



Our reference: FOIREQ17/00042

Ms Verity Pane

By email to: [foi+request-3634-36174edf@righttoknow.org.au](mailto:foi+request-3634-36174edf@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), and received by the Office of the Australian Information Commissioner (OAIC) on 14 June 2017.

You sought access to:

... summary details on any exercise by the Information Commissioner of the Privacy Act 1988's s 98 powers, to seek injunctive and/or ancillary relief against another party.

Basically if it has ever happened (if not, an explicit statement to that fact sought), and if it has, when, against whom, and the outcome.

If you have any details on the use of s 98 by other parties, that would be welcome too (if you have such information).

## Decision

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

Under s 24A of the FOI Act I have decided to refuse your request for access to a document containing information about the use by the Information Commissioner of the powers under s 98 of the *Privacy Act 1988* on the basis that no document exists. My reasons follow.

## 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 14 June 2017
- the FOI Act, in particular ss 4 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 [3.80] — [3.84].

## Documents do not exist (s 24A)

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>

I have asked all relevant staff, including the Deputy Commissioner and the Principal Legal Officer, whether the Information Commissioner has ever applied to the Federal Court under s 98 of the *Privacy Act 1988* for an injunction to restrain a person from engaging in conduct that constitutes, or would constitute, a contravention of the *Privacy Act 1988*.

I have been advised that the Information Commissioner has not applied for an injunction under s 98 of the *Privacy Act 1988*.

I am satisfied that all relevant searches have been undertaken to locate the document you have requested and that no document is in the possession of the OAIC.

As a result, I am refusing your request for access under s 24A of the FOI Act.

## **Further information – applications under s 98**

I understand that other parties have sought orders under s 98 of the *Privacy Act 1988*.

You can search for cases in which other parties have sought orders under s 98 of the *Privacy Act 1988* using the 'Noteup' facility on the Australasian Legal Information Institute (AustLII) website ([www.austlii.edu.au](http://www.austlii.edu.au)).

You can access the 'Noteup' page by going to s 98 of the *Privacy Act 1988* (here is a link - [http://www.austlii.edu.au/au/legis/cth/consol\\_act/pa1988108/s98.html](http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s98.html)). On the top of the page there are a number of tabs, the sixth of which is 'Noteup'. Clicking on this tab will generate a list of cases and publications in which s 98 of the *Privacy Act 1988* is cited. Some of these cases involve applications to the Federal Court for injunctions under s 98 (although not all do, some cases are included because an injunction under s 98 was not sought).

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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].

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

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.