup>3</sup>

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>4</sup>

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<sup>2</sup> *Collection Point Pty Ltd v Commissioner of Taxation* [2013] [FCAFC 67](#) [20].

<sup>33</sup> *Ibid* [22].

<sup>4</sup> *FOI Guidelines* [3.185] (footnotes omitted).

Privacy complaints have been recorded on the current case management database (Resolve) since 12 June 2012. Prior to this date, privacy complaints were recorded on a case management system that has since been decommissioned. Staff in the OAIC can no longer access this system. However even if they did have access, it is unlikely the information you seek could be extracted because of that system's limited functionality (one of the reasons it was replaced). The OAIC has retained migrated records from the decommissioned case management system, stored in monthly batches. However to compile the information you have requested into a discrete document would require a manual search of each individual record and manual collation of the results. This office is not able to produce a written document containing the information you seek in a discrete form using a computer or other equipment ordinarily available to the OAIC.

With regard to privacy complaints received after 12 June 2012 (which are recorded on the current case management database, Resolve), we are not able to compile a written document containing the information you seek in a discrete form using a computer or other equipment ordinarily available to the OAIC.

The case management database used to record privacy complaints from 12 June 2012, contains workflows which can be used to generate documents such as s 44 notices. If these workflows are used by staff, it is possible to run a report to identify all complaints in which the s 44 *workflow* was used and the date the s 44 action was completed. However not all staff use these workflows to generate notices (which can be manually generated and added to the database) and not all instances of the workflows being generated will result in a s 44 notice being issued (for example, a case officer may consider a s 44 notice is needed and generate a notice for clearance by their manager, but their manager disagrees and the notice is not sent).

As a result, the only way to create a document containing every instance of a s 44 notice being issued, is to manually examine every privacy complaint made to the OAIC since 12 June 2012 and compile a document containing the information you have requested. This is not what s 17 of the FOI Act requires. Section 17 only requires a new document to be created when it is possible to do so using a computer or other equipment (such as software) to extract data and create a new document. It is not possible, using our case management database or software, to generate a document containing the information you have requested.

Your request for access to the name of the respondent the power in s 44 was used on appears to be based on an assumption that the power can only be used on the respondent to the privacy complaint. The power in s 44 is not limited to the respondent; it can be used on any person or entity who may have information or documents relevant to an investigation. This information could only be obtained through a manual review of each s 44 notice generated. Section 17 of the FOI Act does not require this office to do this.

For the above reasons, I am satisfied that the documents 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 to satisfy your request.

Yours sincerely



Raewyn Harlock  
Assistant Director  
Dispute Resolution Branch

30 June 2017

## **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](mailto:foi@oaic.gov.au), or by fax on 02 9284 9666.